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Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of Simultaneous Adoption to Parent-Child Provisions of the Uniform Probate Code

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NOTE

SAME-SEX SECOND-PARENT ADOPTION AND INTESTACY LAW: APPLYING THE *SHARON S.* MODEL OF "SIMULTANEOUS" ADOPTION TO PARENT–CHILD PROVISIONS OF THE UNIFORM PROBATE CODE

Jason C. Beekman†

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Introduction

Sarah, an eight-year-old girl, could not wait for her third-grade field trip to the Museum of Natural History. Best of all, her mother, Jill, who normally worked both a full-time job during the week and a part-time job on the weekend, took the day off to chaperone the trip. Just after pulling out of the elementary-school parking lot, a truck

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came speeding down the road and struck the school bus carrying Sarah's class. Sarah was severely injured and rushed by ambulance to the nearby hospital. Jill, uninjured, held Sarah in the ambulance and carried her into the emergency room. Within minutes, Jill found herself removed to the waiting room without ever speaking to a doctor about Sarah's condition. Although Sarah has always known Jill as her mom, legally, Jill is merely a stranger. Patty, Sarah's biological mother and Jill's partner, is the legal parent and the only one vested with the authority to make medical decisions on behalf of Sarah.

Due to a combination of state marriage laws and adoption statutes, most same-sex couples with children must make a very difficult decision—designating one parent as the legal parent. Most adoption laws state that a natural parent's participation in an adoption completely severs his or her legal rights.[1] These laws leave the meaning of participation ambiguously broad and thereby inclusive of processes such as second-parent adoption. Jill's adoption of Sarah would therefore completely divest Patty's legal parentage. Although state adoption laws often have a spousal/stepparent exception, which allows second-parent adoption without severing the biological parent's legal parent–child relationship, this exception does not provide a solution to most same-sex couples living in states that do not provide legally effective same-sex partnerships. Therefore, despite sharing equal parental responsibility and raising Sarah together from an early age, Patty and Jill must decide who will be Sarah's legal mother.

The United States is currently enmeshed in a national debate over same-sex marriage. The debate is occurring in courtrooms as much as at the polls and in state and national legislatures. However, the legal system must address "trickle down" issues stemming from, but extending beyond, the scope of simply determining the particular legal status granted to a homosexual relationship.[2] One major trickle down issue, though often left out of the public discourse, concerns parental determination for children of same-sex couples. Left even further outside pundit discussions, however, is how this parental determination for children of same-sex couples affects the children's inheritance rights under the laws of intestate succession. The latter concern is the principal subject of this Note.

Second-parent adoption, in theory, provides an opportunity for a nonbiological parent to forge a legal relationship with his or her partner's biological child (who usually is either from a previous relationship, or born to the couple through in vitro fertilization, surrogacy, or

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1 *See* discussion and sources cited *infra* Part I.C.

2 *See generally* Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 365–66 (2004).

other similar alternative method).[3] While second-parent adoption allows a heterosexual stepparent family to forge a legal relationship between the child and both parents,[4] similarly situated homosexual couples must overcome several obstacles.[5] The most significant obstacle is what is known as the "cut-off provision," which most state adoption statues include.[6] This provision leads to Jill and Patty's predicament—second-parent adoption severs the legal parent–child relationship between the child and biological parent in order to create a legal relationship between the child and nonbiological parent. The spousal/stepparent exception that prevents divestment of the legal relationship between the biological parent and child during a second-parent adoption remains unavailable for most same-sex couples living in states that do not grant the legal status of spouse to same-sex partners.[7]

This Note will analyze the impact of the cut-off provision on same-sex couples and their children, focusing on this legal doctrine's impact on intestacy law. Principally, this Note discusses the parent–child provisions in the Uniform Probate Code and argues that the "simultaneous" adoption[8] solution, which the court articulated in *Sharon S. v. Superior Court*,[9] should extend beyond the context of adoption and parentage laws to the analogous cut-off provisions in intestate laws. When read to maintain legislative intent and ensure the best interest of the child, provisions in the Uniform Probate Code[10] defining a legal parent–child relationship for the purposes of intestate succession should follow a presumption of simultaneous adoption. Courts should interpret the cut-off provision as a default, but waivable, benefit for the adoptive parent and not as a mandatory requirement. In the context of same-sex couples seeking second-parent adoption, this Note proffers simultaneous adoption in lieu of sequential adoption[11] because simultaneous adoption would allow an adoptive parent to consent to the maintenance of the legal relationship between the natural parent and the child, so that a nonbiological same-sex part-

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3 *See* Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 659 (2002).

4 *See id.* at 657.

5 *See id.* at 658.

6 *See id.*

7 *See id.*

8 I use this phrase to denote the maintenance of the legal parent–child relationship between the natural parent and the child while "simultaneously" establishing a legal parent–child relationship between the adoptive parent and the child. In contrast, I define "sequential" adoption as the severance of the legal parent–child relationship between the natural parent and the child while creating such a legal relationship with the "new" adoptive parent. The latter directly results from the cut-off provision.

9 73 P.3d 554 (Cal. 2003).

10 *See* UNIF. PROBATE CODE § 2-119(b) (amended 2008), 8 U.L.A. 56 (Supp. 2010).

11 *See* Gary, *supra* note 3, at 657.

ner's adoption does not sever the right of the child to inherit from the biological parent.[12]

Part I of this Note provides historical background, including a general overview of family law jurisprudence and the constitutional protection of families, second-parent adoption laws, the relevant impact of same-sex marriage laws, and the resulting cut-off problem. Part II describes and evaluates proposed solutions to the cut-off problem, principally focusing on the solution articulated in *Sharon S.* Part III discusses inheritance under the Uniform Probate Code as an example of state intestacy laws. Part IV applies the solutions in Part II to the Uniform Probate Code parent–child relationship provisions, which include a cut-off provision. Finally, the Note concludes by placing this issue within a larger, more abstract understanding of the constitutional protections for children and families.

I
BACKGROUND

A. Family Law Jurisprudence and the Protection of Families

The Due Process Clause of the Fourteenth Amendment protects parents' fundamental liberty interest "in the care, custody, and control of their children."[13] While states have some power to regulate the family, this power is expressly limited to a state interest in protecting children from parental abuse or harm.[14] Thus, parents have the right to guide the upbringing of their child, so long as the child is not harmed.[15]

After recognizing parents' general privacy-based protection to guide the upbringing of their child, the Supreme Court eventually

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[12] This Note will set aside the civil procedure aspects of this issue, such as the implications of the Defense of Marriage Act (DOMA) and the Full Faith and Credit Clause. An individual state's recognition of a child's inheritance rights if that child is adopted in a different state is beyond the scope of this Note. Additionally, this Note assumes homosexual parents are as fit as heterosexual parents to raise children. Studies have demonstrated that because "parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest.'" Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 176 (2001).

[13] Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (establishing that parents have a protected liberty interest "in the care, custody, and management of their child"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("[T]he relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) (acknowledging the fundamental right of parents to guide the religious upbringing of their children without government intrusion).

[14] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (suggesting that states have some power to regulate families and that the state's interest "as *parens patriae*" in protecting children from harm can limit the fundamental right to control a child's upbringing).

[15] *See* sources cited *supra* notes 13–14.

began to articulate specific protections for diverse family structures. In *Moore v. City of East Cleveland*,[16] the Court refused to adopt a narrow definition of family that would lead to protections solely for traditional nuclear families.[17] In *Moore*, the Court struck down a single-family zoning ordinance that excluded a family consisting of a grandmother, her son, his child, and another grandchild.[18] In *Smith v. Organization of Foster Families for Equality and Reform*,[19] the Court further expanded the definition of family to encompass individuals without a blood, marriage, or adoptive relationship.[20]

Despite this history of articulated protections for both traditional and some nontraditional families, these protections do not appear to extend fully to families headed by same-sex couples.[21] For example, many statutes, especially those relating to marriage and adoption, fail to use sexual-orientation neutral language; instead, they employ terms such as "spouses" and "husband and wife."[22] Another very real and

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16 431 U.S. 494 (1977).

17 *See id.* at 503–04 ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. . . .").

18 *See id.* at 505–06.

19 431 U.S. 816 (1977).

20 *See id.* at 843–44 (noting that a deep, loving relationship between an adult and child may exist even in the absence of a blood connection). Although a blood relationship to the child is insufficient to establish parental rights, it remains strongly presumptive. In *Troxel*, Justice John Paul Stevens stated that biology alone is not enough to establish an absolute right to constitutional protection of the parent–child relationship. Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting). The majority in *Lehr v. Robertson* affirmed the view that biology acted almost as a (significant) first step in establishing the "enduring relationship" necessary for constitutional protection. Lehr v. Robertson, 463 U.S. 248, 259–61 (1983). Therefore, although biology alone is insufficient to establish parental rights, it is significant, and generally, parentage law requires only that the parent demonstrate some additional sense of parental responsibilities, including assisting in raising the child or investing in the child's future. State courts have followed this perspective on the role of biology. *See, e.g.*, State v. Wooden, 57 P.3d 583, 588–89 (Or. Ct. App. 2002) ("[A] biological connection, by itself, does not automatically confer parental rights, but that mere physical absence, by itself, does not automatically waive them."); Randy A.J. v. Norma I.J., 677 N.W.2d 630, 636 (Wis. 2004) ("[P]arental status that rises to the level of a constitutionally protected liberty interest does not rest solely on biological factors, but rather, is dependant upon an actual relationship with the child. . . .").

21 The Supreme Court has not spoken on this issue directly, but the Massachusetts Supreme Judicial Court has specifically recognized the right of children to be free from discrimination in state benefits because of the sexual orientation of their parents. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003) ("It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."). However, very few cases specifically address protections for same-sex families.

22 *See, e.g.*, UNIF. PROBATE CODE § 2-119(b) (amended 2008), 8 U.L.A. 50 (Supp. 2010) (declaring that "[a] parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent").

significant government intrusion that impacts same-sex couples and their children is the cut-off provision in most state adoption laws.[23]

B. Same-Sex Families[24]

The 2000 Census reported that 34.3% of lesbian couples and 22.3% of gay male couples were raising children.[25] New technologies have gradually increased the opportunity for same-sex couples to raise biologically related children. Among lesbian couples, a majority utilize some method of artificial insemination,[26] which is one of the oldest and most common forms of assisted-reproduction technology.[27] As a consequence of artificial insemination, the biological mother automatically gains parental status, while the nonbiological parent must seek out legal parentage.[28]

A majority of gay male couples pursue surrogacy or gestational surrogacy.[29] With surrogacy, the sperm donor (the biological father) automatically gains parental status.[30] Similar to the nonbiological lesbian individual above, the nonbiological parent must work to gain legal parental rights.[31] Whether in the context of gay male couples or lesbian couples, all of these technologies are just "the tip of an iceberg of a myriad of ways where legal issues concerning parentage arise in the context of the non-traditional family."[32]

Finally, adoption is another common method that both lesbians and gay males use.[33] It is important to differentiate between adoption, in which both individuals seek to establish legal adoptive parenthood over a child, and second-parent adoption, in which one parent is the legal, biological parent—either through surrogacy, artificial insemination, or from a previous relationship—and the biological

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23 *See generally* Jason N.W. Plowman, *When Second-Parent Adoption Is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 63 (2008).

24 For the purposes of this Note, I use the phrase "same-sex families" to refer to families headed by same-sex couples.

25 Plowman, *supra* note 23, at 59.

26 *See* Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 2 (1999).

27 *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 86 (1995); Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 996 (1996). For a general discussion of alternative methods for reproduction, see Charles P. Kindregan, Jr., *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123 (2007).

28 *See* Doskow, *supra* note 26, at 2.

29 *See id.* at 3.

30 *See id.*

31 *See id.*

32 *See* Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 392 (2009).

33 *See* Doskow, supra note 26, at 3–4.

parent's partner seeks to establish a legal relationship with the child as well.[34]

With adoption, both parents become legal parents of the co-adopted child; the same is not true in second-parent adoption.[35]

C. Second-Parent Adoption, Legal Parentage, and the Cut-Off Provision

In a family structure in which only one parent is the biological parent, second-parent adoption is often thought of as the best solution to legalize the relationship between the nonbiological parent and the child.[36] Such a declaratory assertion of parental rights avoids the more adversarial process of determining parentage after the dissolution of the same-sex relationship. Establishing a legal parent–child relationship has enormous practical consequences. Among other benefits, the legal relationship entitles the child to inherit from the nonbiological parent's family directly under the law of intestate succession and to be eligible for social security benefits in the event that the nonbiological parent dies or becomes disabled.[37] It also establishes a legal obligation that requires the nonbiological parent to support the child.[38]

From the perspective of the nonbiological parent, many aspects of parenthood are prohibited in the absence of legal parentage. Without a legally recognized relationship, the nonbiological parent is unable to consent to emergency medical procedures for the child or even obtain school records.[39] Most importantly, should the relationship with the child's biological parent dissolve or the biological parent pre-

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34 *See id.*

35 *See* Laura M. Padilla, *Flesh of My Flesh But Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219, 231–32 (1997).

36 There are other nonlitigious options for co-parents, including co-parenting agreements, prebirth decrees, and visitation agreements subsequent to the dissolution of the relationship. *See* Osborne, *supra* note 2, at 367–68. Co-parenting agreements are simple, contract-like legal documents outlining the particular rights and responsibilities of each parent. *Id.* at 370–71. Yet, courts often refuse to enforce co-parenting agreements on the grounds that biological parents cannot contract away any portion of their constitutional right to guide the upbringing of their children. *Id.* Prebirth decrees attempt to adjudicate parenthood from conception (be it by in vitro sperm donation, surrogacy, or other method). *Id.* at 371–72. This option is only available to those parents seeking to legally solidify their relationship with an as yet unborn child. *Id.* Visitation agreements, even if prepared preemptively before the dissolution of a relationship, are often unenforceable because courts are reluctant to allow parties to independently contract for child custody without a court applying a best interest of the child standard. *Id.* at 372–74. Despite these other attempts to avoid a postdissolution adversarial court determination of parental rights, second-parent adoption is the most robust nonlitigious option to formally establish a legal parent–child relationship. *Id.* at 367–68.

37 *See* Doskow, *supra* note 26, at 9.

38 *Id.*

39 *Id.*

decease the nonbiological parent, the nonbiological parent will have no claim for custody or visitation and the child will have no claim for support.[40]

States differ widely in their parentage laws, but many states import provisions from the Uniform Parentage Act (UPA), a model law setting forth rules for establishing the legal parent–child relationship.[41] A brief overview illustrating the development of parentage laws follows.

Historically, legal parentage stemmed solely from blood and legitimacy.[42] Prior to the promulgation of the UPA in 1973, the common law set forth these basic requirements: to be a legal child, the child had to be born to legally married parents.[43] Parentage laws assumed and reinforced notions of the traditional family: the wife gave birth, and the husband was presumed to be the biological father of the child.[44] Over time, parentage laws recognized a broader understanding of family, and slowly, legal parentage extended beyond blood and legitimacy.[45] Adoption, for example, became a process to forge a parent–child relationship outside of the traditional model.[46]

Advancing technologies and increasing numbers of same-sex couples and other nontraditional families have further widened the gap between parentage laws and the reality of a significant number of

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40 *See id.*

41 The Uniform Law Commission (ULC), previously known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), promulgated a version of the UPA in 1973. The NCCUSL approved a new version of the UPA in 2002. *See* Press Release, NCCUSL, Council of State Governments Approves Two Uniform Acts as "Suggested Legislation" (Jun. 1, 2009), *available at* http://www.nccusl.org/update/DesktopModules/News Display.aspx?ItemID=213. The Act reflects both federal requirements and state best practices in the paternity area. Although all states have some sort of parentage act, only nine states have formally enacted a version of the most recent UPA: Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *See* ALA. CODE, §§ 26-17-101 to 26-17-905 (2009); DEL. CODE ANN. tit. 13, §§ 8-101 to 8-904 (2009); N.M. STAT. ANN. §§ 40-11-1 to 40-11-23 (LexisNexis 2004); N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (2009); OKL. STAT. ANN. tit. 10, §§ 7700-101 to 7700-902 (2009); TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (West 2008); UTAH CODE ANN. §§ 78B-15-101 to 78B-15-902 (LexisNexis 2008); WASH. REV. CODE ANN. §§ 26.26.011 to 26.26.913 (West 2005); WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2009). Colorado is currently considering adopting the new version of the UPA. Although other states have not formally adopted the UPA, it still influences the creation of state parentage laws. *A Few Facts About the . . . Uniform Parentage Act (Last Revised or Amendmed 2002)*, NCCUSL, http://nccusl.org/Update/uniformact_fact sheets/uniformacts-fs-upa.asp (last visited Nov. 26, 2009).

42 *See* Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP. TR. & EST. L.J. 433, 434–36 (2008).

43 *See Uniform Parentage Act Summary*, NCCUSL, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Nov. 28, 2009).

44 *See id.*

45 *See id.*

46 *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 711–12 (1984).

families.[47] Thus, determining the legal parents of a child is increasingly more complicated. To help clarify parentage laws, the Uniform Law Commission revised the UPA in 2002 to provide states with clearer guidelines for determining parentage under a variety of circumstances, many of which explicitly acknowledge nontraditional family structures.[48] The updated 2002 UPA defines "parent–child relationship" to be a specific legal relationship and articulates the requirements necessary to establish that relationship.[49] A mother–child relationship is established through birth, adjudication of maternity, or adoption.[50] A father–child relationship is established through an unrebutted presumption of paternity if the child is born during the marriage between the presumed father and mother.[51] A father–child relationship is also established through effective acknowledgment of paternity, adjudication of paternity, adoption, or consent to assisted reproduction.[52] The principal additions of the amended 2002 version of the UPA sought to better address the implications of more complicated family structures. For example, the amended UPA provides guidance for the determination of mother–child and father–child relationships in families created by assisted reproduction or other modern technological method.[53]

Although the UPA recognizes some of the changing reality of American families, it does not go far enough. For example, the UPA does prohibit discrimination based on marital status. Acknowledging an understanding of legal parentage beyond blood and legitimacy, the UPA now states that "[a] child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."[54] However, this passage and the framework of the entire UPA still impliedly posits a family headed by a heterosexual couple as the norm.[55]

In terms of adoption, the Uniform Adoption Act (UAA)[56] provides that "any individual may adopt . . . for the purpose of creating

47 *See* discussion *supra* Part I.B.

48 The amended UPA in large part addresses the challenges that assisted reproduction creates. In between the UPA (1973) and the UPA (2002), the ULC developed two other acts: the Uniform Status of Children of Assisted Conception Act (1988) and the Uniform Putative and Unknown Fathers Act (1988). The new UPA incorporates the substance of these two earlier acts. *See Uniform Parentage Act Summary*, *supra* note 43.

49 UNIF. PARENTAGE ACT § 102(14) (amended 2002), 9B U.L.A. 13 (Supp. 2010).

50 *Id.* § 201(a), 9B U.L.A. 21 (Supp. 2010).

51 *Id.* § 201(b), 9B U.L.A. 21 (Supp. 2010).

52 *See id.*

53 *Id.* § 201 cmt., 9B U.L.A. 21 (Supp. 2010).

54 *Id.* § 202, 9B U.L.A. 309 (2000).

55 *Id.* §§ 201 (a)–(b), 9B U.L.A. 21 (Supp. 2010).

56 Similar to the UPA, the UAA is a model law proposed by the National Conference of Commissioners on Uniform State Laws in the hopes of providing a comprehensive adoption code for states to adopt. The UPA provides that adoption can establish a parent–child

the relationship of parent and child."[57] The UAA comments expound on this by stating, "Marital status, like other general characteristics such as race, ethnicity, religion, or age, does not preclude an individual from adopting."[58] Yet, the UAA does not mention homosexual adoption or protections for same-sex families.[59] Although it does not specifically articulate second-parent adoption as a viable method of gaining legal parentage, the UAA does address the consequences of a second-parent adoption and provides a heteronormative solution. The UAA states that upon a decree of adoption, "the legal relationship of parent and child between each of the adoptee's former parents and the adoptee terminates."[60] This codification of the cut-off provision does, however, provide a stepparent exception.[61] Under this exception, the custodial parent may retain his or her parental status, while the adoptive stepparent acquires the status of legal parent.[62] The heteronormativity of the stepparent exception is clear in light of the significant number of same-sex couples living in states that do not legally recognize same-sex relationships.[63]

Many states go beyond the UPA- and UAA-like silent treatment of same-sex families by explicitly prohibiting homosexual adoption.[64] While some of these prohibitions apply broadly to any two unmarried, nonbiological parents attempting to jointly adopt a child, some are more explicitly homophobic. As of 1977, Florida law expressly prohibits "homosexual" individuals from adopting.[65] Similarly, as of 2000, Mississippi law expressly prohibits "adoption by couples of the same gender."[66] Utah prohibits adoption "by a person who is cohabiting in

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relationship but does not specify any particulars about what qualifies as an adoption. *See id.* §§ 201(a)(3), (b)(4), 9B U.L.A. 21 (Supp. 2010). Therefore, the UAA helps to define what "adoption" means in the UPA.

57 UNIF. ADOPTION ACT § 1-102, 9 U.L.A. 22 (1994).

58 *Id.* § 1-102 cmt., 9 U.L.A. 22 (1994).

59 *Id.*

60 *Id.* § 1-105, 9 U.L.A. 23 (1994).

61 *Id.* § 1-105 cmt., 9 U.L.A. 23–24 (1994).

62 *Id.* § 4-102, 9 U.L.A. 104–05 (1994). A stepparent has standing under this provision to adopt a minor stepchild who is the child of the stepparent's spouse if (a) the spouse has sole legal and physical custody, (b) the spouse had joint legal custody, (c) the spouse is deceased or mentally incompetent, or (d) an agency placed the child with the stepparent. This article does open the door for second-parent adoption outside marriage by stating, "For good cause shown, a court may allow an individual who does not meet the requirements [listed above], but has the consent of the custodial parent of a minor to file a petition for adoption . . . [and therefore] be treated as if [he or she] were a stepparent." *See id.* Considering the amount of discretion that this provision provides to the court, however, the ability for same-sex couples to utilize this provision remains suspect.

63 *See* discussion and accompanying notes *infra* Part I.D.

64 *See* sources cited *infra* notes 65–67.

65 *See* FLA. STAT. ANN. § 63.042(3) (West 2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

66 MISS. CODE ANN. § 93-17-3(5) (West 2007) ("Adoption by couples of the same gender is prohibited.").

a relationship that is not a legally valid and binding marriage."[67] Utah defines cohabitation as "residing with another person and being involved in a sexual relationship with that person."[68]

On the opposite side of the spectrum, a handful of states explicitly permit legal adoption by a second parent in a same-sex relationship without terminating the legal status of the biological parent.[69] In these states, "the adoptive parent stands in parity with the biological parent and has all the rights and responsibilities that flow from legal parenthood."[70] Several of these states provide for same-sex second-parent adoption by statute, while others have provided for same-sex second-parent adoption through appellate court decisions.[71] Vermont is a unique example because it provides protection for same-sex families through a family law code that is gender neutral, stating "[i]f a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[72]

Most states, however, are less explicit in how same-sex couples should fare under applicable state adoption laws and how legal parentage shall be determined for children of same-sex couples. Without clearly established provisions addressing same-sex second-parent adoption, courts are left to interpret applicable state parentage laws. The product of such interpretation often results in the story of Jill and Patty: the biological parent's consent to the adoption of his or her child by the nonbiological parent terminates all of the biological par-

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67 UTAH CODE ANN. § 78B-6-117 (LexisNexis 2008).

68 *Id. Id.* § 78B-6-103(10).

69 Second-parent adoption is available by statute in California, Connecticut, and Vermont. *See* CAL. FAM. CODE §§ 297, 9000(g) (West Supp. 2010) (allowing only registered domestic partners to adopt without terminating the legal status of the biological parent); CONN. GEN. STAT. § 45a-724(a)(3) (West 2009); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002). Although these statutes are based on the UAA, they go beyond the scope of the Act, which does not explicitly provide for second-parent adoption in the same-sex setting. Appellate court decisions in the following jurisdictions have also approved second-parent adoption: California, the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. *See* Sharon S. v. Superior Court, 73 P.3d 554, 562–63 (Cal. 2003); *In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995); *In re* Petition of K.M., 653 N.E.2d 888, 898 (Ill. App. Ct. 1995); *In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270–71 (Ind. Ct. App. 2003); Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 540–41 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 405–06 (N.Y. 1995); *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002); Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

70 *See* Osborne, *supra* note 2, at 369.

71 *See* sources cited *supra* note 70.

72 VT. STAT. ANN. tit. 15A, § 1-102(b) (2002)

ent's rights and duties.[73] As discussed previously, this forced divestment results from an explicit cut-off provision typical of most state adoption laws.[74]

States passed adoption statutes with cut-off provisions in order to effectuate a "fresh start" policy that protects the new adoptive parents from claims of the child's biological parents.[75] The fresh start policy rests on the assumption that the best interest of the child entails cutting all emotional or financial ties to the biological parents and completely immersing the child in the new adoptive family.[76] In joint adoptions by two nonbiological parents, the purpose of the "fresh start" policy is more salient, necessitating terminations of birth parents' rights prior to adoption proceedings.[77] However, the cut-off provision and the "fresh start" policy underlying the provision do not take into account intrafamilial second-parent adoptions. Recognizing that the best interest of the child in such intrafamilial adoptions is to maintain a legal relationship with both the biological parent and new adoptive parent, states added the "spousal/stepparent" exception to prevent any divestment of legal parental interest on behalf of the biological parent.[78] Although recognizing the importance of intrafamilial second-parent adoptions by heterosexual couples, state laws have not accorded same-sex families the same protections.

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[73] *See, e.g.*, *In re* Adoption of T.K.J. 931 P.2d 488, 491 (Colo. App. 1996); *In re* Adoption of Luke, 640 N.W.2d 374, 377 (Neb. 2002); *In re* Adoption of Doe, 719 N.E.2d 1071, 1071–72 (Ohio Ct. App. 1998).

[74] For an example of a cut-off provision, see UNIF. ADOPTION ACT § 1-105, 9 U.L.A. 23 (1994). For further examples, see also discussion and sources cited *supra* notes 56–63.

[75] *See In re* Estates of Donnelly, 502 P.2d 1163, 1166–67 (Wash. 1972) (stating that the purpose of these types of severing provisions gives the adopted child a "'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past.").

[76] *See* Rein, *supra* note 46, at 717 ("[S]ociety generally deems it in the adoptee's best interests to make him a full-fledged member of his adoptive family. This assimilation can occur only if the adopting family treats the adoptee in all respects, including matters of succession, as though he had been born into his adoptive family. Furthermore, it is apparent that an adoptee's retention of ties with his biological family can undermine the psychological aspect of this assimilation.").

[77] New York's statute, which includes a typical cut-off provision, illustrates this point. The New York adoption statute provides, "[a]fter the making of an order of adoption the birth parents of the adoptive child . . . shall have no rights over such adoptive child." N.Y. DOM. REL. LAW § 117(1)(a) (McKinney Supp. 2010); *see also* MASS. ANN. LAWS ch. 210, § 6 (LexisNexis 2009) ("[A]ll rights, duties and other legal consequences of the natural relation of child and parent shall . . . terminate between the child so adopted and his natural parents and kindred. . . .").

[78] WIS. STAT. § 48.92(2) (2010) ("After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents . . . unless the birth parent is the spouse of the adoptive parent . . . shall be completely altered and those rights, duties, and other legal consequences shall cease to exist.").

D. Impact of Same-Sex Marriage Laws[79]

Many same-sex families reside in the majority of states that do not currently legally recognize same-sex marriages. In these states, nonbiological parents are not legally acknowledged as "spouses" or "stepparents" and do not qualify for the spousal/stepparent exception.[80] The Comments to UPA Article 4, the main provision establishing adoption of minor stepchildren by a stepparent, provides a rationale for the stepparent exception: "[the exception is] justified because in the typical stepparent adoption, the minor has been living with the stepparent and the stepparent's spouse . . . , and the adoption merely formalizes a de facto parent-child relationship . . . . [T]he minor's custodial parent has in effect 'selected' the adoptive stepparent on the basis of personal knowledge."[81] These factors justifying the spousal/stepparent exception are arguably equally present in a committed same-sex partnership. It is important, therefore, to recognize that the legal status of a same-sex relationship directly impacts a significant number of parent–child relationships.

Marriage-like recognition of same-sex relationships can provide automatic legal parentage by way of the legal connection between the parents. For example, if same-sex marriage were available, a married lesbian couple

> engaging in reproduction through artificial insemination would not need to take any steps at all to protect the rights of the partner who did not carry the child, as the latter would be considered to be in the same position as the husband of a heterosexual woman who is inseminated with the semen of another man. In such a situation, the law deems the husband the legal parent of a child born as a result of the insemination, despite the absence of genetic connection.[82]

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79 Staying current on the status of same-sex marriage laws across the country is nearly impossible. Some of these states, such as California and Maine, provided legal recognition of same-sex relationships by court decision, but public referendum removed the judicially granted protections. *See* Phillippe Naughton and David Byers, *California Votes to Ban Gay Marriage*, THE SUNDAY TIMES (Nov. 5, 2008), http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article5091994.ece; Michael Falcone, *Maine Vote Repeals Gay Marriage Law*, POLITICO (Nov. 4, 2009 1:29 AM), *http://www.politico.com/news/stories/1109/29119.html*. Most recently, the mayor of the District of Columbia signed into law a same-sex marriage bill. *See* Tim Craig et al., *Washington Mayor Fenty Signs Same-Sex Marriage Bill*, WASH. POST (Dec. 19, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/12/18/AR2009121801789.html.

80 *See* UNIF. ADOPTION ACT § 4-108(a)(2), 9 U.L.A. 108–09 (1994) ("A petition by a stepparent to adopt a minor stepchild must be signed and verified by the petitioner and contain . . . the current marital status of the petitioner, including the date and place of marriage, the name and date and place of birth of the petitioner's spouse . . . .").

81 *Id.* § 4 cmt., 9 U.L.A. 103 (1994).

82 *See* Doskow, *supra* note 26, at 4–5.

Additionally, in states that provide legal recognition of same-sex unions, the spousal/stepparent exception arguably covers homosexual couples if the recognition bestows a legal status of "spouse" or "stepparent." Discriminatory marriage laws, therefore, place burdens not only on homosexual couples but on their children as well.[83]

Although a majority of states provide no legal recognition for homosexual couples, a few states substantially deviate from this norm.[84] Currently, eleven jurisdictions provide either full marriage equality or broad relationship recognition laws: California, Connecticut, the District of Columbia, Iowa, Massachusetts, Nevada, New Hampshire, New Jersey, Oregon, Vermont, and Washington.[85] Of these, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont all provide full marriage equality.[86] The rest provide broad relationship-recognition laws that extend to same-sex couples all, or nearly all, of the rights and responsibilities that married couples have under state law. Although the particular legal status that some of these states grant same-sex couples is a "civil union" or "domestic partnership," the legal protections behind the particular status vernacular are almost identical to those provided under heterosexual marriage.[87] In *Baker v. State*,[88] for example, the Supreme Court of Vermont held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[89] Soon afterwards, the legislature formally defined these protections by enacting the Civil Union Act[90] on July 1, 2000, which affords same-sex couples all the legal benefits of marriage without the specific status declaration. One provision of the Civil Union Act specifically relates to parentage: "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."[91] Therefore, even without an explicit allowance for same-sex second-parent

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83 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws . . . . [S]ame-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction.").

84 *See Relationship Recognition for Same-Sex Couples in the U.S.*, NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_3_10_color.pdf.

85 *Id.*

86 *Id.*; Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. TIMES (Dec. 15, 2009), http://www.nytimes.com/2009/12/16/us/16marriage.html.

87 NATIONAL GAY AND LESBIAN TASK FORCE, *supra* note 84.

88 744 A.2d 864 (Vt. 1999).

89 *Id.* at 867.

90 VT. STAT. ANN. tit. 15, §§ 1201–1207 (LexisNexis 2002).

91 *Id.* tit. 15, § 1204(f).

adoption similar to parent–child determinations in heterosexual marriage, the Vermont statute goes as far as implying a rebuttable presumption that the nonbiological, nonadoptive parent is a legal parent who derives this relationship with the child simply by virtue of the civil union.[92] Even though the spousal exception for second-parent adoption would be available here, it is not necessary to provide legal protection for the nonbiological parent.

In California, the status of "domestic partnership" is available for any two adults, regardless of the gender of the individuals, and bestows marriage-like rights and benefits.[93] A domestic partnership provides the same parental rights to the nonbiological, nonadoptive parent as his or her partner.[94] The statute also extends recognition to any domestic partnership bestowed by another state (up to the same level of protection that California provides).[95]

For the other states in this category, which recognize marriage-like homosexual relationships that do not entail full marriage rights, the question of whether the legal status that they grant can provide either de facto legal parentage for nonbiological parents (similar to states providing full marriage equality) or even qualification as a "spouse" under the cut-off exception is less clear.

A few states provide very limited recognition and protection for same-sex couples: Colorado, Hawaii, Maine, Maryland, and Wisconsin.[96] Hawaii, for example, allows persons to obtain legal recognition for their relationship by registering as "reciprocal beneficiaries."[97] Reciprocal beneficiaries do not have all of the rights of married couples, but many statutory provisions now extend to reciprocal beneficiaries the same rights as spouses.[98] For example, for purposes of intestacy, Hawaiian law provides a surviving reciprocal beneficiary with the same intestate share that it would provide to a surviving spouse.[99] Unfortunately, the statute does not define the effect of such status on determinations of child custody, visitation rights, and other rights of parentage.[100] Whether the couple's legal classification as reciprocal beneficiaries will provide parental rights for nonbiological parents

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92 *Id.*

93 CAL. FAM. CODE § 297(a) (West 2004).

94 *Id.* § 297.5(d) (providing, similar to Vermont's Civil Union Act, that a nonadoptive, nonbiological partner is a legal "parent," with all the corresponding rights of visitation and custody); *see also id.* § 9000 (extending stepparent adoption to adoption by a "domestic partner" as defined in Section 297).

95 *Id.* § 299.2.

96 *See* NATIONAL GAY AND LESBIAN TASK FORCE, *supra* note 84.

97 HAW. REV. STAT. § 572C-4 (2006).

98 *Id.* § 572C-6.

99 *Id.* § 560:2-102.

100 *Id.* § 572C-6.

and whether that classification will provide access to the spousal exception remains suspect.

Finally, the following thirty-three states provide no legal recognition for same-sex couples: Alaska, Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.[101]

A separate issue from a state's own laws regarding same-sex marriage concerns recognition of other states' same-sex marriage laws. Arguably, states that recognize same-sex marriages performed in other states should also provide the opportunity to utilize the spousal exception if the other state bestows a legal status comparable to that of a spouse. Currently, only New York and Maryland fully acknowledge out-of-state same-sex marriages.[102]

II
Proposed Solutions to the Cut-Off Problem

Most state adoption laws are similar to the Uniform Adoption Act in including a cut-off provision and a spousal/stepparent exception, but also remaining silent on same-sex families. Because most states do not provide any legal recognition of same-sex partnerships, the story of Jill and Patty remains all too familiar. However, there are several possible solutions to prevent the cut-off provision from forcing same-sex families to choose one parent to be a legal parent and the other to be a legal stranger.

One possible solution does not rely on legislative change or judicial discretion. Instead, it depends on a specific course of action by the co-parents. In order to avoid the cut-off provision terminating the biological parent's rights, and thereby prohibiting both co-parents from each forming a legal bond with their child, the biological parent may willingly terminate his or her parental rights to the child in order to become a joint adoptive parent alongside his or her partner.[103] If the court approves the adoption, then both parents will be legal parents for all purposes. However, this is not an ideal solution for several reasons. Formally terminating the legal relationship between a biological parent and child has severe financial and psychological consequences:[104] two-parent adoption is often more expensive than second-

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101 *See* National Gay and Lesbian Task Force, *supra* note 84.

102 *See id.*

103 *See* Osborne, *supra* note 2, at 368.

104 *See id.*

parent adoption,[105] and furthermore, the family as a whole may suffer "emotional discomfort in having to abdicate biologically vested rights."[106]

Utilizing the discretion of the court to independently adjudicate parentage is another possible solution.[107] While "[a]doption is a process by which the [Department of Social Services] and the courts determine whether the petitioner can be made a parent of the child . . .[,]a UPA petition argues that the respondent is *already* a parent, and seeks the court's acknowledgment of that existing parental relationship."[108] Under the UPA, and likewise under most state statutes, judges have significant discretion in adjudicating parentage. The court is vested with the power to ascertain parenthood, looking specifically at the petitioning individual and that individual's relationship with the child in question.[109] However, similar to the solution discussed above, adjudicating parentage is costly, both emotionally and financially.[110] More importantly, this solution is only possible if the state parentage statute recognizes nonbiological grounds for parentage.[111] Even if the statute recognizes nonbiological grounds, such as de facto parenthood based on functional aspects of the parent–child relationship, "the cases have not . . . determined that a functional parent will have all the rights of a biological or [formal] adoptive parent."[112] Finally, this solution does not preemptively establish a legal parent–child relationship, but rather it is usually only available after a relationship dissolves and the court ascertains parentage for the purposes of custody and other parental rights.[113]

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105 *Id.*

106 *Id.*

107 *See id.* at 386.

108 *See* Doskow, *supra* note 26, at 21.

109 *See* Osborne, *supra* note 2, at 388.

110 *Id.* at 388.

111 For example, the American Law Institute's (ALI) Principles of the Law of Family Dissolution offers a legal framework that recognized the realities of nontraditional families in ascertaining parentage. The ALI's Principles recognize both parents by estoppel and de facto parentage. According to the ALI Principles, a parent by estoppel is one who, although not a biological or adoptive parent, meets certain circumstantial requirements of parenthood. Once the parent meets these requirements, he or she has the rights and privileges of a legal parent. A de facto parent, on the other hand, is an individual who lived with the child for more than two years and, with the agreement of the legal parent, formed a parent–child relationship for reasons other than financial compensation. A person trying to demonstrate de facto parenthood must meet many requirements, including showing substantial caretaking functions. Under the ALI's framework, only parents by estoppels, and not de facto parents, stand in complete parity with legal parents. *See generally* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002).

112 *See* Gary, *supra* note 3, at 668.

113 *See* Osborne, *supra* note 2, at 391.

Another possible solution is promulgating state legislation, such as the Uniform Parentage Act, that would explicitly define second-parent adoption in gender neutral terms and expand the spousal/stepparent exception to include same-sex families. However, the possibility of passing such a large measure, especially in the midst of the current nationwide battle over same-sex marriage, is highly unrealistic. Legalizing same-sex marriage is also clearly a solution as discussed in Part I.C, but similar to changing state parentage laws, the prospect of legalizing same-sex marriage nationwide, and thereby including same-sex families under the spousal/stepparent exception, is impractical at this point. The more practical, immediate solution would be a more inclusive interpretation of existing laws rather than an expanded exception or, even more dramatic, a completely new framework by which to establish parental rights.

Courts employ several possible strategies in attempting to read adoption statues in a way that invokes the true legislative intent—promoting the "best interest of the child"—and thereby prevents the devastating effects of the cut-off provision. In *Sharon S. v. Superior Court*,[114] a landmark California Supreme Court case, the court offers a unique and thoughtful solution to the cut-off provision. In the case of a same-sex second-parent adoption, the majority treats the adoption as simultaneous, not sequential,[115] thereby preserving biological parentage and adding additional rights of legal parentage for the nonbiological parent.[116] The court does not take an overly activist position; it does not broadly read the stepparent exception to include same-sex families, which would violate the literal language of the statute. Rather, the court finds a solution within the established framework of existing state law defining legal parent–child relationships.[117]

Section 8617 of the California Family Code provides: "The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child."[118] Faced with a typical cut-off provision, the court's solution is simple: read the California cut-off provision as a waivable benefit, rather than a mandatory prerequisite for a valid adoption.[119] The court therefore reiterates the previously recognized power of an individual to "waive compliance with statutory conditions intended for his or her benefit, so long as

114 73 P.3d 554 (Cal. 2003).

115 Note again that these are terms of art that I use to describe the California Supreme Court's approach in *Sharon S.*

116 *Sharon S.*, 73 P.3d at 561.

117 *See id.*

118 *Id.* at 560.

119 *Id.*

the Legislature has not made those conditions mandatory."[120] In this context, the court determined that "nothing [in Section 8617,] or in any other statutory provision, prohibits the parties to an independent adoption from waiving the benefits of section 8617 when a birth parent intends and desires to coparent with another adult who has agreed to adopt the child and share parental responsibilities."[121] To support its assertion that the cut-off provision was not meant to be mandatory, the court demonstrates that all requirements for a valid adoption are present even if the cut-off provision is waivable. Therefore "the objective of the adoption statutes . . . is not frustrated when statutory provisions like section 8617 are treated as nonmandatory."[122] Furthermore, in *Marshall v. Marshall*,[123] a decision establishing the stepparent exception in California, the court already recognized that a birth parent consenting to an adoption may waive termination of her parental rights. In *Sharon S.*, the court simply found there was nothing confining this approach to the stepparent context.[124]

Simultaneous adoption, which the court makes possible by defining the cut-off provision as a waivable benefit and not a mandatory requirement, effectuates what the court believes to be the legislature's true intent. In drafting the state family code, the court believes "the Legislature did not intend . . . to bar an adoption when the parties clearly intended to waive the operation of that statute and agreed to preserve the birth parent's rights and responsibilities."[125]

Other courts have also found simultaneous adoption to be an attractive solution for the cut-off provision.[126] In promoting "the best interest of the child," courts treat the cut-off provision as a guiding statement and not a mandatory law. Ultimately, they find that divesting the rights of one parent in favor of another is not in a child's best interest.[127] Courts addressing this issue have argued that divesting the

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120 *Id.* at 561.

121 *Id.*

122 *Id.* at 562 (internal quotations omitted).

123 239 P. 36 (Cal. 1925).

124 *See Sharon S.*, 73 P.3d at 566.

125 *Id.* at 560; *see also* Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) ("The Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition.").

126 *See, e.g.*, *In re* Adoption of Carolyn B., 774 N.Y.S.2d 227, 230 (N.Y. App. Div. 2004) (allowing two unmarried adults to adopt simultaneously, rather than sequentially).

127 *See, e.g.*, *In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1258 (Ind. Ct. App. 2004) ("It is clear that the divesting statute, designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."); *Tammy*, 619 N.E.2d at 319 ("While the Legislature may not have envisioned adoption by same-sex partners, there is no indication that it attempted to define all possible categories of persons leading to adoptions in the best interests of children. Rather than limit the potential categories of persons entitled to adopt . . . , the Legislature used general language to define who may adopt and who may be adopted."); *In re* Jacob, 660 N.E.2d 397, 399 (N.Y. 1995) ("[T]he adoption statute must be applied in harmony with the

legal parental relationship between a child and his or her biological parent, which is the consequence of applying most adoption statutes to a same-sex couple second-parent adoption, could not be the actual legislative intent behind the cut-off provision.[128] Even if a discussion of legislative intent is somewhat moot because state legislatures did not consider same-sex second-parent adoption while drafting adoption laws, "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest."[129]

III
INTESTACY LAW AND THE UNIFORM PROBATE CODE

The debate surrounding second-parent adoption and the determination of legal parenthood directly impacts the law of succession.[130] Legal recognition of a parent–child relationship is vital for both intestacy and testacy purposes. If a succession document does not provide an adequate definition, a court will look to intestacy laws for assistance in determining the meaning of terms like "child" and "descendent."[131] More importantly, how a state's probate code defines a parent–child relationship in its intestacy laws is important, given that most people die intestate.[132]

Testamentary freedom—an individual's right to control the disposition of their property—is at the heart of American estate law.[133]

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humanitarian principle that adoption is a means of securing the best possible home for a child.").

128 *See In re* M.M.D., 662 A.2d 837, 845 (D.C. 1995) ("'The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose . . . . [T]he canon does not require distortion or nullification of the evident meaning and purpose of the legislation.'" (quoting United States v. Brown, 333 U.S. 18, 25–26 (1948))); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) ("When the statute is read as a whole, we see that its general purpose is to clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals . . . . The legislature recognized that it would be against common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child, albeit in a family unit with a partner who is biologically unrelated to the child." (quoting Adoption of B.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993))).

129 *B.L.V.B.*, 628 A.2d at 1275.

130 For a general discussion of the impact of the changing American family on American estates law, see Tritt, *supra* note 32, at 41.

131 Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 171, 185 (2008).

132 *Id.* at 178–79.

133 *See* Tritt, *supra* note 32, at 374; *see also* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 502 (1977) ("[T]he very existence of a history of succes-

Individuals exercise this right through wills, other will-like instruments (e.g., trusts, contracts, life insurance, and pension plans), and intestacy statutes.[134] The latter of the three, intestacy statutes, mandate the recipients of a decedent's estate and are meant to act as a proxy for the testator's intent should the testator die without a will.[135] Therefore, if the intestate statute does not recognize the individual's relationship with the child as a legal parent–child relationship, then it will not effectively approximate the likely intent of the intestate parent to pass on his or her property.[136]

Determining the presence of a legal parent–child relationship is especially important in intestacy law. In most state intestate regimes, a decedent's children have priority over most other surviving relatives; therefore, intestate statutes must clearly define the requirements for a legally recognized parent–child relationship.[137] Children must also be defined for the purposes of class gifts.[138] Children not legally defined by the applicable state intestate statute to be in a parent–child relationship with the decedent will not have standing as an intestate heir to contest the decedent's will or intestate disposition.[139] It is also important to note that the special importance of establishing a parent–child relationship for the purposes of intestacy laws extends beyond inheritance and property succession. The Social Security Act, for example, determines eligibility of dependent children of a deceased parent for benefits by determining whether the child is in a legal parent–child relationship with the decedent under the state's intestacy law.[140]

Although a full history of intestate law is beyond the scope of this Note, a brief discussion of intestate law is necessary to understand the important role of parental determination. The "sanguinary nexus test" is the "dominant criterion for intestacy preference assumptions (determining whether an individual has a right to take property when a 'parent' dies without a will), and . . . the standard for class gift terminology under a will or other dispositive instrument."[141] Similar to

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sion law suggests the existence of the goal [of the transfer of private property upon death], as does the existence of the institution of private property itself.").

[134] *See* Tritt, *supra* note 32, at 375.

[135] *Id.* at 382.

[136] *See* T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1522 (1999) (stating that the official comments to the UPC state that intestacy rules in the probate code are "explicitly designed to mirror the likely intent of the . . . decedent").

[137] *See* Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920 (1989).

[138] *See* Tritt, *supra* note 32, at 382.

[139] *Id.* at 380.

[140] *See* 42 U.S.C. §§ 402(d)(3), 416(h)(2)(A) (2006).

[141] *See* Tritt, *supra* note 32, at 369.

adoption laws, there is no federal law of succession in the United States: state law governs property succession and estate laws.[142] For the purposes of this Note, discussion of intestacy law will analyze the Uniform Probate Code (UPC) as the "model American law governing the transfer of property at death."[143] Although state probate statutes vary, the UPC is representative of most state probate provisions.[144] The UPC articulates the law of intestate succession and provides substantive rules regarding execution and revocation of wills and other such instruments.[145] If a state adopts the UPA, then the UPA defines the parent–child relationship for all purposes in the state, including for intestacy, unless the law of the state provides otherwise.[146] However, recent UPC amendments, where adopted, explicitly provide otherwise and will govern for intestacy purposes.[147]

A critique of current intestacy statutes follows a common critique of state parentage laws: they fail to reflect the reality of the changing landscape of the American family.[148] Same-sex second-parent adoption, for example, is a direct affront to the entrenched model in estate law that defines succession in terms of blood ties. The 2008 UPC Amendments attempted to expand the definition of parent–child re-

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142 *Id.* at 379 n.49.

143 *Id.* at 372 n.12.

144 *Id.* at 374 n.15.

145 *Id.* at 372 n.12

146 UNIF. PARENTAGE ACT § 203 (amended 2002), 9B U.L.A. 310 (2000) ("Unless parental rights are terminated, a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this state."); *see also* UNIF. ADOPTION ACT § 4-103, 9 U.L.A. 106 (1994) ("An adoption by a stepparent does not affect . . . the right of the adoptee or a descendant of the adoptee to inheritance or intestate succession through or from the adoptee's former parent."). However, this only applies to stepparent adoptions and not to second-parent adoptions generally.

147 The UPC amendments modify various aspects of the definition of parent and child for intestacy purposes. There is an advantage to basing inheritance on the determination of a legal parent under the UPA rather than under the recent amendments to the UPC. The recent amendments include a cut-off provision: a genetic parent will cease to be a parent for intestacy purposes if his or her unmarried partner adopts the child. Under the UPA, however, the genetic parent remains a legal parent for purposes of inheritance. *See* UNIF. PARENTAGE ACT § 203 and cmt. (amended 2002), 9B U.L.A. 310 (2000).

148 *See* Gary, supra note 131, at 172; *see also* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94–95 ("One of the increasingly notable shortcomings of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family."); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 L. & INEQUALITY 1, 2–8 (1998) (noting the increasing number of same-sex couples in recent years and criticizing the UPC for not including them within its provisions); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200–01 (2001) ("Many of [the inheritance system's] rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support."); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064 (1999) (criticizing typical intestacy statutes for "[denying] gay men and lesbians equal donative freedom" and "[devaluing] gay men and lesbians and their relationships").

lationships to include increasingly emerging nontraditional family structures.[149] However, the overly complicated amendments maintain the sanguinary nexus test, only expanding the scope of the legally defined parent–child relationship to include (a) children of an adjudicated legal parent, (b) adopted children, (c) nonmarital children, and (d) a limited exception for stepparent and intrafamily adopted children, as well as other previously unrecognized relationships.[150] Thus, although seeking to "redefine" the existing definition of parent–child relationship, the 2008 UPC Amendments "retain [the] relic [of the sanguinary nexus test] and slap band-aids on it . . . to account for a few specific and selective relationships that fall outside of the traditional genetic definition, such as adopted children and children born of certain [assisted-reproduction technologies]."[151]

Two of the new amended provisions, UPC Sections 2-118 and 2-119, specifically address adopted children. However, these amendments "do not adequately address the emerging issue of second-parent adoptions by gay and lesbian couples and the interplay with state marriage or partnership laws."[152] The Amended UPC sections severely limit the right of adopted children to inherit from their nongenetic parents, providing a right to inherit only where the genetic parent's spouse is adopting the adoptee. Stemming from the same intent as state adoption laws, to preserve the new adoptive family against claims from the severed biological parent, the UPC provides that for intestacy purposes, "an adoptive child is the child of the adopting parents and not of the child's biological parents. . . . [A]doption [therefore] cuts off the right of inheritance as between the adopted child and the biological relatives, thereby effectuating the 'fresh start' policy."[153]

Thus, the adoptive parents become the intestacy parents.[154] "Under UPC section 2-114, an adopted child is the child of the adopting parents and not of the child's biological parents."[155] Adoption, for intestacy purposes, cuts off the right of inheritance as between the adopted child and the biological relatives and creates inheritance rights in the adopted child's adoptive family.[156] Similar to state adoption laws, the UPC provides several exceptions to the rule that adop-

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149 *See* Tritt, *supra* note 32, at 379 n.54, 407. Note that no state has yet adopted the 2008 UPC amendments.

150 UNIF. PROBATE CODE §§ 2-116 to 2-122 (amended 2008), 8 U.L.A. 54–67 (Supp. 2010).

151 *See* Tritt, *supra* note 32, at 372.

152 *Id.* at 409 n.309.

153 *Id.* at 409.

154 UNIF. PROBATE CODE § 2-118(a) (amended 2008), 8 U.L.A. 55 (Supp. 2010).

155 *See* Gary, *supra* note 3, at 656.

156 *Id.*

tion cuts off inheritance rights between the adopted child and the genetic parents.[157]

One exception continues a provision that existed in the UPC before the 2008 Amendments. In stepparent adoptions, the parent who is no longer a legal parent (the parent who died or gave up parental rights) remains a parent for inheritance by the child or a descendent of the child from or through the parent.[158] Following a stepparent adoption, the genetic parent who is no longer a legal parent will not inherit from the child, but a child will still inherit from or through that genetic parent, even if the parent permitted the adoption of the child by the child's stepparent.[159] Just as in state adoption laws, the UPC provides exceptions to the "fresh start" divestment policy—including the stepparent exception[160] and the spouse exception.[161] These exceptions, as well as the exception for children adopted by a relative or surviving spouse of a relative[162] or after the death of both genetic parents,[163] allow the child to continue to inherit from or through the biological parent.

These exceptions do not cover second-parent adoptions by unmarried couples—a genetic parent will cease to be a parent for intestacy purposes if his or her unmarried partner adopts the child. Thus, analogous to state adoption laws, many same-sex families are left unprotected. In states where same-sex marriage or other legal recognition of same-sex relationships is not available, the UPC would limit the rights of that child to the intestate succession of one of the parents. In effect, the parents would have to choose who would be the "legal" parent under the parent–child definition of the UPC, meaning which parent the child could automatically inherit from, have standing to contest a will, or be labeled an interested heir. "For example, if the genetic mother in a lesbian couple wishes her partner to adopt the child, the genetic mother risks her child being unable to inherit from the genetic mother because this scenario does not fit one of the ex-

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157 UNIF. PROBATE CODE § 2-119(e) (amended 2008), 8 U.L.A. 56–57 (Supp. 2010).

158 *Id.* § 2-119(b), 8 U.L.A. 56 (Supp. 2010); *see also id.* § 2-118, 8 U.L.A. 55 (Supp. 2010). Analogous to adoption statutes, the UPC provides a spousal/stepparent exception in section 2-119 (formerly section 2-114(b)), which states that an adoption "by the spouse of either genetic parent" does not affect the intestate rights between the child and the biological parent who is the spouse of the adoptive parent and does not affect the rights of the child to inherit form or through the biological parent who either is deceased or has given up parental rights. The exception covers only stepparents, utilizing the word "spouse." Same-sex families are thus left out.

159 *Id.*

160 *Id.* § 2-119(b), 8 U.L.A. 56 (Supp. 2010).

161 *Id.* § 2-119(c), 8 U.L.A. 56 (Supp. 2010).

162 *Id.*

163 *Id.* § 2-119(d), 8 U.L.A. 56 (Supp. 2010).

ceptions to the 2-119 (a) severing the parent-child relationship between an adoptee and the adoptee's genetic parents."[164]

IV
SOLUTIONS TO THE CUT-OFF PROBLEM IN THE UNIFORM PROBATE CODE

As discussed more fully above, the UPC contains a cut-off provision similar to those in state adoption laws.[165] Analogous to state adoption laws, the UPC contains a spousal/stepparent exception,[166] but most same-sex couples live in states that do not explicitly allow marriage-like legal status. Therefore, the same problem occurs—the nonbiological same-sex parent adoption divests the legal relationship between the child and the biological parent and, in doing so, destroys the link necessary for intestacy inheritance and may even destroy any standing to contest wills or other testate instruments.

One often articulated solution to the intestacy statutes' failure to reflect the diversity of American families involves implementing an entirely new framework for parent–child determinations in intestacy law. State intestacy laws utilize formal definitions to bestow a particular status on individuals, establishing who qualifies as a family member for the purposes of inheritance.[167] To qualify as a family member under most succession laws, "a surviving individual must have been married to the decedent or related to the decedent genetically or by adoption."[168] Some commentators have argued that the current status-based scheme should be replaced by a functionally based approach that inquires into the existence, or lack thereof, of a parent–child relationship as the sole means for determining child status for purposes of succession laws.[169]

While this functional framework might protect same-sex families from the cut-off provision, "[e]xpanding intestacy rights to include functional relationships is fraught with risks."[170] First, the prospect of changing such a long held model is somewhat unrealistic. Even amending the state probate statute to formally recognize same-sex second-parent adoption or providing a broader exception would be difficult.

Second, even if implementing this new framework was politically feasible, it would be administratively inefficient and burdensome and

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164 *See* Tritt, *supra* note 32, at 409 n.309.
165 UNIF. PROBATE CODE § 2-119(a) (amended 2008), 8 U.L.A. 56 (Supp. 2010).
166 *See id.* § 2-119(b), 8 U.L.A. 56 (Supp. 2010).
167 *See* Gary, *supra* note 3, at 653–54.
168 *See* Tritt, *supra* note 32, at 379.
169 *See id.* at 403–04.
170 *See* Gary, *supra* note 3, at 673.

would subject individuals to the discretionary decision making of judges, who might be potentially biased against nontraditional families.[171] Thus, providing additional court discretion might actually lead to less inclusiveness of nontraditional families in intestate laws.[172] "Giving a court discretion to determine inheritance rights between family members raises concerns about the societal norms that may underlie a court's decision. A judge who disapproves of a family headed by gay or lesbian partners may be unlikely to find that a parent-child relationship existed, regardless of the evidence."[173] In addition to potential bias, increasing judicial discretion would introduce more uncertainty into succession law, which is already very complex.[174]

Third, a functional analysis would allow individuals to inherit who perhaps should not be entitled to intestacy rights.[175] A close relationship with a neighbor, for example, might be enough to inherit under a functional analysis, and such a relationship is arguably not one that approximates the intent of the decedent.

Finally, keeping an open functional relationship does not provide the incentive for parents to legalize their relationships with their children. Such formalized relationships create an easy way to determine status for the surviving beneficiary and are more likely to carry out the decedent's intent.[176] Generally, therefore, legalizing relationships is a good action to promote. However, a more functional model would encourage couples to just wait and let a court bestow parentage through a functional determination. Thus, similar to adoption statues and the solutions discussed in Part II, the best solution in the intestacy law context is applying the simultaneous adoption solution articulated in *Sharon S.*

The simultaneous adoption solution to the cut-off provision in adoption statutes, as I articulated in Part II, should apply to the parent–child relationship provisions in state probate laws. Applying the *Sharon S.* simultaneous adoption provides that a biological parent who does not relinquish parental rights with respect to a child will continue to be treated as a parent, and the child as the parent's child, for

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171 For a discussion of potential criticisms of a functionally based approach, see Tritt, *supra* note 32, at 422–29. Addressing these criticisms, "[f]or efficiency purposes, and because most children would fall into the blood or adopted category, [Tritt's functional approach proposes] a rebuttable presumption of a parent-child relationship in cases of genetic children and adopted children." *Id.* at 423. Therefore, in essence, his proposed solution ultimately resembles the current, more formal status-based framework.

172 "[O]ne study has concluded that judges often rely on traditional conceptions of family when evaluating same-sex second-parent adoptions." *See* Plowman, *supra* note 23, at 82.

173 *See* Gary, *supra* note 3, at 681.

174 *Id.*

175 *Id.* at 682–83.

176 *Id.* at 677.

purposes of intestacy.[177] Similar to the explanation provided by the court in *Sharon S.*, this solution does not require a broad and activist reading of the exception or a new, even more expansive intestate framework. Instead, it simply provides that the cut-off provision is discretionary, not mandatory, and thus, the child's right to inherent from the biological parent is not automatically extinguished by the nonbiological parent's second-parent adoption.

There is a concern, however, with analogizing to adoption law and applying the *Sharon S.* solution. Looking at legislative intent, the purpose behind adoption statutes in particular and family law in general is to effectuate the best interest of the child. However, the purpose behind intestate and probate laws is to ensure testamentary freedom and effectuate the intent of the individual. Yet, allowing an adoptive parent to waive the "benefit" of the cut-off provision demonstrates, in a very direct way, the desire of both the biological parent and the adoptive parent to include the child in the definition of "family" for the purposes of inheritance.

CONCLUSION

The structure of the American family is changing as a more fluid and flexible understanding of family replaces notions of an archetypical heterosexual nuclear family. Despite this change, however, laws written with the traditional archetypical family in mind remain on the books. Many areas of law, including adoption and probate laws, must respond to the evolving concept of family, a concept increasingly inclusive of same-sex couples and their children. Arguing for the universal legalization of same-sex marriage as the solution is both unrealistic and, arguably, impractical, but laws should not discriminate against same-sex couples and, more importantly, their children. While it can be argued that the cut-off provision does not explicitly discriminate against same-sex couples and their children, it has an unconstitutionally disparate impact on children of same-sex individuals, particularly because they are unable to access the spousal/stepparent exception in most cases.[178] The cut-off provision might therefore violate the Equal Protection Clause of the Constitution because it treats

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[177] *See* Gary, *supra* note 3, at 681.

[178] If a law does not make a discriminatory classification on its face but is applied unequally so as to practically result in unjust and illegal discrimination between persons in similar circumstances, then the law violates the Equal Protection Clause. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (finding that a San Francisco ordinance concerning the operation of laundries amounted to de facto discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment when it was applied only to laundries operated by Chinese aliens).

children of same-sex couples differently than children of heterosexual couples.[179]

There is a long line of cases in which the Supreme Court has invalidated statutes that treat illegitimate children differently than those born in wedlock.[180] In *Levy v. Louisiana*,[181] for example, the Court utilized the rational basis test and determined that there was no rational reason to prevent illegitimate children from recovering under the state's wrongful death statute.[182] Although the Court's decision in *Labine v. Vincent*[183] concluded the opposite, the cases are distinguishable. *Labine*, decided three years after *Levy*, passed on a Louisiana law concerning an illegitimate child who sought a portion of her father's property after he died.[184] The Court held that refusing to allow this illegitimate, unacknowledged child to inherit through intestate succession did not violate the Due Process or Equal Protection Clauses because Louisiana had a legitimate state interest in an orderly administration of succession and, therefore, there was a rational basis for the discriminatory treatment.[185] The Court noted, however, that if the decedent had acknowledged his illegitimate daughter during his lifetime, then she would have been a natural child under the state's intestacy scheme and would have inherited from his estate.[186] In *Weber v. Aetna Casualty & Surety Co.*,[187] the Court applied intermediate scrutiny to a worker's compensation-claim methodology and held a "denial of equal recovery rights to dependent unacknowledged illegitimate[ ]" children violated the equal protection guarantee of the Fourteenth Amendment.[188] Finally, in *Trimble v. Gordon*,[189] the Court invalidated an Illinois intestacy statute limiting inheritance by intestate succession to illegitimate children of the mother.[190] Once again, the Court noted the irrationality of any scheme that treated illegiti-

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179 The Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

180 *See* Levy v. Louisiana, 391 U.S. 68 (1968). In *Levy*, the Court considered whether Louisiana could statutorily preclude illegitimate children from recovering under its wrongful death statute. *Id.* at 69–70. Applying the rational basis test, the Court held that the Louisiana court's construction of the wrongful death statute as denying recovery to illegitimate children invidiously discriminated against these children for no rational reason. *Id.* at 72. For a general discussion on the Levy case and others in this line of jurisprudence, see *The Supreme Court, 1975 Term–Discrimination Against Illegitimate Children*, 90 HARV. L. REV. 123 (1976).

181 391 U.S. 68 (1968).

182 *See id.* at 72.

183 401 U.S. 532 (1971).

184 *Id.* at 533–34.

185 *Id.* at 535–37.

186 *Id.* at 536–37.

187 406 U.S. 164 (1972).

188 *Id.* at 165.

189 430 U.S. 762 (1977).

190 *Id.* at 776.

mate and legitimate dependents differently.[191] The Court upheld *Trimble* a decade later in *Reed v. Campbell*[192] when it explicitly clarified that *Trimble* was still good law.[193] While the level of scrutiny might not be the same in all the cases, there is a demonstrated history of Supreme Court precedent looking at the disparate impact of particular statutes and requiring that states not treat children differently merely on the basis of legitimacy.

Analogizing from these cases, the Court would most likely apply a rational basis test to the cut-off provision and require a legitimate state interest to hold the provision constitutional as applied to same-sex families. There does not appear to be a state interest that would pass constitutional muster. The "fresh start" policy, the only real reasoning states mention behind the cut-off provision, does not provide even a legitimate interest in the same-sex second-parent adoption context. In fact, it goes against the child's best interest in divesting a meaningful personal relationship of all legal merit.

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191 *See id.* at 770–71.
192 476 U.S. 852 (1986).
193 *See id.* at 856.