

JOINT AND SHARED PARENTING: VALUING ALL FAMILIES AND ALL CHILDREN IN THE ADOPTION PROCESS WITH AN EXPANDED NOTION OF FAMILY

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I. INTRODUCTION

Adoption is “[t]he creation of a parent-child relationship by judicial order between two parties [who may be] unrelated.”¹ It is a process “whereby a person takes another person into the relations of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person.”² Adoptions were not recognized at common law; therefore, who may adopt a child is determined by state statutes that vary widely.³ The state’s interest lies in securing a permanent, stable placement for children and in protecting the integrity of the adoption process.⁴

Adoption is not a right for the child or the prospective adoptive parents. It is a privilege that is bestowed upon some qualified adults. In the adoption process, the best interests of the child are paramount.⁵ When a woman and her brother file a petition to adopt her biological child after the woman divorces the child’s biological father, whether the brother and sister may jointly adopt this child is governed by the adoption statute that exists in their state of residence.

All states allow qualified single adults and married couples to adopt a child if the married couples adopt jointly. Only a few courts have decided whether unmarried persons may adopt a child jointly. Such a limitation in the laws has a profound significance for not only the number of qualified adults who are able to adopt but also for the number of children who are adopted each year. If more states permitted persons who were not only unmarried, but those who had a close, committed bond, beyond just romantic or sexual to adopt, the numbers for both eligible adoptive parents and adopted children would increase. Part II of this article explains who may adopt under current statutes.⁶ Part III describes children who are available for adoption and provides statistics about such children, and Part IV describes the groups of persons who actually adopt children under current statutory law.⁷ Part V discusses case law in which courts have addressed the question of whether two particular prospective adoptive parents who are unmarried but may or may not be romantically linked to each other may adopt a child.⁸ Part VI proposes a new definition for joint

1. A HANDBOOK OF FAMILY LAW TERMS 23 (Bryon A. Garner ed., 2001).

2. *In re Adoption of Carl*, 709 N.Y.S.2d 905, 907 (N.Y. Fam. Ct. 2000).

3. *Id.* at 907-08.

4. *Id.* at 909.

5. *See id.* (holding that the proposed adoption was in the child’s best interests, which is the determinative factor in deciding whether to grant an adoption petition).

6. *See infra* Part II.

7. *See infra* Parts III-IV.

8. *See infra* Part V.

adoption, an expanded interpretation of adoption statutes, and legislative amendments to increase the number of people who are eligible to adopt in order to reflect the modern, realistic composition of families.⁹ The proposal also offers criteria for evaluating joint petitions and explores the benefits for both the children who need permanent homes and the adults who wish to be their parents. Although adults may petition to adopt adults, this article focuses only on a different approach for who may adopt children because more than 100,000 children are available for adoption.

II. WHO MAY ADOPT A CHILD UNDER CURRENT STATUTES

In all states, statutes provide that the following persons may adopt a child: single persons, a husband and wife together, and stepparents.¹⁰ In addition, a few state courts also allow unmarried cohabitants to adopt a child.¹¹ Presently, a very small group of unmarried adults are allowed to adopt jointly by express statutory promulgation.¹² A few statutes expressly exclude certain groups of people from adopting any children.¹³ Section 63.042(3) of the Florida statute, for example, provides that same-sex persons whether single or in a committed relationship, may not adopt children in that state.¹⁴

III. WHO IS AVAILABLE FOR ADOPTION

Approximately 114,000 children are available for adoption annually from the child welfare system.¹⁵ At fifty-three percent, male children slightly outnumber the female children who are available.¹⁶ Their ages

9. See *infra* Part VI.

10. See, e.g., ALASKA STAT. § 25.23.020 (2009); ARIZ. REV. STAT. § 8-103 (LexisNexis 2008); D.C. CODE § 16-302 (2009); N.Y. DOM. REL. LAW § 110 (McKinney 2009).

11. Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993).

12. See VT. STAT. ANN. tit. 15A, §1-102(b) (2009); see also CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY, AND PRACTICE 126 (2006) (reporting that in states where unmarried adults are not permitted to adopt jointly, legislatures have reasoned that unmarried adults would be unable to provide the family stability or permanence that a child needs).

13. See MISS. CODE ANN. § 93-17-3 (2008) (prohibiting same gender adoptions); UTAH CODE ANN. § 78(B)-6-117(3) (West 2008) (excluding sexually involved unmarried cohabitants).

14. FLA. STAT. ANN. § 63.042 (LexisNexis 2008) (prohibiting all same-sex adoptions).

15. ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM, U.S. DEP'T OF HEALTH & HUMAN SERVS., PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006 5, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf [hereinafter ADOPTION AND FOSTER CARE].

16. *Id.*

range from under one-year-old to seventeen-years-old.¹⁷ They represent all races, but the largest groups are White (45,096), African American (40,840), and Latino (17,240).¹⁸ Only 51,000 of the available children are adopted each year from the child welfare system.¹⁹ Many of them, over 20,000 per year, will age out of the system because they will not be adopted before they reach the age of majority.²⁰

Many of the children who are available for adoption are classified as special needs children.²¹ They are children who are older than eight or nine. They are children of color. They are children with physical or mental disabilities or some other medical condition that requires extraordinary care.

IV. WHO ACTUALLY ADOPTS AVAILABLE CHILDREN

The previous section describes the children who are eligible for adoption in the United States. This section addresses who actually takes advantage of the opportunity to adopt some of the 114,000 children who are waiting to be adopted in any given year. In its most recent report, the United States Department of Health and Human Services' Administration for Children and Families reported that 51,000 children were adopted in 2007.²² Married couples adopted sixty-eight percent or 34,898 children.²³ Single females adopted twenty-seven percent or 13,822 children, while single males adopted three percent or 1,483 children.²⁴ Unmarried couples adopted two percent or 797 children.²⁵

Also, relatives and foster parents adopt many children. During the period between October 1, 2005 and September 30, 2006 more than forty percent of the adoptions that were finalized in Alaska (46%), California (46%), Hawaii (55%), Michigan (42%), and Oklahoma (44%) were relative adoptions.²⁶ During the same period, foster parents adopted more than fifty

17. *Id.*

18. *Id.*

19. *Id.* at 7.

20. *Id.*

21. See 26 U.S.C. § 23(d)(3) (2006) (defining special needs children); see also MABRY & KELLY, *supra* note 12, at 241 (citing other statutes which define special needs children).

22. ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN FOSTER CARE AND ADOPTION FY 2002-FY 2007 1 (2008), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm.

23. ADOPTION AND FOSTER CARE, *supra* note 15, at 8.

24. *Id.*

25. *Id.*

26. ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., PRIOR RELATIONSHIP OF ADOPTIVE PARENT(S) TO CHILD OCTOBER 1, 2005 TO SEPTEMBER 30, 2006 1 (2006), http://www.acf.hhs.gov/programs/cb/stats_research

percent of children who were adopted in forty states including the District of Columbia (90%), Illinois (99.9%), Massachusetts (99.3%), and Virginia (90%).²⁷ Other states, like Indiana (54%) and Minnesota (61.6%), reported a significant percentage of adoptions by adults who were unrelated to the children whom they adopted.²⁸ Many more adults have expressed an interest in adopting children, but barriers such as prohibitions on same-sex adoptions and joint adoptions prevent them from adopting a child.²⁹

Single women adopt thousands of children. These applicants' income, education levels, and occupations vary. They tend to have "a positive self-image and to have high expectations of themselves."³⁰ They also have "a high capacity for nurturing a child . . . and a high degree of sensitivity to the needs of children."³¹ Some of these single mothers are dependent upon their parents to help them with parenting the children whom they adopt.³² Yet they face social stigma that may prevent more single women from adopting children. Single women who choose to adopt a child without a nuclear family are viewed as selfish because they are not providing a father and an intact home for a child.³³ Some opponents contend that single parenting leads to social problems.³⁴

Some agencies and birth mothers do not accept applications from single adults. Others will accept a single person's application but favor a married couple when a child is eligible for placement.³⁵ Though single parent

/afcars/statistics/priorrel_tbl6_2006.htm.

27. *Id.*

28. *Id.*

29. See JEFF KATZ, & EVAN B. DONALDSON, ADOPTION INST., LISTENING TO PARENTS: OVERCOMING BARRIERS TO THE ADOPTION OF CHILDREN FROM FOSTER CARE 28 (2005) (quoting one woman who describes the potential adoptive parent orientation as welcoming to all, except same-sex applicants).

30. See Joan F. Shireman & Penny R. Johnson, *Single Persons as Adoptive Parents*, 50 SOC. SERV. REV. 103, 106-07 (1976) (indicating that single women who adopted children seemed to possess good coping skills to deal with problems and life's stresses).

31. *Id.* at 107-08.

32. *Id.* at 113.

33. See Martha Osborne, *Single Parent Adoption and Women*, <http://adoption.about.com/od/nontraditional/a/singleapar.htm> (last visited June 4, 2009) (describing how, unlike married adoptive couples, single mothers are not so readily lauded for their desire to pursue adoption).

34. *Id.*; See LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, THE COMPLETE ADOPTION BOOK: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD 129 (2d ed. 2000) (stating that statistically, single-parent families produce children with more social problems, but that these statistics are based on poor, undereducated teenage moms); MADY PROWLER, U.S. DEP'T OF HEALTH & HUMAN SERVS., SINGLE PARENT ADOPTION: WHAT YOU NEED TO KNOW 4 (1994), <http://www.harmony.cc/uploads/pdf/Single%20Parent%20Adoption.pdf>.

35. See PROWLER, *supra* note 34, at 4 (describing how some agencies will put applications from single applicants on the back burner while waiting to find a couple who wants to adopt).

adoption is gaining acceptance, many still espouse the traditional view “that a child needs a mother and a father for healthy growth and development,” citing mental health experts who believe “that the ‘ideal’ is to place a child in a two-parent home with a mother and father who are compatible and loving.”³⁶

Single women and unmarried same-sex persons are more likely to adopt special needs children. Some of them adopt special needs children because they are more willing to parent children who need extra care, and birth mothers favor married couples for healthy infants.³⁷ The Child Welfare League of America favors a more inclusive recognition of applicants that should be endorsed by others: “All applicants should have an equal opportunity to apply for the adoption of children, and should receive fair and equal treatment and consideration of their qualifications as adoptive parents, consistent with state and federal laws.”³⁸

V. CURRENT AUTHORITY RECOGNIZING JOINT ADOPTION

A few courts have addressed the issue of whether unmarried couples may adopt a child jointly.³⁹ Two questions arise when joint petitions are filed. The first question is whether the relevant adoption statute permits joint adoption.⁴⁰ If so, the second question becomes whether the proposed joint adoption would be in the child’s best interests.

To answer the first question, courts first analyze the plain language of the applicable adoption statute. Then, if they find that the language does not expressly provide for such adoptions, as is common in most of the statutes, the courts peruse the legislative history of the statutes to ascertain what the legislators intended when they wrote the statutory language. Finding no direction in the legislative history, courts have interpreted the language applying principles of either liberal construction or strict statutory construction.

36. *See id.* (discussing obstacles to single parent adoption, including tougher scrutiny).

37. *See Cynthia R. Mabry, Opening Another Exit from Child Welfare For Special Needs Children: Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida*, 18 ST. THOMAS L. REV. 269, 286 (2005) (providing results from a study of gays and lesbians that shows that ninety-five percent of 183 subjects adopted children who would be considered special needs).

38. *See* CHILD WELFARE LEAGUE OF AMERICA, STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES 56 (2000) (citing relevant considerations, including an applicant’s ability to successfully parent a child and an individual assessment of an applicant’s capacity to understand and meet the needs of a particular available child).

39. *See, e.g., S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 822 (Ky. Ct. App. 2008) (holding that a stepparent-like adoption cannot exist in harmony with Kentucky law).

40. *See id.* at 826 (criticizing the lower court for “blatantly disregard[ing] universal rules of statutory construction” when it held that adoption statutes should not be read literally in order to allow the adoption at issue).

A. The Liberalist Interpretation – Granting Joint Petitions

Several states including the District of Columbia, California, Indiana, Massachusetts, and Vermont have granted joint petitions to adopt that were submitted by heterosexual or same-sex couples who were not married.⁴¹ The analysis in cases interpreting those states' statutes is persuasive and instructive as we consider whether unmarried adults who are not involved in an intimate relationship should be permitted to adopt a child together.⁴²

Second parent adoption, also called co-parent adoption, involves "adoption of a child by her parent's non-marital partner, without requiring the first parent to give up any rights or responsibilities to the child."⁴³ It is distinguished from the concept of joint and shared parenting because not all prospective adoptive parents want to adopt a child who is the biological or adoptive child of a partner.

Both heterosexual and same-sex unmarried couples who are living together and committed to each other have been allowed to adopt children under a liberal construction of unclear or ambiguous statutes. All of the courts emphasize the primary goal and purpose of adoption—to create a new family for a child who needs a permanent home.⁴⁴ In analyzing the statutory language, these courts concluded that the adoption statute neither authorized nor prohibited two unmarried persons to adopt. The courts concluded that the phrases "any person" or "any adult" may adopt could be

41. See CAL. FAM. CODE § 9000 (West 2009); CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2008); D.C. CODE § 16-302 (2009); VT. STAT. ANN. tit. 15A, § 1-102(b) (2009).

42. See *Sharon S. v. Super. Ct.*, 73 P.3d 554, 558 (Cal. 2003) (reversing the lower court's grant to allow a birth mother to withdraw her consent to, and to terminate, the adoption by her former domestic partner); *In re* Petition of K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (holding that the Act must be construed to give standing to the unmarried persons in these cases, regardless of sex or sexual orientation, to petition for adoption jointly). See generally *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995); *In re* Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995); *In re* Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pa. 2002); *In re* Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).

43. See Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986). But see *Adoptions of T.K.J. and K.A.K.*, 931 P.2d 488, 490-91, 496 (Colo. Ct. App. 1996) (explaining that a "co-parent" adoption, in effect, grants the petitioner the rights and duties associated with "stepparent adoption"); *S.J.L.S.*, 265 S.W.3d at 815-16, 822-23 (denying a petition for a "step-parent like adoption" by a domestic partner); *In re* Adoption of Luke, 640 N.W.2d 374, 376 (Neb. 2002); *In re* Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994).

44. See, e.g., *In re* Adoption of Garrett, 841 N.Y.S.2d 731, 732 (N.Y. Sup. Ct. 2007) (recognizing that past jurisprudence was "predicated on the rationale that the relationship between the proposed adoptive parents is the functional equivalent of the traditional husband-wife relationship, albeit between same-sex couples or unmarried partners").

read in the plural form.⁴⁵

In *In re M.M.D. & B.H.M.*,⁴⁶ a seminal case on this issue, the District of Columbia Court of Appeals decided whether a same-sex couple that was living together in a "committed personal relationship" was eligible to adopt a child under the District of Columbia adoption statute.⁴⁷ If so, the court would also consider whether the couple could adopt the child jointly.⁴⁸ Section 16-302 of the District of Columbia Code provides that while any person may petition for a decree of adoption, the court will not consider the petition unless the petitioner's spouse, if he or she has one, also joins in the petition, "except that if either the husband or wife is a natural parent of the prospective adoptee, the natural parent need not join in the petition with the adopting parent, but need only give his or her consent to the adoption."⁴⁹ Initially, the court applied the general principle that "if a statute does not contain "a limiting adverb such as 'solely,' [it would not] imply such a restriction."⁵⁰

The legislative history of the statute was not instructive regarding whether joint petitions were permitted. The statute and the legislative history were silent as to whether unmarried couples could adopt a child in the District of Columbia.⁵¹ However, the legislative history did reveal a policy of inclusiveness. Therefore, the court concluded that based on District of Columbia adoption policies, liberal interpretations should be applied to the unclear and ambiguous adoption statute.⁵²

The Court of Appeals rejected strict construction that courts in other jurisdictions had applied to other state adoption statutes. The Court of Appeals found that, "strict construction would deny adoptions to unmarried couples simply because adoption as such was impossible at common law and, solely for that reason, should be precluded unless the statute expressly

45. See *In re M.M.D. & B.H.M.*, 662 A.2d at 846 (ruling that one of the main issues of the case was not whether more than one person may adopt a child, but rather whether in all instances when two persons seek to adopt they must be married to each other).

46. *Id.* at 840.

47. *Id.*

48. See *id.* (stating that if the court determined that a same-sex couple was living in a committed personal relationship, the next issue would be to determine whether the fact that one member of the couple already has adopted the child creates any impediment to both joining in the adoption).

49. D.C. CODE § 16-302 (2009).

50. *In re Adoption of M.A.*, 930 A.2d 1088, 1093 (Me. 2007).

51. See *In re M.M.D. & B.H.M.*, 662 A.2d at 854 (concluding that "the strict construction approach, like the expression *unius maxim*, does not offer a persuasive reason for precluding adoption by unmarried couples").

52. See *id.* at 844-46 (reiterating four general rules for liberal statutory interpretation).

recognizes a particular adoptive relationship.”⁵³ Not persuaded by other courts’ opinions, the District of Columbia Court of Appeals decided that a mechanical application of strict construction principles was not a persuasive basis for precluding unmarried couples from adopting children.⁵⁴

Next, the court considered the policy that underlies the adoption process, which is “to provide a loving, nurturing home that pursues the best interests of the adopted child.”⁵⁵ The court then considered a myriad of benefits that the adoptee and the adoptive parents would receive upon adoption.⁵⁶ Finally, it concluded that it was “satisfied that the paramount statutory purpose—the ‘best interests’ of the adoptee—will be best served, and that no other affected interests protected by the statute will be ill served, by a liberal, inclusive interpretation” of the statute by ruling that “unmarried couples, whether same-sex or opposite-sex, who are living together in a committed personal relationship, are eligible to file petitions for adoption under [section 16-305].”⁵⁷ The court decided that the legislature did not intend to impose a restriction to bar petitions to adopt from unmarried persons.⁵⁸ Accordingly, in the District of Columbia, unmarried couples would be included in the group of persons who may adopt jointly.⁵⁹

Many of the cases in which courts have granted joint petitions for unmarried couples to adopt were decided in New York. *In re Adoption of Joseph* involved an unmarried heterosexual couple’s petition to adopt their foster child.⁶⁰ They were cohabitants who had parented the child together for three years.⁶¹ The couple had successfully maintained a relationship together for twenty-nine years.⁶² The court opined that the issue of a joint petition was a question for the legislature, but nonetheless granted the

53. See *id.* at 853 (recognizing “an overriding need to effectuate [the adoption statutes’] beneficial purposes”).

54. *Id.*

55. See *id.* at 857 (delineating the steps that must be taken in order for best interests of the child to be truly realized: “(1) transferring to the adoptive parent all legal rights, duties, and consequences of the parental relationship, (2) severing the rights and obligations of any natural parent who no longer will have custody of the child, and (3) determining all other legal effects of the adoption upon the families of the natural parents and the adoptive parents”).

56. See *id.* at 858-59 (listing as a benefit the protection of Hillary in the event of Bruce’s death, since Mark would be entitled to be Hillary’s guardian).

57. *Id.* at 859.

58. See *id.* at 851 (holding that statutory language might be fairly understood to comprehend various scenarios, though only some are expressly mentioned by way of example).

59. *Id.* at 853.

60. 684 N.Y.S.2d 760, 760 (N.Y. Sup. Ct. 1998).

61. *Id.* at 761.

62. *Id.*

petition because the Court of Appeals had granted another unmarried couple's second parent adoption petition.⁶³ Thus, there was "no valid reason not to extend that right to foster parents, albeit unmarried."⁶⁴

In *In re Adoption of Carl*, an unmarried man and woman who were living together filed a joint petition to adopt a child who was not related to them.⁶⁵ At an adoption agency's request, the couple had served as the child's foster parents for four years.⁶⁶ Although they chose not to marry, the couple had been life partners for twenty-four years.⁶⁷ The issue before the court was "whether the petitioners, two unmarried adults, may jointly adopt a child who is the child of neither of them."⁶⁸

First, the court looked at whether the statute allowed such an adoption. It concluded that section 110 of the New York adoption statute expressly permitted "[a]n adult unmarried person or an adult husband and his wife together . . . [or] [a]n adult married person who is living separate and apart from his or her spouse . . . [in accordance with a legal separation order] or has been living separate[ly] and apart from his or her spouse for at least three years" to adopt a child.⁶⁹ The statute clearly permitted married persons, unmarried adults, stepparents, and separated persons to adopt children in New York.⁷⁰ The court cited other precedent that had held that the word "together" in the statute did not mean that only married couples could jointly adopt a child.⁷¹ Accordingly, it held that Section 110 did not expressly prohibit unmarried joint adoptions.⁷² The court reasoned that two unmarried petitioners who were willing and able to parent Carl and provide him with a permanent and stable home should be able to adopt him. The single woman's male partner was functioning as the child's legal parent.⁷³ The adoption was in Carl's best interests. The court further reasoned that "[t]o deny the adoption would . . . create a family with two unmarried parents only one of whom would be allowed to formalize his or her

63. *See id.* (citing the "best interests" of the child as justification for its ruling).

64. *See id.* (citing *In re Jacob*, 660 N.E.2d 397, 414 (N.Y. 1995)).

65. 709 N.Y.S.2d 905, 906 (N.Y. Fam. Ct. 2000).

66. *Id.*

67. *Id.*

68. *Id.* at 907.

69. N.Y. DOM. REL. LAW. § 110 (McKinney 2009).

70. *See In re Adoption of Carl*, 709 N.Y.S.2d at 908-09.

71. *See id.* at 909 (applying the word "together" only to married persons, which would not preclude unmarried persons from adopting).

72. *Id.*

73. *Accord In re Adoption of M.A.*, 930 A.2d 1088, 1097 (Me. 2007) (affording the strong parental structure present similar weight in determining that adoption served the children's best interests); *In re Adoption of Joseph*, 684 N.Y.S.2d 760, 761 (N.Y. Sup. Ct. 1998).

parental relationship with Carl. Such a result would be contrary to . . . provid[ing] the child with emotional stability and permanency.”⁷⁴

In the same year that *Carl* was decided, two more unmarried petitioners filed an application to adopt a boy named Emilio. In *In re Adoption of Emilio R.*, Emilio’s maternal great-aunt and her unmarried heterosexual partner had lived together for twenty years.⁷⁵ They wanted to adopt Emilio after the death of his grandmother, who had cared for Emilio after a court terminated his birth mother’s parental rights upon finding that she was incapable of caring for him.⁷⁶ When they filed the petition, they had raised Emilio with their biological son and treated Emilio as if he were their son since he was sixteen months old.⁷⁷ Furthermore, the boys considered themselves brothers and Emilio viewed his aunt’s partner as the “father he never had.”⁷⁸

The Family Court denied the petition based on concerns that often are expressed about unmarried persons who file petitions to adopt children—the adoption “would not promote the child’s sense of permanency or emotional stability”⁷⁹ On the contrary, the appellate court ruled that the statute did not prohibit adoption by an unmarried couple when neither of the adults was the child’s biological parent.⁸⁰ The court reasoned that there was a blood relationship between one of the prospective parents and that the couple had provided a “nurturing family setting.”⁸¹ “If the goal is indeed to encourage a familial permanency through adoption, it is difficult to imagine a more suitable set of eligible parents than petitioners,” stated the court, noting that there was no basis in law or fact for the Family Court to have so grossly ignored the best interests of Emilio in light of petitioners’ “good faith and exemplary parental performance.”⁸²

In 2004, following the *Carl* opinion, another New York court also decided that the state adoption statute did not present an impediment to an unmarried couple’s joint adoption of a child.⁸³ The court reasoned that the

74. *In re Adoption of Carl*, 709 N.Y.S.2d at 910 (citations omitted).

75. 742 N.Y.S.2d 22, 28 (N.Y. App. Div. 2002).

76. *See id.* (noting that Emilio had been under the custody of the petitioners for more than thirteen years).

77. *Id.*

78. *Id.*

79. *See id.* (finding error in the Family Court’s holding that the petitioners’ lacked standing due their common law marriage, and that the non-inclusion of such status in the adoption statute was a disqualifying factor).

80. *Id.* at 30.

81. *Id.*

82. *Id.*

83. *See In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 229-30 (N.Y. App. Div. 2004) (finding that under a joint adoption scheme, the two petitioners could avoid having to obtain costly separate adoptions that would leave the child with only a single

two women who had engaged in a commitment ceremony had been “functioning jointly” as the child’s parents and were seeking to create a legal relationship that permanently reflected the reality of their family situation.⁸⁴

More recently, courts in Indiana and Maine have addressed this issue. In 2006, in *R.K.H. v. Morgan County Office of Family and Children (In re Infant Girl W.)*, the issue presented to the Court of Appeals of Indiana was “whether the Indiana Adoption Act permits an unmarried couple—any unmarried couple, regardless of gender or sexual orientation—to file a joint petition for adoption.”⁸⁵ The child had been placed with licensed foster parents who had been living together in a committed relationship for more than eleven years.⁸⁶

First, the court of appeals ruled that “statutory construction is a matter of law reserved for the court[.]” but when a statute is unambiguous, no interpretation can be made.⁸⁷ The court is obligated to “apply its plain and clear meaning.”⁸⁸ The Indiana adoption statute provides that an Indiana resident may file a petition to adopt a child, and that married persons must adopt jointly.⁸⁹ The statute is silent, however, as to whether single persons may adopt jointly.⁹⁰ The court ruled that “[i]t is a well-settled rule of statutory construction that words used in their singular also include their plural.”⁹¹ Thus the term “resident” in the statute could be read to include “residents.”⁹² Therefore, “under the Indiana Adoption Act, an unmarried couple may file a joint petition to adopt a minor child.”⁹³ Furthermore, the court held that its decision was consistent with a 2003 decision allowing second parent adoption based on the benefits of a two-parent household.⁹⁴

In *In re Adoption of M.A.*, a 2007 case, a same-sex couple filed a joint petition to adopt two foster children who had been living in their home for

parent while the second adoption was being finalized).

84. *Id.* at 230.

85. 845 N.E.2d 229, 233 (Ind. Ct. App. 2006).

86. *See id.* (pointing out that the petitioners were licensed foster parents who had cared for the child since she was two days old).

87. *Id.* at 242.

88. *Id.*

89. IND. CODE ANN. § 31-19-2-2(a) (West 2009).

90. *See* § 31-19-2-4 (including consent requirements that only applied to married persons).

91. *R.K.H.*, 845 N.E.2d at 242.

92. *Id.*

93. *Id.* at 243.

94. *See id.* at 242 n.7 (citing *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003)) (upholding a woman’s petition to jointly adopt her same-sex partner’s three adopted children).

two years.⁹⁵ Both children were special needs children suffering from post-traumatic stress disorder, reactive attachment disorder, and attention deficit and hyperactive disorder.⁹⁶ The prospective adoptive parents were not related to the children. The children's guardian ad litem, the Department of Health and Human Services' adoption worker, and its adoption supervisor filed recommendations in support of the petition.⁹⁷ Still, the Probate Court denied the petition because it concluded that it lacked jurisdiction under the adoption statute to consider the application.⁹⁸ The court strictly construed section 9-301 of the Maine statute which provided that a "husband and wife jointly or an unmarried person, resident or nonresident of the State, may petition the Probate Court to adopt a person, regardless of age, and to change that person's name."⁹⁹

The Supreme Judicial Court of Maine considered the question of "whether a joint petition for adoption filed by two unmarried persons is procedurally barred because the statute addresses joint petitions only in connection with a husband and wife, but not in connection with two unmarried persons."¹⁰⁰ Like the Indiana court, the Maine court concluded that the Maine adoption statute was silent with respect to joint adoptions by unmarried applicants.¹⁰¹ Examining the plain meaning of the statute, the court decided that the statute was ambiguous and it did not include an express restriction that would disqualify joint petitions by unmarried persons.¹⁰² "[I]f we infer that section 9-301 prohibits joint petitions by unmarried persons, but does not prohibit joint adoption by two unmarried persons, unmarried persons can still accomplish a joint adoption through successive or consolidated individual petitions," explained the court, noting that construing the statute to prohibit joint petitions by unmarried persons would "elevate[] form over substance to an illogical degree."¹⁰³ Finally, the court determined that Maine's adoption statute should be liberally

95. 930 A.2d 1088, 1090 (Me. 2007).

96. *Id.*

97. *See id.* (indicating that the guardian ad litem and Department adoption workers felt adoption was in the children's best interests).

98. *Id.* at 1091.

99. ME. REV. STAT. ANN. tit. 18A, § 9-301 (2008).

100. *In re Adoption of M.A.*, 930 A.2d at 1091.

101. *See id.* at 1092-93 (rejecting the petitioner's assertion that a statutory rule of construction of section 9-301 would cause the term "unmarried person" in the statute to include the plural "unmarried persons").

102. *See id.* at 1093 (refusing to narrowly construe the statute in the absence of a limiting adverb such as "solely").

103. *See id.* (specifying that the couple could file separate individual petitions for adoption and move to consolidate the petitions for a single proceeding or one of them could file a petition and when that petition is granted, the other parent could file a second adoption petition).

construed to promote the state's underlying policy—"to protect the rights and privileges of the child being adopted."¹⁰⁴ Thus, section 9-301 did not prohibit two unmarried persons from filing a joint adoption petition.¹⁰⁵

B. The Strict Interpretation – Denying Joint Petitions

Several courts have applied strict construction when answering the question of whether two unmarried persons may adopt jointly.¹⁰⁶ They have held that because an adoption statute does not expressly provide for certain types of adoption, those petitions cannot be granted.¹⁰⁷ Changing the statute is a legislative matter, not a matter of interpretation for the courts.

In *In re Jason C.*, a man and a woman were foster parents for a child for two years before the man and woman divorced.¹⁰⁸ After the divorce, the man continued to spend time with the child and to support the child financially. The woman, now a divorcee, filed a petition to adopt the child. Afterward, the man filed a separate petition to join in the adoption.¹⁰⁹ The trial court denied the petition because the New Hampshire adoption statute did not authorize it to issue a joint adoption decree for two unmarried adults.¹¹⁰ On appeal, the man argued that since the statute allowed "an unmarried adult" to adopt, the term "adult" should be construed to mean "adults."¹¹¹ He further argued that courts should interpret adoption statutes "to facilitate the adoption of children by removing 'arbitrary and broad restrictions' on who could adopt and to enable the courts to respond to the varied circumstances of individual cases."¹¹² The Supreme Court of New Hampshire affirmed the trial court's decision.¹¹³ It ruled that construing the state's adoption statute to allow the probate court to entertain the adoption petition from two unmarried adults would be contrary to legislative intent.¹¹⁴ To reach this conclusion, the New Hampshire Supreme Court examined the language of the statute regarding categories of petitioners eligible to adopt. The statute stated that "an 'unmarried adult,' and the

104. *Id.* at 1096.

105. *Id.* at 1098.

106. *See, e.g., In re Jason C.*, 533 A.2d 32 (N.H. 1987).

107. *See, e.g., In re Adoption of Garrett*, 841 N.Y.S.2d 731, 733 (N.Y. Sup. Ct. 2007).

108. 533 A.2d at 32.

109. *See id.* at 33 (explaining that the foster mother would oppose the foster father's petition if he sought to obtain standing to request physical custody in the future).

110. *See id.* (construing the language of the statute literally).

111. *Id.*

112. *Id.* (citations omitted).

113. *Id.* at 34.

114. *Id.* at 33.

‘unmarried father or mother of the individual to be adopted,’” may petition, and that “[m]arried applicants must apply jointly with their spouses, however, except under narrowly limited circumstances.”¹¹⁵

The court stated a preference for married couples who were living together. “We may infer, then, that it was the legislature’s intent to confine adoption to applicants who will probably provide a unified and stable household for the child. This objective is not likely to be served by authorizing two unmarried applicants to adopt jointly.”¹¹⁶

In August 2007, a New York court refused to interpret the same adoption statute that it had liberally construed in *In re Adoption of Carl*, *In re Adoption of Joseph*, and other cases, to allow joint petitioners who were not intimately involved to adopt a child.¹¹⁷ *In re Adoption of Garrett* was decided almost twenty years after *In re Jason C.* in New Hampshire.¹¹⁸ After the child’s parents divorced, the child lived with his biological mother and her biological brother, the child’s uncle, in New York.¹¹⁹ After living together for approximately eight months, the sister and brother filed a joint petition to adopt the sister’s child. The child’s biological father consented to the adoption.¹²⁰ The court acknowledged that “adoption law had undergone a significant transformation” because same-sex couples and unmarried heterosexual couples had been allowed to adopt children in the State of New York.¹²¹

The court reiterated that the purposes of adoption were “providing the best possible home for the child or giving legal recognition to an existing family unit.”¹²² However, the court declined to expand current adoption principles “to virtually unlimited boundaries” to allow a biological parent and another member of her family to adopt the parent’s child.¹²³ It refused to expand prior holdings that allowed same-sex and unmarried heterosexual couples to adopt because of what it described as a notable distinction between a sister and brother petition and its holdings in earlier decisions.¹²⁴

115. *Id.*

116. *See id.* at 33-34 (expressing concern about the difficulty in deciding where the child would live since the couple had previously divorced).

117. *In re Adoption of Garrett*, 841 N.Y.S.2d 731, 733 (N.Y. Sup. Ct. 2007).

118. *Id.*; *In re Jason C.*, 53 A.2d at 32.

119. *In re Adoption of Garrett*, 841 N.Y.S.2d at 732.

120. *Id.*

121. *Id.* (citing *In re Adoption of Carl*, 709 N.Y.S.2d 905 (2000) and *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995)).

122. *Id.* at 733.

123. *Id.*; *See Decisions of Interest, Man Can’t Adopt Sister’s Child While She Remains Legal Parent*, 9 N.Y. FAM. L. MONTHLY 7 (Oct. 2007) (noting the lack of precedent for this decision and the court’s unwillingness to stretch the existing adoption case law).

124. *See In re Adoption of Garrett*, 841 N.Y.S.2d at 732-33 (concluding that the

The court held that all of the previous cases involved situations in which "the relationship between the proposed adoptive parents is the functional equivalent of the traditional husband-wife relationship."¹²⁵ Moreover, the court ruled, it would not allow this additional type of adoption without direction from a "higher court," indicating that the interested parties should seek declaratory relief elsewhere in the New York court system.¹²⁶

VI. ANALYSIS: EXPANDING THE NOTION OF FAMILY FOR PARENTLESS CHILDREN

Already, family members across the county are either living together, or in close geographic proximity to each other, and are successfully parenting children. In fact, some have done so longer than some married couples that have raised children in an intact marriage. More states should interpret adoption statutes to allow these adults to adopt without the current strictures imposed on unmarried persons who want to adopt a child.

A. An Additional Model of Family for All Waiting Children

The American Bar Association supports the concept of joint adoption.¹²⁷ It announced its support for "state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child."¹²⁸ For these purposes, joint adoption would be defined as when two or more unmarried adults, who may or may not be related to a child, adopt a child together. No involvement in a romantic/sexual relationship or cohabitation would be required.

Professor Angela Mae Kupenda advocates that two single adults who are not romantically involved or in a "traditional marriage relationship" should be permitted to adopt a child jointly.¹²⁹ In 1997, Professor Kupenda

brother-sister relationship does not implicate the same rationale, mimicking the "ideal" family, as previous cases had).

125. *Id.* at 732.

126. *Id.* at 733.

127. ABA Center of Children and the Law, *Joint and Second Parent Adoptions* (Aug. 2003), <http://www.abanet.org/child/foster-adopt.shtml> (last visited on June 5, 2009).

128. *Id.*

129. Angela Mae Kupenda, *Two Parents Are Better than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 703 (1997).

proposed this additional model for adopting African American children.¹³⁰ Any two single adults who share a “close committed bond” who qualified individually could adopt a child together.¹³¹ The proposal was based on the extended family model of raising children that always has existed in the African American family. That is, traditionally, many people other than a child’s biological parents, including extended family members and unrelated people, help to raise African American children.¹³²

Professor Kupenda contends that informal adoption and the extended family concept are African traditions that Africans continued when they were enslaved and brought to the United States.¹³³ In Africa, multiple adults raised children. “Parenting was shared by the extended family and friends, with multiple adults filling the parental role.”¹³⁴ The practice continued when African parents were permanently separated from their child and other adults took over the role of parent for the parentless child.¹³⁵

Professor Kupenda posits that “two single, black co-parents are certainly better than no parents”¹³⁶—the only alternative that will exist for too many children who are available for adoption. Professor Kupenda supported her theory with four points: 1) there is a stigma associated with single parenting, especially for African American women and men; 2) a single person may not have the financial resources for making a long-term commitment to care for a child, and pooling resources will enable single adoptive parents to “provide greater stability and security [for a child];” 3) many African Americans already are caring for children whom they have informally adopted; and 4) thousands of African American children will not be adopted because of racism and cultural misunderstandings.¹³⁷

Professor Kupenda’s novel approach to adoption should be expanded to apply to all children who are available for adoption, not just African

130. *See id.* (advancing that under this model, “two friends, two sisters, two brothers, a sister and a brother [and so on] could jointly adopt and co-parent a child”).

131. *Id.* at 705.

132. *See id.* at 705, 707 (emphasizing that this model was not intended to replace the present system but could work for African Americans as it reflected the reality of raising children in the black community). *See generally* Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1658 (1995) (noting that there is a long history of extended family members helping to raise African American children).

133. Kupenda, *supra* note 129, at 711-12.

134. *Id.* at 712.

135. *Id.*; *see* Holmes, *supra* note 132, at 1660-65 (describing the history and sociology of the experiences of the black extended family unit).

136. Kupenda, *supra* note 129, at 706.

137. *See id.* at 708-10 (noting that scholars suggest that the continued reliance on the traditional model is racist and oppressive, reflecting a preference for the white, heterosexual traditional family structure).

American children. African American children are the second largest group of children who are available for adoption, but a significant number of White and Latino children who are available for adoption could also benefit from Kupenda's model.¹³⁸

In adoption, the child's best interests are of paramount concern, so an advocate for joint parenting must begin with the benefits of joint adoption from a child's perspective. The child will have two legal parents, which means that the child would have certain rights and may be eligible for certain economic and non-economic benefits that the child would not be entitled to absent an adoption. The Supreme Judicial Court of Maine summarized the benefits of allowing two unmarried persons to adopt a child in a single petition:

A joint adoption assures that in the event of either adoptive parent's death, the children's continued relationship with the surviving adoptive parent is fixed and certain. A joint adoption also enables the children to be eligible for a variety of public and private benefits, including Social Security, worker's compensation, and intestate succession, as well as employment benefits such as health insurance and family leave, on account of not one, but two legally recognized parents. Most importantly, a joint adoption affords the adopted children the love, nurturing, and support of not one, but two parents.¹³⁹

Allowing adults who already care for children and those who want to care for a child to jointly adopt a child also means that the adoptive parents will have certain rights and responsibilities. As adoptive parents they would receive all of the rights and responsibilities of parenting a child as if the child were their biological child. Thus, they will be recognized as the child's legal parents and have the same rights and obligations as a biological parent.¹⁴⁰ They will have joint decision-making authority to determine where the child will be educated, the child's religious upbringing, and decisions about the child's medical care. They will have authority to claim the child dependency exemption and other tax benefits. They will have standing to sue for custody or access to the child if one of the parents dies or there is a breakdown in the relationship. Their consent will be required before the child could be adopted by anyone else.¹⁴¹

In addition, the new parents will have obligations to the child. As any other parents would, they will be obligated to cover the child under their insurance policy. They will have an obligation to meet the child's basic

138. ADOPTION AND FOSTER CARE, *supra* note 15, at 2.

139. *In re Adoption of M.A.*, 930 A.2d 1088, 1097 (Me. 2007).

140. *See Carter v. Carter*, 546 S.E.2d 220, 221 (Va. Ct. App. 2001) (concluding that the stepparent becomes a joint guardian of the child who is jointly responsible for decision-making and for support).

141. MABRY & KELLY, *supra* note 12, at 578-80.

needs for food, shelter, and clothing.¹⁴²

Two parents are better than one. Certainly there are many single women and men who successfully have raised their children. According to the most recent Census Report, millions of children are living with one parent.¹⁴³ More than two million children live with two unmarried parents.¹⁴⁴ The benefit for children in foster care of allowing joint-adoption is that they will have two adults to care for them, so if one parent becomes incapacitated or dies, someone else will be there to provide the care and support that the child needs. Agencies that have been reluctant to certify single women should expand the pool of prospective adoptive parents by recruiting more qualified single persons to adopt and allowing single persons to adopt a child together. "Having two legal parents forever will clearly be in the children's best interests."¹⁴⁵

As Professor Kupenda noted, the joint parenting model already exists outside the courts.¹⁴⁶ Many single parents already rely upon others to help them to raise their children. In certain cultures, such as the African American, Latino, and Indian cultures, adults customarily take children into their home and informally adopt them as their own.¹⁴⁷ Sometimes the care that is provided is temporary, other times the adults care for the child together until he or she reaches the age of majority. Some of these adult caregivers would adopt the child if they were allowed to do so.

Widespread endorsement of joint adoption plans across the United States will protect children and the adults who care for them. It also will ensure that valid adoption orders entered in one state will be recognized in another state if the family decides to relocate or to spend a significant period of time in another state.¹⁴⁸ Joint adoption should be more widely recognized

142. See *id.* (explaining that generally, the joint adoptive parents will have equal responsibilities for the care, nurture, welfare, education, and support for the adopted child).

143. Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, 50 Million Children Lived with Married Parents in 2007 (July 28, 2008), available at http://www.census.gov/Press-Release/www/releases/archives/marital_status_living_arrangements/012437.html.

144. *Id.*

145. See *In re Adoption of M.A.*, 930 A.2d 1088, 1090 (Me. 2007) (quoting the guardian ad litem's recommendation for a second parent adoption in Maine) (internal citations omitted).

146. See Kupenda, *supra* note 129, at 712 (stating that support from others, those outside of the nuclear family, is considered critical and is respected in African American families).

147. Angela Mae Kupenda et al., *Aren't Two Parents Better Than None: Contractual and Statutory Basics for a "New" African American Co-Parenting Joint Adoption Model*, 9 TEMP. POL. & CIV. RTS. L. REV. 59, 59-61 (1999) [hereinafter Kupenda et al., *Aren't Two Parents*].

148. See *Adar v. Smith*, 591 F. Supp. 2d 857, 860, 862 (E.D. La. 2008) (finding violation of the Full Faith and Credit Clause, which guarantees that any state's valid

because it will mean that more children will be placed in permanent homes with qualified adults who can and are willing to care for them. The possibility of joint adoption would provide a “greater incentive for other unmarried persons to undertake the profound and difficult responsibility of serving as pre-adoptive foster parents for young children with significant special needs,” because absent such an incentive “there will be fewer homes for such children.”¹⁴⁹

B. Additional Best Interests Criteria for Joint Adoptions

All states have promulgated statutes which enumerate criteria for ascertaining whether an adoption would be in a child’s best interests.¹⁵⁰ To ascertain whether two or more unmarried adults who are not romantically linked may adopt a child together, further inquiry must be made to ascertain whether the applicants would provide a safe, secure and suitable home for a particular child.

In addition to the typical best interest analysis, other criteria should be examined when joint petitions are filed. The additional criteria should include, but not be limited to, a home assessment that addresses the following concerns:

- The petitioners’ demonstrated commitment to shared parenting;
- The love, affection, and emotional bond between the child and the adults who want to adopt the child;
- Whether each petitioner is or will function as a parent;
- Whether the petitioners and the child are a part of an established family unit;
- The extent and length of shared parenting before the petition was filed;
- The petitioners’ ability/capacity to make decisions together;
- The petitioners’ parenting styles;
- The child’s preference;
- The petitioners’ relationship to each other and the likelihood that a cooperative relationship will continue; and,
- The petitioners’ living arrangement.

A Delaware court considered the following criteria to ascertain whether a person was functioning as a child’s parent. Under its definition, an adult should be considered the child’s parent when he or she:

Has assumed the obligations of parenthood by taking significant

adoption decree must be honored by every other state).

149. *In re Adoption of M.A.*, 930 A.2d at 1098.

150. *See, e.g.*, DEL. CODE ANN. tit. 13, § 722 (2009) (instructing courts to consider relevant factors, including the wishes of the child and his or her parents).

responsibility for the child's care, education and development—including the child's support, without the expectation of financial compensation.

Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship that is parental in nature.

Has helped to shape the child's daily routine by addressing developmental needs, disciplining the child, providing for the child's education and medical care and serving as a moral guide.

Has on a day to day basis, through interaction, companionship, interplay, and mutuality, fulfilled the child's needs for a psychological adult who helped fulfill the child's needs to be loved, valued, appreciated and received, as an essential person by the adult who cares for him.¹⁵¹

I. No Requirement for Marriage

A marriage license, while an acceptable ground for consideration, should not be a requirement when two willing and suitable adults want to provide a permanent home for a child. Many couples who seek to adopt children jointly have been living together longer than some couples have been married. One author calls favoring married couples in the adoption process "legal racism."¹⁵² Stability for a child cannot be determined on the basis of marital status. There are unmarried couples, family members, and friends who have been committed to each other for decades. Many join together to parent children informally. "Marriage should matter less" as courts determine whether two adults should be allowed to adopt a child.¹⁵³

Marital status does not guarantee a forever family. The current divorce rate among heterosexuals is forty-three percent.¹⁵⁴ Moreover, some married persons who have adopted one or more children have divorced after adopting the children, so marriage does not guarantee stability for adoptees.¹⁵⁵

151. *In re Hart*, 806 A.2d 1179, 1187-88 (Del. Fam. Ct. 2001).

152. See Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 237 (1988) (claiming that the legal bias against non-traditional family arrangements amounts to racism because racial and ethnic minorities often choose such arrangements).

153. Nancy Polikoff, Professor, Washington College of Law, Presentation at the American University Journal of Gender, Social Policy & the Law Symposium: Valuing All Families Under Law (Jan. 26, 2009), available at <http://media.wcl.american.edu/Mediasite/Viewer/?peid=27332bf5-ebc8-49a4-baa8-939be5a006f3>.

154. CDC NAT'L CTR. FOR HEALTH STATISTICS, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 17 (2001), <http://www.cdc.gov/nchs/data/ad/ad323.pdf>.

155. *Compare Celebrity Adoptions: Tom Cruise and Nicole Kidman*, <http://www.virginmedia.com/homefamily/relationships/celebrity-adoptions.php?ssid=4> (last visited June 5, 2009) (detailing the couple's adoption of two children), with Daniel

2. *No Requirement for a Romantic or Marriage-like Relationship*

Similarly, a romantic relationship should not be required for joint adoption. Some prospective adoptive parents will not be involved in a sexual or romantic relationship with the person with whom they want to adopt a child. The applicants could be relatives or good friends. Many friendships outlast marital relationships.

3. *No Unreasonable Limits on the Number of Petitioners Who May Join in a Petition*

Some courts have held that to allow unmarried persons to file joint petitions will result in an indefinite number of persons who could join in a single petition to adopt a child.¹⁵⁶ Allowing an unlimited number of persons to join to adopt a child may be catastrophic for the willing prospective adoptive parents as well as the child. Also, because it has been a decade-long struggle to get legislatures and courts to recognize two adults who want to parent a child together, perhaps it would be more plausible to suggest that the number of petitioners be limited to two adults in most instances.

On the other hand, an exception may be warranted in some cases. For example, two sisters who live with their brother may petition to adopt their ten-year-old nephew. All three adults are devoted to raising the child and this way the child will have female and male role models while feeling the love of all three adults. The child will be able to inherit from all of them and to receive additional benefits such as medical benefits from one or more of them. An alternative would be foster care where he would have multiple placements and there is a high probability that he would age out of the system without being adopted. Indeed, under this joint adoption model, a child really could have two mothers, two dads, two mothers and a dad, or any number of different configurations.

4. *No Necessity for a Contractual Agreement*

Professor Angela Mae Kupenda who originally called for joint adoptions between adults who parent African American children in the extended

Jeffreys, *The Wife Who Tired of Cruise Control*, DAILY MAIL (London), Feb. 7, 2001, at 8, available at <http://www.rickross.com/reference/scientology/scien278.html> (reporting the couple's divorce three years after adoption).

156. See, e.g., *In re Adoption of M.A.*, 930 A.2d 1088, 1092 (Me. 2007). But see 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 (1990) [hereinafter Polikoff, *This Child*] (noting how courts have recognized that adoption statutes are unable to protect children from family structures changing away from the traditional model).

family tradition¹⁵⁷ later joined with other professors to recommend that unmarried joint petitioners enter into a contractual arrangement “to better assure a similar commitment between the coparents . . . and aid [them] in thinking through and planning for their own unique needs and sharing parenting roles and dynamics.”¹⁵⁸ The proposed contractual terms would include “mutual assent,” and a “mutual exchange of promises.”¹⁵⁹

The contractual requirement that Professor Kupenda and her colleagues propose should not be a requirement for joint petitioners. The adoption process is already complex and very convoluted. Requiring a contract will cause further delay and increase expenses because employment of attorneys and others may be necessary to ensure that the contractual provisions are enforceable.¹⁶⁰ Whatever process states adopt to evaluate adoption petitions and the petitioners, it should be designed to ensure that children will be placed in permanent homes that meet their needs as early as possible. Requiring the parties to enter into a contract does not further that goal.

VII. CONCLUSION

More than a decade has passed since a New Jersey Court noted that the non-traditional type of family unit was becoming an increasing phenomenon.¹⁶¹ As other courts have observed, current definitions of family were formulated in the early 1900s. At that time, the legislature could not have contemplated that same-sex adults would file petitions to adopt children.¹⁶² Certainly, during those times, many different configurations of family were not contemplated either. Accordingly, just as courts decided to expand the definition of family to permit unmarried couples to adopt, so should they expand the list to include other types of families. To fail to acknowledge these families would create an absurd and

157. See Kupenda, *supra* note 129, at 711-12 (describing how the African American tradition makes co-parenting structures particularly suitable for African American children).

158. Kupenda et al., *Aren't Two Parents*, *supra* note 147, at 71-72.

159. *Id.* at 72-73.

160. See *In re Adoption of M.A.*, 930 A.2d at 1097 (noting that the ability to file joint petitions of adoption saves parties the burden of proceeding through separate petitions with the added cost and delay that arise from a more complex process).

161. See *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 540-41 (N.J. Super. Ct. App. Div. 1995) (holding that the relationship served the best interests of the child and thus deserved legal protection, despite the public's disapproval of the family's non-traditional structure).

162. *In re M.M.D. & B.H.M.*, 662 A.2d 837, 857 (D.C. 1995); *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993); *In re Adoptions of B.L.V.D. and E.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993); see Polikoff, *This Child*, *supra* note 156, at 524 (recognizing that legislatures likely did not consider non-traditional adoptions when the adoption laws were drafted).

unreasonable result.¹⁶³

Nineteen years ago, in *In re M.M.D. & B.H.M.*, the District of Columbia Court of Appeals explicitly noted that it was not deciding whether three siblings who were living together or two persons who were not living together could adopt a child.¹⁶⁴ It is time for courts to reinterpret adoption statutes so that existing families like these may be formalized and that more families can be created for children who need them. The current distinctions like the one made by the court in *In re Garrett* are absurd. Recent opinions like those in *In re Infant Girl W.* in Indiana and *Adoption of M.A.* in Maine support the joint adoption concept while the court in *In re Garrett* took a giant step away from embracing such adoptions in the State of New York when it denied the sister/brother petition.

Other courts have been concerned that the legislature has not expressly permitted joint adoptions and have been reluctant to grant those petitions absent a proper legislative amendment.¹⁶⁵ For that reason, state legislators must be urged to promulgate legislation and agencies must implement procedures to create more families for children. Meanwhile, because the process of amending legislation takes months, more courts should apply a liberal construction to adoption statutes so that qualified adults may adopt children even if they are not married and even if they do not live together in a romantic relationship. The strict statutory construction that ignores the configuration of the current family structure robs children of two parents.

Alternatives to joint parenting certainly would include second parent adoption (when it is permitted in a particular state), guardianship, establishment of a power of attorney, a will that provides for the child upon the caretaker's death, and a shared parenting agreement.¹⁶⁶ However, none of those options is satisfactory for a child in foster care or the persons who are caring for the child.

Furthermore, these alternatives are not in the child's best interests because the child will not have two adults who are his or her legal parents. Courts have opined that when joint petitions are not allowed, it causes the

163. See generally Jason N.W. Plowman, Note, *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, 58-59 (2008) (arguing that failing to recognize some family relationships denies children support and the legal protection of both their parents).

164. See 662 A.2d at 846 n.5 (noting that a case involving adoption by multiple siblings could raise issues that are distinct from those in a case involving two people who are living together in a committed relationship).

165. See *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 835 (Ky. Ct. App. 2008) (describing the judiciary's role as limited to answering whether state law permits certain adoptions, not constructing adoption rights for policy reasons).

166. See *In re Adoption/Guardianship* Nos. 2152A, 2153A, 2154A, 641 A.2d 889, 893 (Md. Ct. Spec. App. 1994) (examining multiple situations which terminated the natural parents' rights).

person who cannot adopt the child to file a second-parent or “stepparent-type” petition “which would amount to little more than a legal fiction with the result being the same—both petition[er]s would be [the child’s] adoptive parent.”¹⁶⁷

As one attorney argued on behalf of two unmarried petitioners, “[t]his is [2009], and these are real issues where the legislation hasn’t caught up with many, many people who are in the shadows of what our Christian nation views as family.”¹⁶⁸ A few courts have left it to their state legislatures to decide whether other types of non-traditional families should be recognized.¹⁶⁹ When the Kentucky Court of Appeals refused to recognize a second-parent adoption because the statute did not expressly provide for such adoptions, it reasoned that “[n]othing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts.”¹⁷⁰ The court suggested that the parties’ lawyers “would have been perfectly justified in petitioning the Legislature, or encouraging their clients to do so, for an amendment to the adoption laws.”¹⁷¹ Because adoption laws vary in each state and who may adopt is governed by adoption statutes, citizens, attorneys, and other adoption advocates must lobby their state legislators to change the laws so that they accurately reflect how families look today.

In sum, the interpretation of statutes to expand the definition of family must be broadened so that more families can be created for children. The scope of shared parenting must be expanded to include prospective adoptive families other than heterosexual or same-sex couples who are living together. Finally, agencies and those who are in the position to accept adoption petitions and to evaluate prospective adoptive parents must expand their appreciation for a variety of family types. Many more single women, for example, one group that already adopts thousands of children, probably would adopt more children if agencies and other decision makers were more receptive. “[T]here are many children for whom th[e] [dual-gender married couple] ‘ideal’ is not possible.”¹⁷²

167. *In re Adoption of Carl*, 709 N.Y.S.2d 905, 910 (N.Y. Fam. Ct. 2000).

168. *S.J.L.S.*, 265 S.W.3d at 817 (emphasis omitted).

169. *See id.* at 835 (placing the moral duty on the legislature to determine whether different marriages and rights are socially recognized and protected).

170. *Id.* at 819 (quoting *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997)).

171. *Id.* at 835.

172. *See PROWLER*, *supra* note 34, at 4.

