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THE SUPREME JUDICIAL COURT OF MASSACHUSETTS GIVES UNMARRIED COUPLES STANDING TO PETITION TO ADOPT CHILDREN, BUT IS THIS REALLY AN ENDORSEMENT OF NON-TRADITIONAL FAMILIES?

I. INTRODUCTION

While most Americans consider getting married and raising a family among their fundamental rights, those persons living “non-traditional” lifestyles consider these “rights” privileges reserved only for those individuals who satisfy their state's definition of marriage and family.¹ No state recognizes gay or lesbian marriages in the same manner as it recognizes heterosexual marriages.² Although the United States Supreme Court has articulated a Fourteenth Amendment due process right for heterosexuals to raise children,³ the Court has remained silent as to whether this protection applies equally to gay men and lesbians.⁴ Without legal precedent providing authority for the recognition of gay and lesbian families with regard to marriage and parenthood, gay and lesbian partners in many states continue to seek the protections and rights which

¹ See Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1060-61 (1995) (illustrating ways state laws, especially marriage laws treat heterosexuals differently from gay men and lesbians); Felicia Meyers, Comment, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 839 (1993) (recognizing courts' victimization of gay and lesbian parents by not acknowledging rights afforded heterosexual parents).

² Davies, *supra* note 1, at 1060. Some jurisdictions do allow gay and lesbian lifetime partners to register their “domestic partnerships” similar to marital registration, but these partnerships do not provide the same privileges afforded to marriages. See Davies, *supra* note 1, at 1060 n.46 (citing Boston's 1993 Family Registration Act permitting gay and lesbian couples to register but not share health benefits). *But see* Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55 (1989) (calling cohabitating gay men “family” because relationship exhibited traditional marriage indicia).

³ See Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding heterosexual right to bear and raise children).

⁴ Felicia E. Lucious, Note, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 S.U.L. REV. 171, 171 (1994). The Supreme Court has never extended this constitutional right to bear and raise children free from unreasonable state interference to the gay and lesbian population. *Id.* at 171 n.7.

heterosexual married couples take for granted.⁵

Although one state has successfully challenged statutory prohibitions against gay and lesbian marriages on state constitutional grounds,⁶ the now-federally sanctioned state statutory prohibitions on these marriages remain significant obstacles to gay and lesbian couples who seek the benefits of legal, as well as social, recognition.⁷ Some states and municipalities have afforded gay and lesbian couples a few rights on par with those enjoyed by the heterosexual married population by including them among protected classes under anti-discrimination laws and by granting gay and lesbian cohabitants familial status for purposes of employment benefits where one partner is a civil servant.⁸

While some states have afforded gay and lesbian couples a few of the rights enjoyed by heterosexual married couples, the dual treatment of heterosexuals and homosexuals by both state and federal government with respect to marriage perpetuates a legal system hostile to gay and lesbian couples seeking recognition of their non-traditional families.⁹ State statutes which criminalize "gay and lesbian sodomy" amplify this hostility.¹⁰ In order to gain legal familial

⁵ See Lucious, *supra* note 4, at 179-80 (describing lack of familial status for gay and lesbian families because Supreme Court applies law unequally).

⁶ See *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993), *reconsid. granted in part*, 74 Haw. 645, 875 P.2d 225 (1993) (questioning on state due process grounds Hawaii's marriage statute prohibiting marriages between persons of same sex). On remand, state of Hawaii was unable to demonstrate that the statutory prohibition against same-sex marriages furthered a compelling state interest and was narrowly tailored to avoid unnecessary infringements on the constitutional rights of the citizens of that state. *Id.*

⁷ See 28 U.S.C. ch. 115, § 1738C (1996) (outlining the Defense of Marriage Act). The Defense of Marriage Act permits any state to deny full faith and credit to out of state marriages between persons of the same sex. *Id.* For same sex couples who marry in Hawaii, for example, this federal statute permits other states to deny the existence of the marriage thus also denying the legal and social benefits that derive from marriage. The act further defines marriage under 1 U.S.C. ch. 1 (1996) as between only a man and a woman, and a spouse as a person of the opposite sex who is a husband or wife. *Id.*

⁸ See Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity*, 59 MO. L. REV. 775, 790-91 (1994) (citing Cambridge, Massachusetts, among a number of municipalities affording rights to gay and lesbian couples). The employment benefits of one partner, such as medical or dental insurance plans, in some states or municipalities may cover both the employee and his or her partner without the requirement of a marital relationship between them. *Id.*

⁹ See Davies, *supra* note 1, at 1060-61 (citing legislative non-recognition of gay and lesbian marriages as source of courts' refusal of support).

¹⁰ See Cox, *supra* note 8, at 785 (citing criminalization of homosexual sodomy a contributor to lack of legal recognition of same-sex marriages); see also Appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335, 340, 727 P.2d 830, 835 (Ariz. Ct. App.

recognition, some gay men and lesbians have gone so far as to file petitions to adopt their partners, in the hope of creating some relationship which the law will recognize.¹¹ Many of these attempts to create a "family" in the eyes of the law through so called "adult adoption" have fallen short however since many courts feel, as one judge stated, that the petitions are a "cynical distortion" of the adoption statute.¹²

This article traces the evolution of child adoption by gay and lesbian couples in spite of the legal system's slow recognition of non-traditional families. It will trace the current status of adoption by gay and lesbian couples at the state level and the ways in which the practitioner may effectively articulate and substantiate an adoption petition on behalf of a gay or lesbian petitioner.

II. THE LEGAL SYSTEM'S TREATMENT OF GAY AND LESBIAN FAMILIES

A. Custody Cases

Hostility from the legal system toward gay and lesbian parenting first materialized with regard to custody rights of gay men and lesbians upon divorce.¹³ A wave of cases concerning the rights of gay or lesbian parents vying

1986) (finding gay and lesbian man per se unfit parent based on statutory proscription of sodomy). Homosexual sodomy remains criminalized by statute in many states under the authority of the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct 2841 (1986).

¹¹ See, e.g., *In the Matter of Adult Anonymous II*, 452 N.Y.S.2d 198, 88 A.D.2d 30 (N.Y. App. Div. 1982) (granting petition for adoption of 42-year-old man so parties may "formalize themselves as a family unit for publicly acknowledging their emotional bond and unifying their property rights . . ."); *In the Matter of the Adoption of Elizabeth* by P.S., 509 N.Y.S.2d 746, 747, 134 Misc. 2d 144, 146 (N.Y. Fam. Ct. 1986) (approving adoption of female ten months younger than parent since parent-child relationship existed); *In the Matter of the Adoption of Robert Paul P*, 63 N.Y.2d 233, 237-238, 471 N.E.2d 424, 426-27 (N.Y. 1984) (denying gay man's petition to adopt partner because legislature never intended such adoptions).

¹² See *In the Matter of Adult Anonymous II*, 452 N.Y.S.2d at 203, 88 A.D.2d at 38 (Sullivan, J., dissenting) (calling such an adult petition a "cynical distortion" of the adoption function); see also Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207 (1995) (explaining that courts routinely construe adoption laws narrowly thereby denying "adult adoptions" outside statutory scope).

¹³ See *Roe v. Roe*, 228 Va. 722, 727-28, 324 S.E.2d 691, 694 (1985) (denying a divorced father custody of his child based on his sexual orientation). *But see Bezio v. Patenaude*, 381 Mass. 563, 579-80, 410 N.E.2d 1207, 1216 (1980) (rejecting contention that a determination of parental fitness may be based solely on sexual orientation). See also

for custody against their heterosexual spouses has forced many courts to consider the legal status of non-traditional families.¹⁴ By forcing courts to consider and determine custody petitions of such parents, they have achieved a semblance of familial recognition from some states.¹⁵

A court determination of custody upon divorce entails an analysis of the best interests of the child involved.¹⁶ This standard is necessarily broad, thereby taking into account a variety of characteristics of each party vying for custody, including the morality of each parent.¹⁷ When making custody determinations, a court weighs the potential harm of severing a child from a biological parent with the characteristics of each parent to decide which party can best provide for the child's needs.¹⁸

When considering the relevance of sexual orientation in a custody dispute, some judges have allowed moral judgment as to the sexual preference of the parent, rather than parenting skills, to infect the determination of custody.¹⁹ This "judicial homophobia," as one author has coined it, becomes the basis for the

Meyers, *supra* note 1, at 851 (recognizing similar justifications curtailing rights of gay men and lesbians in custody disputes and adoptions).

¹⁴ See Cox, *supra* note 8, at 785 (recognizing courts are forced to acknowledge existence of gay and lesbian relationships when determining custody); see, e.g., Bottoms v. Bottoms, 18 Va. App. 481, 444 S.E.2d 276 (1994), *rev'd* 249 Va. 410, 457 S.E.2d 102 (1995) (challenging custody rights of a mother whose post-divorce relationship was lesbian); Doe v. Doe, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983) (challenging custody of mother on the basis of her lesbian relationship); Chicoine v. Chicoine, 479 N.W.2d 891, 894 (S.D. 1992) (restricting visits to a lesbian mother).

¹⁵ See, e.g., Guinan v. Guinan, 102 A.D.2d 963, 964, 477 N.Y.S.2d 830, 831 (N.Y. App. Div. 1984) (awarding custody to lesbian mother since lesbian behavior does not render her unfit parent); Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980) (finding lesbian mother fit parent because no evidence of harmful affect on children); In the Matter of J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974) (holding sexual orientation unacceptable basis for denying custody rights of gay and lesbian parents).

¹⁶ See Cox, *supra* note 8, at 775n.1 (citing applicable standard in custody cases as "best interest of the child" from Homer J. Clark, Jr., *The Law of Domestic Relations in the United States* section 19.4 (1988)).

¹⁷ See Cox, *supra* note 8, at 775 (recognizing morality of parent often adjudicated by "behaviors" court deems immoral such as homosexuality).

¹⁸ Cox, *supra* note 8, at 775.

¹⁹ See Davies, *supra* note 1, at 1059-1060 (describing how moral judgments often affect determination of parental rights in custody and visitation disputes); see also Meyers, *supra* note 1, at 840 (citing ways courts approach sexual orientation in custody cases based on feelings toward homosexuality). Meyers cites one author's term for the injection of moral judgments in the determination of custody disputes involving gay men and lesbians—"judicial homophobia." See Meyers, *supra* note 1, at 841 (quoting Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71, 74 (1988)).

custody determination when the judge uses his discretion to give disproportionate weight to sexual orientation in assessing the morality of a parent.²⁰ At present, three states allow sexual orientation to create an irrebuttable presumption of parental unfitness for purposes of custody disputes between parents.²¹ Courts adopting this "per se" approach cite five factors to justify their decisions which some believe are unsupported by factual, solid evidence.²²

Other courts reject the irrebuttable presumption in favor of a rebuttable presumption that the gay or lesbian parent's sexual orientation is not in the best interests of the child, placing the burden on that parent to prove the absence of harm to the child from such orientation.²³ The rebuttable presumption implies

²⁰ See Cox, *supra* note 8, at 775 (citing judicial attachment of harm to homosexuality based on stereotype sacrifices not promotes child's interests).

²¹ Meyers, *supra* note 1, at 840; see also Cox, *supra* note 8, at 792-793 (citing irrebuttable presumption of unfitness evidencing broad discretion courts have applying best interests standard). The three states which still use the so-called "per se" approach are Missouri, Oklahoma, and Arkansas. See, e.g., G.A. v. D.A., 745 S.W.2d 726, (Mo. Ct. App. 1988) (Lowenstein, J. dissenting) (citing majority's creation of irrebuttable presumption of parental unfitness based on sexual orientation unfair); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982) (finding change of circumstances of mother's commencement of lesbian relationship sufficient to deny her custody); Thigpen v. Carpenter, 21 Ark. App. 194, 198-99, 730 S.W.2d 510, 513 (1987) (holding that proof of detrimental effect of sexual conduct on child is unnecessary to deny custody). One of these states, Missouri, has not been so strict in the scrutiny of heterosexual extramarital affairs. See Cox, *supra* note 6, at 799 (citing *Wilhelmsen v. Peck*, 743 S.W.2d 88 (Mo. Ct. App. 1987) as evidence that heterosexual extramarital affairs are not so heavily scrutinized by courts). The court in *Wilhelmsen* distinguished heterosexual from gay and lesbian couples with the theory that the heterosexual couples were not so morally offending and antisocial as their alternative counterparts. *Wilhelmsen v. Peck*, 743 S.W.2d at 93.

²² See Cox, *supra* note 8, at 794 (listing five factors used by courts to support their decisions). Courts cite the following five factors to support their decisions:

- (1) the adverse effect the parent will have on the child's moral development,
- (2) the harassment and ridicule the child might receive from others,
- (3) state sodomy laws,
- (4) the fear the child might be more likely to be a gay and lesbian if raised by a gay and lesbian parent, and
- (5) the fear that the child is at an increased risk for contracting AIDS.

Id.; see Meyers, *supra* note 1, at 843 (stating these reasons are supported by presumptions rather than by factually solid evidence).

²³ Meyers, *supra* note 1, at 840. Meyers uses the "middle ground approach" of Tennessee to illustrate the rebuttable presumption. Meyers, *supra* note 1, at 840.; see also Dailey v. Dailey, 635 S.W.2d 391, 396 (Tenn. Ct. App. 1982) (restricting visitation of mother based on anticipated harmful effects of mother's sexual orientation on child); Collins v. Collins, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. March 3, 1988) (suggesting that

that the presumption itself is in the best interests of the child at the outset.²⁴ Some scholars note that a presumption that gay or lesbian parents are unfit, though rebuttable, is dependent upon a moral judgment of homosexuality from which courts should refrain. Authors note that society's own reaction to sexual orientation is at best mixed and there is only disputed evidence as to whether such orientation actually does affect the child's welfare.²⁵

More recently, however, many courts, including Massachusetts courts, have approached the issue of sexual orientation in custody cases by conditioning its relevance on a correlation between the fitness of the parent and the parent's sexual orientation.²⁶ The courts adopting the "nexus" test, as some have called it, recognize the importance of custody decisions made truly in the child's best interests, without arbitrary presumptions based on societal prejudices.²⁷ The nature of a custody determination which impacts a child forever necessitates a careful analysis of the child's interests free from current prejudices against gay

unless lesbian mother "dissolves" her alternative lifestyle, she would sacrifice custody of child).

²⁴ See Cox, *supra* note 8, at 803 (citing reliance of a presumption on its validity, here that granting custody to homosexual parent does not fulfill child's best interests).

²⁵ See *id.* at 803 (opining reaction to homosexuality is mixed, so court's presumption against custody to homosexual does not reflect societal consensus).

²⁶ See *Bezio v. Patenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (holding absent evidence correlating mother's parental fitness and sexual orientation, state may not deny custody). But see *Bottoms v. Bottoms*, 18 Va. App. 481, 491, 444 S.E.2d 276, 282 (1994) *rev'd* 249 Va. 410, 457 S.E.2d 102 (1995) (granting third party custody despite absence of compelling evidence rebutting presumption of lesbian mother's fitness). Courts adopting this "nexus" approach will not deny custody to a parent without evidence of some demonstrable harm to the child as a result of the parent's sexual orientation. *Meyers, supra* note 1, at 842. Nineteen states currently adopt this test. Cox, *supra* note 8, at 792.

²⁷ See Cox, *supra* note 8, at 806 (stating protection of child begins with recognition of individuality of heritage, regardless of social popularity); see also *Meyers, supra* note 1, at 843 (noting courts utilizing nexus approach analyze heterosexual and gay and lesbian behavior in same manner). The consistency of the nexus approach with respect to sexual activity, whether gay and lesbian or heterosexual, survives the constitutional challenges to which the *per se* and middle ground approaches are vulnerable. See *Meyers, supra* note 1, at 846.

The Supreme Court of Alaska refused to allow social stigma against gay men and lesbians to take the form of "harm" used to deny custody because this stigma is the only thing separating heterosexuals and gay men and lesbians; since the stigma is not the fault of gay men and lesbians, courts should not use it to punish them. *Lucious, supra* note 4, at 181 (paraphrasing argument of highest court in Alaska in *S.N.E. v. R.L.B.*, 699 P.2d 875, 11 MEDIA L. REP. 2278 (Ala. 1985)).

men and lesbians.²⁸ A careful analysis of the child's interest should focus on the child rather than on the sexuality of the parent.²⁹

Whether by the states' refusal to recognize same-sex marriages or by the various approaches in child custody involving gay and lesbians parents, gay men and lesbians face significant obstacles to parenting and to legal familial recognition.³⁰ This denial of recognition is extraordinary considering that recent statistics show that somewhere between six and fourteen million children have at least one gay or lesbian parent and that the primary caretakers of between eight and ten million children are gay or lesbian.³¹ Although courts in New York have found sufficient indicia of marriage among these households for purposes of the rent control statute and granting custody,³² without full legal and social recognition of their families, state and federal governments effectively deny between eight and ten million children the benefits that recognition carries with

²⁸ See Cox, *supra* note 8, at 792 (noting difference between custody and adoption cases). For a general definition of the child's best interests, see the Uniform Marriage and Divorce Act 402 which includes: (1) the wishes of the child's parent as to custody, (2) the wishes of the child herself as to custody, (3) interaction with any person who may significantly affect the child's welfare, (4) the adjustment of the child to her surroundings, (5) the mental and physical health of all involved. See Meyers, *supra* note 1, at 839 n.15 (paraphrasing the considerations under the Uniform Marriage and Divorce Act 402 (1987)).

²⁹ Lucious, *supra* note 4, at 177. The general nature of the best interest test, however, gives courts great discretion to examine a plethora of factors which may potentially affect the child, which may include a judge giving disproportionate weight to the sexuality of the petitioner. See Lucious, *supra* note 4, at 177 (stating general guidelines and courts' discretion examining relevant factors leaves room to inject personal prejudices). Lucious goes on to state that unbiased determinations of the child's best interest should prevail otherwise the decision amounts to discrimination against gay men and lesbians. Lucious, *supra* note 4, at 177.

³⁰ See Davies, *supra* note 1, at 1056 (recognizing existence of "substantial impediments" confronting non-traditional families in search of legal recognition).

³¹ Barbra Kantowitz, *Gay Families Come Out*, NEWSWEEK, November 4, 1996, at 52 (highlighting estimates that between 6 and 14 million children have at least one gay parent); see also Cox, *supra* note 8, at 786n.66 (citing statistics from *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1629 (1989) that three million gay and lesbian parents are the primary caretakers between eight and ten million children).

³² See *Braschi*, 74 N.Y.2d at 312, 543 N.E.2d at 55 (N.Y. 1989) (finding marriage indicia present in gay partnership so couple is "family" under rent control statute); see also *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 963, 134 Misc. 2d 317, 323 (Sup. Ct. 1986) (finding stability and exclusivity of gay partnership and its domestic character relevant to custody determination).

it.³³

B. Adoption

In the last twenty years lesbian and gay couples have pierced through the barriers to parenting by becoming part of the evolving national dialogue regarding adoption through both second-parent and traditional adoptions.³⁴ The nuclear family consisting of a mother, a father, and their children is still the exclusive “traditional” family unit.³⁵ Just as it has impeded their ability to retain custody of their children, the vagueness of the best interest of the child standard, utilized in both custody and adoption contexts, has given the courts and agencies in some states the discretion to impede the ability of gay men and lesbians to adopt children.³⁶

With little case authority with respect to adoptions by gay and lesbian couples, courts have relied on custody precedent for guidance because providing for the welfare of the child is the implied statutory purpose of most adoption statutes as it is in the custody context.³⁷ Adoption, unlike custody however, is a creature of statute.³⁸ In addition to the need for a trial court finding the best interests of the child served through a grant of the petition, adoption also requires that the petitioner has standing to adopt and that the petitioner falls

³³ See *supra*, note 8, and accompanying text (citing a number of benefits which legal recognition promises).

³⁴ See Elovitz, *supra* note 12, at 207 (discussing how gay and lesbian couples become parents through second parent and traditional adoption petitions).

³⁵ Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 897 (1984). “The uncertain legal status of gay parents is indicative of an attempt to maintain the fiction of traditional family integrity and homogeneity.” Meyers, *supra* note 1, at 839; *cf.* *In re Adoption of a Child by J.M.G.*, 267 N.J. Super. at 631, 632 A.2d at 554 (1993) (recognizing that families “differ in both size and shape”). “We cannot continue to pretend that there is one formula . . . that should constitute a family in order to achieve the . . . environment we believe children should inhabit.” *In re J.M.G.*, 267 N.J. Super. at 631, 632 A.2d at 554-55 (Freeman, J.).

³⁶ See Meyers, *supra* note 1, at 851 (indicating best interests test has similar effects in adoption and custody settings based on judicial discretion). Meyers cites the dubious status of gay and lesbian rights in some jurisdictions which gives rise to a judicial denial of the opportunity to adopt under the guise of the best interests test just as in custody cases. *Id.* at 853.

³⁷ See Lucious, *supra* note 4, at 181 (stating absence of case authority regarding adoption leaves courts to rely on custody for guidance).

³⁸ *Davis v. McGraw*, 206 Mass. 294, 297, 92 N.E. 332 (1910).

within the jurisdictional parameters of the adoption statute.³⁹

As a practical matter, the failure of states to recognize gay and lesbian marriages serves as a jurisdictional bar to adoption because the language of many adoption statutes precludes dual petitions by unmarried couples.⁴⁰ Two other states, Florida and New Hampshire, statutorily proscribe adoptions by gay and lesbian couples.⁴¹ As one author notes, "a per se rule [against gay and lesbian adoption] is remarkable because the central tenet of adoption is serving the best interests of the child; therefore, it is rare to have laws that exclude entire groups from being adoptive parents."⁴² Prohibitions on marriage and adoption by state legislatures make it extremely hard, if not impossible, for gay and lesbian couples to realize the opportunity to raise a family and reap the benefits of legal recognition of that family.⁴³

Alternatives to adoption, such as testamentary guardianship, currently do not fill the void of establishment of a parent-child relationship with the benefits of full recognition.⁴⁴ Adoption is an alternative for persons who wish to create

³⁹ See *In re Tammy*, 416 Mass. 205, 217, 619 N.E.2d 315, 321 (1993) (concluding petition in child's best interest gives Probate Court jurisdiction to entertain petition of unmarried couple).

⁴⁰ See *Davies*, *supra* note 1, at 1060 (recognizing non-recognition of gay and lesbian marriages precludes them from fitting within adoption statutory guidelines). Some adoption statutes refer only to adoption by a person (with consent of spouse on the presumption that the petitioner is married to the natural parent) in the case of step-parent adoption, or of adoption by married couples. See MASS. GEN. L. ch. 210, § 1 (1995) (providing person of majority may petition or if married must join spouse).

⁴¹ See FLA. STAT. ANN. § 63.042(3)(West 1985) (statutorily prohibiting adoption by gay and lesbian couples); N.H. REV. STAT. ANN. § 170-B:4 (1990) (allowing adoptions only by an individual not a minor and not a gay man or a lesbian).

⁴² *Elovitz*, *supra* note 12, at 209. *Elovitz* also cites the rational basis test under *Heller v. Doe*, ___ U.S. ___, 113 S.Ct. 2637 (1993), as a means for striking these statutes since they bear no rational basis to an important governmental interest. *Elovitz* at 209. *But see In re Opinion of the Justices*, 129 N.H. 290, 297, 525 A.2d 1095, 1099-1100 (N.H. 1987) (*per curiam*) (citing correlation between parental sexual orientation and child's orientation upholding adoption statute under rational basis).

⁴³ See *Suzanne Bryant*, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 239 (1995) (From the recognition of spousal and parent/child relationships flow legal rights which afford benefits to those who hold them. Such benefits for the child include inheritance and other financial benefits such as health insurance. *Id.*

⁴⁴ See *Meyers*, *supra* note 1, at 854 (citing the California alternatives to adoption). Using adoption alternatives used in California, *Meyers* indicates their inadequacies, starting with the alternative which entails the appointment of a co-parent as testamentary guardian. *Meyers*, *supra* note 1, at 854. The second alternative is the claiming of rights under either *de facto* parent, equitable parent, or parent standing in *loco parentis*. *Meyers*, *supra* note 1, at 854. *De facto* parent is non-statutory, however, and does not afford the same rights of

a full legal relationship with a child, but who cannot or who decide against bearing children of their own.⁴⁵

III. *IN RE TAMMY*

A. Overview

Gay and lesbian couples have begun to realize the benefits of full legal recognition after the Massachusetts Supreme Judicial Court became the second appellate court to begin removing the barriers to parenthood.⁴⁶ The *In re Tammy* court liberally interpreted the Massachusetts adoption statute to allow a biological mother to retain her parental rights while granting her lesbian partner's petition for adoption of the child.⁴⁷ Because the biological mother retained her rights, the *Tammy* decision concerned a "second-parent" adoption.⁴⁸ A second parent adoption involves adoption by the legal parent's non-marital partner without termination of the rights or responsibilities of the legal parent.⁴⁹ Most

and parent standing in loco parentis has not yet been extended to same-sex parents. *Id.*

⁴⁵ See Lucious, *supra* note 4, at 171. Same sex couples fall within the group who physically cannot bear children with a legal tie to both mothers or to both fathers. Even with the options of foster parentism, surrogacy, artificial insemination, or children from previous marriages, "other parents" must rely on adoption in order to create the legally binding relationship complete with the benefits accruing therefrom. *Id.* at 173.

⁴⁶ *In re Tammy*, 416 Mass. 205, 217, 617 N.E.2d 315, 322 (1993). Vermont was the first state supreme court to allow a lesbian mother to adopt her partner's biological child without termination of the rights of the biological mother in *Adoptions of B.L.V.B. & E.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (1993). Only Massachusetts and Vermont "provide mandatory authority for coparental legal rights in lesbian relationships." Davies, *supra* note 1, at 1055. Many lower courts in other jurisdictions have also granted such petitions. See *In the Matter of the Adoption of a Child by J.M.G.*, 267 N.J. Super. at 632, 632 A.2d at 555 (1993) (granting adoption petition of biological mother's life partner upon finding partner is "cornerstone" of home); *In the Matter of the Adoption of Caitlin and Another*, 622 N.Y.S.2d 835, 163 Misc. 2d 999 (1994) (granting petition of biological mother's life partner upon finding nurturing family environment). *But see* Elovitz, *supra* note 12, at 208 (noting many courts have interpreted adoption statutes narrowly prohibiting second parent adoptions).

⁴⁷ See *In re Tammy*, 416 Mass. at 217, 619 N.E.2d at 322 (upholding a dual petition for adoption by biological mother's life partner and the biological mother).

⁴⁸ See *In re Tammy*, 416 Mass. at 206-207, 619 N.E.2d at 316-17 (stating Susan is mother consenting to Helen's petition on condition she not lose parental rights).

⁴⁹ See Bryant, *supra* note 43, at 233 (defining second parent adoptions as adoption by legal parent's non-marital partner); see also Elovitz, *supra* note 12, at 207 (defining second parent adoption as means of creating "a second legally recognized parent for child"). Bryant describes second parent adoptions as a "natural extension of step-parent adoptions" because in both cases the legal parent desires to provide stability for the child by creating

courts granting second parent adoptions have premised their decision on the benefits to the child in having legal ties to both caretakers, rather than a legal tie to the biological mother alone.⁵⁰ Although adoptions by gay and lesbian couples received considerable support from the recent *In re Tammy* decision, the significance of the case will ultimately depend on its precedential value for cases involving gay and lesbian couples who seek to begin a family through adoption with no biological tie.⁵¹

B. Background on Adoption in Massachusetts

In Massachusetts, the primary authority for adoption cases involving gay and lesbian couples is *Bezio v. Patenaude*⁵² and the adoption statute.⁵³ Although a custody decision, *Bezio* provides mandatory authority for the analysis of the best interest of a child where the sexual orientation of the parent is involved.⁵⁴

because in both cases the legal parent desires to provide stability for the child by creating a second legal parent for the child while retaining his/her own rights. Bryant at 233; *cf. In re Tammy*, 416 Mass. at 217, 619 N.E.2d at 321 (concluding if petition in child's best interests, court will enter a decree on a joint petition for adoption).

⁵⁰ See Elovitz, *supra* note 12, at 208 (finding common in decisions granting second parent adoptions benefit of legal ties to both caretakers). *But see In re Angela Lace*, 184 Wis.2d 492, 518, 516 N.W.2d 678, 686 (1994) (denying a second parent adoption petition). Such denials of second parent petitions cause harsh consequences for the parent who remains without a biological tie, but who has cared for the child since birth as if a "parent" though not in the eyes of the law. Elovitz, *supra* note 12, at 209. Such consequences include a denial of visitation and custody rights on divorce or death of the biological parent. *Id.*; see *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 841, 279 Cal. Rptr. 212, 219 (1991) (holding partner of biological mother did not qualify as parent for visitation when couple separated).

⁵¹ See *In re Tammy*, 416 Mass. 205, 207, 619 N.E.2d 315, 315-16 (1993) (involving adoption petition of two lesbian partners, one of whom was biological mother of the child). The court did not address the situation where two unmarried people, whether gay or lesbian or otherwise, seek to begin a family by adoption. *Id.*; *cf. Elovitz, supra* note 12, at 207 (indicating two ways adoption affects gay and lesbian people are second parent and traditional adoptions).

⁵² 381 Mass. 563, 410 N.E.2d 1207 (1980).

⁵³ See *In re Tammy*, 416 Mass. at 210-16, 619 N.E.2d at 317-21 (using adoption statutory language to hold unmarried individual may adopt without terminating biological mother's rights); see also *Bezio v. Patenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (holding best interests of child and parental fitness predicated on behavior adversely affecting child).

⁵⁴ See *Bezio*, 381 Mass. at 576-79, 410 N.E.2d at 1214-16 (combining parental fitness and best interest tests holding they require evidence of adverse affect on child). The Supreme Judicial Court refused to allow the State to deprive parents of custody because their household environments fail to "embrace ideologies or pursue life-styles at odds with

The adoption statute provides jurisdictional authority for the standing of a petitioner to adopt a child, that is, whether the petitioner is eligible to adopt.⁵⁵ In *In re Tammy*, the Supreme Judicial Court liberally interpreted the adoption statute's jurisdictional requirements in order to promote the statute's best interest of the child purpose.⁵⁶ The Supreme Judicial Court approved a dual petition by two unmarried, same-sex cohabitants, one of whom was the child's biological mother because the trial court had found that a grant of the petition would ultimately promote the best interest of Tammy.⁵⁷

C. Holding

The decision in *In re Tammy* rests on a finding by the trial court that a grant of the petition would serve the best interests of the child.⁵⁸ Once the trial court found that a grant of the petition promoted the statutory purpose, the Supreme Judicial Court sought to find a way through the language of the adoption statute to allow two unmarried persons, one of whom was child's biological mother, standing to adopt.⁵⁹ The Supreme Judicial Court found authority for the

the average." *Id.* at 579.

⁵⁵ See MASS. GEN. L. ch. 210, § 1 (1996) (providing list of eligible petitioners in adoption proceeding).

⁵⁶ See *In re Tammy*, 416 Mass. 205, 210-12, 619 N.E.2d 315, 318-20 (1993) (concluding though not expressly named eligible petitioners, unmarried couple may petition since promotes statute's purpose). This liberal construction finds authority from a legislatively mandated rule that "words importing the singular may extend and be applied to several persons" so long as not inconsistent with the intent of the statute and the context of the statute. *Id.* at 212, 619 N.E.2d at 320.

⁵⁷ *Id.* at 217, 619 N.E.2d at 321.

⁵⁸ See *id.* (stating trial court's finding that the adoption in best interest of child). Based on home study conducted by the Department of Social Services and the findings of a court-appointed Guardian ad Litem who considered outside social science evidence and the specific evidence of this case in his report, the Probate Court found that granting the petition served Tammy's best interests. *Id.* at 206, 209-210, 619 N.E.2d at 315, 317. The court determines the best interests of the child by looking at all of the facts surrounding the welfare of the child and the abilities of the parents to provide for the child. See MASS. GEN. L. ch. 210, § 3(c) (1992) (listing factors in assessing best interests of child). The lower Probate Court found the best interests of Tammy served through a grant of the petition largely in light of the biological relationship to one mother and the nurturing, caring relationship since birth to the other mother. See *In re Tammy* 416 Mass. at 206, 619 N.E.2d at 315.

⁵⁹ See *In re Tammy* 416 Mass. at 210, 619 N.E.2d at 317 (using principles of statutory construction as authority for standing of petitioners). In *In re Tammy* the Supreme Judicial Court had the luxury of interpreting the adoption statute with a record from the lower probate court that the best interests of this child would be promoted with the grant

standing of the petitioners to adopt, by statutory construction relying on the purpose of the statute.⁶⁰

In *In re Tammy*, the Supreme Judicial Court considered a second parent adoption petition filed by two unmarried women.⁶¹ Faced with the dual petition and the unmarried status of the petitioners, the court determined that the ultimate issue in this case was whether the petitioners had standing to adopt under the language of the statute.⁶² The court found that nothing in the statutory language precluded the petition and that the petitioners met all of the statutory preconditions.⁶³ Furthermore, because the biological mother was a party to the joint adoption petition, the court also concluded that her parental rights need not

of the petition. *See id.* (holding despite trial court's determination that petition in child's best interests, question of jurisdiction remains). On the record before it, then, the Supreme Judicial Court needed only to interpret the adoption statute in a way which would promote this purpose. *Id.* The best interests of the child thus became the prerequisite for such an interpretation.

⁶⁰ *See In re Tammy*, 416 Mass. at 206, 619 N.E.2d at 315 (describing petitioners as two unmarried women).

⁶¹ *In re Tammy*, 416 Mass. 205, 206, 619 N.E.2d 315, 315 (1993). The two women have been physicians in a committal relationship with each other for over ten years. *Id.* Since Massachusetts doesn't recognize gay and lesbian marriages, they have never married. *Id.* Through artificial insemination, the women conceived a child whose father relinquished his parental rights (he is the cousin of the non-biological mother). *Id.* The biological mother consented to the adoption by her partner. *Id.*

⁶² *In re Tammy*, 416 Mass. at 210, 619 N.E.2d at 317-18. The court recognized that since adoption is a creature of statute under *Davis v. McGraw*, 206 Mass. 294, 297 (1910), the statute itself must allow such a petition. *Id.*; see MASS. GEN. L. ch. 210 (1992). The primary purpose of the statute was to advance the child's best interests. *In re Tammy*, 416 Mass. at 210, 619 N.E.2d at 317-18. The court interpreted the statute's ambiguities to allow the petition that the Probate Court adjudicated to be in the child's best interest. *See id.* (citing MASS. GEN. L. ch. 210, §§ 3, 4A, 5A, 5B, 6 and *Adoption of a Minor*, 343 Mass. 292, 294-96, 178 N.E.2d 264, 265-66 which calls best interests of child primary principle governing adoption or custody).

⁶³ *In re Tammy*, 416 Mass. at 210-11, 619 N.E.2d at 318 (quoting MASS. GEN. L. ch. 210, § 1). The statute states "{a} person of full age may petition the probate court. . ." and doesn't expressly preclude joinder by another person. MASS. GEN. L. ch. 210, § 1. The statute does not expressly exclude two unmarried people from filing a petition. *In re Tammy*, 416 Mass. at 211-12, 619 N.E.2d at 318-19 (excluding specifically classes of people with no standing to adopt). The court noted that before a decree of adoption may be entered, one of five preconditions under G. L. c. 210, § 2A must be satisfied. *Id.* at 212-13, 619 N.E.2d 319-20. Since the Department of Social Services approved the petition in writing and since *Tammy* was a blood relative of the adoptive parents, the petition satisfied two of the preconditions. *Id.*

terminate on entry of the adoption decree.⁶⁴

In a 4-3 decision, the majority upheld the dual petition since both the legislative intent and the statutory language also supported such a construction.⁶⁵ The legislative intent as articulated by the court, evinces the goal of adoption to be the promotion of the best interests of the child. Since the trial court found those interests served in this case the Supreme Judicial Court subsequently found support for the plural construction.⁶⁶ Although recognizing that the legislature probably did not specifically envision such a petition when it enacted the statute, the court also found that the legislature's use of general language to define those who could adopt did evince an intent to promote a variety of petitions.⁶⁷ The legislature's careful definition of those persons who could not adopt fulfilled the context piece of the construction requirement.⁶⁸ The legislature's failure to expressly prohibit a petition by two unmarried individuals thus opened the door to a construction allowing the petition in this case.⁶⁹ Having satisfied the legislative intent and context requirements of the rules of construction, the court concluded that so long as the decree serves the child's best interests, the Probate Court has jurisdiction to grant a joint adoption petition by unmarried persons without the termination of the natural parent petitioner's legal relationship to the child.⁷⁰

⁶⁴ *In re Tammy*, 416 Mass. at 217, 619 N.E.2d at 321. The court concluded that the legislature did not intend termination of the natural mother's rights if she is a party to the adoption petition. *Id.* Once again, the court relied on the best interests analysis in interpreting the statute to allow Tammy's natural mother to retain her parental rights. *Id.* at 216, 619 N.E.2d at 321.

⁶⁵ *In re Tammy*, 416 Mass. at 216, 619 N.E.2d at 321 (4-3 decision). The courts reasoning relied on a rule of construction which supports the inclusion of a plural "persons" in the statute, although the statute only defines a "person" as one with standing to adopt. *Id.* The court could embrace such a construction could only if the legislative intent and the context of the language also supported such a construction. *Id.*; MASS. GEN. L. ch. 4, § 6 (1992) states "words importing the singular number may extend and be applied to several persons unless the resulting construction is inconsistent with the manifest intent of the law-making body or repugnant to the test of the same statute."

⁶⁶ *In re Tammy*, 416 Mass. 205, 211-12, 619 N.E.2d 315, 319-19 (1993).

⁶⁷ *In re Tammy*, 416 Mass. at 212, 619 N.E.2d at 319.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *In re Tammy*, 416 Mass. at 217, 619 N.E.2d at 321. *But see Id.* at 217-18 (Lynch, J., dissenting) (seeking accommodation of child's best interests without "doing violence to the statute" by accepting a single petition with rights retained by mother). Here Justice Lynch, while carefully disavowing any stance on the sexual preferences of the petitioners, seems to want to prevent dual petitions by unmarried couples so as to preclude gay and lesbian couples from beginning a family through adoption. Though he never specifically

IV. THE BEST INTERESTS STANDARD WHERE GAY AND LESBIAN PARTNERS SEEK TO BEGIN A FAMILY THROUGH ADOPTION

With this jurisdictional victory for dual adoption petitions by unmarried couples in Massachusetts, the previous marriage preclusion of gay and lesbian and even some heterosexual couples in the area of adoption has largely been negated.⁷¹ The best interests of the child prerequisite, however, remains a formidable hurdle for the practitioner who seeks to pursue a petition on behalf of such couples who wish to begin a family through adoption.⁷² In *In re Tammy*, the biological tie and the benefits to the child through grant of the decree gave the trial court considerable leave to find the welfare of the child promoted under the circumstances.⁷³ Just as it has proven for custody cases from which it evolved, the best interests test still has the potential to circumvent the support for non-traditional families in Massachusetts by allowing courts to give disproportionate weight to sexual orientation in petitions involving parties who

states such an intention, the effect of his interpretation would continue the preclusion of gay and lesbian couples from adopting children which are not so-called second parent adoptions.

⁷¹ Elovitz, *supra* note 12, at 236. Other states, such as New York have followed the model of the highest courts in Vermont and Massachusetts by granting second-parent petitions. *See In re Jacob and Dana*, 86 N.Y.2d 651, 660 N.E.2d 397 (N.Y. Ct. App. Nov. 2, 1995). The analysis in *In re Tammy* logically extends to heterosexual unmarried couples who choose not to marry and want to establish paternity or maternity. Elovitz, *supra* note 14, at 236.

⁷² *See* Elovitz, *supra* note 12, at 210 (stating many states find lesbians and gay men do not meet criteria for adoptive parents). The Arizona Court of Appeals allowed an adoption agency to consider sexual orientation of the adoptive parent in finding him unfit to adopt. *See Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 340, 727 P.2d 830, 835 (1986) (finding gay man per se unfit parent based on statutory proscription of homosexual sodomy). Elovitz also notes agency preclusions to adoptive opportunities for lesbian and gay people based on pretextual factors. Elovitz, *supra* note 12, at 210. Despite the fact that he finds the fears surrounding child rearing by gay men and lesbians to be groundless based on social science research, Elovitz cites courts which have responded to the research by upholding the bans on gay and lesbian adoptions. Elovitz, *supra* note 12, at 210.

⁷³ *See In re Tammy*, 416 Mass. 205, 206, 619 N.E.2d 315 (1993); *see also* Bryant, *supra* note 43, at 234 (confirming second parent adoptions are in child's best interest since "they stabilize the existing family unit and provide the child with numerous legal, psychological, and economic benefits"). Bryant cites such advantages as legal parent-child relationships, stable custody plans, and inheritance among the advantages for a child where a second parent adoption has been granted. Bryant, *supra* note 43, at 234.

have no biological tie to the child.⁷⁴ In assessing the welfare of the child, some courts allow a thorough consideration of all of the facts which may affect the child, including the effects of marital status and non-marital relationships.⁷⁵ Other courts allow a consideration of sexual orientation only if the opposing party can prove some specific adverse impact to the child's welfare.⁷⁶

The discretionary nature of the best interests test gives judges the opportunity to inject their own views on sexual orientation and block petitions. The lack of predictability in the application of the best interests of the child standard makes it difficult to determine how the court will address future cases that do not involve second parent adoptions.⁷⁷ Without a record from the trial court that the petition was in the best interest of the child, the Supreme Judicial Court in *In re Tammy* likely would not have interpreted the adoption statute as it did. The question remains whether the construction of the adoption statute can also support a petition by unmarried individuals with no prior contact with the child.

Most cases where courts have granted gay men and lesbians the opportunity to adopt a child with which they have no biological connection have occurred only where the child was difficult to place.⁷⁸ A recent District of Columbia case,

⁷⁴ See *In re Adoption of Charles B.*, 50 Ohio St. 3d 88, 90, 552 N.E.2d 884, 886 (1990) (holding "adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors" in determining best interest of child). Only abuses in discretion will be overturned on review. *Id.*

⁷⁵ See *Beck v. Beck*, 341 So. 2d 580, 582 (La. App. 1977) (considering mother's heterosexual adulterous relationship exposed to child which rendered her unfit parent for custody).

⁷⁶ See *Bezio v. Palenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980) (refusing sexual orientation as factor in assessing custody unless it adversely affects child); see also *In the Matter of the Adoption of a Child by J.M.G.*, 267 N.J. Super. at 628-29, 632 A.2d at 553 (1993) (citing the holding of *In re J.S.C.*, 129 N.J. Super. 486, 489 (Ch. Div. 1974) that parental custody rights "cannot be denied, limited, or abridged on the basis of sexual orientation" unless adverse affect on child). New Jersey applied the best interests standard in custody matters to adoption petitions to conclude that sexual orientation would be nothing more than a factor in its decision. In the *Matter of the Adoption of a Child by J.M.G.*, 267 N.J. Super. at 628, 632 A.2d at 553.

⁷⁷ See *supra*, note 49 and accompanying text. The requirement for the child's best interests as a prerequisite for the decree could become a significant obstacle to those families who have no biological tie to the child to be adopted. Many courts, especially lower courts, have granted such second parent adoption petitions on a finding that the petitions promote the child's welfare. See *supra*, note 49.

⁷⁸ See *Charles B.*, 50 Ohio St. 3d at 94, 552 N.E.2d at 888 (granting adoption petition of bisexual psychological counselor to adopt a special needs child); see also *Glover v. Glover*, 66 Ohio App. 3d 724, 732-33, 586 N.E.2d 159, 164-65 (1990) (limiting *Charles*

however, did allow two gay men to begin a family by adoption through a second parent adoption where one of the men had already adopted the child and the couple had established a family unit with the child.⁷⁹ Although a few gay and lesbian partners have begun families through adoption, the circumstances in those cases have been exceptional, making the future of such petitions questionable.

Because statutory interpretation necessarily depends on whether granting the adoption petition is in the best interests of the child, unmarried gay and lesbian couples potentially face a considerable obstacle to adoption. Thus far, courts that allow second-parent adoptions have relied on the legislative purpose of protecting the welfare of the child to guide their interpretation of adoption statutes to include dual petitions by a biological parent and partner while retaining the rights of the biological parent.⁸⁰ When a gay or lesbian couple seeks to adopt a child together, without a biological and legal tie, the analysis changes because the petition is a dual petition by two people neither of which have a legal tie to the child. When neither petitioner holds such a legal or biological tie to the child, the best interests test can address only contingencies of potential benefits upon grant of the petition, rather than realities of current and future benefits based on an established relationship.

The best interests test ideally involves a factually-specific analysis of every adoptee's situation and the adoptive parent's ability to provide and care for the child without regard to sexual orientation. The discretionary nature of the test, however, leaves room for courts to ensure continued support for traditional families while denying that support for non-traditional families.⁸¹ The threat of

B. to situations where child is hard to place). *But see* Cox v. Fla. Dept. of Health and Rehab. Servs., 656 So. 2d 902, 903 (1995) (refusing to strike Florida adoption statute prohibiting homosexual adoption so gay men could adopt special needs child).

⁷⁹ In re M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995). After placing an ad in the newspaper, the two men received an answer from a woman willing to allow them to adopt her soon-to-be-born child. *Id.* One of the men, Bruce, filed the first adoption petition, and adopted Hillary soon after, although both men take equal parts in her care. *Id.* The two men together then petitioned, with Bruce's consent to adopt Hillary in order to create a legal relationship with each of them which the D.C. court granted. *Id.*

⁸⁰ *But cf.* In re Jason C., 129 N.H. 762, 764, 533 A.2d 32, 33 (N.H. 1987) (Souter, J.) (articulating statutory purpose to be encouragement of traditional family structures which provide stability); *accord* Adoption of Meaux, 417 So. 2d 522, 523 (La. Ct. App. 1982) (Domengeaux, J. concurring).

⁸¹ *See* Davies, *supra* note 1, at 1059 (stating moral judgments such as those espoused in *Bowers v. Hartwick*, 478 U.S. 186 (1986) often affect determination of best interests of child in custody cases); *see, e.g.*, Beck v. Beck, 341 So.2d 589, 582 (La. App. 1977) (allowing court's moral principles to invade when mother living in non-marital relationship is deemed unfit); Roe v. Roe, 228 Va. 722, 726, 324 S.E.2d 691, 693 (1985) (recognizing

denial of petitions based solely on sexual orientation is ever present because moral judgments may always underlie seemingly sound legal doctrine.⁸² A requirement that the opposer of the petition prove that the petitioner's sexual orientation has some specific impact on the child removes this discretion and undermines the ability to give disproportionate weight to sexual orientation.

The Supreme Judicial Court of Massachusetts has at least opened the door to dual petitions by unmarried couples so long as the petitioner can prove that a grant of the petition promotes the child's welfare.⁸³ In Massachusetts, the court determines the best interests of the child by considering "all factors relevant to the physical, mental, and moral health of the child" as well as the ability of the adopting party to "bring up the child and provide suitable support and education for it."⁸⁴ One of those factors may include the sexual orientation of the adoptive parent if raised by those opposing to petition. If those in opposition do raise sexual orientation as a factor, the legal practitioner must support the petition by articulating that the child has not received and will not receive any adverse

father as a fit parent, but his sexual orientation flies in the face of society's mores); *Chicoine v. Chicoine*, 479 N.W.2d 891, 894 (S.D. 1992) (remanding trial court decision which restricted a lesbian mother's visitation rights); *but see Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) (stating that judge can't be ultimate authorities on Divine Will); *Bezio v. Patenaude*, 318 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980) (holding mother's lesbianism may be considered only if clear nexus with her fitness as parent); *Guinan v. Guinan*, 102 A.D.2d 963, 964, 477 N.Y.S.2d at 830, 831 (1984) (allowing sexual orientation to become factor only upon showing it adversely affects welfare of child).

⁸² See Elovitz, *supra* note 12, at 209 (citing courts' discretionary powers and unfounded stereotypes as sources of second parent adoption denials). Elovitz also cites the judicial manipulation of social science research as flawed or irrelevant since it has yet to show any harm to a child from the gay and lesbian status of a parent. Elovitz, *supra* note 12, at 216-17. Courts denying these adoptions cite the lack of understanding of homosexuality and the belief that it is a result of genetic and environmental factors to support their claims. Elovitz, *supra* note 12, at 216-17 (citing *In Re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987)). These assumptions while devastating in child custody cases, are worse in adoptions because there is no prior legal relationship between the child and the adoptive parent. Elovitz, *supra* note 12, at 224. Because of the lack of prior legal relationship, great deference is given to the courts' and the social workers' definitions of ideal parents. Elovitz, *supra* note 12, at 224; see also Ali, Comment, *Homosexual Parenting*, 22 U.C. DAVIS L. REV. 1009 (citing lingering of judicial preconceptions in adoption law well beyond that of custody).

⁸³ *In re Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993).

⁸⁴ See MASS. GEN. L. ch. 210, § 3(a); see also *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (citing Washington, D.C. and Massachusetts as recognizing non-standard families which could be in a child's best interest under the adoption statute).

effects from such orientation.⁸⁵ Unlike custody cases where the parent is presumed fit, the burden in adoption proceedings involving gay and lesbian petitioners is on the prospective parent to demonstrate that their sexual orientation will not harm the child.⁸⁶

The difficulty arises where the adoptive parents, as in most cases, have not had any contact with the child before the petition.⁸⁷ In these cases, the court must rely on a Social Services home-study or other such evaluation of the home environment provided by the adoptive parents.⁸⁸ At least one commentator has suggested that stories about the everyday lives of gay men and lesbians provide valuable insight into what the court can expect for the child on granting the petition.⁸⁹ Some courts have cited evidence as to the commitment of the gay and lesbian partners and the permanency of their relationship in order to grant

⁸⁵ See, e.g., *Fort v. Fort*, 12 Mass. App. Ct. 411, 418-19, 425 N.E.2d 754, 759 (1981) (holding father's illegal heterosexual relationship does not per se prevent him custody absent affect on child); *Custody of a Minor*, 389 Mass. 755, 767-770 (1983) (stressing parent's lifestyle, standing alone not sufficient to sever natural bond between parent and child); *Bezio*, 381 Mass. at 579, 410 N.E.2d at 1216 (refusing to allow lifestyle alone to determine child's custody from parental fitness). The author Bryant cites the broad discretion courts enjoy in granting adoptions based on the paramount best interests of the child consideration. Bryant, *supra* note 43, at 236. Specific evidence of adverse affects of homosexuality, rather than general societal discrimination are needed to support an finding of unfitness. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (refusing to allow general societal racial prejudices to dictate the custody of a child).

⁸⁶ See *Lucious*, *supra* note 4, at 191-92n. 151. A party in opposition must still prove an adverse affect on the child. *Lucious*, *supra* note 4, at 192 n.152.

⁸⁷ *Elovitz*, *supra* note 12, at 209. Any contact with a child pre-adoption is generally minimal in the cases of gay and lesbian couples since many states' social services agencies preclude gay men and lesbians as foster parents in their policy, including Massachusetts. However, many times such partners will lie about their sexual orientation in order to be given the opportunity to become a foster parent and then an adoptive parent. *Elovitz*, *supra* note 12, at 209.

⁸⁸ See *In re Tammy* 416 Mass. 205, 209, 619 N.E.2d 315, 317 (1993) (citing Department of Social Service home study as source of evidence of home environment).

⁸⁹ See Marc. A. Fajer, *Can Two Men Really Eat Quiche Together?*, U. MIAMI L. REV. 511, 514 (1992) (suggesting telling stories about gay and lesbian lives is essential to litigation involving homosexuals). *But cf.* *In re Angela Lace*, 184 Wis. 2d at 518, 516 N.W.2d at 686 (refusing to grant adoption petition of lesbian partner because couple is unmarried). The Wisconsin Supreme Court did not consider the indicia of marriage between the two parties nor their commitment to each other in deciding that the mother's lesbian partner could not adopt the child. *Id.*

custody or adoption.⁹⁰ Most courts also look at the ability of the petitioners to provide for the child, financially.⁹¹ Generally, however, all courts granting these petitions primarily look to the petitioner's commitment to the child.⁹²

The practitioner may also wish to put the state to its test by demanding that it put forth specific evidence of the adverse affects of the adoptive parents' sexual preferences on the child while reminding the court of the unconstitutionality of relying on general societal prejudices to determine placement.⁹³ A recent custody case from New York involving a gay father found that even the boy's difficulty in accepting his father's sexual orientation would not preclude the father's custody on the belief that the child will eventually be required to integrate that fact into his life.⁹⁴ Still another approach has been cited by the District of Columbia Court of Appeals as true to the legislative intent of all adoption statutes.⁹⁵ According to the Appeals Court, the best interest of the child goal of the adoption statute necessarily includes providing the child a permanent loving home.⁹⁶ Since there is not a suitable single person or married couple available to adopt every child who lacks a permanent home, the court found it absurd to limit the class of people eligible to adopt to just

⁹⁰ See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (citing five-year relationship of two gay men when granting their adoption petition); *Matter of Caitlin*, 163 Misc. 2d 999, 622 N.Y.S.2d 835 (N.Y. Fam. Ct. 1994) (considering nine-year cohabiting lesbian partners' property co-ownership and relationships with each's family in granting adoption); *In the Matter of the Adoption of a Child by J.M.G.*, 267 N.J. Super. at 624, 632 A.2d at 551 (1993) (citing ten-year committed relationship between mother and partner evidence to grant second parent petition).

⁹¹ See, e.g., *In the Matter of Evan*, 153 Misc. 2d 844, 846, 583 N.Y.S.2d 997 (N.Y. Surr. Ct. 1992) (citing security afforded a child in a second parent adopted child based on support obligation, inheritance, and social security entitlements); *In re Tammy*, 416 Mass. at 207, 619 N.E.2d at 316-17 (noting potential inheritance from Helen, non-biological mother, and careers as physicians providing financial stability); *Matter of Caitlin*, 163 Misc. 2d 999, 622 N.Y.S.2d 835 (N.Y. Fam. Ct. 1994) (recognizing large home of mothers in excellent repair located in quiet suburban neighborhood with families).

⁹² See *Matter of Caitlin*, 163 Misc. 2d at 999, 622 N.Y.S.2d at 835 (calling the petitioners "intelligent, stable, mature women . . . who have carefully considered their relationship and how they can be the best kind of parents . . ."); see also *In re M.M.D.*, 662 A.2d at 837 (recognizing Hillary's bonding to both men equally and their equal sharing of her care and nurturing).

⁹³ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding reliance on societal prejudice in the context of custody is unconstitutional).

⁹⁴ *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 134 Misc. 2d 317 (Sup. Ct. 1986).

⁹⁵ *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. App. 1995).

⁹⁶ *Id.*

single and married persons.⁹⁷ The court focussed on the best interests of the child with regard to how she would best thrive, rather than on the family structure.⁹⁸ The court found sexual orientation of the adoptive parents a consideration under the best interests of the child only where relevant to specific harm to the child.⁹⁹

In Massachusetts, although the state may not deprive parents of custody of their children simply because their "households fail to meet the ideals approved by the community . . . or embrace ideologies or pursue life-styles at odds with the average," evidence suggesting a correlation between sexual orientation and fitness as a parent is admissible.¹⁰⁰ The admissibility of this type of evidence based on a correlation alone provides little guidance to the discretion of a judge who determines parental fitness and the best interests of the child.¹⁰¹ The finality of the adoption, as opposed to the custody decree which is subject to changing circumstances, provides even further leave for a judge to consider a wide range of factors in adoption in order to manipulate the test.¹⁰² The practitioner should

⁹⁷ *Id.*; see also *Adoptions of B.L.V.B. and E.L.V.B.*, 160 Vt. 368, 375, 628 A.2d 1271, 1275 (Vt. 1993) (stating that "today a child who receives proper nutrition, adequate schooling, and supportive sustaining shelter is among the fortunate, whatever the source . . ."). The Supreme Court of Vermont, via Judge Denise Johnson, went on to say that "a child who also receives the love and nurture of even a single parent can be counted among the blessed." *Id.* at 375, 628 A.2d at 1275. As a result, the court found that a child such as found in this case who has all of this provided by two adults who are dedicated to him as well as committed to each other should be permitted to remain with them. *Id.*

⁹⁸ *Id.*

⁹⁹ See Appendix, In the Matter of the Adoption of a Minor Child, 662 A.2d 837 (D.C. App. 1995) (stating sexual orientation relevant only where shown to adversely affect the child).

¹⁰⁰ See *Bezio v. Patermaude*, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980) (quoting *Custody of a Minor* (No. 2), 378 Mass. 712, 719 (1979)).

¹⁰¹ The critical question of the welfare of the child is a combination of the parental fitness and the best interest test. See *Bezio*, 381 Mass. at 576-77, 410 N.E.2d at 1214-15. Neither test is properly applied without the other. *Id.* Massachusetts courts have stressed that the life-style of a parent, by itself, is not a sufficient ground for "severing the natural bond between a parent and a child." *Doe v. Doe*, 16 Mass. App. Ct. 499, 503, 452 N.E.2d 293, 296 (1983). The lack of evidence demonstrating the adverse affect of the parent's lifestyle on the child precludes a consideration of such issues. *Id.* at 504, 452 N.E.2d at 296. Although this argument logically extends from the custody situation here to an adoption, the absence of a natural bond between the child and the adoptive parent has not been addressed.

¹⁰² See *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985). The Virginia Supreme Court judicially recognized the underlying difference between custody and adoption in that custody is subject to changing conditions and adoption decrees are final and irrevocable. *Id.* The finality of the adoption decree would seem to evince a more compelling argument

thus keep the court focussed on the welfare of the child through the petitioners' commitment to the child and to each other, as well as their ability to provide for the child. If petitioners' sexual orientation is brought into the analysis from those opposing the petition, the practitioner should rely on the absence of harm to the child from this behavior.

V. CONCLUSION

Although the Massachusetts Supreme Judicial Court paved the way for second-parent adoptions and provided standing for unmarried couples to adopt, a court must find the best interests of the child standard met before granting such petitions. The best interest standard is easily met where there is a second-parent adoption in light of the benefits for a child to have a legal tie to the partner of the natural parent, similar to a step-parent. Where there is a dual petition for adoption by an unmarried couple with no biological tie to the child, however, the benefits must be carefully outlined and potential adverse affects of sexual orientation on the child addressed. The practitioner may use various methods with which to prove the benefits to the child through a dual petition.

In Massachusetts, the Supreme Judicial Court has opened the door for a dual petition through liberal interpretation of the adoption statute provided that the court finds the child's best interests met. No studies have shown harm to a child because of the sexual orientation of a parent, so any evidence of the adverse effect of the sexual preference of an adoptive parent on a particular child is skeptical at best. Establishment of a secure, permanent, and loving home life for a child is a critical prerequisite for such a petition. After all, where so many children are in need of a stable home and where so many children successfully thrive under the care of gay and lesbian parents, perhaps more states should open the pool of adoptive parents in order to truly promote the welfare of children.

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for the trial judge to support a consideration of sexual orientation and its potential effects on the child.