

5-1-1997

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Recommended Citation

Elizabeth Rover Bailey, *Three Men and a Baby: Second-Parent Adoptions and Their Implications*, 38 B.C.L. Rev. 569 (1997), <http://lawdigitalcommons.bc.edu/bclr/vol38/iss3/5>

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THREE MEN AND A BABY: SECOND-PARENT ADOPTIONS AND THEIR IMPLICATIONS

Society ought to grant legal recognition, by permitting an adoption, to the relationship between a child and a person who functions as that child's parent.¹ In many instances, this would advance the best interests of the child.² The highest courts of three states have already granted joint adoptions to two unmarried people who functioned as parents to a child.³ In each of these instances, one of the parents *already* had a legally recognized parent-child relationship with the child by virtue of being the child's biological parent.⁴ Even though the letter of the law in each state prohibited biological parents from sharing parental rights and responsibilities with adoptive parents, each court looked beyond the language of the statute to its purpose, which is to advance the best interests of the child, and allowed the adoptions.⁵ Each state's statute in effect provided that the biological parent lost all parental rights and responsibilities with regards to the child upon the child's adoption.⁶ Yet, in each instance, the court placed primary em-

¹ See 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, 883 (1984); Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GEN. L. & POL'Y 233, 234 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 524, 575 (1990).

² See *infra* notes 161-207 and accompanying text for a discussion of how allowing these adoptions could advance the best interests of the child.

³ See *In re Tammy*, 619 N.E.2d 315, 315, 316, 321 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995); *In re B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993).

⁴ See *In re Tammy*, 619 N.E.2d at 316; *In re Jacob*, 660 N.E.2d at 398; *In re B.L.V.B.*, 628 A.2d at 1272.

⁵ See MASS. GEN. LAWS ch. 210, § 6 (1994); N.Y. DOM. REL. LAW § 117 (McKinney 1988); VT. STAT. ANN. tit. 15, § 448 (1989); *In re Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 401, 404, 405-06; *In re B.L.V.B.*, 628 A.2d at 1273 & n.1, 1274, 1276.

⁶ See MASS. GEN. LAWS ch. 210, § 6; N.Y. DOM. REL. LAW § 117; VT. STAT. ANN. tit. 15, § 448; *In re Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 401; *In re B.L.V.B.*, 628 A.2d at 1273. Those parental rights include: the right to custody of the child; to discipline the child; to make decisions about education, medical treatment and religious upbringing; to name the child; to benefit from the child's earnings and services; to speak for the child; and to assert or waive the child's rights and the right to determine who may visit the child and to place the child in another's care. See Bartlett, *supra* note 1, at 884. Parental responsibilities, on the other hand, include the obligation to care for the child, support him or her financially, see to his or her education and provide him or her with proper medical care. See *id.* at 885. Parents also have the duty to control the child, and if they fail in this duty they may be required to answer for the child's wrongdoings. See *id.*

phasis on the best interests of the child, which was the legislative intent behind the provision, and hence allowed the rights and responsibilities of the biological parent to continue, while permitting an adoptive parent to gain parental rights and responsibilities.⁷

Other courts should follow this lead, placing the best interests of the child above all else when considering whether to grant legal recognition to a child's relationship with a person who functions as his or her parent.⁸ In so doing, courts should not preclude the adoption solely on the basis of the sexual orientation of the person seeking to adopt.⁹ Furthermore, when more than two people function as parents to a child, society's laws ought not to limit a child to only two legally recognized parents.¹⁰ Such a limit may not advance the best interests of a child.¹¹

Section I of this Note surveys the facts, statutory background and courts' reasoning in cases from three states where the courts permitted unmarried cohabitants to adopt a child.¹² Section II applies the general statutory scheme of the three states, and the "best interests of the child" reasoning used in each of the cases, to argue that a child ought not to be limited to only two legal parents.¹³

I. ALLOWING TWO UNMARRIED COHABITANTS TO ADOPT A CHILD

Since June of 1993, the highest courts in three states and the District of Columbia have allowed adoption of a child by unmarried cohabitants.¹⁴ In the most recent case, the New York Court of Appeals

⁷ See *In re Tammy*, 619 N.E.2d at 318, 321; *In re Jacob*, 660 N.E.2d at 399, 404, 405-06; *In re B.L.V.B.*, 628 A.2d at 1273, 1274, 1276.

⁸ See Bryant, *supra* note 1, at 241.

⁹ See N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (1988); *In re Tammy*, 619 N.E.2d at 317, 320; *In re Jacob*, 660 N.E.2d at 398; *In re B.L.V.B.*, 628 A.2d at 1276; Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GEN. L. & POL'Y 191, 191, 205 (1995). *But see* FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994).

¹⁰ See *infra* notes 161-207 and accompanying text for a discussion of why society ought not to limit a child to two legally-recognized parents when he or she has a parent-child relationship with more.

¹¹ See *infra* notes 160-206 and accompanying text for a discussion of how limiting a child to two parents may not be in that child's best interests.

¹² See *infra* notes 14-134 and accompanying text for a discussion of the facts, applicable statutes, and courts' reasoning which allowed three states to permit adoption by unmarried cohabitants.

¹³ See *infra* notes 135-207 and accompanying text for a discussion of how the statutes and potential best interests of the child allow more than two parents per child.

¹⁴ See *In re M.M.D.*, 662 A.2d 837, 840 (D.C. 1995); *In re Tammy*, 619 N.E.2d at 315, 316; *In re Jacob*, 660 N.E.2d at 398; *In re B.L.V.B.*, 628 A.2d at 1272.

on November 2, 1995 allowed a woman to adopt her partner's child, and an unmarried man and woman together to adopt the woman's biological child, without extinguishing the biological mother's parental rights and obligations in either instance.¹⁵ In September of 1993, the Supreme Judicial Court of Massachusetts allowed two women together to adopt the biological child of one of the women without extinguishing the biological mother's parental rights and obligations.¹⁶ Similarly, in June of 1993, the Supreme Court of Vermont allowed one woman to adopt her partner's biological child without extinguishing the mother's parental rights and obligations.¹⁷

A. *The Adoptions*

Although each of these adoptions occurred in different states, the governing laws are similar in salient details.¹⁸ In all of the states, adoption is not a common-law creation but rather a creature of statute.¹⁹ Each state's adoption statute indicates who may adopt, providing for adoption by either an individual or a husband and wife together.²⁰ Each state's statute further provides that adoption extinguishes the parental rights and obligations of the biological parent.²¹ However, none of the statutes specifically provide for adoption by two or more unmarried people.²²

The purpose underlying all of the statutes is an attempt to embody and protect the best interests of the child.²³ Thus, the courts of New York, Massachusetts and Vermont all faced the issue of whether two unmarried individuals who were not both the biological parents of the child could become the legal parents of the child, despite the lack of a specific provision to that effect in the state's adoption statute.²⁴

¹⁵ See *In re Jacob*, 660 N.E.2d at 398, 404.

¹⁶ *In re Tammy*, 619 N.E.2d at 316, 321.

¹⁷ See *In re B.L.V.B.*, 628 A.2d at 1272, 1274, 1276.

¹⁸ See *infra* notes 19-23 and accompanying text for a discussion of the similarities in the state adoption statutes.

¹⁹ See *In re Tammy*, 619 N.E.2d at 317; *Davis v. McGraw*, 92 N.E. 332, 332 (Mass. 1910); *In re Jacob*, 660 N.E.2d at 399; *In re Eaton*, 111 N.E.2d 431, 432 (N.Y. 1953); *In re B.L.V.B.*, 628 A.2d at 1272-74.

²⁰ See MASS. GEN. LAWS ch. 210, § 1 (1994); N.Y. DOM. REL. LAW § 110 (McKinney 1988); VT. STAT. ANN. tit. 15, § 431 (1989).

²¹ See MASS. GEN. LAWS ch. 210, § 6; N.Y. DOM. REL. LAW § 117; VT. STAT. ANN. tit. 15, § 448.

²² See MASS. GEN. LAWS ch. 210, § 1; N.Y. DOM. REL. LAW § 110; VT. STAT. ANN. tit. 15, § 431; *In re Tammy*, 619 N.E.2d at 322 (Lynch, J., dissenting).

²³ See *In re Tammy*, 619 N.E.2d at 318; *In re Jacob*, 660 N.E.2d at 399; *In re B.L.V.B.*, 628 A.2d at 1276 & n.5.

²⁴ See MASS. GEN. LAWS ch. 210, § 1; N.Y. DOM. REL. LAW § 110; VT. STAT. ANN. tit. 15, § 431; *In re Tammy*, 619 N.E.2d at 315; *In re Jacob*, 660 N.E.2d at 398; *In re B.L.V.B.*, 628 A.2d at 1272.

1. Vermont: *In re B.L.V.B.*²⁵

In 1993, the Supreme Court of Vermont, in *In re B.L.V.B.*, unanimously allowed one woman to adopt her partner's biological child without extinguishing the mother's parental rights and obligations.²⁶ In Vermont, adoption is solely a creature of statute.²⁷ Section 431 of the Vermont adoption statute provides that a single adult, or a husband and wife together, may adopt a child and requires that if an adult seeking to adopt is married, the spouse must join in the adoption.²⁸ The statute also provides, in section 448, that the adoption terminates the rights of the biological parent.²⁹ Section 448 further contains a stepparent exception, allowing a biological parent to retain his or her rights when his or her spouse adopts the child.³⁰

Because adoption in Vermont is a statutory creation, the court examined the statute in order to decide whether to permit the adoption.³¹ The court noted that the statute's primary objective is the promotion of children's welfare.³² Thus, in applying the statutes, Vermont courts seek to implement that purpose by looking not only at the words of the statute but also at its reason and spirit to avoid results that are irrational, unreasonable or absurd.³³

The petitioners in *In re B.L.V.B.*, Jane and Deborah, had lived together in a committed relationship since 1986.³⁴ Together they decided to have and rear children.³⁵ On two separate occasions, Jane gave birth to a son after being impregnated with sperm from an anonymous donor.³⁶ Deborah assisted the midwife at both births, and had been equally responsible for parenting the children since their births.³⁷

²⁵ 628 A.2d 1271.

²⁶ *Id.* at 1272, 1276.

²⁷ *See id.* at 1272-74.

²⁸ VT. STAT. ANN. tit. 15, § 431. Specifically, the statute provides that "[a] person or husband and wife together . . . may adopt any other person" and that "[a] married man or a married woman shall not adopt a person or be adopted without the consent of the other spouse." *Id.*

²⁹ *Id.* § 448.

³⁰ *Id.* Specifically, the statute provides:

The natural parents of a minor shall be deprived, by the adoption, of all legal right to control of such minor . . . [but] when the adoption is made by a spouse of a natural parent, obligations . . . and rights of . . . the natural parent who has intermarried with the adopting parent shall not be affected.

Id.

³¹ *See In re B.L.V.B.*, 628 A.2d at 1272-74.

³² *Id.* at 1273 & n.1.

³³ *See id.* at 1273.

³⁴ *Id.* at 1272.

³⁵ *See id.*

³⁶ *See In re B.L.V.B.*, 628 A.2d at 1272.

³⁷ *See id.*

Jane and Deborah filed uncontested adoption petitions seeking legal recognition of their status as co-parents, asking the probate court to allow Deborah to legally adopt the children while leaving Jane's parental rights intact.³⁸ Both the Department of Social and Rehabilitation Services and a separate psychologist determined that the adoptions were in the best interests of the children, and recommended that the court allow the adoptions for the psychological and emotional protection of the children.³⁹ The probate court nevertheless denied the petition, holding that the Vermont adoption statute requires that for a couple to adopt together, the couple must be married, and that if the two are not married, the parental rights and obligations of the biological parent terminate upon adoption.⁴⁰

The Vermont Supreme Court first examined the language of the statute to determine whether Vermont law requires the termination of a biological mother's parental rights if her children are adopted by a person to whom she is not married.⁴¹ Noting that section 431 allows an unmarried person to adopt, and that the only limitation on that right is that if the person to be adopted is married, his or her spouse must consent to the adoption, the court determined that only a restrictive reading of section 448, which severs the rights of the biological parent upon adoption, would exclude Deborah from adopting the two children.⁴² Because the legislature adopted this provision in 1947, the court determined that the legislature did not consider, and thus neither explicitly condemned nor condoned, adoption by unmarried couples.⁴³

Thus, finding no specific guidance, the court turned to the legislative purpose behind section 448.⁴⁴ After close examination of the statute, the court concluded that the legislature intended to prevent a biological parent's continued involvement from disrupting the family unit formed by the adoption.⁴⁵ The court noted that this intent would not apply to the situation here, because both the biological mother and the adoptive mother comprise the child's family unit.⁴⁶

To avoid frustrating the purpose behind a statute, the court asserted, its interpretation must change as social mores change.⁴⁷ Thus,

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *In re B.L.V.B.*, 628 A.2d at 1272.

⁴² *Id.* at 1273.

⁴³ *Id.* at 1273-74, 1273 n.2.

⁴⁴ *Id.* at 1274.

⁴⁵ *Id.*

⁴⁶ See *In re B.L.V.B.*, 628 A.2d at 1274.

⁴⁷ *Id.* at 1275.

the court refused to conclude that the legislature intended to terminate the rights of a biological parent who would continue raising the child, because such a conclusion would defeat adoptions otherwise in the best interests of the children.⁴⁸ Hence, the court allowed adoptions by same-sex, unmarried parents to fall within the provision in section 448, allowing a stepparent to adopt his or her spouse's child without extinguishing the spouse's parental rights.⁴⁹

Explicitly declining to approve or disapprove of Jane and Deborah's relationship, and emphasizing that Deborah had acted as a parent to the children from the moment they were born, the court allowed the adoption.⁵⁰ In so doing, the court asserted that denying the children of same-sex unions a legal relationship with their de facto second parents would, as a matter of law, violate the best interests of the children and the purpose of the statute.⁵¹ The Vermont Supreme Court thus concluded that the statutory language did not prohibit the adoptions, that terminating the birth mother's rights would reach an absurd result in these circumstances and that such a result was inconsistent with the best interests of the children and the public policy of Vermont.⁵² Therefore, the court allowed Jane and Deborah to adopt Jane's biological children whom they both parented from birth.⁵³

2. Massachusetts: *In re Tammy*⁵⁴

In 1993, a divided Supreme Judicial Court of Massachusetts ("SJC"), in *In re Tammy*, allowed two unmarried cohabiting women, one of whom was the biological mother of the child, to jointly adopt that child.⁵⁵ In Massachusetts, as in Vermont, the law of adoption is purely statutory.⁵⁶ Thus, the Massachusetts courts, in determining when to allow an adoption, must examine the relevant statute's language and purpose.⁵⁷

Section 1 of chapter 210 of the Massachusetts General Laws provides that any adult may petition the probate court for permission to adopt someone younger, unless the person to be adopted is the wife,

⁴⁸ *Id.* at 1274.

⁴⁹ *See id.* at 1276.

⁵⁰ *Id.*

⁵¹ *In re B.L.V.B.*, 628 A.2d at 1276 & n.5.

⁵² *See id.* at 1273, 1274, 1276.

⁵³ *See id.* at 1273, 1276.

⁵⁴ 619 N.E.2d 315 (Mass. 1993).

⁵⁵ *Id.* at 315, 316. The court divided four to three on the decision. *See id.* at 315, 321.

⁵⁶ *See id.* at 317; *Davis v. McGraw*, 92 N.E. 332, 332 (Mass. 1910); *In re B.L.V.B.*, 628 A.2d at 1272-74.

⁵⁷ *See In re Tammy*, 619 N.E.2d at 317-18.

husband, brother, sister, uncle or aunt of the petitioner.⁵⁸ The statute does not explicitly forbid or require anyone else to join the petition, other than the prospective parent's spouse, if he or she is married.⁵⁹ Section 6 of the statute does provide, however, for the termination of the parental rights and obligations of the child's biological parent upon entry of an adoption decree.⁶⁰ The legislative intent to promote the best interests of the child is evidenced throughout the statute governing adoptions.⁶¹

At the time of the case, Helen and Susan had lived together in a committed relationship for more than ten years.⁶² Like Deborah and Jane in the Vermont case, Helen and Susan planned together to have a child whom they would jointly parent.⁶³ After conceiving by artificial insemination, Susan gave birth to Tammy.⁶⁴ Since Tammy's birth, both Susan and Helen had equally reared her, providing her with what the court determined to be a comfortable home and a warm, stable and supportive environment.⁶⁵

A wide variety of witnesses "testified to the fact that Helen and Susan participate equally in raising Tammy, that Tammy relates to both women as her parents, and that the three form a healthy, happy, and stable family unit."⁶⁶ Evidence also indicated that the adoption was important for Tammy financially as well as emotionally.⁶⁷ In addition, Helen and her living children and descendants, whether by blood or adoption, are beneficiaries of three irrevocable family trusts.⁶⁸ An attorney appointed to represent Tammy's interests strongly recommended that the court grant the joint petition.⁶⁹

Based on this evidence, a judge of the probate and family court entered a decree allowing both Helen and Susan to adopt Tammy, after determining that they functioned separately and together as the custodial and psychological parents of Tammy and that it was in Tammy's best interests for both to adopt her.⁷⁰ The judge asked that the appeals court decide, however, whether such a decree was possible as a matter

⁵⁸ MASS. GEN. LAWS ch. 210, § 1 (1994).

⁵⁹ See *In re Tammy*, 619 N.E.2d at 318.

⁶⁰ Chapter 210, § 6.

⁶¹ See *In re Tammy*, 619 N.E.2d at 319.

⁶² See *id.* at 316.

⁶³ See *id.*; *In re B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993).

⁶⁴ See *In re Tammy*, 619 N.E.2d at 316.

⁶⁵ See *id.*

⁶⁶ *Id.* at 317.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *In re Tammy*, 619 N.E.2d at 317.

⁷⁰ See *id.* at 315-16.

of law.⁷¹ The SJC then transferred the case to itself on its own motion to determine if anything in the law of the Commonwealth would prevent this adoption.⁷² Acknowledging that the legislature primarily intended that the adoption statute advance the interests of the child, the SJC first considered whether the statute permitted two unmarried cohabitants to adopt.⁷³ The court then turned to the issue of whether Susan's legal relationship with Tammy would have to terminate upon Tammy's adoption.⁷⁴

In considering whether the statute permitted the joint adoption, the SJC applied the "legislatively mandated rule of statutory construction that 'words importing the singular number may extend and be applied to several persons'" to determine that more than one person may adopt a child.⁷⁵ The SJC noted that the legislature specifically demarcated those adoptions which would be counter to public policy in another section of the chapter and did not prohibit adoption by two unmarried individuals.⁷⁶ Furthermore, the SJC indicated, the legislature used general language to define who may adopt and who may be adopted so that the probate court could consider a variety of adoption petitions which might be in the best interests of the child.⁷⁷

After determining that there was no specific statutory prohibition against Susan and Helen's adoption of Tammy, the SJC considered whether this adoption was in Tammy's best interest.⁷⁸ The court noted that this adoption would result in a plethora of financial benefits to Tammy.⁷⁹ Perhaps more importantly, the SJC reasoned, the adoption

⁷¹ See *id.* at 316.

⁷² See *id.* at 316, 317.

⁷³ See *id.* at 318.

⁷⁴ See *In re Tammy*, 619 N.E.2d at 321.

⁷⁵ *Id.* at 319, 321. This maxim requires that one read section 1 of chapter 210 to permit: [more than one] person of full age [to] petition the probate court of the county in which [they] reside[] for leave to adopt as [their] child another person younger than [themselves] unless such other person is [their] wife or husband, or brother, sister, uncle or aunt, of the whole or half blood.

MASS. GEN. LAWS ch. 210, § 1 (1994); MASS. GEN. LAWS ch. 4, § 6 (1994); See *In re Tammy*, 619 N.E.2d at 319.

⁷⁶ *In re Tammy*, 619 N.E.2d at 319. Chapter 210, section 1 of the Massachusetts General Laws lists the "wife or husband, or brother, sister, uncle or aunt, of the whole or half blood" of the adopter as those adoptions counter to public policy. MASS. GEN. LAWS ch. 210, § 1; see *In re Tammy*, 619 N.E.2d at 318, 319.

⁷⁷ *Id.* at 319.

⁷⁸ See *id.* at 320.

⁷⁹ *Id.* Specifically, the SJC determined that the adoption would:

entitle Tammy to inherit from Helen's family trusts and from Helen and her family under the law of intestate succession, . . . to receive support from Helen, who will be legally obligated to provide such support, . . . to be eligible for coverage under

would allow Tammy to preserve her family relationship with Helen in the event that Helen and Susan separate or Susan predeceases Helen.⁸⁰ In light of these factors, the SJC determined that the adoption would be in Tammy's best interest.⁸¹

The SJC next focused on whether Helen's adoption of Tammy required extinguishing Susan's parental rights.⁸² Reasoning that the section extinguishing the rights of the biological parent upon adoption is directed to instances where the child is adopted away from its biological parents, the SJC indicated that the provision's purpose "is to protect the security of the child's newly-created family unit by eliminating involvement with the child's natural parents."⁸³ Thus, the SJC concluded that the legislature did not intend for a biological parent's legal relationship with his or her child to be terminated when the biological parent is a party to the adoption petition.⁸⁴ Therefore, the SJC ultimately held that the probate court has jurisdiction to enter a decree on a joint adoption petition brought by two petitioners, and that when a biological parent is a party to the joint adoption petition, that parent's legal relationship to the child does not terminate upon entry of the adoption decree.⁸⁵ This holding allowed Helen and Susan to adopt Tammy under Massachusetts law without extinguishing Susan's parental rights and obligations.⁸⁶

Unlike the majority, which focused on the fact that the statute did not expressly forbid the adoption, the three dissenting justices would have denied the petition because the statute does not expressly permit the adoption.⁸⁷ They noted that "[t]here is . . . nothing in the statute indicating a legislative intent to allow two or more unmarried persons jointly to petition for adoption," and interpreted the statute narrowly because adoption is a creature of the legislature.⁸⁸ The dissenting justices indicated that unless one of the potential petitioners specifically enumerated in the statute brings the adoption petition, then

Helen's health insurance policies, and to be eligible for social security benefits in the event of Helen's disability or death.

Id.

⁸⁰ *Id.*

⁸¹ *In re Tammy*, 619 N.E.2d at 321.

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See In re Tammy*, 619 N.E.2d at 321.

⁸⁷ *See id.* at 318 (majority), 322-23 (Lynch, J., dissenting).

⁸⁸ *Id.* at 322, 322-23 (Lynch, J., dissenting).

the court should lack jurisdiction to entertain the petition.⁸⁹ Because the only time the statute contemplates a second petitioner is where the initial petitioner has a living, competent spouse, the dissent would have held that the statute did not permit Helen and Susan's joint petition for adoption of Tammy, but would have allowed Helen to petition alone to adopt Tammy with Susan's consent and would further have permitted Susan to retain all her parental rights and obligations.⁹⁰

Thus, two slightly different approaches to parallel situations emerged.⁹¹ The Vermont court allowed *one* partner to adopt the other's child without extinguishing the first parent's parental rights and obligations.⁹² In contrast, the Massachusetts court allowed *both* partners *together* to adopt the child of one of them without extinguishing the first parent's rights and obligations.⁹³

3. New York: *In re Jacob*⁹⁴

In 1995, the Court of Appeals of New York, in *In re Jacob*, allowed adoptions in two separate cases it joined together: one in which *one* partner sought to adopt the other's child without extinguishing the parental rights of the first parent; and one in which *both* partners *together* sought to adopt the child of one of them without extinguishing the first parent's parental rights.⁹⁵ The court held that New York's adoption statute both permitted the petitioner in each case to adopt, and did not require termination of the biological parent's rights in either case.⁹⁶ Section 110 of the Domestic Relations Law, New York's adoption statute, provides that an "adult unmarried person or an adult husband and his adult wife together may adopt another person."⁹⁷ The Domestic Relations Law further provides that the biological parent's rights and obligations terminate upon the adoption.⁹⁸ In New York,

⁸⁹ *Id.* at 323 (Lynch, J., dissenting).

⁹⁰ *Id.* at 322 (Lynch, J., dissenting). This result, though not supported by reasoning in the dissenting opinion, would likely have been reached by the SJC in an analysis of the Massachusetts laws similar to that performed by the Vermont court nearly two years earlier. *See id.* (Lynch, J., dissenting); *In re B.L.V.B.*, 628 A.2d 1271, 1273-76 (Vt. 1993).

⁹¹ *See In re Tammy*, 619 N.E.2d at 321; *In re B.L.V.B.*, 628 A.2d at 1273-76.

⁹² *In re B.L.V.B.*, 628 A.2d at 1272, 1276.

⁹³ *In re Tammy*, 619 N.E.2d at 321.

⁹⁴ 660 N.E.2d 397 (N.Y. 1995).

⁹⁵ *Id.* at 398.

⁹⁶ *Id.*

⁹⁷ N.Y. DOM. REL. LAW § 110 (McKinney 1988).

⁹⁸ *Id.* Specifically, the statute states that "after the making of an order of adoption the natural parents shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession." *Id.*

neither marital status nor sexual orientation may alone be determinative in an adoption proceeding.⁹⁹

In one of the two joined cases, Jacob's mother and his biological father had separated before Jacob's birth.¹⁰⁰ When the child was one year old, his mother, Roseanne M.A., began living with Stephen T.K.¹⁰¹ Three years later, Stephen and Roseanne filed a joint petition to adopt Jacob.¹⁰² In the other case, G.M. and P.I., two women, had lived together in a close relationship for nineteen years.¹⁰³ In 1989 the two women decided that P.I. would have a child they would rear together, and after artificial insemination by an anonymous donor, P.I. gave birth to Dana in 1990.¹⁰⁴ Since then, G.M. and P.I. have shared parenting responsibilities.¹⁰⁵ In April of 1993, G.M. filed a petition to adopt Dana, to which P.I. consented.¹⁰⁶

The family court which first considered Jacob's adoption acknowledged that granting the adoption would be good for Jacob, yet dismissed the petition because the adoption statute did not authorize adoptions by an unmarried couple.¹⁰⁷ The Appellate Division affirmed, although two justices dissented.¹⁰⁸ In the other adoption proceeding, a disinterested investigator's report had recommended that G.M. be permitted to adopt Dana and indicated that G.M. and P.I. provided her with a "family structure in which to grow and flourish."¹⁰⁹ Even so, the family court denied the petition, holding that the statute did not grant the petitioners the power to adopt, and further held that the adoption statute prohibited the adoption by requiring the termination of P.I.'s relationship with Dana upon adoption by G.M.¹¹⁰ The Appellate Division concluded that G.M. had statutory permission to adopt, but affirmed that the provision extinguishing the biological parent's rights and obligations prohibited the adoption.¹¹¹

The Court of Appeals of New York began its analysis by acknowledging that adoption in New York is solely the creature of statute, and

⁹⁹ See N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (1988).

¹⁰⁰ See *In re Jacob*, 660 N.E.2d at 398.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *In re Jacob*, 660 N.E.2d at 398.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *In re Jacob*, 660 N.E.2d at 398.

¹¹¹ See *id.*

thus the court must strictly construe the adoption statute.¹¹² The court went on to indicate that the requirement of strict construction applies equally to legislative purpose and statutory language.¹¹³ Thus, the court indicated "that in strictly construing the adoption statute, [the court's] primary loyalty must be to the statute's legislative purpose—the child's best interest."¹¹⁴

The court found that allowing the two adults who function as a child's parents to become the child's legal parents would advance the policy of protecting the child's best interests.¹¹⁵ The benefits of such a recognition, the court continued, would include the right of the child to receive social security and life insurance benefits from both parents, the right to sue for the wrongful death of either parent, the right to inherit from both parents under the laws of intestacy and eligibility for coverage under both parents' health insurance policies.¹¹⁶ The court went on to emphasize that in addition to these financial benefits, the child would also gain the emotional security of knowing that if anything should happen to the biological parent, the other parent would have presumptive custody, enabling the child's relationship with extended family members to continue.¹¹⁷ Having concluded that the proposed adoptions thus satisfied the purpose of the adoption statute, the court turned its attention to whether the adoptions also comported with the language of the statute.¹¹⁸

The court began by emphasizing that the patchwork nature of New York's current adoption statute, caused by innumerable amendments, made it difficult to discern with precision any specific legislative intent.¹¹⁹ The court then turned to the particular statutory provisions at issue.¹²⁰ Reasoning that section 110, entitled "Who May Adopt," explicitly permits an adult unmarried person to adopt, the court concluded that both petitioners, as adult unmarried persons, had permission to adopt.¹²¹ Turning then to the issue of whether the phrase "or an adult husband and his adult wife together" in section 110 of the statute requires that only married people may adopt a child together, the court asserted that the statute requires only that if a married person seeks to adopt, his or her spouse must join in the adoption, rather than

¹¹² *Id.* at 399.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *In re Jacob*, 660 N.E.2d at 399.

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 400.

¹¹⁹ See *id.*

¹²⁰ See *In re Jacob*, 660 N.E.2d at 400.

¹²¹ *Id.*

that only married couples may adopt together.¹²² The court concluded that amendments to the adoption statute indicate a legislative intent to broaden the field of potential adoptive parents, regardless of their marital status or sexual orientation.¹²³

Having concluded that section 110 did not preclude the adoptions, the court examined whether section 117, which extinguishes the rights of the biological parent upon adoption of his or her child, required termination of Jacob and Dana's biological mothers' rights.¹²⁴ Noting that the legislature which codified section 117 in 1938 probably did not contemplate families with same-sex parents, the court asserted that the legislature designed section 117 "as a shield to protect new adoptive families," and not "as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."¹²⁵

First, the court indicated, section 117 speaks primarily of estate law, so it appears that the legislative intent is to clarify the resolution of property disputes upon the death of an adoptive parent or child, rather than to control the granting of the adoption in the first place.¹²⁶ Second, the court examined recent amendments to other sections of the adoption laws, which allow the biological parent to remain involved in the child's life even after the adoption.¹²⁷ The court reasoned that these provisions imply legislative acceptance of biological parents ongoing role in their children's lives, even after an adoption.¹²⁸ Based on this reasoning, the court concluded that section 117 does not require termination of the biological parent's rights when the biological parent has consented to the adoption and will continue to rear the child together with the second parent.¹²⁹ Thus, having determined that the adoptions would generally be in the best interests of the children, that section 110 granted permission to adopt to the petitioners, and that section 117 did not require termination of the rights and obligations of the biological parents, the court reinstated the adoption provisions and remitted the cases to the family court for further proceedings.¹³⁰

¹²² *Id.*

¹²³ *See id.* at 400-01.

¹²⁴ *See id.* at 401.

¹²⁵ *In re Jacob*, 660 N.E.2d at 405.

¹²⁶ *Id.* at 402.

¹²⁷ *Id.* at 403-04. Section 117(1)(d) of the domestic relations law allows a stepparent to adopt a child with consent of the biological parent, without extinguishing the biological parent's rights and responsibilities. N.Y. DOM. REL. LAW § 117(1)(d) (McKinney 1988). Further, social services law section 383-c allows the parties to an adoption to agree to different terms as to the nature of the biological parents' post-adoptive relationship with the child, expressly permitting the biological parent to retain certain rights. N.Y. SOC. SERV. LAW § 383-c(3)(b) (McKinney 1988 & Supp. 1996).

¹²⁸ *See In re Jacob*, 660 N.E.2d at 404.

¹²⁹ *Id.*

¹³⁰ *Id.* at 399-400, 401, 404, 406.

Three dissenting justices did not agree with the majority's interpretation of the statute, and would have held that the petitioners lacked statutory permission to adopt and that the rights and obligations of the biological mother terminated upon adoption.¹³¹ The dissent wondered whether, under the majority's reasoning and holding, there would be any limit to how many people could join together to adopt a child.¹³² It also expressed concern that the majority's interpretation of the adoption statute constituted judicial overstepping into the legislative arena.¹³³ Because of these concerns, and a stricter reading of the adoption statutes, the dissent would have denied the petitions to adopt.¹³⁴

II. WHY WE SHOULD NOT LIMIT A CHILD TO TWO PARENTS

A. *Established Precedent and Policy Support Multiple-Parent Adoptions*

The majority opinions in all of the cases discussed above address three main issues: (1) whether the petitioners have power to adopt under a "who can adopt" provision of the state statute; (2) whether the biological parents' rights and obligations must terminate upon the adoption; and (3) whether the adoption will effectuate the best interests of the child.¹³⁵ I suggest that, under the logic of these cases, nothing in any of the state statutes denies permission for more than two petitioners simultaneously to adopt a child; that nothing in any of the state statutes requires termination of the biological parent's rights upon such an adoption, if the biological parent intends to continue raising the child; and that such an adoption may be in the best interests of a child.¹³⁶ Thus, allowing three or more parents to adopt the same child flows logically from the reasoning of these three decisions.¹³⁷

1. Statutory Scheme, Generally

Because I propose a situation which the courts of Vermont, Massachusetts and New York have not yet addressed, I will discuss the applicable law as though it were an amalgamation of the statutory law

¹³¹ *Id.* at 408, 410 (Bellacosa, J., dissenting).

¹³² *Id.* at 408 (Bellacosa, J., dissenting).

¹³³ See *In re Jacob*, 660 N.E.2d at 414-15 (Bellacosa, J., dissenting).

¹³⁴ *Id.* at 415 (Bellacosa, J., dissenting).

¹³⁵ See *In re Tammy*, 619 N.E.2d 315, 318, 321 (Mass. 1993); *In re Jacob*, 660 N.E.2d at 399, 400, 401; *In re B.L.V.B.*, 628 A.2d 1271, 1273 (Vt. 1993).

¹³⁶ See *In re Tammy*, 619 N.E.2d at 318, 321; *In re Jacob*, 660 N.E.2d at 399, 400, 401; *In re B.L.V.B.*, 628 A.2d at 1273.

¹³⁷ See *In re Tammy*, 619 N.E.2d at 318, 321; *In re Jacob*, 660 N.E.2d at 399, 400, 401; *In re B.L.V.B.*, 628 A.2d at 1273.

in all three states. Thus, my generic statute contains those provisions that are common to the adoption statutes of the three states, specifically, a provision naming who can adopt and indicating that "a person or a husband and wife together" may do so, and a provision indicating that upon adoption, the parental rights and obligations of the biological parents terminate.¹³⁸ Additionally, in this generic state, adoption is a creation of the legislature and of statute and, as in Vermont, Massachusetts and New York, consideration of the child's best interests motivates the adoption statute.¹³⁹

2. Statutory Permission to Adopt

Under the reasoning of the three cases, three or more people would have statutory permission to adopt the same child.¹⁴⁰ In each case, the court allowed an adoption in part on the grounds that it was not specifically prohibited by statute.¹⁴¹ The situation I propose is similarly not prohibited by statute.¹⁴²

In Vermont, the court determined that a provision that "[a] person or husband and wife together" may adopt did not deny one woman the right to adopt her partner's biological child, in part because the statutory language did not prohibit such adoptions.¹⁴³ In allowing two women to join together to adopt a child, the Massachusetts SJC focused on the fact that the statute neither expressly prohibits joinder by any person to an adoption petition nor prohibits adoption by two unmarried individuals.¹⁴⁴ The New York Court of Appeals also focused on the fact that the statute did not preclude an unmarried person in a relationship with another unmarried person from adopting.¹⁴⁵ The common logic to the reasoning of the three courts is that the statute does not specifically prohibit the proposed adoption.¹⁴⁶ In the same way,

¹³⁸ See MASS. GEN. LAWS ch. 210, §§ 1, 6 (1994); N.Y. DOM. REL. LAW §§ 110, 117 (McKinney 1988); VT. STAT. ANN. tit. 15, §§ 431, 448 (1989).

¹³⁹ See *In re Tammy*, 619 N.E.2d at 317, 319; *In re Jacob*, 660 N.E.2d at 399; *In re B.L.V.B.*, 628 A.2d at 1273 & n.1, 1272-74.

¹⁴⁰ See *In re Tammy*, 619 N.E.2d at 318-19; *In re Jacob*, 660 N.E.2d at 400-01; *In re B.L.V.B.*, 628 A.2d at 1273.

¹⁴¹ See *In re Tammy*, 619 N.E.2d at 318; *In re Jacob*, 660 N.E.2d at 398-99; *In re B.L.V.B.*, 628 A.2d at 1273.

¹⁴² See *In re Tammy*, 619 N.E.2d at 318; *In re Jacob*, 660 N.E.2d at 398-99; *In re B.L.V.B.*, 628 A.2d at 1273. See *supra* notes 137-38 and accompanying text for discussion of statutory scheme.

¹⁴³ See *In re B.L.V.B.*, 628 A.2d at 1272-73, 1273-74.

¹⁴⁴ See *In re Tammy*, 619 N.E.2d at 318 & n.3, 321.

¹⁴⁵ See *In re Jacob*, 660 N.E.2d at 400-01.

¹⁴⁶ See *In re Tammy*, 619 N.E.2d at 318; *In re Jacob*, 660 N.E.2d at 398-99; *In re B.L.V.B.*, 628 A.2d at 1273.

none of the statutes *prohibit* adoption of a child by more than two people.¹⁴⁷

For example, if a child's parents divorce and one remarries, the stepparent could adopt the child, the remarried parent and the stepparent could adopt the child, or the stepparent, the remarried parent *and* the single parent could adopt the child.¹⁴⁸ Furthermore, if the single parent also remarried, there is no reason why the second stepparent could not also adopt, either alone or in combination with any of the other parents, provided the court found the adoption to be in the best interests of the child.¹⁴⁹ Much attention is given in each of the above cases to the role the second parent plays in raising the child.¹⁵⁰ If everyone petitioning to adopt the child functions as a parent to the child, then the reasoning of the Vermont, Massachusetts and New York courts grants each functional parent statutory permission to adopt.¹⁵¹

3. Termination of Biological Parents' Rights

Because the courts did not terminate the biological parent's rights and obligations in a second-parent adoption when the biological parent remained involved in the life of the child, third-parent (or fourth-parent) adoptions need not terminate the parental rights and responsibilities of the already recognized parents.¹⁵² The Vermont court concluded that the policy behind the termination provision was to protect the security of family units, and that to enforce the provision where the biological mother intended to take part in raising the child would reach an absurd result.¹⁵³ In Massachusetts, the court reached a similar conclusion by indicating that the termination provision attempts to protect the security of the child's newly created family unit, rather than to sever the relationship between a biological parent and his or her child when the parent is a party to the adoption petition.¹⁵⁴ Similarly, in New York, the court concluded that the termination provision exists

¹⁴⁷ See *In re Tammy*, 619 N.E.2d at 318-19; *In re Jacob*, 660 N.E.2d at 400-01; *In re B.L.V.B.*, 628 A.2d at 1273.

¹⁴⁸ See *supra* notes 140-47 and accompanying text for a discussion of statutory permission to adopt.

¹⁴⁹ *Id.*

¹⁵⁰ See *In re Tammy*, 619 N.E.2d at 316; *In re Jacob*, 660 N.E.2d at 398; *In re B.L.V.B.*, 628 A.2d at 1272.

¹⁵¹ See *In re Tammy*, 619 N.E.2d at 316, 318-19; *In re Jacob*, 660 N.E.2d at 398, 400-01; *In re B.L.V.B.*, 628 A.2d at 1272, 1273.

¹⁵² See *In re Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 404; *In re B.L.V.B.*, 628 A.2d at 1274.

¹⁵³ See *In re B.L.V.B.*, 628 A.2d at 1274.

¹⁵⁴ See *In re Tammy*, 619 N.E.2d at 321.

as a shield to protect new adoptive families and need not apply where the biological parent either consents to or joins in the adoption, agrees to retain parental rights and intends to continue raising the child.¹⁵⁵

Under this reasoning, if the biological parent of a child were to continue raising the child along with his or her stepparent, then the termination provision of the generic statute need not extinguish the parental rights and responsibilities of the biological parent.¹⁵⁶ This is especially true if the legislature of my generic state, as in Vermont, Massachusetts and New York, intended the termination provision to protect the sanctity of the adoptive family from intrusion by a biological parent who is *not* a part of that family.¹⁵⁷ Thus, neither the "who may adopt" provision nor the termination provision of my generalized statute prohibits adoption of a child by three or more people who all function as the parents of that child, or requires termination of the rights of a biological parent who remains involved in the upbringing of the child.¹⁵⁸ Therefore, a child's divorced parents and his or her two stepparents could all become the legal parents of the child.¹⁵⁹

To take the example only a bit further, imagine that rather than two women seeking judicial acknowledgment of both of their relationships with the child of one of them, that two men seek the same judicial recognition. From there, one can imagine the dissolution of the relationship between the two men, and the introduction of a stepfather into the child's life. Just as two biological parents and a stepparent could become the legal parents of a child, so could the two adoptive parents and the stepparent.¹⁶⁰ Thus, a judicially recognized family could consist of three men and a baby.

B. *The Best Interests of the Child?: Counter-Arguments Considered*

Allowing a child to have three parents may seem a bit absurd—after all, it is not biologically possible for a child to have more than two parents. Is it really in the best interests of the child to have more than

¹⁵⁵ See *In re Jacob*, 660 N.E.2d at 404, 405.

¹⁵⁶ See *In re Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 404, 405; *In re B.L.V.B.*, 628 A.2d at 1274. See *supra* notes 138–39 and accompanying text for hypothetical statutory scheme.

¹⁵⁷ See *In re Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 405; *In re B.L.V.B.*, 628 A.2d at 1274.

¹⁵⁸ See *supra* notes 138–57 and accompanying text for a discussion of how the reasoning of the cases and my generalized statute allow adoption by three or more people without terminating the biological parent's rights.

¹⁵⁹ See *id.*

¹⁶⁰ See *supra* notes 148–51 and accompanying text for a discussion of adoption by two biological parents and a stepparent.

two parents, or are three or more parents detrimental to a child? The two parent nuclear family is the time-honored, tried and tested, best way to rear a child, is it not?

In many instances, it will be in the best interests of the child to grant legal recognition to the child's relationships with more than two parents.¹⁶¹ The three cases discussed in this Note advance several arguments for allowing legal recognition of a second parent that apply equally to allowing legal recognition of a third or fourth parent.¹⁶² The Vermont court, in considering the best interests of the child, focused on the benefits and security of a legal relationship with someone who functions as a parent to the child.¹⁶³ The Massachusetts court noted the ability of the child to inherit under laws of intestacy, to receive support from both women who would both be legally obligated to provide such support, to be eligible for coverage under both women's social security benefits and health benefits, as well as the fact that the child perceived both women as her parents and that her relationship with each should be preserved in the event of the termination of their relationship to one another.¹⁶⁴ Similarly, in New York, the court focused on the child's right to receive social security and life insurance benefits, the right to sue for the wrongful death of a parent, the right to inherit under the laws of intestacy, eligibility for coverage under his or her parents' health insurance policies and the benefit of preserving the child's relationship with the adoptive parent in the event of the dissolution of the parents' relationship with each other or the death of one parent.¹⁶⁵

The benefits which accrue to a child upon adoption by more than two people include both the pecuniary and the emotional.¹⁶⁶ The child will become eligible for coverage under all parents' insurance policies, allowing the family to choose the best policy and protecting the child from loss of insurance should one or more parent(s) become unemployed.¹⁶⁷ "In addition, . . . a [third] parent adoption enables the child

¹⁶¹ See *infra* notes 162–207 and accompanying text for a discussion of how granting legal recognition to more than two parent-child relationships could be in a child's best interest. I want to emphasize from the outset that it *may* be in a child's best interest to have more than two legally recognized parents. I do not claim that this will be in the best interests of all children, everywhere.

¹⁶² See *In re Tammy*, 619 A.2d at 320; *In re Jacob*, 660 N.E.2d at 399; *In re B.L.V.B.*, 628 A.2d at 1276.

¹⁶³ See *In re B.L.V.B.*, 628 A.2d at 1276.

¹⁶⁴ See *In re Tammy*, 619 A.2d at 316, 320.

¹⁶⁵ See *In re Jacob*, 660 N.E.2d at 399.

¹⁶⁶ See *infra* notes 167–77 and accompanying text for a discussion of benefits accruing to a child upon adoption by more than two people.

¹⁶⁷ See *Bryant, supra* note 1, at 241 (citing *Chancellor v. Chancellor*, 23 S.W.2d 761, 763–65 (Tex. Ct. App. 1929) (holding that the term "child" in insurance policy includes adopted children)).

to inherit from [all] parents through the law of intestate succession."¹⁶⁸ The pecuniary interests mentioned by the Massachusetts and New York courts when considering second-parent adoptions apply similarly to consideration of third-parent adoptions.¹⁶⁹ The rights to social security and life insurance benefits, to inherit under the laws of intestacy, to sue for the wrongful death of a parent, to be covered by a parent's health insurance policy and to have a parent obligated to provide support for a child do not diminish in economic value when tripled or quadrupled (for three or four parents) as opposed to when doubled (for two parents).¹⁷⁰

Despite the fact that courts may limit children to two legal parents, legal rules do not constrain the realities of many children's lives.¹⁷¹ Children form strong bonds with their daily caregivers, whether biologically related or not.¹⁷² What matters to children are the day-to-day interactions with the adults who take care of them and thus become their parent figures.¹⁷³ Children often form attachments to adults outside the nuclear family.¹⁷⁴ When parents create a nontraditional family, that family becomes the reality of the child's life.¹⁷⁵ Furthermore, although experts are divided on much about rearing children, "[n]ear consensus . . . exist[s] . . . for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships."¹⁷⁶ Thus, where a child has bonded with more than two

¹⁶⁸ Bryant, *supra* note 1, at 240.

¹⁶⁹ See *In re Tammy*, 619 N.E.2d at 320; *In re Jacob*, 660 N.E.2d at 399.

¹⁷⁰ See *In re Tammy*, 619 N.E.2d at 320; *In re Jacob*, 660 N.E.2d at 399.

¹⁷¹ See Bartlett, *supra* note 1, at 881-82; Polikoff, *supra* note 1, at 473. The legal doctrine of equitable adoption recognizes this fact by permitting a child to inherit from a person who was not the child's legal parent when that person had demonstrated an intent to adopt the child. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 100-08 (5th ed. 1995); Polikoff, *supra* note 1, at 473 n.52.

¹⁷² See Bryant, *supra* note 1, at 239 n.37.

¹⁷³ See *id.* (citing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 12-13 (1973)).

¹⁷⁴ See Bartlett, *supra* note 1, at 882.

¹⁷⁵ See Polikoff, *supra* note 1, at 473, 483.

¹⁷⁶ Bartlett, *supra* note 1, at 902 (citing M. AINSWORTH, *THE EFFECTS OF MATERNAL DEPRIVATION: A REVIEW OF FINDINGS AND CONTROVERSY IN THE CONTEXT OF RESEARCH STRATEGY IN DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS* 97, 143 (1962); E. ERIKSON, *IDENTITY AND THE LIFE CYCLE* 122-31 (1980); J. GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 8-9, 31-33 (1979); LAIRD, *An Ecological Approach to Child Welfare: Issues of Family Identity and Continuity*, in *SOCIAL WORK PRACTICE: PEOPLE AND ENVIRONMENTS* 174 (1979); M. PRINGLE, *THE NEEDS OF CHILDREN* 34-39 (1974); Colon, *Family Ties and Child Placement*, 17 *FAM. PROCESS* 289 (1978); Finkelstein, *Children in Limbo*, 25 *SOC. WORK* 100 (1980); Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 *AM. J. ORTHOPSYCHIATRY* 20 (1976)).

parents, the law ought to recognize these bonds in order to promote the emotional well-being of the child.¹⁷⁷

1. Perhaps Allowing a Child to Have More Than Two Parents Might Subject the Child to Peer Ridicule for Being "Different"

Ridicule for being "different" might so impact a child with more than two parents that allowing the adoption is not in his or her best interests per se.¹⁷⁸ This argument shares a common basis with that which holds that children of homosexual or lesbian parents suffer a stigmatic harm.¹⁷⁹ In fact, studies have shown that children of lesbians or gay men do not suffer from growing up outside the mainstream.¹⁸⁰

Furthermore, peer teasing, taunting and ostracism ought not to provide a legal basis for denying an adoption petition, since it is not the role of any court to give effect to private bias and social prejudice.¹⁸¹ While acknowledging that issues surrounding prejudice and discrimination are very real for young people growing up in nontraditional families, one must remember that children in many families need to cope with differences due to race, ethnicity or socioeconomic class, which may not be the overriding concerns that adults sometimes imagine.¹⁸² Although I have not found any surveys to this effect, my own informal collection of anecdotal reports indicates that almost everyone receives incessant teasing about *something* as a child.¹⁸³

¹⁷⁷ See Bartlett, *supra* note 1, at 944; Polikoff, *supra* note 1, at 483.

¹⁷⁸ See Marianne T. O'Toole, *Gay Parenting: Myths and Realities*, 9 PACE L. REV. 129, 146 (1989).

¹⁷⁹ See *id.*

¹⁸⁰ See *In re Tammy*, 619 N.E.2d 315, 317 (Mass. 1993); *In re Evan*, 583 N.Y.S.2d 997, 1001-02 n.1 (Surr. 1992) (citing Patterson, *infra*, at 1033); Bryant, *supra* note 1, at 239 & n.39 (citing *In re J.M.G.*, 632 A.2d 550, 553-54 (N.J. Super. Ct. Ch. Div. 1993) (quoting Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1031-32 (1992)); Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1055 & n.5 (1995) (citing APRIL MARTIN, PH.D., *THE LESBIAN AND GAY PARENTING HANDBOOK* 204-10 (1993); CHERI PIES, *CONSIDERING PARENTHOOD: A WORKBOOK FOR LESBIANS* 77-93 (1993); RICHARD A. POSNER, *SEX AND REASON* 417-19 (1992)).

¹⁸¹ See O'Toole, *supra* note 178, at 146.

¹⁸² See Patterson, *supra* note 9, at 200. Often, things are more simple from a child's perspective than an adult's. See *id.* One lesbian mother described the experience of telephoning the parents of her daughter Emily's school friend. See *id.* (citing MARTIN, *supra* note 180, at 326). The child who answered passed the phone to her mother, explaining "It's Emily's mom. Well, it's one of them—she's got two." See *id.* (citing MARTIN, *supra* note 180, at 326). Another child, whose teacher asked who the other man who lived at the child's house was, answered simply "that's my father's husband." See *id.* (citing Jane Gross, *New Challenges of Youth: Growing up in Gay Home*, N.Y. TIMES, Feb. 11, 1991, at A1).

¹⁸³ I received ribbing about my last name ("Rover" rapidly became "Bow-Wow" for many of my classmates); others I know experienced such lovely comments as "what are all those spots on

2. Most Children Live in Traditional Nuclear Families and Have No Need for Legal Recognition of More than Two Parents

Maybe courts need not recognize more than two parents, because most children live in nuclear families and have only two parents.¹⁸⁴ In fact, many children live in extended and nontraditional families.¹⁸⁵ As the United States Supreme Court acknowledged:

[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.¹⁸⁶

Not only does our culture contain instances of children raised by more than two people, some other cultures allow an even more extended definition of family.¹⁸⁷ For example, in Polynesia, parenting is a collective task; the language generalizes the words for mother, father and grandparent to all relatives of equivalent age and gender, children have several houses that they regard as home and parental rights are not exclusive of those of other adults.¹⁸⁸

3. Permitting Adoptions by More than Two Parents Might Contribute to Ongoing Disintegration of the Nuclear Family

These adoptions would not lead to the downfall of the nuclear family in the United States, in part because the nuclear family does

your face?" (asked of a girl who had freckles) and the standard taunts of "crybaby," "four-eyes," "metal-mouth," "fatso," "stupid" and "ugly," to name just a few.

¹⁸⁴ See Howard V. Hayghe, *Family Members in the Work Force*, 113 MONTHLY LAB. REV. 14, 16 (1990).

¹⁸⁵ See *id.*; Davies, *supra* note 180, at 1066; see also Bartlett, *supra* note 1, at 880-81 (stating that 25% of children did not live with two natural parents in 1982 and predicting an increase to 40% by 1990); James R. Wetzel, *American Families: 75 Years of Change*, 113 MONTHLY LAB. REV. 4, 4 (1990) (indicating that fewer families currently live in a married, two-parent family arrangement).

¹⁸⁶ *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05 (1977).

¹⁸⁷ See Polikoff, *supra* note 1, at 474 (discussing child rearing in Polynesia); Linda F. Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 540-43 (discussing anthropological evidence from Polynesia, Eskimo culture, the West Indies, Ghana, British Honduras and Native American culture for proposition that other cultures approach child rearing differently).

¹⁸⁸ See Polikoff, *supra* note 1, at 474 (citing Ritchie, *Polynesian Child Rearing: An Alternative Model*, 5 ALTERNATIVE LIFESTYLES: CHANGING PATTERNS IN MARRIAGE, FAM. & INTIMACY 125, 130 (1983)).

not constitute the reality of many children's lives already.¹⁸⁹ Historian Stephanie Coontz argues that "families have always been in flux and often in crisis; they have never lived up to the nostalgic notion about the way things used to be."¹⁹⁰ There are many versions of "family": single parents raising children; children traveling between two homes; children living with stepparents; grandparents, aunts, uncles and siblings caring for children; heterosexual, unmarried cohabitants rearing children together; and families with two parents of the same gender.¹⁹¹

Today, fewer Americans are living in traditional nuclear families than earlier in the twentieth century.¹⁹² By 1988, the traditional family unit accounted for only about one-fifth of total families, compared with more than three-fifths in 1940.¹⁹³ The percentage of children living in never-married single parent households more than quintupled between 1970 and 1982.¹⁹⁴ In 1985, there were 6.8 million children living in stepfamilies.¹⁹⁵ Thus, large numbers of children already live outside traditional nuclear families.

Strict adherence to the structure of nuclear families may not be best for children and parents in industrial societies.¹⁹⁶ One commentator has argued that the nuclear family cannot provide adequate health, education and welfare for the young and the old so effectively as an extended family.¹⁹⁷ The parent-child relationship of nuclear fami-

¹⁸⁹ See Hayghe, *supra* note 184, at 16.

¹⁹⁰ Linda Eisaguirre, *The Model Family that Never Was*, ROCKY MTN. NEWS, March 12, 1995, at 87A (citing STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992)).

¹⁹¹ See Davies, *supra* note 180, at 1066; see also Bartlett, *supra* note 1, at 880-81 (stating that 25% of children did not live with two natural parents in 1982 and predicting an increase to 40% by 1990); Wetzel, *supra* note 185, at 4 (indicating that fewer families currently live in a married, two-parent family arrangement).

¹⁹² See Wetzel, *supra* note 185, at 4. Wetzel states: "The past 75 years brought momentous changes in family life patterns of Americans as we adapted to dynamic economic, social, and demographic developments." *Id.* at 12.

¹⁹³ See Hayghe, *supra* note 184, at 16.

¹⁹⁴ See Bartlett, *supra* note 1, at 991 n.9 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-20, NO. 380, MARITAL STATUS AND LIVING ARRANGEMENTS: MAR. 1982 5, Table E (1983) (percentage of children under the age of 18 living in never-married single parent households increased from 0.8% in 1970 to 4.4% in 1982)).

¹⁹⁵ See Polikoff, *supra* note 1, at 476 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, NO. 162, STUDIES IN MARRIAGE AND THE FAMILY: JUNE 1989 29 (1990)).

¹⁹⁶ See *Moore v. City of East Cleveland*, 431 U.S. 494, 510 n.7 (1977) (Brennan, J., concurring) (citing BETTY YORBURG, *THE CHANGING FAMILY* 194 (1973)).

¹⁹⁷ See *id.* (Brennan, J., concurring) (citing BETTY YORBURG, *THE CHANGING FAMILY* 194 (1973)).

lies can become unbearably intense and exhausting if unrelieved.¹⁹⁸ Thus, the media, celebrities and community groups increasingly assert that "it takes a whole village to raise a child."¹⁹⁹

For the law to stagnate while society evolves may harm those children already living in nontraditional situations.²⁰⁰ Additionally, such noted legal minds as Chief Justice Oliver Holmes and Justice Harry Blackmun have argued that

it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁰¹

4. Recognizing Multiple Parent-Child Relationships Might Lead to Complicated Custody Disputes if the Parental Relationships Dissolve

Recognizing multiple parent-child relationships might complicate custody disputes so much that courts ought never to acknowledge more than two parents of any one child.²⁰² Denying recognition to multiple-parent relationships would not prevent such confusion—it already exists.²⁰³ Custody disputes frequently involve more than two people.²⁰⁴ At least one court has already ordered a three-way custody and visitation arrangement.²⁰⁵ Furthermore, various courts and com-

¹⁹⁸ See *id.* (Brennan, J., concurring) (citing BETTY YORBURG, *THE CHANGING FAMILY* 194 (1973)); Eisaguirre, *supra* note 190, at 87A. The May 1995 issue of *Psychology Today* includes a list titled "21 Tricks for Taming Children," which recommends that parents "share [their] baby with other parents, grandparents, aunts, and uncles. Never try to do it alone; you will exhaust one another with your needs. As the old African proverb says, 'It takes a whole village to raise a child.'" Frank Pitman, *How to Manage Your Kids*, 28 *PSYCHOL. TODAY* 42 (May, 1995).

¹⁹⁹ See, e.g., HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* (1995); Eisaguirre, *supra* note 190, at 87A; Susan Ireland, *Biggest Problem Educators Face is Abandonment of Children*, *THE MORNING CALL* (ALLENTOWN, PA), Mar. 17, 1995, at A17; *Navigating the Real World*, *L.A. TIMES*, Sept. 27, 1995, at B2.

²⁰⁰ See *In re B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993).

²⁰¹ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897)).

²⁰² See Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 *GOLDEN GATE U. L. REV.* 223, 225 (1994).

²⁰³ See *infra* notes 204–07 and accompanying text for a discussion of the already existing confusion in custody battles.

²⁰⁴ See *Chaffin v. Fryc*, 119 Cal. Rptr. 22, 22, 26 (Ct. App. 1975) (maternal grandparents granted custody); *Roberts v. Roberts*, 212 S.E.2d 410, 413 (N.C. Ct. App. 1975) (maternal great-aunt and great-uncle granted custody).

²⁰⁵ See Polikoff, *supra* note 1, at 470 n.35.

In a ruling deemed "highly unusual," a Chicago judge issued an order by agreement

mentators have attempted to develop doctrines to apply to situations where a child who is the subject of a custody dispute has bonded with an adult who is not a legally recognized parent of that child.²⁰⁶ Perhaps, then, granting legal recognition to these relationships, in the form of allowing an adoption *before* the dissolution of the parents' relationships to one another, would actually simplify some custody disputes by clarifying for the court whether a particular adult had a parental relationship with the child.²⁰⁷

III. CONCLUSION

The Vermont, Massachusetts and New York courts allowed second parents to adopt their children.²⁰⁸ The courts accomplished this by looking past the strict language of their states' adoption statutes to the legislative intent underlying those statutes, and by examining the best interests of the children.²⁰⁹ The same reasoning suggests that courts should allow third parents to adopt their children.²¹⁰ The state adoption statutes neither forbid such adoption nor require termination of already extant parent-child relationships.²¹¹ Rather, the statutes seek to

of all parties, awarding custody of a five-year-old girl to her mother, her mother's ex-husband (whom the girl knew as her father), and the girl's biological father. The girl will live with her mother and will visit her two fathers on weekends and in the summer.

Id. (citing *Wagner v. Erber*, No. 85-D-6382 (Ill. Cir. Ct., Cook Cty., Sept. 29, 1987)).

²⁰⁶ See Bartlett, *supra* note 1, at 944-51. The California Supreme Court has suggested that visitation should be granted to a *de facto* parent which it describes as "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical and psychological needs for affection and care." See Burks, *supra* note 202, at 243-45. Katherine Bartlett developed a test for a "psychological parent" that redefines parenthood into a non-exclusive status and permits awards of custody and visitation based upon the child's best interests. See Bartlett, *supra* note 1, at 944-51. Nancy Polikoff proposes expanding the definition of parenthood employed in custody and visitation disputes "to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature." Polikoff, *supra* note 1, at 464.

²⁰⁷ See *supra* notes 202-06 and accompanying text for a discussion of the current complexities facing courts when considering custody and guardianship awards.

²⁰⁸ See *supra* notes 18-134 and accompanying text for a discussion of the three courts permitting second parent adoptions.

²⁰⁹ See *supra* notes 18-134 and accompanying text for a discussion of courts allowing adoptions based on legislative intent to embody child's best interests in the adoption statute.

²¹⁰ See *supra* notes 140-207 and accompanying text for an application of this reasoning to the situation where a third parent seeks to adopt a child.

²¹¹ See *supra* notes 140-60 and accompanying text for a discussion of how the adoption statutes neither precluded this adoption, nor required termination of parents' rights.

implement the best interests of the child, which may include recognition of more than two parental relationships.²¹²

First, such recognition provides enhanced financial and emotional stability for the child.²¹³ Second, it acknowledges the reality of many children's daily lives.²¹⁴ Third, to the extent that such recognition challenges the structure of the nuclear family, many families already do not conform to such a structure.²¹⁵ Fourth, although dissolution of the relationships between the multiple parents may lead to complex custody cases, such complexities already exist and lack the guidance that a legally validated relationship could give.²¹⁶ Hence, courts should grant legal recognition, in the form of permitting an adoption, to the relationship between a child and every one of his or her parents.²¹⁷

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²¹² See *supra* notes 161–207 and accompanying text for a discussion of how recognizing more than two parental relationships could advance the best interests of the child.

²¹³ See *supra* notes 161–77 and accompanying text for a discussion of how such an adoption enhances the child's emotional and financial well-being.

²¹⁴ See *supra* notes 171–77 and accompanying text for a discussion of children's day-to-day lives and interactions with adults.

²¹⁵ See *supra* notes 184–201 and accompanying text for a discussion of the myriad versions of family.

²¹⁶ See *supra* notes 202–07 and accompanying text for a discussion of extant complexities of guardianship and custody disputes.

²¹⁷ See *supra* notes 135–207 and accompanying text for a discussion of why a court should not limit a child to two parents.