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# It's Me or Your Family: How Florida DOMA and the Florida Probate Code Force Same-Sex Couples to Make an Impossible Choice in Estate Planning

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# IT'S ME OR YOUR FAMILY: HOW FLORIDA DOMA AND THE FLORIDA PROBATE CODE FORCE SAME-SEX COUPLES TO MAKE AN IMPOSSIBLE CHOICE IN ESTATE PLANNING

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## I. INTRODUCTION

Recent developments in adoption rights for homosexuals in Florida have dramatically changed the legal landscape for same-sex couples hoping to secure property rights for each other after death.[1] Prior to 2010, no homosexual person could adopt any child or adult in Florida, thus rendering adult adoption generally inapplicable to same-sex couples.[2] With the Third District Court of Appeal's ("Third District") authorization of a homosexual adoption in *Florida Department of Children & Families v. Adoption of X.X.G. & N.R.G.*,[3] came the possibility of adult adoption as a way to ensure the surviving partner would receive property and assets in accordance with the decedent's intent.[4]

While adult adoption provides same-sex couples with a safer way to plan their estates pursuant to their wishes, it comes with a rather steep price: The adoptee's right to inherit his or her biological family's intestate estate is severed.[5] When an individual is legally adopted, he or she relinquishes his or her right to inherit from relatives through intestacy, therefore potentially los-

1. *See, e.g.*, Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 81, 92 (Fla. 3d Dist. Ct. App. 2010) (holding that Florida's ban on homosexual adoption served no rational basis and therefore violated Florida's Constitution), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).

2. FLA. STAT. § 63.042(3) (2012), *declared unconstitutional by* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

3. 45 So. 3d 79 (Fla. 3d Dist. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).

4. *See* George D. Karibjanian, *Estate Planning for Same-Sex Partners*, FLA. B.J., June 2012, at 91, 95. While section 63.042(3) of the *Florida Statutes* has not been officially invalidated by the Supreme Court of Florida, the State has said that it will not appeal the decision in *Adoption of X.X.G. & N.R.G.*, perhaps reflecting a growing statewide trend of permitting and honoring homosexual adoptions. *See id.*; *see also Adoption of X.X.G & N.R.G.*, 45 So. 3d at 99 (Salter, J., concurring).

5. Madeleine N. Foltz, Comment, *Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-at-Law Status for Domestic Partners*, 40 U. BALT. L. REV. 495, 511–12, 515–16 (2011).

ing out on considerable assets in the future.[6] Thus, Florida forces same-sex couples to choose, quite literally, between their partner and their family.[7]

This article will first discuss the history of same-sex couples in regards to the legal obstacles they face in Florida.[8] Specifically, this section will focus on the same-sex marriage controversy and the evolution of homosexual adoption rights in Florida.[9] Second, this article will explore adult adoption generally.[10] This section will address many different aspects of adult adoption, for instance, its statutory basis in Florida, other reasons behind it, and its key differences as compared to child adoption.[11] The next section will discuss adult adoption as a legal tool for same-sex partners planning an estate in Florida.[12] This section will weigh the benefits of adult adoption with regard to intestate succession, will contests, and rights to homestead against the irrevocable nature of adoption, and the resulting severance of the adoptee's inheritance rights to his or her family's intestate estate.[13] The next section will consider a possible solution to the problems associated with same-sex couples and adult adoption in Florida: Trusts.[14] This section will discuss Florida trusts generally, and which types would likely be the most beneficial to same-sex couples interested in long-term, financially stable futures together.[15] Finally, this article will illustrate why trusts could provide a far more sensible method by which same-sex couples in Florida can confidently control their assets during life and after death.[16]

## II. SAME-SEX COUPLES IN FLORIDA

### A. *The Right to Marry*

The fundamental right to marry has been a major focal point of gay rights activists both statewide and nationwide for many years.[17] Same-sex couples fight for the right to marry and share equal marital benefits enjoyed

6. *See id.* at 515–16.
7. *See* Karibjanian, *supra* note 4, at 95; Foltz, *supra* note 5, at 515–16.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Part II.A–B.
10. *See* discussion *infra* Part III.
11. *See* discussion *infra* Part III.A–C.
12. *See* discussion *infra* Part IV.
13. *See* discussion *infra* Part IV.A–C.
14. *See* discussion *infra* Part V.
15. *See* discussion *infra* Part V.A–B.
16. *See* discussion *infra* Part VI.
17. *See* Robert Nolin, *Florida Gay Rights Fight Buoyed by Big Wins in West*, S. FLA. SUN-SENTINEL, Feb. 11, 2012, at A1 (describing the recent developments across the country in the fight for marriage equality).

by heterosexual couples, while those in opposition fear this would taint the traditional definition of marriage.[18] Florida is notorious for being one of the most hostile states toward same-sex couples from a legal standpoint.[19] The controversy over same-sex marriage in Florida finally boiled over with the passage of the Florida Defense of Marriage Act ("Florida DOMA").[20]

The Florida Legislature passed Florida DOMA in 1997, thereby officially renouncing same-sex marriage throughout the state.[21] Florida DOMA mirrors the Federal Defense of Marriage Act ("Federal DOMA") in that Florida DOMA circumvents the Full Faith and Credit Clause of the United States Constitution.[22] According to Florida DOMA: "Marriages between persons of the same sex entered into in any jurisdiction . . . either domestic or foreign . . . are not recognized for any purpose in this state."[23] Furthermore, Florida DOMA defines marriage as "only a legal union between one man and one woman as husband and wife."[24] Therefore, Florida DOMA not only prohibits same-sex couples from getting legally married in Florida, it also, and perhaps more importantly, refuses to recognize valid same-sex marriages from another state or country for purposes of, including but not limited to, divorce, child-rearing, and posthumous asset distribution.[25] Florida DOMA is considered by many to be an enormous setback in the fight for homosexual equality within the state.[26]

### B. *The Right to Adopt*

A logical progression from the fundamental right to marry is the fundamental right to have and raise children.[27] In Florida, same-sex couples have also experienced considerable hardship in their quest to legally adopt children because according to Florida law, same-sex couples are nothing

18. *See* Joel Marino, *Ban on Gay Marriage Debated*, S. FLA. SUN-SENTINEL, Feb. 8, 2008, at B6 (explaining the reasoning behind those who oppose marriage equality in Florida).

19. *See About Equality Florida*, EQUALITY FLA., http://eqfl.org/about/ (last visited Oct. 28, 2012).

20. *See* FLA. STAT. § 741.212 (2012); Kantaras v. Kantaras, 884 So. 2d 155, 157–58 (Fla. 2d Dist. Ct. App. 2004).

21. FLA. STAT. § 741.212(1); *Kantaras*, 884 So. 2d at 157.

22. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738C (2006); FLA. STAT. § 741.212.

23. FLA. STAT. § 741.212(1).

24. *Id.* § 741.212(3).

25. *See id.* § 741.212(1).

26. *See generally* Buddy Nevins & Jim Davis, *Same-Sex Marriage Ban Gains in Florida Baptists Back Amendment to Constitution*, S. FLA. SUN-SENTINEL, Nov. 10, 2004, at 1B (summarizing the anti-gay sentiment behind Florida DOMA and gay activists' reactions).

27. *See generally* Nolin, *supra* note 17 (recognizing that despite Florida and Federal DOMA, many states, including Florida, are recognizing homosexuals' right to adopt).

more than two unrelated, single, homosexual individuals—and until recently, were outright prohibited from adopting statewide.[28] The tables turned dramatically in 2008 with *In re Adoption of Doe*,[29] and in 2010 with *Adoption of X.X.G. & N.R.G.*—landmark cases that resulted in the Third District's authorization of Florida's first homosexual adoption.[30]

Pursuant to section 63.042(3) of the *Florida Statutes*: "No person eligible to adopt . . . may adopt if that person is a homosexual."[31] In other words, prior to 2008, even though an individual would otherwise be fully qualified and permitted to adopt, he or she would be prohibited based solely on his or her sexual orientation.[32] Until 2008, Florida was the only state that banned homosexual adoptions outright, with no exceptions.[33] The effect of this statute was likely devastating to many individuals and families in Florida.[34] The inability to legally adopt means that the relationship between the parties lacks critical legal authority, for instance, with regard to posthumous asset distribution.[35]

Gay rights activists statewide felt the sting of section 63.042(3) in 1995's *Cox v. Florida Department of Health & Rehabilitative Services* (*Cox II*).[36] In this case, a homosexual couple, while attending a voluntary parenting class, disclosed to the Florida Department of Health and Rehabilitative Services ("HRS") their sexual orientation and desire to adopt a mentally-disabled foster child.[37] The HRS promptly sent the couple a letter advising them that the HRS would not accept their application for adoption pursuant

28. *See* FLA. STAT. § 63.042(3).

29. 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

30. *See* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008); *In re Adoption of Doe*, 2008 WL 5006172, at *21, *29.

31. FLA. STAT. § 63.042(3).

32. *See id.*

33. John Schwartz, *Florida Court Calls Ban on Gay Adoptions Unlawful*, N.Y. TIMES, Sept. 23, 2010, at A18.

34. *See* Lindsay Ayn Warner, Note, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 609–10 (2009) (describing the unfortunate consequences of the ban on homosexual adoption in Florida with regard to minor children and intestate succession).

35. *See* Karibjanian, *supra* note 4, at 92 (describing the numerous advantages to a legally recognized marriage).

36. 656 So. 2d 902, 903 (Fla. 1995) (per curiam); *see also* FLA. STAT. § 63.042(3).

37. *Cox II*, 656 So. 2d at 903; Fla. Dep't of Health & Rehabilitative Servs. v. Cox (*Cox I*), 627 So. 2d 1210, 1212 (Fla. 2d Dist. Ct. App. 1993), *review granted,* 637 So. 2d 234 (Fla. 1994), *and quashed in part*, 656 So. 2d 902 (Fla. 1995).

to section 63.042(3).[38] The couple filed suit in a Sarasota trial court seeking the statute declared unconstitutional.[39] The trial court found for the couple, and held that section 63.042(3) was void.[40] The HRS appealed to the Second District Court of Appeal ("Second District"), and the court reversed, declaring the statute constitutional.[41] The court surmised that homosexual rights were, at that time, an issue for the Florida Legislature, and not the courts, to handle.[42] The couple appealed to the Supreme Court of Florida in 1995.[43] The Supreme Court of Florida held for the HRS, affirming the constitutionality of section 63.042(3).[44] Unfortunately for homosexuals and gay rights supporters throughout the state, this outright prohibition lay dormant until 2010.[45]

The tables finally turned on homosexual adoption laws in Florida, when the Third District affirmed the 2008 ruling of *In re Adoption of Doe* in its 2010 decision of *Adoption of X.X.G. & N.R.G.*[46] In *In re Adoption of Doe*, a Miami trial court allowed a homosexual man to legally adopt two foster children that had been living with him for four years.[47] The trial court determined, based on expert testimony, that because the children and the man had presumably developed strong and healthy parent-child relationships, legal adoption would certainly be in the best interests of the children.[48] The only factor impeding the adoption was the man's sexual orientation.[49] As a homosexual man, he was outright prohibited from legally adopting the children in Florida.[50] The trial court not only granted him the adoption, but it also determined that there was no rational basis for section 63.042(3) and declared it unconstitutional.[51] The State of Florida appealed this decision but the Third

38. *Cox I*, 627 So. 2d at 1212; *see also* FLA. STAT. § 63.042(3).
39. *Cox I*, 627 So. 2d at 1212.
40. *Id.*; *see also* FLA. STAT. § 63.042(3).
41. *See Cox I*, 627 So. 2d at 1212, 1220.
42. *Id.* at 1220.
43. Cox v. Fla. Dep't of Health & Rehabilitative Servs. (*Cox II*), 656 So. 2d. 902, 902 (Fla. 1995) (per curiam).
44. *Id.* at 903; *see also* FLA. STAT. § 63.042(3).
45. *See* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).
46. *Id.* at 92; *In re* Adoption of Doe, 2008 WL 5006172, at *29 (Fla. 11th Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).
47. *In re Adoption of Doe*, 2008 WL 5006172, at *1, *29.
48. *Id.* at *4.
49. *See id.* at *1.
50. *Id.*
51. *Id.* at *29.

District affirmed in *Adoption of X.X.G. & N.R.G.*[52] Florida has since said it will not appeal the Third District's ruling, and that section 63.042(3) will not bar homosexual adoptions in the Third District.[53] Gay rights activists across the country consider *Adoption of X.X.G. & N.R.G.* an enormous triumph for homosexual equality in Florida.[54]

## III. ADULT ADOPTION GENERALLY

### A. *The Florida Statutory Basis*

While the idea of a capable, mature adult being adopted by a fellow adult seems somewhat unconventional, many people have chosen this method to, for instance, carry out their rather complicated financial plans.[55] Section 63.042(1) of the *Florida Statutes* provides: "Any person, a minor or an adult, may be adopted."[56] Probably unbeknownst to many, Florida law unequivocally and expressly authorizes adult adoption.[57] Furthermore, while the courts have not expressly forbidden older-younger same-sex partner adult adoption, the Third District's decision to honor a homosexual adoption in *Adoption of X.X.G. & N.R.G.* is still just two years old, so only time will tell how courts will respond.[58]

### B. *Other Reasons to Adopt an Adult*

There are many reasons why one would choose to adopt an adult other than to protect someone from an unfortunate consequence of intestate suc-

52. Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).

53. Karibjanian, *supra* note 4, at 95.

54. *See* Jerome Hunt & Jeff Krehely, *State Antigay Adoption Policies Need to Go*, CENTER FOR AM. PROGRESS (Oct. 12, 2010), http://www.americanprogress.org/issues/lbgt/news/2010/10/12/8493/state-antigay-adoption-policies-need-to-go/; *see also* Schwartz, *supra* note 33.

55. Sarah Ratliff, Comment, *Adult Adoption: Intestate Succession and Class Gifts Under the Uniform Probate Code*, 105 NW. U. L. REV. 1777, 1780–84 (2011) (describing different reasons and methods by which people utilize adult adoption).

56. FLA. STAT. § 63.042(1) (2012), *declared unconstitutional by* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

57. *See id.*

58. *See* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008); *see also* Karibjanian, *supra* note 4, at 95.

cession.[59] Certain situations involving benefits that are restricted to specific classes of family members may call for adult adoption as the only feasible way to direct funds in accordance with one's financial goals.[60] Additionally, adult adoption can be a valid way to become a member of a designated class for class gift purposes.[61]

### 1. Generation-Specific Benefits

Two interesting examples of cases in which adult adoption was used for generation-specific financial benefits are Florida's *In re Adoption of Holland*[62] and Tennessee's *Coker v. Celebrezze*.[63]

*In re Adoption of Holland* offers a look at a relatively unusual situation in which a Florida adult adoption was used for a purely financial purpose.[64] In *In re Adoption of Holland*, a grandfather sought to adopt his consenting adult grandson.[65] The grandfather, a disabled veteran, wished "to confer [to his grandson] financial aid available to the children (but not grandchildren) of disabled veterans."[66] The court approved the adoption, making the grandfather's former grandchild his new legal child and allowing the financial aid benefits to pass to him.[67] The court in *In re Adoption of Holland* seemed to have no problem authorizing the legal adult adoption, despite the fact that the grandfather had a strictly financial motive in the adoption.[68]

*Coker* provides a look into an adult adoption in Tennessee that also took place solely for the financial benefit of the adopted party.[69] In *Coker*, a grandfather attempted to adopt his twenty-three year old mentally-disabled grandson to confer to him the grandfather's social security benefits as his lineal descendant.[70] Tennessee's adoption statute was vague with regard to whether adult adoptions were permissible.[71] Due to the fact that the grandson lived with his grandfather since he was a toddler and that the grandson

59. *See* Ratliff, *supra* note 55, at 1778 (describing other reasons why an adult would adopt another adult).
60. *See id.* at 1782–83.
61. *Id.*
62. 965 So. 2d 1213, 1214 (Fla. 5th Dist. Ct. App. 2007).
63. 241 F. Supp. 783, 783–84, 787 (E.D. Tenn. 1965).
64. *See In re Adoption of Holland*, 965 So. 2d at 1214.
65. *Id.*
66. *Id.*
67. *Id.*
68. *See id.*
69. *See* Coker v. Celebrezze, 241 F. Supp. 783, 783–84, 787 (E.D. Tenn. 1965).
70. *Id.* at 783–84.
71. *See id.* at 787 (citing TENN. CODE ANN. § 36-1-102(3)(A) (2012)).

was clearly incapable of taking care of himself financially, the court honored the adoption, and the benefits were passed to the grandson as the grandfather's adopted son.[72] The court also interpreted the Tennessee statute as not prohibiting adult adoption.[73] In this case, one can see another example of a state court honoring an adult adoption with a purely financial motive.[74]

### 2. Access to Class Gifts

Florida law defines a class gift as: "[A] gift of an aggregate sum to a group of persons whose exact identity and number are to be determined sometime after the execution of the will."[75] The class gift—often given to the decedent's children—is designed to accommodate the potential change in identity and number.[76] Florida recognizes children as all natural born and adopted children.[77] Therefore, class gifts may include current natural born and adopted children as well as future natural born and adopted children.[78] An individual may, as an adult, still be adopted and considered part of the group to be given the class gift upon the testator's death.[79] Courts seem to interpret adult adoptions, for purposes of class gifts, differently across the country.[80] *In re Estate of Fortney*[81] and *Davis v. Neilson*[82] illustrate such contrasting interpretations.[83]

In *In re Estate of Fortney*, married Kansas couple Asa and Adaline died, leaving their estate first to their children and then to their living and future grandchildren as a class gift.[84] One of their children, John, legally adopted his wife's sixty-five-year-old nephew, Amspacker.[85] Therefore, Amspacker gained an interest in Asa and Adaline's estate through the adoption, as he

72. *See id.* at 783–85, 787.
73. *Id.* at 787 (interpreting TENN. CODE ANN. § 36-1-102(3)(A)).
74. *See Coker*, 241 F. Supp. at 787.
75. *In re* Estate of McCune, 214 So. 2d 56, 57 (Fla. 4th Dist. Ct. App. 1968).
76. *See id.* at 57–58; Ratliff, *supra* note 55, at 1790, 1796, 1798.
77. *See* FLA. STAT. § 732.108(1) (2012).
78. *See* Ratliff, *supra* note 55, at 1796.
79. *Id.* at 1782–83.
80. *Compare In re* Estate of Fortney, 611 P.2d 599, 605 (Kan. Ct. App. 1980) (stating that adult adoptees are heirs of their adopting parents under the plain meaning of the applicable statute), *with* Davis v. Neilson, 871 S.W.2d 35, 39 (Mo. Ct. App. 1993) (suggesting that certain factors should be considered by a court when determining whether familial ties are created by the adoption).
81. 611 P.2d 599 (Kan. Ct. App. 1980).
82. 871 S.W.2d 35 (Mo. Ct. App. 1993).
83. *Compare In re Estate of Fortney*, 611 P.2d at 605, *with Davis*, 871 S.W.2d at 39.
84. *In re Estate of Fortney*, 611 P.2d at 600–01.
85. *Id.* at 600.

became their legal grandchild.[86] Asa and Adaline's brothers' and sisters' descendants, the remaindermen and would-be takers after John, were unsatisfied with losing their share to Amspacker, and questioned the legitimacy of the adoption.[87] In its ruling, the court focused on "the intent of Asa . . . when he executed [his] will."[88] The court first determined that Asa's devise to his son John and John's children included John's potentially adopted children, as well as biological.[89] The court then held that:

> [A]nyone of any age can be a child of another as long as a blood or legal relationship exists. One does not lose his or her status as a child of its parents when the age of majority is reached. . . . [T]o construe the adoption statutes to mean that adult adoptees have no rights would make adopting an adult a meaningless ritual. Certainly the legislature would not have intended that result.[90]

Thus, the court honored the adult adoption and allowed Amspacker to inherit from Asa and Adaline's estate.[91] *Fortney* is a good example of a case in which a court strictly interpreted its state's adoption statutes to include adult adoptees in class gift situations, regardless of age.[92]

*Davis*, a Missouri case, offers a somewhat contrasting view of adult adoptees and class gifts.[93] In this case, Neilson, a beneficiary of a trust, adopted six adults—all of whom were essentially strangers—to take the remainder of his share as a class gift when the trust terminated upon his fortieth birthday.[94] Neilson also had two natural children with his ex-wife, who were also entitled to a portion of the class-gifted trust.[95] After the adoption, Neilson's natural children's share under the trust estate was considerably depleted by their six new siblings.[96] The trustee of the estate refused to distribute the funds to the six adult adoptees, claiming the adoptions were a sham.[97] The appellate court reversed the trial court's grant of summary judgment to the six adult adoptees.[98] The court explained that to determine

86. *See id.* at 601, 605.
87. *Id.* at 600–01.
88. *Id.* at 602.
89. *In re Estate of Fortney*, 611 P.2d at 602.
90. *Id.* at 604–05.
91. *See id.* at 605.
92. *See id.* at 604–05.
93. *See* Davis v. Neilson, 871 S.W.2d 35, 39 (Mo. Ct. App. 1993).
94. *Id.* at 36–37.
95. *Id.* at 37.
96. *See id.*
97. *Id.* at 36.
98. *Davis*, 871 S.W.2d at 36, 39.

whether the adoptions were valid, the trial court should look to the following factors:

> [W]hether the adopter has assumed responsibility for the adoptee; whether the adoptee has taken the adopter's surname; whether the adoptee entered the adopter's home, and, if so, at what age; the length of time the adopter and adoptee lived together; and the nature and extent of [the] adopter's and [the] adoptee's parent-child relationship.[99]

Thus, *Davis* sets out factors that courts may use to determine the validity of an adult adoption for class gift purposes.[100] In contrast to the *Fortney* court's textual interpretation of the Kansas adoption statutes, the court in *Davis* seemed to employ a more liberal interpretation of the Missouri adoption statutes.[101]

### C. *Differences Between Adult & Child Adoption*

Other than the discrepancy in age of the adoptee, adult and child adoptions have a few key differences that motivate courts to rule in very different ways.[102] Virtual adoption—an equitable doctrine and exception to the formal legal adoption process—is one example of how courts distinguish between adult and child adoptions.[103] Furthermore, beneficiaries to residuary trusts are sometimes thwarted in their efforts to reap the benefits of the heir-at-law status adult adoption provides.[104]

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99. *Id.*

100. *Id.*

101. *Compare In re* Estate of Fortney, 611 P.2d 599, 604–05 (Kan. Ct. App. 1980) (holding that "anyone of any age can be a child of another as long as a blood or legal relationship exists," and that adult adoptees have rights), *with Davis*, 871 S.W.2d at 39 (concluding that courts must "look to several factors" in "determin[ing] whether the persons adopted . . . have the familial ties" that are necessary to have rights).

102. *See, e.g.*, Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam) (denying a virtual adoption to an adoptee because he was an adult when the adoption took place, and therefore the equitable doctrine did not apply).

103. *See id.* at 323.

104. Armstrong v. Hixon, 206 S.W.3d 175, 183 (Tex. App. 2006).

### 1. Virtual Adult Adoption

Virtual adoptions are thought of as an exception to the standard method by which one legally adopts another.[105] A virtual adoption in Florida is defined as:

> [A]n equitable doctrine designed to protect the interests of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption. . . . The doctrine is invoked in order to allow the supposed-to-have-been adopted child to take an intestate share.[106]

One key difference in how courts treat child versus adult adoption is the way the courts treat virtual adoptions in each situation.[107] *Miller v. Paczier*[108] offers a look into how Florida courts treat virtual adult adoption.[109]

In *Miller*, an adult man claimed that he had formed a relationship with his now-deceased aunt and uncle such that he should be considered virtually adopted for purposes of inheriting from their intestate estate.[110] The Florida court held that declaring the nephew virtually adopted would offend the traditional purpose of virtual adoption.[111] Specifically, the court explained that because the nephew was an able-bodied adult, perfectly capable of taking care of himself financially, imputing a virtual adoption would open up the floodgates to future fraudulent claims against other intestate estates.[112] The court further stated that virtual adoption was meant "to protect the interests of minors, who . . . were given by their natural parents to adoptive parents based upon an oral agreement to allow the child to inherit from the adoptive parents, if they died intestate."[113] *Miller* illustrates how Florida courts seem to be reluctant to honor virtual adult adoptions as compared to virtual child adoptions.[114]

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105. *Miller*, 591 So. 2d at 323.
106. *Id.* at 322 (citations omitted).
107. *See id.* at 322–23.
108. 591 So. 2d 321 (Fla. 3d Dist. Ct. App. 1991) (per curiam).
109. *See id.* at 322–23.
110. *Id.* at 322.
111. *Id.* at 323.
112. *Id.* (citing Thompson v. Moseley, 125 S.W.2d 860, 862 (Mo. 1939)).
113. *Miller*, 591 So. 2d at 323.
114. *See id.*

### 2. Residuary Trust Beneficiaries

Another interesting example of a case in which an adopted adult was not afforded the same rights that a natural adult child would have been is *Armstrong v. Hixon*.[115] *Armstrong*, a Texas case, addressed whether unrelated adopted adults can be possible beneficiaries to residuary trusts.[116]

In *Armstrong*, a Texan decedent's residuary trust was to pass to his brother's children—John, Tobin, and Lucie—according to a codicil executed shortly before his death.[117] Then, upon each child's death, assuming the trust had yet to terminate, the remaining assets were to pass to that child's own children.[118] At the time the case was decided, John was deceased but had children of his own who were entitled to his share.[119] Tobin was still living but also had children.[120] Lucie never married and never had children.[121] Lucie did, however, adopt an adult woman, Katherine.[122] Tobin, individually, and John's children—the entitled parties to the residuary trust—brought suit against Lucie to preclude Katherine from "tak[ing] as a descendant under the [w]ill."[123] The entitled parties were unhappy with the fact that they would have to share the residuary with Katherine, should Lucie die.[124] Lucie argued that the Supreme Court of Texas had already decided, in a prior case, that an adopted adult was *not* precluded from inheriting from collateral relatives.[125] After considering the legislative history, however, the court rejected this argument.[126] The court explained that Texas law permits adopted children to inherit *from* adoptive parents in the same way biological children do, but it does not permit inheritance "'*through*' the adoptive parents."[127] Therefore, Katherine was not entitled to a share of the residuary trust after Lucie's death.[128] This case illustrates Texas's contrasting interpretation of adult adoption versus child adoption with respect to residuary trust beneficiaries.[129]

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115. 206 S.W.3d 175, 183 (Tex. App. 2006).
116. *Id.* at 179.
117. *Id.* at 178.
118. *Id.*
119. *Id.* at 178–79.
120. *Armstrong*, 206 S.W.3d at 179.
121. *Id.*
122. *Id.*
123. *Id.*
124. *See id.*
125. *Armstrong*, 206 S.W.3d at 181 (citing Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687, 688–89 (Tex. 1984)).
126. *Id.* at 182.
127. *Id.* at 183 (emphasis added).
128. *Id.*
129. *See id.*

## IV. SAME-SEX COUPLES, ADULT ADOPTION, & ESTATE PLANNING

Because the Third District deemed section 63.042(3) of the *Florida Statutes* unconstitutional, many same-sex couples, that still cannot enjoy the benefits of a legally recognized marriage under Florida DOMA, have begun to use adult adoption as a way to circumvent frustrations and uncertainties in estate planning.[130]

### A. *The Good: Securing Assets & Homestead*

The Uniform Probate Code was adopted by and became effective in Florida as the Florida Probate Code (the "FPC") in 1976.[131] The FPC governs probate and intestacy rules throughout the state.[132] According to section 732.101(1) of the FPC: "Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs . . . ."[133] If one fails to make a will, makes an invalid will, or makes a will that is later contested and invalidated, his or her assets will pass through intestacy.[134] In each of these scenarios, the surviving partner will inherit nothing, as he or she is not a protected class in Florida's per stirpes distribution scheme for intestacy.[135] Adult adoption, however, may move the surviving partner from an unprotected class of heirs into a protected class of heirs, thus fulfilling the decedent's wishes.[136] This is possible because the FPC affords the same legal status to adopted children and adults as natural children—lineal descendants—a protected class of heirs.[137]

#### 1. Intestate Succession

Under the FPC, if a same-sex couple fails to use a will to dispose of property upon death, everything wholly-owned by the decedent will pass through intestacy.[138] Florida uses a per stirpes distribution scheme, which

130. *See* FLA. STAT. § 741.212(1) (2012); Karibjanian, *supra* note 4, at 91, 95.
131. FLA. STAT. §§ 731.005, .011; *Uniform Commercial Code Locator*, LEGAL INFO. INST., http://www.law.cornell.edu/uniform/probate.html (last visited Oct. 28, 2012).
132. *See* FLA. STAT. §§ 731.005, .011.
133. *Id.* § 732.101(1).
134. *See id.*
135. *See id.* §§ 732.103–.104.
136. *Id.* § 732.108(1) (stating that adopted children have the same legal rights as natural children for purposes of intestate succession).
137. *See* FLA. STAT. § 732.108(1).
138. *See id.* § 732.101(1).

determines the order of heirs that will inherit an intestate estate.[139] The first taker under the per stirpes distribution scheme is the surviving spouse.[140] Because same-sex couples in Florida may not legally marry pursuant to Florida DOMA,[141] the surviving spouse status is unavailable.[142] The second takers are the decedent's lineal descendants.[143] If a same-sex couple chooses adult adoption, the surviving partner and adoptee will be the technical lineal descendant and will inherit the entire estate.[144]

### 2. Will Contests

Another situation that may arise after someone's death is if his or her will is contested and later invalidated.[145] This is different than the previous example in that the testator *did* make a will, presumably to show intent contrary to Florida's per stirpes distribution system.[146] The only parties who have standing to contest and invalidate a will are parties who stand to inherit from a decedent's intestate estate should the will be invalidated.[147] Adult adoption is the key here because if the surviving partner becomes the only lineal descendant, and therefore the only taker through intestacy, no other relative has standing to contest the will, as no other relative stands to inherit anything if the will is invalidated.[148] Therefore, if a couple chooses adult adoption, the surviving partner will be safeguarded by not only the will itself, but also from will contests, as there would be no one available to contest and invalidate it.[149]

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139. *Id.* §§ 732.102–.104.
140. *Id.* § 732.102.
141. *Id.* § 741.212(1), (3).
142. FLA. STAT. § 732.102.
143. *Id.* § 732.103(1).
144. *See id.* § 732.108(1).
145. Gwendolyn L. Snodgrass, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 78–79 (1997) (explaining that homosexuals' wills are more likely to be contested than heterosexuals' wills).
146. *See id.* at 78–79; *see also supra* Part IV.A.1.
147. Ratliff, *supra* note 55, at 1782.
148. *See id.*
149. *See id.*

### 3. Rights to Homestead

A surviving spouse's right to inherit the decedent's homestead is fundamental in Florida.[150] According to Article X, section 4 of the Florida Constitution, real property owned by the decedent, upon which the decedent or decedent's family lived, is passed to the decedent's surviving spouse and descendants and is "exempt[ed] from forced sale" by most creditors.[151] Because Florida DOMA makes the surviving spouse's status unavailable to same-sex couples, homestead cannot be passed to the decedent's partner in a traditional manner.[152] Adult adoption offers an elementary way for homestead to be passed to the decedent's partner as his or her lineal descendant.[153] If the decedent dies without a will, homestead will pass through intestacy first to his or her surviving spouse, and then to his or her lineal descendants.[154] Therefore, if the same-sex couple chooses adult adoption, homestead will pass through intestacy to the surviving partner as the decedent's lineal descendant.[155] Without adult adoption, the surviving partner will not receive homestead if the decedent dies intestate.[156]

## B. *The Bad: Irrevocability & Severed Inheritance*

While on its face adult adoption seems like a foolproof option for same-sex couples who wish to secure their assets, there are several major drawbacks.[157] The irrevocable nature of adoptions and severed familial inheritance rights are the two most pressing issues that may plague same-sex couples that choose adult adoption.[158]

### 1. Adoption Is Irrevocable

As with child adoptions, adult adoptions are generally protected from annulment.[159] Courts honor adult adoption annulments only in extreme situa-

150. *See generally* FLA. CONST. art. X, § 4 (the homestead provision of the Florida Constitution).
151. *Id.* § 4(a)–(b).
152. *See id.* § 4(b)–(c); FLA. STAT. § 741.212(1) (2012).
153. *See* FLA. CONST. art. X, § 4(a)(1); Foltz, *supra* note 5, at 513.
154. FLA. CONST. art. X, § 4(b); FLA. STAT. §§ 732.101(1), .103(1).
155. *See* FLA. CONST. art. X, § 4(b); FLA. STAT. § 732.101(1).
156. Foltz, *supra* note 5, at 513; *see* FLA. STAT. § 732.103.
157. Foltz, *supra* note 5, at 514–16.
158. *Id.*
159. *Id.* at 514.

tions; for example, when there is evidence of fraud or undue influence.[160] Therefore, if a same-sex couple chooses adult adoption to secure assets and then ends their relationship, probably much to their chagrin, their legal relationship remains valid and intact.[161]

### 2. Extinguished Familial Inheritance Rights

The second major drawback to adult adoption is the severance of the adoptee's inheritance rights to his or her natural family's intestate estate.[162] Section 732.108(1) of the *Florida Statutes* maintains:

> For the purpose of intestate succession by or from an adopted person, the adopted person is a descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family, and is not a descendant of his or her natural parents, nor is he or she one of the kindred of any member of the natural parent's family . . . .[163]

Unfortunately, none of the three exceptions to this rule apply to save familial inheritances in cases of adult adoption between same-sex partners.[164] Put simply, the future adoptee must choose to inherit from either his or her partner, or his or her natural family's intestate estate, because once adopted, he or she is not legally entitled to both in Florida.[165]

## C. *The Ugly: Post-Adoption Trouble in Paradise*

The worst-case scenario for same-sex couples that choose adult adoption would begin with a relationship going south, post-adoption.[166] A bad breakup, coupled with the adoptee's parents dying intestate and a bitter ex-partner with a valid will, could possibly result in the adoptee being effectively disinherited from both parties.[167]

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160. *Id.*; *see, e.g.*, Lambert v. Taylor, 8 So. 2d 393, 394–95 (Fla. 1942) (per curiam) (holding that an adoption procured through fraud was invalid, and therefore, annulled).
161. Foltz, *supra* note 5, at 514–15.
162. *Id.* at 515–16.
163. FLA. STAT. § 732.108(1) (2012).
164. *Id.* § 732.108(1)(a)–(c).
165. *See id.* § 732.108(1).
166. *See* Foltz, *supra* note 5, at 514–16.
167. *See id.* at 515–16.

### 1. Double Disinheritance?

In a situation involving a difficult split between same-sex partners who have chosen adult adoption, the adoptee has agreed to relinquish his or her rights to his familial intestate inheritance due to the adoption itself.[168] Therefore, if his or her parents die intestate, he or she will inherit nothing from them.[169] Furthermore, if the couple does not split amicably, the adoptive partner may disinherit the adoptee in a will.[170] In summary: If the adoptee's parents die intestate, and the scorned adoptive partner dies with a will that disinherits the adoptee, he or she may inherit nothing from either party.[171] This situation seems to put considerable pressure on same-sex couples to decide well before the adoption whether they will stay together long-term, and if things do not work out, to stay amicable.[172] This may, perhaps, call for a written agreement that after the adoption, the adoptive partner vows not to disinherit the adoptee in a will, regardless of the circumstances underlying the breakup.[173]

## V. THE BETTER OPTION: TRUSTS

It may be that the best option same-sex couples have to secure assets for posthumous distribution in Florida does not actually lie with adult adoption.[174] With adult adoption, there are far too many pitfalls, and from a legal standpoint, the benefits generally do not seem to outweigh the drawbacks.[175] Most significantly, adult adoption forces same-sex couples to choose whether to inherit from their partner or their family through intestacy.[176] Most people would probably not be able to make the choice, depending on the size of each party's respective estate. Instead, same-sex couples might be better off using a different legal tool to plan their estates: Trusts.[177]

168. *Id.* at 515.
169. *Id.*
170. *Id.*
171. *See* Foltz, *supra* note 5, at 515–16.
172. *See id.*
173. *See id.* at 508–09, 515–16.
174. *See* Karibjanian, *supra* note 4, at 94–95; Foltz, *supra* note 5, at 517.
175. *See* Foltz, *supra* note 5, at 514–17.
176. *See id.* at 515–16.
177. *See* Karibjanian, *supra* note 4, at 94.

### A. *Florida Trusts Generally*

Trusts offer a far more workable tool for planning estates for same-sex couples than wills.[178] Where wills are strict and rigid in Florida, trusts are flexible with regard to issues like execution formalities and amendments.[179]

The Florida Trust Code ("FTC")[180] governs trust laws throughout the state.[181] Pursuant to section 736.0401(1) of the FTC, a trust may be created in Florida by "[t]ransfer[ring] . . . property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect on the settlor's death."[182] In other words, unlike wills, trusts may be created to take effect while the settlor is still alive, and the beneficiary's interest is not necessarily restricted to vest only after the settlor dies.[183]

The general requirements to create a trust in Florida are that "[t]he settlor has [the] capacity to create a trust; [t]he settlor [has the] intent to create [a] trust; [and] [t]he trust has a definite beneficiary."[184] Trusts in Florida also must have a trustee with duties to perform.[185] Trustees are assigned to manage the trust in the interest of the beneficiary or beneficiaries.[186] The property—or res—being transferred into the trust must be presently identifiable.[187] Finally, the trust must have a valid trust purpose that is both lawful and feasible.[188] A key restriction on trusts in Florida is that one "person [may] not [be both] the sole trustee and sole beneficiary."[189]

#### 1. Inter Vivos v. Testamentary Trusts

Trusts in Florida come in two basic forms: Inter vivos and testamentary.[190] Inter vivos trusts are the types of trusts formed and made effective

178. *See id.* (describing the different types of trusts that may be used to help same-sex couple clients confidently plan their estates).
179. *Compare* FLA. STAT. § 732.502 (2012), *with id.* § 736.0403.
180. FLA. STAT. §§ 736.0101–.1303.
181. *Id.* § 736.0102.
182. *Id.* § 736.0401(1).
183. *Id.*; *see* Karibjanian, *supra* note 4, at 94.
184. FLA. STAT. § 736.0402(1)(a)–(c).
185. *Id.* § 736.0402(1)(d).
186. *Id.* § 736.0801.
187. *Id.* § 736.0401(2); BLACK'S LAW DICTIONARY 1420 (9th ed. 2009).
188. FLA. STAT. § 736.0404.
189. *Id.* § 736.0402(1)(e).
190. *See id.* § 689.075(1) (explaining that a validly executed inter vivos trust shall not be considered a failed attempt at a testamentary disposition for several reasons; revealing the clear distinction between Florida inter vivos and testamentary trusts); Donna Litman, *Revocable Trusts Under the Florida Trust Code*, 34 NOVA L. REV. 1, 4 (2009).

during a settlor's lifetime.[191] In contrast, testamentary trusts are more like wills in that the beneficiary's interest does not vest until the death of the settlor.[192] Because inter vivos trusts avoid probate altogether, inter vivos trusts seem to be the better option for same-sex couples over testamentary trusts.[193]

Additionally, inter vivos trusts may include testamentary aspects that dispose of the remaining estate to the surviving partner upon the settlor's death in the same way a will or purely testamentary trust would.[194] Using an inter vivos trust, the settlor may retain an interest in the trust for himself or herself, and also tailor the inter vivos trust throughout the course of the relationship to meet the couple's eventual posthumous asset distribution goals.[195] Purely testamentary trusts, on the other hand, lay dormant until the settlor's death.[196] Inter vivos trusts are therefore perhaps the best of both worlds for same-sex couples that choose to utilize a trust because they offer a way to control assets both during life and secure them after death.[197]

### 2. Revocable v. Irrevocable Trusts

Inter vivos trusts in Florida may be either revocable or irrevocable.[198] Revocable trusts leave the settlor with room to amend and/or terminate the trust at any time during his or her lifetime.[199] In contrast, irrevocable trusts leave the settlor essentially powerless—he or she has relinquished his or her right to amend or terminate the trust and the trust itself is solely in the hands of the trustee and/or beneficiaries.[200] Therefore, if a same-sex couple chooses to use an inter vivos trust to control assets during life and after death, it would certainly be more beneficial to select a revocable trust rather than an irrevocable trust.[201] This way, the couple may decide over the span of their relationship whether they need to change anything in the trust to accommodate changing income and expenses, acquiring new assets, adopting children, etc.[202]

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191. Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 398 n.230 (1995); Litman, *supra* note 190, at 4.
192. FLA. STAT. § 736.0403(2)(b); Litman, *supra* note 190, at 4.
193. Chase, *supra* note 191, at 398.
194. FLA. STAT. § 736.0403(2)(b).
195. Karibjanian, *supra* note 4, at 94.
196. FLA. STAT. § 736.0403(2)(b); Litman, *supra* note 190, at 4.
197. *See* Karibjanian, *supra* note 4, at 94.
198. FLA. STAT. § 736.0602(1).
199. Foltz, *supra* note 5, at 508.
200. *Id.* at 508–09.
201. *See id.*
202. *See id.* at 508.

Furthermore, if the relationship ends, the couple may terminate the revocable inter vivos trust and be freed from the relationship altogether.[203] This is in direct contrast to irrevocable inter vivos trusts and adult adoption, in which the legal relationships are far more certain to remain forever intact in the eyes of the law.[204]

### B. *"Silver Lining" Trusts*

While it is clear that both Federal DOMA and Florida DOMA continue to impede the efforts of same-sex couples trying to plan their estates, there remains a specific group of estate planning rules that ironically works in direct favor of same-sex couples, thanks to Congress.[205] These rules are a group of limitations passed by Congress in 1990 and imposed by the Internal Revenue Service.[206] These limitations are sometimes referred to as the related-parties rules.[207] Generally, these rules prevent related individuals from taking advantage of certain federal tax planning techniques.[208] Related individuals refer to those who are bound by blood or marriage in the eyes of federal law.[209] Since the related-parties rules govern federal tax laws, and same-sex couples may not legally marry pursuant to Federal DOMA, same-sex couples are therefore unrelated parties by definition and may enjoy exemption from this type of estate planning limitation.[210] This benefit is a rarity within federal law, and could be considered the "silver lining" in estate planning for same-sex couples.[211] Two specific estate planning techniques that are likely more attractive to homosexual couples than heterosexual couples due to this convenient exemption are the Grantor Retained Income Trust (GRIT) and the Grantor Retained Annuity Trust (GRAT).[212]

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203. *See* FLA. STAT. § 736.0602(1).
204. *See* Foltz, *supra* note 5, at 508–09, 514–15.
205. Karibjanian, *supra* note 4, at 94; *see* 28 U.S.C. § 1738C (2006); FLA. STAT. § 741.212.
206. Karibjanian, *supra* note 4, at 94; Scott E. Squillace, *GRITs for Gays and Other Unique Planning Opportunities for Same-Sex Couples*, J. PRAC. EST. PLAN., Oct.–Nov. 2009, at 23–24.
207. *See* Squillace, *supra* note 206, at 24.
208. *See id.*
209. 26 U.S.C. § 2701(e)(1)–(2), (4).
210. 28 U.S.C. § 1738C; Squillace, *supra* note 206, at 24.
211. Squillace, *supra* note 206, at 24.
212. Karibjanian, *supra* note 4, at 94.

### 1. GRITs

GRITs have been considered a type of trust that appear almost perfectly tailored to the same-sex couple living in a DOMA state.[213] While statutorily cut off from use by a heterosexual married couple, same-sex couples are free to utilize GRITs to develop and secure their estate plans.[214] A GRIT is an irrevocable trust into which the grantor, or adoptive partner, deposits an initial gift of property.[215] This property is presumably a slowly and modestly appreciating asset, or something that will earn interest over time due to sheer market forces.[216] Throughout the trust term, the grantor receives payment for any interest accrued on this property.[217] Then, upon termination of the trust term, or death of the grantor who has pre-appointed a trustee, the remaining property vests to a named beneficiary, the adoptee.[218]

### 2. GRATs

GRATs are very similar to GRITs, with the exception of an income requirement and the inevitable failure of the trust should the grantor die prior to the end of the trust term.[219] Unlike GRITs, which expect and embrace minimal interest and payments to the grantor, GRATs require the initial gifted property to produce steady income for the grantor in the form of a fixed annuity.[220] Furthermore, if the grantor of a GRAT dies before the trust term expires, the trust automatically fails, whereas in a GRIT, the failing trust may be saved by granting certain powers to a trustee.[221]

## VI. CONCLUSION

Adult adoption for same-sex couples is a relatively new[222] and perhaps underused legal mechanism in Florida. While Florida DOMA still prohibits same-sex couples from enjoying the benefits of the all-powerful surviving spouse status in probate court, the Third District's authorization of a homosexual adoption in *Adoption of X.X.G. & N.R.G.* opened the door for same-

213. Squillace, *supra* note 206, at 24, 26.
214. Karibjanian, *supra* note 4, at 94.
215. *See* Squillace, *supra* note 206, at 26.
216. *See id.*
217. *Id.*
218. *See id.*
219. *Id.* at 27.
220. *See* Squillace, *supra* note 206, at 26–27.
221. *Id.*
222. *See* Karibjanian, *supra* note 4, at 95.

sex couples to adopt each other as a way to secure assets after death.[223] While the Florida Legislature has not stricken section 63.042(3) from the *Florida Statutes*, the State's affirmative decision *not* to appeal *Adoption of X.X.G. & N.R.G.*[224] could reflect a statewide trend toward officially and permanently legalizing homosexual adoptions.

With adult adoption, same-sex couples can enjoy a degree of security in probate court, regardless of situations involving intestacy.[225] They are also protected against will contests and later will invalidation.[226] Finally, adult adoption can guarantee the adoptee's rights to the adopter-decedent's homestead, a critical and fundamental principle in Florida.[227]

Unfortunately, adult adoption is irrevocable, leaving emotionally broken same-sex relationships still legally valid and intact.[228] Perhaps more significantly, adult adoption severs the adoptee's right to inherit from his or her family's intestate estate.[229]

Therefore, Florida DOMA and the FPC force adoptees to choose between a guaranteed inheritance from his or her adoptive partner and his or her family through intestacy.[230] Heterosexual couples would never be faced with such a difficult choice, but unfortunately, Florida's legally hostile environment toward same-sex couples compels it.[231]

It may be that, instead of adult adoption, trusts are a far better way for same-sex couples to securely plan their estates for the future.[232] An inter vivos revocable trust would be a much more sensible tool for same-sex couples, as it comes into effect during the settlor's lifetime, may be amended to fit the couple's changing financial and familial status, and is terminable at

223. *See id.* at 95; *see also* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), *aff'g In re* Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).

224. *See* Karibjanian, *supra* note 4, at 95; *see also* FLA. STAT. § 63.042(3) (2012), *declared unconstitutional by* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

225. *See* FLA. STAT. § 732.103(1) (declaring that without a surviving spouse, assets will pass through intestacy to the decedent's lineal descendants; in adult adoption, the adopted partner becomes the lineal descendant and will receive the assets through intestacy); Ratliff, *supra* note 55, at 1781.

226. Ratliff, *supra* note 55, at 1782.

227. *See* FLA. CONST. art. X, § 4(a)(1), (b).

228. Foltz, *supra* note 5, at 515.

229. *Id.* at 515–16.

230. *See id.*; FLA. STAT. §§ 732.101, .103, 741.212.

231. *See* Foltz, *supra* note 5, at 495; *About Equality Florida*, *supra* note 19 (describing the legally hostile environment in Florida toward homosexuals and homosexual relationships).

232. *See* Karibjanian, *supra* note 4, at 94 (suggesting different types of trusts that may benefit same-sex couples that live in states that refuse to recognize same-sex marriage).

any time should things between the couple go awry.[233] Additionally, testamentary aspects may be incorporated into an inter vivos revocable trust to dispose of residual property upon the death of the settlor, in the same way a will or purely testamentary trust would.[234] Finally, GRITs and GRATs provide specific types of trusts that seem perfectly tailored to the same-sex Floridian couple plagued by Federal and Florida DOMA.[235]

While most of the attention—media and otherwise—is currently on equality in homosexuals' ability to *enter into* a marriage and ability to adopt *children* in Florida, posthumous asset distribution for same-sex couples that choose adult adoption is an issue that will certainly rear its head in the courts in only a matter of decades.[236] It is important to flesh out issues that will arise involving same-sex couples that adopt each other before Florida probate courts are left with complicated and speculative adult adoption situations in the near future.[237]

233. *Id.*; *see* FLA. STAT. § 736.0602.

234. *See* FLA. STAT. § 736.0403(2)(b).

235. Squillace, *supra* note 206, at 24, 27.

236. Nolin, *supra* note 17 (describing gay rights activists' focus on homosexual couples' right to enter into a legally recognized marriage in Florida).

237. *See* Ratliff, *supra* note 55, at 1805 (suggesting that the legislature take into account the fact that same-sex couples now use adult adoption to secure assets posthumously in states where same-sex adoption is not legally recognized, and tailoring laws to avoid unintended and unfortunate circumstances in probate courts).