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**THE STATUS OF SAME SEX ADOPTION IN  
THE KEYSTONE STATE SUBSEQUENT TO  
THE STATE SUPREME COURT'S DECISION  
IN *ADOPTION OF R.B.F. AND R.C.G.***

*Martha Elizabeth Lieberman\**

*“Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and two adults (a lesbian couple) dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities . . . .”<sup>1</sup>*

INTRODUCTION

The demographic changes in the United States over the past century make it difficult to describe an average American family.<sup>2</sup> Today, a diversity of perspectives on morality and individual

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\* Brooklyn Law School Class of 2004; B.A., Ithaca College, 2000. The author would like to thank the staff of the *Journal of Law and Policy*.

<sup>1</sup> *Adoption of B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993) (holding that an unmarried same-sex partner could adopt her partner’s biological child).

<sup>2</sup> *See, e.g., Troxel v. Granville*, 530 U.S. 57, 63 (2000) (holding that a Washington state court decision granting grandparents visitation rights to their grandchildren over the objections of the sole surviving parent—a “fit, custodial mother”—violated the mother’s substantive due process rights, and finding that a family can consist of mother and child); *See also* NANCY E. WALKER ET. AL., *CHILDREN’S RIGHTS IN THE UNITED STATES* 70 (1999) (discussing how the term “family” now includes households where the parents are divorced, households where grandparents act as parents, and single parent households).

freedoms has produced a spectrum of views on what constitutes a family.<sup>3</sup> Families whose heads of household are gay or lesbian are just one part of that spectrum. Between one and nine million children in the United States are estimated to have at least one gay or lesbian parent.<sup>4</sup> While gay or lesbian couples raise children in every state, the law, as determined by state government in Pennsylvania in particular, does not afford them the same parental rights it affords biological or adoptive parents.<sup>5</sup>

Numerous gay and lesbian couples, in planning their lives together, are seeking to adopt children or undergo *in vitro*<sup>6</sup>

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<sup>3</sup> William C. Duncan, *Don't Ever Take a Fence Down: The "Functional" Definition of Family-Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57, 66 (2001). Duncan states the following:

In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child.

*Id.* at 66.

<sup>4</sup> COMMITTEE ON PSYCHOSOCIAL ASPECTS OF CHILD AND FAMILY HEALTH, AM. ACAD. OF PEDIATRICS, COPARENT OR SECOND-PARENT ADOPTION BY SAME-SEX PARENTS (vol. 109, number 3, 2002) (reporting that pediatricians should make every effort to support second-parent adoption because of its advantages to the children involved) [hereinafter AM. ACAD. OF PEDIATRICS REPORT].

<sup>5</sup> See 23 PA. CONS. STAT. ANN. § 2525 (West 2001). The Statute states in pertinent part:

The court shall cause an investigation to be made and a report filed by . . . an appropriate person designated by the court . . . . The investigation shall cover all pertinent information regarding the child's eligibility for adoption and the suitability of the placement, including the physical, mental and emotional needs and welfare of the child, and the child's and the adopting parent's age, sex, health and racial, ethnic and religious background.

*Id.* See, e.g., *In re Adoption of B.L.P.*, 16 Fiduc. Rep.2d 95, 98 (Montg. Co. Orphans' Ct. Pa. 1998) (rejecting the application of a lesbian partner to become an adoptive parent of a child).

<sup>6</sup> See MARTHA FIELD, DO NEW REPRODUCTIVE TECHNIQUES THREATEN THE FAMILY? 34 (1988). Field says that *in vitro fertilization*:

refers to the process by which a doctor stimulates a woman's ovaries,

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fertilization to establish families.<sup>7</sup> For many of them, gaining recognition of legal parental status for the same-sex partner of the natural or adoptive parent has been an intense struggle.<sup>8</sup> Alternative families, face a difficult task in becoming integrated within the confines of existing adoption laws.<sup>9</sup> In Pennsylvania, for

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removes several eggs in a procedure called a laparoscopy, and fertilizes them in a Petri dish . . . . Two or three days later, when each egg has divided a few times the doctor can transfer the eggs to the uterus of the woman providing the eggs, with the hope of producing a “test-tube” baby nine months later.

*Id.*

<sup>7</sup> See AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 2 (stating that *in vitro* fertilization is an alternative insemination technique and that “[t]he woman or women may choose to become pregnant using sperm from a completely anonymous donor, from a donor who has agreed to be identifiable when the child becomes an adult, or from a fully known donor (e.g., a friend or a relative of the nonconceiving partner)”).

<sup>8</sup> See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000) (denying custody to the former same-sex partner of a lesbian mother because it would be too disruptive for the family, but granting visitation rights instead); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999) (granting a former lesbian same-sex partner visitation rights after the couple separated); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (denying custody to the former same sex partner and remanding the issue of visitation rights to determine if it was in the best interest of the child).

<sup>9</sup> See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 344 (2002) (arguing that the current statutory framework for recognizing lesbian second-parent adoption is too complicated and actually only ends up hurting the child and the relationship that child has with her parents). The adoption process is complicated, both legally and emotionally, because it is a lengthy course involving fulfillment of many statutory requirements and is taxing on family relationships. See *infra* Part I.A-B (discussing the history and implications of adoption law on families in Pennsylvania). Common issues faced by newly forming adoptive families include attachment, family reorganization and resolution of differences in sexuality, gender, class and race. Gay and lesbian adoptive families face these issues and additionally must contend with being part of a sexual minority in an often unsympathetic, heterosexually dominant society. See Steven E. James, *Clinical Themes in Gay- and Lesbian-Parented Adoptive Families*, CLINICAL CHILD PSYCHOL. & PSYCHIATRY 475, 480 (2002) (arguing that adoption by gay and lesbians deserves particular attention by the mental health community because of the

example, there is no statutory or common law prohibition against gays and lesbians adopting a child who has no legal parents.<sup>10</sup> On the other hand same-sex couples that attempt to adopt in Pennsylvania are often thwarted because of a statutory provision requiring a biological or original adoptive parent to terminate his parental rights prior to approval of an adoption petition filed by his partner.<sup>11</sup> It seems unreasonable to allow same-sex couples to adopt a child with no legal parents without difficulty but prohibit or set hurdles for those same couples adopting the biological child of their same-sex partner.

On August 20, 2002, however, in *In re Adoption of R.B.F. and R.C.G.*,<sup>12</sup> the Pennsylvania Supreme Court held that unmarried same-sex partners may adopt a child without meeting the statutory requirement that the legal parent first relinquish his parental rights.<sup>13</sup> This groundbreaking decision was hailed as a “win for gays and lesbians across the commonwealth.”<sup>14</sup> The Court held that trial courts have discretion to find cause to waive the statutory relinquishment requirement.<sup>15</sup> The court remanded the

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unique psychological issues it raises for all involved).

<sup>10</sup> 23 PA. CONS. STAT. ANN. § 2312 (1981) (stating “any individual may become an adopting parent”).

<sup>11</sup> 23 PA. CONS. STAT. ANN. § 2901 (West 2001) (“Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents’ rights have been terminated . . .”). There is a spousal exception. *See* 23 PA. CONS. STAT. ANN. § 2903 (West 2001) (“Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.”).

<sup>12</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002).

<sup>13</sup> *Id.*

<sup>14</sup> Lori Litchman, *Pennsylvania High Court Oks Second-Parent Adoption*, LEGAL INTELLIGENCER, Aug. 21, 2002, at B-1 (reporting on the beneficial impact of the Pennsylvania Supreme Court’s decision for gay and lesbian couples in Pennsylvania who are raising children).

<sup>15</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1197 (finding that the statute “affords the trial court discretion to determine whether, under the circumstances of a particular case, cause has been shown to demonstrate why a particular statutory requirement has not been met”). *See* 23 PA. CONS. STAT. ANN. § 2901 (West 2001) (“Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or

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consolidated cases to the trial level to determine if cause had been shown to waive the relinquishment requirement.<sup>16</sup> On remand, the petitioners in *In re Adoption of R.B.F. and R.C.G.* will have to argue that cause exists to waive the relinquishment requirement because the child is already being raised by the same-sex couple and it would be in the best interest of the child to be legally related to both of her parents.<sup>17</sup>

This note supports the outcome in *In re Adoption of R.B.F. and R.C.G.*,<sup>18</sup> but disagrees with the court's reasoning, which fails to effectuate the purpose of the Pennsylvania Adoption Act—to ensure the welfare of the child.<sup>19</sup> This note suggests that the Pennsylvania Supreme Court should have taken the extra step of setting a clear standard for the trial courts to use upon remand and in future cases. This note also suggests that the Pennsylvania legislature should take proactive measures to protect the best interest of children by recognizing second-parent adoptions.<sup>20</sup>

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parents' rights have been terminated . . ."). Prior to 1982, the section read: "Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the adoptee has resided with the petitioner for at least six months prior thereto or, in lieu of such residence, the adoptee is at least 18 years of age or is related by blood or marriage to the petitioner." See 23 PA. CONS. STAT. ANN. § 2901 (West 1981).

<sup>16</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1195.

<sup>17</sup> LESBIAN/GAY LAW NOTES, *Pennsylvania Supreme Court Opens Door to Second-Parent Adoption*, Sept. 2002 (reporting on the decision of in *In re Adoption of R.B.F. and R.C.F.*). When a same-sex partner seeks to adopt the biological or adopted child of his partner, he is seeking formal parental rights protecting his interests in the child in case of possible custody disputes should the partnership dissolve. He is seeking to be a second-parent. In addition, adoption protects the child by declaring legal parents responsible for her well-being and providing formal rights to inheritance and social security benefits should her legal parents die. See Symposium, *Re-Orienting Law and Sexuality: Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 CLEV. ST. L. REV. 101, 116 (2000) [hereinafter Becker] (arguing for recognition of second-parent adoption in order to give families stability).

<sup>18</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1195.

<sup>19</sup> See 23 PA. CONS. STAT. ANN. § 2724 (a)-(b) (West 2001). See language of the statute *supra* note 5.

<sup>20</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 1 (stating in second-

Part I of this note examines the development of adoption laws and second-parent adoption in Pennsylvania. Part II analyzes the factual and procedural history of *R.B.F.* Part III discusses the implications of *R.B.F.*, critiques the vague standards given by the court and suggests clearer standards for use by the trial court on remand and in future proceedings. Part IV argues that the legislature should take affirmative action to protect the best interest of children of same sex couples by approving second-parent adoption.

#### I. OVERVIEW OF ADOPTION LAW AND HISTORY OF SECOND-PARENT ADOPTIONS

Adoption is a statutory right, unknown at common law.<sup>21</sup> Although Congress has influence over the construction of adoption laws, adoption is generally a question reserved for state regulation.<sup>22</sup> This section examines the development and purpose

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parent adoption, “children born or adopted into families headed by partners who are of the same-sex usually have only [one] biologic or adoptive legal parent. The other partner in a parental role is called the “coparent” or “second-parent”). See also Becker, *supra* note 17, at 115 (supporting recognition of second-parent adoption); Jacobs, *supra* note 9, at 343 (proposing that the courts use a “statutory parental analytic framework, the UPA, to adjudicate maternity for lesbian coparents, thereby conferring all the rights and privileges of legal parenthood” and thus fully protecting the relationship between a child and her lesbian coparent).

<sup>21</sup> See 23 PA. CONS. STAT. ANN. § 2301 (West 2001) (“The court of common pleas of each county shall exercise through the appropriate division original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings.”).

<sup>22</sup> GINA MARIE STEVENS, CONGRESSIONAL RESEARCH SERVICE, ADOPTION: PARENTAL RIGHTS AND CHILDREN’S INTERESTS, 30 (1994). Stevens explains that:

At the time the Constitution was adopted, its framers felt that states should have jurisdiction over most domestic family law questions. Article I § 8 of the Constitution, the so-called enumerated powers clause, limits congressional authority to act by specifying general subject categories where federal action is permissible. Under this clause and the Tenth Amendment, categories other than those enumerated are reserved for state action. These enumerated powers do not readily

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of adoption laws in Pennsylvania and the current process for adopting a child. This section will also analyze how statutory requirements have affected the development of second-parent adoption.

*A. Statutory Adoption in Pennsylvania*

In 1925, the Pennsylvania legislature codified adoption, thereby authorizing and defining the procedural parameters of adoption.<sup>23</sup> The law generally sanctioned adoption to provide a legal heir to families without male offspring and offered a permanent family to children whose biological parents could not or would not raise them.<sup>24</sup>

For much of the twentieth century, the adoption process was so guarded it created the illusion that an adopted child was actually the adoptive parents' biological child.<sup>25</sup> Birth parents rarely met adoptive parents, the facts of the adoption were hidden from public view and often the adopted child was not even informed she was adopted.<sup>26</sup> Historically, the law reflected this societal attitude by requiring the sealing of adoption records and making it difficult for adoptees to obtain information about their birth parents.<sup>27</sup> The secretiveness of the process began to be questioned as parents started to adopt children from foreign countries, adoptive parents

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encompass most family law questions, so what federal legislation there is in this area is usually based on some other federal interest, such as conditions on federal grants. Thus, Congress has little express authority to legislate in this area, and the individual states have the primary authority.

*Id.* at 6. *See also* *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (holding that state laws govern the area of domestic relations except in rare occasions when family law comes into conflict with a federal statute).

<sup>23</sup> 127 PA. CONS. STAT. § 1 (West 1925).

<sup>24</sup> *See* MARTIN GUGGENHEIM ET. AL., *THE RIGHTS OF FAMILIES* 204 (1996) (discussing the procedure and implication of adoption law).

<sup>25</sup> *See id.* at 203 (discussing the social policy reasons for keeping adoptions secret including shame).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



increasingly informed their children about their adoption at younger ages, and meetings between birth parents and adoptive parents became routine.<sup>28</sup>

As social policy shifted during the century, the statutes were amended numerous times.<sup>29</sup> These amendments were also propagated to codify the court's interpretation of the laws.<sup>30</sup> In 1970, in response to society's changing attitude towards adoption as something more acceptable, the Pennsylvania legislature passed the Adoption Act, replacing the earlier adoption statutes.<sup>31</sup> The Adoption Act defines who may adopt, who may be adopted, and sets forth the requirements for the contents of an adoption petition.<sup>32</sup> While adoption law has developed in many ways, the

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<sup>28</sup> *Id.*

<sup>29</sup> See 23 PA. CONS. STAT. ANN. § 2102 (West 2001) (listing the 1947, 1970, 1981 and 1982 amendments to the Adoption Act).

<sup>30</sup> Symposium, *Constructing Family, Constructing Change: Shifting Legal Perspectives on Same-Sex Relationships: Panel One: Family Law: Article: Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255, 270 (Spring 1998) [hereinafter Glennon] (arguing that the judge's practice of allowing step-parents to adopt forced the legislature to codify adoption in 1970). Other reasons for the amendments include clarification of the laws as well as streamlining of adoption procedure to make it simpler and faster. *Id.*

<sup>31</sup> 23 PA. CONS. STAT. ANN. §§ 2101-2910 (West 2003); JOINT STATE GOVERNMENT COMMISSION, *Proposed Adoption Act*, Leg. J., 182 (Pa. 1970) (the Act was passed but with modest legislative history). See *Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000); *Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 741 (Pa. Super. Ct. 2000) (Johnson, J., dissenting) (pointing out that the Adoption Act of 1970, July 24, P.L. 620, No. 208 § 601(a) states that "the act of April 4, 1925 (P.L.127), entitled 'An act relating to Adoption,' is hereby repealed absolutely").

<sup>32</sup> 23 PA. CONS. STAT. ANN. § 2312 (West 2001) ("Any individual may become an adopting parent."); § 2311 ("Any individual may be adopted, regardless of his age or residence."); § 2710 (The petition requirements include information about the adopting parent such as name, residence, marital status, age occupation, religious affiliation, racial background and their relationship to the adoptee.). Also, the petition must include copies of all section 2711 consents required by the Adoption Act relating to consents necessary to adoption or the basis upon which such consents are not required. See § 2710. Finally, a copy of the adoptee's birth certificate must be included. See *id.*

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system still reflects the traditional view of adoption as a secret process,<sup>33</sup> in that petitions and hearings remain closed to the public and obtaining access to adoption records remains a challenge.<sup>34</sup>

Modern adoption law creates the process by which a parent-child relationship is legally formed between a child and an adult who is not the child's biological parent.<sup>35</sup> Following an adoption, the birth parent relinquishes and the adoptive parent assumes all of the biological parent's rights and responsibilities.<sup>36</sup> There are exceptional circumstances, such as stepparent adoptions, where a judicial decree will not end the legal relationship between a child and the members of her biological family.<sup>37</sup> Only the courts may order adoption, and a prospective adoptive parent must seek the court's permission to adopt by filing a petition.<sup>38</sup> After the petition is filed, the court orders an investigation and report to be filed, which helps determine the child's eligibility for adoption and the

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<sup>33</sup> See GUGGENHEIM, *supra* note 24, at 203 (explaining that the child is usually left unaware of the adoption in order to "shield the birth mother from the stigma of having given birth to a child out-of-wedlock and to mask the adoptive parents' inability to conceive a child").

<sup>34</sup> 23 PA. CONS. STAT. ANN. § 2504.1 (2003). The statute states in pertinent part:

The court shall take such steps as are reasonably necessary to assure that the identity of the adoptive parent or parents is not disclosed without their consent in any proceeding under this subchapter or Subchapter B (relating to involuntary termination). The Supreme Court may prescribe uniform rules under this section relating to such confidentiality.

*Id.* For a discussion on adoption proceedings and the confidentiality of the various records, see LESTER WALLMAN & LAWRENCE J. SCHWARZ, HANDBOOK OF FAMILY LAW 78 (1989) (discussing adoption proceedings and the confidentiality of the various records).

<sup>35</sup> See WALLMAN & SCHWARZ, *supra* note 34, at 77 (detailing the legal process of adoption).

<sup>36</sup> *Id.* at 108 (discussing the legal effects of adoption).

<sup>37</sup> *Id.* at 107.

<sup>38</sup> See 23 PA. CONS. STAT. ANN. § 2301 (West 2001) ("The court of common pleas of each county shall exercise through the appropriate division original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings.").

suitability of the placement.<sup>39</sup> After evaluating the child's best interest, the judge decides whether to approve the adoption.<sup>40</sup> The judge makes her decision after examining the petition for adoption, obtaining all necessary consents and conducting a hearing.<sup>41</sup>

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<sup>39</sup> 23 PA. CONS. STAT. ANN. § 2525 (West 2001) (The statute states in pertinent part:

The court shall cause an investigation to be made and a report filed by . . . an appropriate person designated by the court . . . . The investigation shall cover all pertinent information regarding the child's eligibility for adoption and the suitability of the placement, including the physical, mental and emotional needs and welfare of the child, and the child's and the adopting parent's age, sex, health and racial, ethnic and religious background.

*Id.*

<sup>40</sup> *In re McQuinton's Adoption*, 86 A. 205, 269 (Pa. 1913) (finding that the Adoption Act required the court to decree adoption liberally because it gave children greater opportunities for the fullest development).

The general purpose of the act in question is unmistakable; it is the expression of the humane and benevolent sentiments of the legislature that passed it towards a dependent class of our population, many members of which, by reason of conditions for which they are not responsible, and which, because of infancy they have no power to overcome, are, if not entirely helpless in the struggle of life, so far prejudiced and handicapped by their environment that fair opportunity to develop into virtuous men and women is denied them. It therefore calls for a liberal construction to the end that it may fairly accomplish the purpose of the enactment.

*Id. See also* 23 PA. CONS. STAT. ANN. § 2724 (a)-(b) (West 2001) (setting forth factors taken into account in evaluating the child's best interests). Section 2724(b) states that:

The court shall hear testimony in support of the petition and such additional testimony as it deems necessary to *inform* it as to the desirability of the proposed adoption . . . . In any case, the age, sex, health, social and economic status or racial, ethnic or religious background of the child or adopting parents shall not preclude an adoption but the court shall decide its desirability on the basis of the physical, mental and emotional needs and welfare of the child.

*Id.* (emphasis added).

<sup>41</sup> 23 PA. CONS. STAT. ANN. §2724 (West 2001) (stating that at the hearing, testimony can be given in support of the petition and an investigation can be ordered to verify the statements of the petition or other facts to determine the

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Therefore case law provides guidance in areas that the legislature has not yet acted, such as the articulation of desirable and undesirable adoptive situations.<sup>42</sup>

*B. Development of Second-Parent Adoption*

In order to promote finality in adoption proceedings, most state laws include a cut-off provision prohibiting adoption by an unmarried partner unless the parental rights of the first parent are terminated.<sup>43</sup> This provision allows the new family to develop without fear of intrusion from the biological parents.<sup>44</sup> There is a

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desirability of the adoption); *see also* WALLMAN & SCHWARZ, *supra* note 34, at 78 (stating that the adoption will be approved when the court has reviewed the results of the hearing, all legal requirements have been met and the court finds it is in the best interest of the child).

<sup>42</sup> *See, e.g.*, Adoption of E.M.A., 409 A.2d 10 (Pa. 1979) (holding that a parent's qualified consent to an adoption of his child by another who is not his spouse is not permissible under the law).

<sup>43</sup> *See, e.g.*, N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1999) ("After the making of an order of adoption the natural parents of the adoptive child . . . shall have no rights over such adoptive child or his property by descent or succession."); MASS GEN. LAWS ANN. CH. 210, § 6 (West 1999) ("All 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."); *See* 23 PA. CONS. STAT. ANN. § 2903 (West 2000) ("Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.") Wisconsin has a similar provision. *See* WIS. STAT. ANN. § 48.92(2) (2001) ("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 all the rights, duties and other legal consequences of the relationship shall cease to exist.").

<sup>44</sup> *See* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 937 (2000) (arguing that adoption is traditionally seen as a process where one family ends and a new one begins); *see also* WALLMAN & SCHWARZ, *supra* note 34, at 108. Wallman and Schwarz explain the legal effect of adoption:

An order of adoption terminates any rights the natural parents previously had with respect to the child and vice versa. Through the adoption process a new lineage results and a child possesses the same

statutory exception to the cut-off provision for stepparents, which allows the spouse of a birth parent or of an adoptive parent to adopt the child without terminating any initial parental rights.<sup>45</sup> The rationale behind the stepparent exception derives from the custodial biological parent's plan to raise the child with the stepparent.<sup>46</sup> This is because the government believes that if the non-custodial biological parent approves of the adoption or is no longer a part of the child's life there will be no animosity among the parties to disrupt finality, and it will be in the best interest of the child to have this additional step-parent adopt her.<sup>47</sup>

The statutory section, however, does not apply to same-sex couples because under Pennsylvania law, same-sex couples are not permitted to marry.<sup>48</sup> Thus if the custodial legal parent desires his same-sex partner to possess the legal status of parent, he cannot achieve this without superseding his own parental rights.<sup>49</sup> This

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status he would have had if he was born to the adoptive parents. For example, once adopted, the child has the right to be supported by the adoptive parents and the right to inherit from and through them.

*Id.*

<sup>45</sup> 23 PA. CONS. STAT. ANN. § 2903 (West 2000) ("Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding."). Wisconsin has a similar provision. *See* WIS. STAT. ANN. § 48.92(2) (2001) ("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 all the rights, duties and other legal consequences of the relationship shall cease to exist."); *see also* Schacter, *supra* note 44, at 937 ("State adoption statutes generally recognize an exception to this cut-off provision for stepparent adoptions, which, by some tallies, have come to compromise the majority of all adoptions.").

<sup>46</sup> *See* Schacter, *supra* note 44, at 937.

<sup>47</sup> *See* Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of The Child*, 66 TENN. L. REV. 1019, 1024 (1999) (discussing the different types of adoption).

<sup>48</sup> 23 PA. CONS. STAT. ANN. § 1704 (West 2000) ("Marriage shall be between one man and one woman . . . [and] a marriage between persons of the same-sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.").

<sup>49</sup> When a lesbian woman or gay man becomes a parent through adoption

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statutory cut-off provision is problematic for same-sex couples trying to adopt. The child's legal parent does not wish to relinquish his parental rights, yet he cannot fall under the spousal exception, which would allow both parents to possess legal rights.<sup>50</sup>

Not all courts apply cut-off provisions to forbid same-sex adoptions. In Vermont, for instance, the Supreme Court permitted adoption by a lesbian couple without requiring termination of the biological mother's rights, finding that adoption is in the best interest of the children when the partner has been living with the biological mother since the children's births and the wording of the statute does not expressly prohibit such an adoption.<sup>51</sup> Similarly, in Massachusetts, the Supreme Court permitted a lesbian parent's same-sex partner to adopt the parent's biological child.<sup>52</sup> The Court found it would be in the best interest of the child because the women had a stable and committed relationship, both women

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or alternative insemination, the law acknowledges that person as having full and absolute parental rights. *See* AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 1 (explaining the process of alternative insemination); *see* In the Matter of the Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. 1993) (granting the adoption of a child by its biological mother's lesbian partner); The lesbian or gay parent's partner may function as a second-parent, but he or she may not have any formal legal rights with respect to the child; *see, e.g., In re Adoption of B.L.P.*, 16 Fiduc. Rep. 2d 95, 98 (Montg. Co. Orphans' Ct. Pa. 1998) (rejecting the application of a lesbian partner to become an adoptive parent of a child); *see also* Schacter, *supra* note 44, at 936 (stating that "there is a disturbing asymmetry between the profound emotional bonds that may link a child to a non-biological parent and the law, which, in the absence of second-parent adoption, is likely to treat that parent as a "legal stranger" to the child).

<sup>50</sup> *See, e.g., Georgina G. v. Terry M.*, 516 N.W.2d 678 (Wis. 1994) (holding that an adoption of the child by the biological mother's same-sex partner would sever the biological mother's ties with the child). The court also found that the legislature specifically exempted stepparent adoptions from cutting off parental rights, and therefore the court presumed that the legislature did not intend to exempt adoptions by non-marital partners, concluding that the cut-off provision was mandatory for non-marital partners. *Id.*

<sup>51</sup> Adoptions of B.L.V.B., 628 A.2d 1271 (Vt. 1993); 15 VT. STAT. ANN. §301 (West 2002) (stating "legal rights, privileges, duties and obligations of parents [are] to be established for benefit of children"); 15 VT. STAT. ANN. § 665 (stating custody to be awarded upon the best interests of child).

<sup>52</sup> Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

participated jointly in raising the child, the child viewed both women as parents, and the child would gain the practical benefits from the legal recognition of a second-parent.<sup>53</sup> The highest courts of New York and the District of Columbia have also approved the adoption of children by their parents' same-sex partners.<sup>54</sup> In addition, lower courts in a number of other states have all approved second-parent adoption by same-sex couples.<sup>55</sup>

Courts that have permitted such adoptions generally conclude that children are best served by having two legal parents rather than one legal parent and one de facto parent.<sup>56</sup> A child with two legal parents has two sources of support and inheritance rights, as well as access to an array of benefits, including health insurance, social security and other benefits provided by the parents'

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<sup>53</sup> *Id.*; MA. STAT. 210 §1 (West 2002) ("A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself . . . (iii) the granting of the petition is in the best interests of the child."). Practical benefits include the child gaining access to the second-parents health insurance coverage and additional inheritance benefits. *Id.*

<sup>54</sup> *See, e.g., In re Dana*, 660 N.E.2d 397 (N.Y. 1995) (holding that provision of adoption statute terminating biological parent's rights toward adoptive child does not apply in situations when biological parent consents to adoption, agrees to retain parental rights, and agrees to raise child together with adopting parent). The court did not require the termination of the parental rights of biological mothers who consented to adoption of their respective children by an unmarried man and lesbian partner with whom the mothers shared long-term emotional and financial commitments. *See* N.Y. DOM. REL. § 117(1)(a) ("After the making of an order of adoption the birth parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated."); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (holding that gay and lesbian partners have standing under New York and Washington D.C. law to become adoptive parents, and the portions of the statutes purporting to terminate the biological mothers' parental rights do not apply).

<sup>55</sup> *See* GUGGENHEIM, *supra* note 24, at 285 (discussing the current status of second-parent adoption law in various states).

<sup>56</sup> *See* Jacobs, *supra* note 9, at 346 (reporting on cases where courts have sanctioned second-parent adoption because of the benefits to the child). An individual becomes a de facto parent when they have assisted in the raising of a child to such a degree that it as if they are actually the child's parent). *Id.*

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employers.<sup>57</sup> If the adults' relationship later ends, their status as the child's legal parents gives them both standing to seek custody or visitation with the child.<sup>58</sup> Additionally, both legal parents could be required to continue to support the child.<sup>59</sup>

With adoption law currently in a state of flux because each state has different laws, the National Conference of Commissioners of Uniform State Laws (NCCUSL) approved a new Uniform Adoption Act in 1994, which has been forwarded to all fifty states with a recommendation that it be enacted by their legislatures.<sup>60</sup> This model law seeks to promote the interest of children in being raised by parents, including same-sex couples, who are committed and capable of caring for them.<sup>61</sup> The model law departs from the historical practice of categorically excluding whole classes of prospective adoptive parents on the basis of marital status, sexual orientation or other arbitrary factors, and seeks to protect children's ties to the people who have actually raised them.<sup>62</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *See* GUGGENHEIM, *supra* note 24, at 229.

<sup>59</sup> *See* L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (finding that a lesbian that has the status of in loco parentis to the biological child of her former partner must pay child support).

<sup>60</sup> Unif. Adoption Act 2-401-09, 9 U.L.A. (1994). The prefatory note of the Act states:

The Act aims to be a comprehensive and uniform state adoption code that: (1) is consistent with relevant federal constitutional and statutory law; (2) delineates the legal requirements and consequences of different kinds of adoption; (3) promotes the integrity and finality of adoptions while discouraging "trafficking" in minors; (4) respects the choices made by the parties to an adoption about how much confidentiality or openness they prefer in their relations with each other, subject, however, to judicial protection of the adoptee's welfare; and (5) promotes the interest of minor children in being raised by individuals who are committed to, and capable of, caring for them.

*Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (stating that the NCCUSL wants to "encourage different kinds of people to adopt and prohibit the categorical exclusion of anyone from being considered as an adoptive parent").



In addition the American Academy of Pediatrics recently published a study on the benefits of second-parent adoption.<sup>63</sup> The study found that legal endorsement of second-parent adoption achieves greater custodial rights and responsibilities for the adoptive parent protecting the child if the biological or original adoptive parent becomes unable to take care of the child or the couple separates.<sup>64</sup> Legal endorsement also ensures the child's eligibility for health benefits, inheritance and social security survivor benefits from both parents, and provides legal grounds for either parent to offer their consent for medical care, or make educational and other important decisions on behalf of the child.<sup>65</sup> The American Academy of Pediatrics therefore supports legislative and legal efforts to permit adoption of the child by the second-parent in gay and lesbian families.<sup>66</sup>

The recommendations proposed neither by NCCUSL nor by the American Academy of Pediatrics have been implemented in

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<sup>63</sup> See AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4. The study evaluated evidence, gathered during several decades using diverse samples and methodologies, of the impact of gay or lesbian parents on children, and concluded that a child's development will improve if the relationship of their homosexual parents is recognized by law because there will likely be less conflict and more stability in the home. *Id.*

<sup>64</sup> See *L.S.K. v. H.A.N.*, 813 A.2d 874 (finding that a lesbian that has the status of in loco parentis to the biological child of her former partner must pay child support); see, e.g., Jacobs, *supra* note 9, at 344 (discussing the implication of *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App.1991)). In this case a lesbian couple planned to have a child together, and then one of the women conceived and had the child. *Id.* at 219. Later the biological mother was killed in a car accident and the court found the women who did not give birth to the child was not a parent and thus could not have custody to the child, despite the planning and caring for the child. *Id.*

<sup>65</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 2. See, e.g., Jacobs, *supra* note 9, at 347 (discussing the benefits of recognizing second-parent adoptions).

<sup>66</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 3 (finding that when two adults raise a child, they and the child deserve the security that comes along with legal recognition because denying proper parental legal status prevents "children from enjoying the psychologic[al] and legal security that comes from having 2 willing, capable, and loving parents").

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Pennsylvania.<sup>67</sup> There is, however, no statutory or common law prohibition against gays and lesbians or unmarried couples adopting in Pennsylvania.<sup>68</sup> Instead, couples are required to demonstrate why the adoption is desirable, and judicial determinations are made on a case-by-case basis.<sup>69</sup>

Judicially approved adoptions, which require the court to create an exception to the Adoption Act, were not available in Pennsylvania until the decision in *In re Adoption of R.B.F. and R.C.G.*<sup>70</sup> For example, in *In re Adoption of E.M.A.*, the Pennsylvania Supreme Court held that the father's qualified consent (consenting to adoption without fully relinquishing parental rights, as seen in stepparent adoption) was not sufficient to meet the statutory requirement when a non-spouse sought to adopt.<sup>71</sup> The court stated that, "our courts have no authority to

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<sup>67</sup> See Glennon, *supra* note 30, at 265, 276 (stating that the Pennsylvania Adoption Act has some similar wording to the model law but the model law remains unadopted. Glennon also argues that the recommendations of social scientists such as the American Academy of Pediatrics are not followed).

<sup>68</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1199 (Pa. 2002). One state expressly prohibits gays and lesbians from adopting. FLA. STAT. CH. 63.042(3) (1999) (providing that "no person eligible to adopt under this statute may adopt if that person is a homosexual").

<sup>69</sup> *Id.* at 1202. In states that do not expressly prohibit gays and lesbians from adopting, the judicial system determines whether the second-parent receives legal rights with respect to the adopted child. *Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 750 (Pa. Super. Ct. 2000) (Johnson, J., dissenting) (stating "[o]ur legislature . . . has already recognized that the trial judges who are on the front lines of these adoption proceeding are best situated to determine an appropriate procedure to follow in cases where there is a void of authority in the Adoption Act." See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000) (denying custody to the former same-sex partner of a lesbian mother because it would be to disruptive for the family but granting visitation rights); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999) (granting a former lesbian same-sex partner visitation rights after the couple separated); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (denying custody to the former same sex partner and remanding the issue of visitation rights to determine if it was in the best interest of the child).

<sup>70</sup> *In re Adoption of E.M.A.*, 409 A.2d 10, 11 (Pa. 1979).

<sup>71</sup> *Id.* Qualified consent means sanctioning the action without relinquishing your own rights which is required to effectuate the adoption petition. *Id.*

decree an adoption in the absence of the statutorily required consents. Nor may exceptions to the Adoption Act be judicially created where the Legislature did not see fit to create them.”<sup>72</sup> The court’s language made same-sex couples wary of their chances of success in adoption proceedings in Pennsylvania.<sup>73</sup> Even with such strong language, fourteen county courts in Pennsylvania allowed for second-parent adoption.<sup>74</sup> In November 2000, second-parent adoptions in Pennsylvania were suspended pending appeal of *In re Adoption of C.C.G. and Z.C.G.* and *In re Adoption of R.B.F. and R.C.F.*, Pennsylvania state cases in which two gay couples’ adoption petitions were rejected.<sup>75</sup> This fractured societal framework, including the complex statutory conditions, formed the background in which *R.B.F.* was litigated.

## II. PROCEDURAL AND FACTUAL BACKGROUND OF *R.B.F. ET AL.*

The decision in *In re Adoption of R.B.F. and R.C.G.*<sup>76</sup> consolidates two cases on appeal: *In re Adoption of C.C.G. and Z.C.G.* and *In re Adoption of R.B.F. and R.C.F.*<sup>77</sup> This decision confirms that same-sex adoption is possible under current Pennsylvania law.<sup>78</sup>

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<sup>72</sup> *Id.* at 11.

<sup>73</sup> See Glennon, *supra* note 30, at 277 (arguing that same-sex couple adoption precedent hurts the chances that these “families” will attempt to become legal through adoption proceedings).

<sup>74</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 740 (Pa. Super. Ct. 2000); see also *Ruling Benefits Gays’ Children: Health Coverage, Inheritance, Social Security Rights Widened*, PITTSBURGH POST-GAZETTE, Aug. 22, 2002, at B-1 (discussing the various approaches county courts in Pennsylvania took to second-parent adoption).

<sup>75</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 740; *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 727-28. (Pa. Super. Ct. 2000).

<sup>76</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002).

<sup>77</sup> *Id.* at 1199.

<sup>78</sup> *Id.* The Supreme Court of Pennsylvania, however, did not answer other legal questions implicated by same-sex adoption, such as whether the constitutional concept of equal protection requires that adoption petitions of same-sex couples be granted. See Glennon, *supra* note 30, at 260 (discussing other arguments that gay couples may have to defend their adoption petitions

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## A. In re Adoption of C.C.G. and Z.C.G.

In *In re Adoption of C.C.G. and Z.C.G.*, the appellants, J.C.G. and J.J.G., have been gay domestic partners in Pennsylvania since 1982.<sup>79</sup> In 1991, J.J.G. legally adopted C.C.G., and in 1999, J.J.G. legally adopted his second child, Z.C.G.<sup>80</sup> After the adoptions, the children and the appellants lived together as a family.<sup>81</sup> In June of 1998, J.C.G., the gay partner and prospective adopting parent, legally changed his last name to that of J.J.G., the legal parent.<sup>82</sup> In May of 1999, appellants, J.J.G. and J.C.G. filed a petition pursuant to the Adoption Act wherein the gay partner sought to adopt the children.<sup>83</sup> The petition was required by statute to contain a consent form relinquishing the parental rights of J.J.G.<sup>84</sup> The appellants intentionally omitted the language indicating permanent surrender of J.J.G.'s parental rights.<sup>85</sup>

On June 18, 1999, the Erie County Common Pleas Court issued an order denying the adoption petition because the father failed to relinquish his parental rights as required under section 2711(d) of

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being denied). This note, however, will focus on the procedural process of *R.B.F.* to develop a better understanding of how and why the Pennsylvania Supreme Court held as it did.

<sup>79</sup> *Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 726 (Pa. Super. Ct. 2000).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 730.

<sup>82</sup> *Id.* at 726. *See* text accompanying note 48 (discussing inability of gay partners to legally marry).

<sup>83</sup> *Id.*

<sup>84</sup> *See* 23 PA. CONS. STAT. ANN. § 2711(D)(1) (West 2002) (requiring the consenting parent of an adoptee under the age of eighteen to provide a statement relinquishing parental rights to his child). The statute states in pertinent part:

I hereby voluntarily and unconditionally consent to the adoption of the above named child. I understand that by signing this consent I indicate my intent to permanently give up all rights to this child. I understand such child will be placed for adoption . . . I have read and understand the above and I am signing it as a free and voluntary act.

*Id.*

<sup>85</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 727-28. (Pa. Super. Ct. 2000).

Pennsylvania law.<sup>86</sup> Appellants filed a motion requesting the trial court withdraw its order.<sup>87</sup> On June 19, 1999, the trial court affirmed its order and Appellants filed an appeal.<sup>88</sup> On June 19, 2000 the Superior Court of Pennsylvania affirmed the denial of the adoption petition.<sup>89</sup>

B. In re Adoption of R.B.F. and R.C.F.

In *In re Adoption of R.B.F. and R.C.F.*, the appellants, C.H.F. and B.A.F., are a lesbian couple who have been domestic partners in Pennsylvania since 1983.<sup>90</sup> In 1996, after deciding to raise a family together, C.H.F. conceived through *in vitro* fertilization with an anonymous donor.<sup>91</sup> B.A.F. legally changed her last name to that of appellant C.H.F. before the twins were born on March 11, 1997.<sup>92</sup> On April 24, 1998, appellants filed a petition with the Court of Common Pleas of Lancaster County seeking adoption of the children by B.A.F.<sup>93</sup> Similar to the companion case of *In re Adoption of C.C.G. and Z.C.G.*,<sup>94</sup> appellant C.H.F. intentionally omitted statutorily required language from the petition permanently relinquishing her parental rights.<sup>95</sup>

On October 22, 1998, the trial court denied the petition based on the appellants' failure to meet the requirements of the Adoption

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<sup>86</sup> See *id.* at 726; § 2711(D)(1) ("The consenting parent of an adoptee under the age of eighteen must provide a statement relinquishing parental rights to his child.").

<sup>87</sup> See *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 726.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 730. The denial of the adoption petition was affirmed for lacking the parental relinquishment required by statute. *Id.*

<sup>90</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1198-99 (Pa. 2002).

<sup>91</sup> *Id.*

<sup>92</sup> *Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 740 (Pa. Super. Ct. 2000); *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 727-28 (Pa. Super. Ct. 2000).

<sup>93</sup> *Adoption of R.B.F. and R.C.F.*, 762 A.2d at 740.

<sup>94</sup> *Id.*

<sup>95</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1198.

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Act by omitting the parental rights relinquishment language.<sup>96</sup> The appellants appealed to the Superior Court, which affirmed the trial court's judgment.<sup>97</sup> The appellants then filed a motion for reargument and reconsideration, which was granted.<sup>98</sup> The court nonetheless affirmed the denial of the petition on June 19, 2000, the same day as the petition in *In re Adoption of C.C.G. and Z.C.G.* was denied.<sup>99</sup> The Superior Court issued almost identical opinions for *In re Adoption of C.C.G. and Z.C.G.* and *In re Adoption of R.B.F. and R.C.F.*<sup>100</sup>

*I. Superior Court Majority Opinion from In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F.*<sup>101</sup>

The majority, noting the appellants' purposeful omissions of the relinquishment requirement from their petitions for adoptions, held that the clear and unambiguous provisions of the Adoption Act do not permit a non-spouse to adopt a child where the legal parents have not relinquished their respective parental rights.<sup>102</sup> The court refused to create judicial exceptions to the requirements of the Adoption Act, stating that to do so would overstep into the authority of the legislature.<sup>103</sup> The Superior Court therefore rejected the appellants' claim that the trial court was afforded discretion to waive statutory requirements when "cause had been shown," finding instead that the statutory requirements had not been met, and no cause had been shown why they should not be

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<sup>96</sup> *Adoption of R.B.F. and R.C.F.*, 762 A.2d at 739.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 740.

<sup>99</sup> *Id.* at 742; *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 726 (Pa. Super. Ct. 2000).

<sup>100</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 726; *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 739. Because the opinions are nearly identical, the remainder of the discussion of case history in Part II will treat the opinions as one.

<sup>101</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 727-28.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 728 (stating "it is for the legislature to decide whether to expand the Adoption Act to cover same-sex partners").

met.<sup>104</sup> Without fulfillment of the statutory requirements, the analysis of the best interest and general welfare of the children would be premature and therefore could not be considered.<sup>105</sup> Consequently, the court denied the petitions.<sup>106</sup>

2. *Judge Elliot's Concurrence in In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F.*<sup>107</sup>

Judge Elliot, in concurrence, contended that qualified consent is only effective in spousal situations because of the narrow interpretation of qualified consent in the binding precedent of *In re Adoption of E.M.A.*<sup>108</sup> Since the appellants cannot be recognized as married, they cannot fall under the spousal exception for qualified consent.<sup>109</sup> Judge Elliot focused on the holding from the Pennsylvania Supreme Court in *E.M.A.*, which insisted on strict construction of the Adoption Act and lack of judicial power to create exceptions to the Act where the legislature did not grant them.<sup>110</sup> Judge Elliot suggested that, in light of the precedent and the realities of changing families petitioning for adoption, "the issue of qualified consent outside of marriage must be re-addressed by the Pennsylvania Supreme Court or returned to the Legislature for further consideration or amendment."<sup>111</sup>

3. *Dissenting Opinions in In re Adoption of C.C.G. and Z.C.G.*

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<sup>104</sup> *Id.* at 729. See 23 PA. CONS. STAT. ANN. § 2711(2002) (requiring the consenting parent of an adoptee under the age of eighteen to provide a statement relinquishing parental rights to his child unless cause can be shown as to why such parental rights should not be relinquished).

<sup>105</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 734.

<sup>106</sup> *Id.* at 733.

<sup>107</sup> *Id.* at 730.

<sup>108</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 744 (Pa. Super. Ct. 2000); *In re Adoption of E.M.A.*, 409 A.2d 10 (Pa. 1979) (holding that a parent's qualified consent to an adoption of his child by another who is not his spouse is not permissible under the law).

<sup>109</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 744.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 744-45.

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Judge Johnson's dissenting opinion articulated three reasons for dissenting from the majority opinion.<sup>113</sup> First, Judge Johnson argued that section 2711 of the Adoption Act,<sup>114</sup> requiring the relinquishment of parental rights, should not be strictly construed because it "contravenes the mandate of the Statutory Construction Act to liberally construe state statutes,"<sup>115</sup> and is incongruous with the legislature's purpose in enacting section 2711."<sup>116</sup> Judge Johnson articulated that the portion of section 2771 requiring voluntary relinquishment of parental rights served the limited purposes of protecting a parent's fundamental liberty interest<sup>117</sup> and ensuring finality by preventing the biological parent from challenging the adoption.<sup>118</sup> Judge Johnson argued that neither of those purposes was served because J.J.G.'s relinquishment of his parental rights contravened the protection of his fundamental

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<sup>112</sup> *Id.* at 745.

<sup>113</sup> *Id.* Judges Kelly and Todd joined Judge Johnson's dissent. *Id.*

<sup>114</sup> 23 PA. CONS. STAT. ANN. § 2711 (West 2001) ("The consenting parent of an adoptee under the age of eighteen must provide a statement relinquishing parental rights to his child.").

<sup>115</sup> See 1 PA. CONS. STAT. §§ 1501-1991; *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 741 (Pa. Super. Ct. 2000); see also 1 PA. CONS. STAT. § 1928(a) (stating the "rule that statutes in derogation of the common law are to be strictly construed, shall have no application to the statutes of this Commonwealth enacted finally after September 1, 1937"). Because the Adoption Act was enacted in 1970, the Act must be liberally construed. *Id.*; see also 1 PA. CONS. STAT. § 1928(c) (stating that "all other provisions of a statute shall be liberally construed to effect their objects and promote justice").

<sup>116</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 741 (noting that the purpose of the Adoption Act is to promote the child's best interest).

<sup>117</sup> *Id.* at 746 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

<sup>118</sup> *Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 731 (Pa. Super. Ct. 2000) (citing *In the Matter of Adoption of Christopher P.*, 389 A.2d 94, 97 (Pa. 1978); *In re Shapiro*, 377 A.2d 153, 155 (Pa. 1977)).



liberty interest.<sup>119</sup> In addition, J.J.G. was a party to the petition for adoption and the only person possessing legal rights to the children.<sup>120</sup> Therefore, no finality issue existed because J.J.G. would not challenge the adoption later since he was a voluntary party to the petition from its inception.<sup>121</sup>

Second, Judge Johnson stated that the majority erroneously relied on cases involving involuntary termination of parental rights, while this case involved retention of parental rights.<sup>122</sup> Judge Johnson argued that in failing to make the distinction, the majority overlooked the trial court's discretion in granting adoption petitions pursuant to section 2901 of the Adoption Act.<sup>123</sup> He stated that the "cause shown" language in section 2901 allows the court to determine that an adoption should be granted, and the court may do so even though a parent's rights have not been terminated.<sup>124</sup> He argued that the majority's reading of the termination clause, which would restrict the trial court from considering reasons why the adoption should be granted without meeting the termination provisions, effectively eliminates the "cause shown" language, rendering the clause superfluous.<sup>125</sup>

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<sup>119</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 732 (asserting that J.J.G.'s fundamental liberty interest is his maintaining his parental rights). *Id.*

<sup>120</sup> *Id.* at 726.

<sup>121</sup> *Id.*

<sup>122</sup> J.J.G. never intended to relinquish his parental rights and was only seeking to extend parental rights to his partner J.C.G. *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 728. The case in which Judge Johnson believed the majority erroneously relied on is *In re Adoption of E.M.A.* 409 A.2d 10 (Pa. 1979), discussed *supra* note 108.

<sup>123</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 733-34 (Pa. Super. Ct. 2000); *see also* 23 PA. CONS. STAT. ANN. § 2901 (West 2001) (stating in pertinent part that "[u]nless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated . . . and all other legal requirements have been met").

<sup>124</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 746 (Pa. Super. Ct. 2000).

<sup>125</sup> *Id.* at 747 (quoting *Commonwealth v. Mack Bros. Motor Car Co.*, 59 A.2d 923, 925 (Pa. 1948) and *Commonwealth v. Baumer* A.2d 472, 474 (Pa. Super. 1968) and citing 1 PA. CONS. STAT. §1922(2) (stating that the General Assembly intends the entire statute to be effective and certain)). It states "The

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Johnson concluded that where petitioners are seeking to add a parent, and no fundamental parental rights are at risk, section 2901's "cause shown language" gives the court discretion to dispense with the parental termination requirement of section 2711.<sup>126</sup> He articulated that in cases where no fundamental parental rights are at risk, the court's examination should focus on the child's best interest rather than the termination of parental rights.<sup>127</sup>

Third, Judge Johnson stated that the majority's focus should not have been on the homosexual relationships between the petitioners, but on the parent-child relationship and the benefits that adoption would offer the children.<sup>128</sup> He argued that the majority's failure to recognize the reality of gay and lesbian couples raising children "perpetuates the fiction of family homogeneity at the expense of the children whose reality does not fit this form."<sup>129</sup> He noted that while the children's daily lives would not be altered by the denial of the petition, they would have less legal protection available.<sup>130</sup> For those reasons, Johnson concluded that the majority of the court was incorrect in denying the adoption and should have used its discretion to decree the adoption on the basis of the best interests of the child.<sup>131</sup>

*b. Judge Todd*

Judges Kelly and Johnson joined Judge Todd's dissenting

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legislature cannot, however be deemed to intend that language used in a statute shall be superfluous and without import." *Id.*

<sup>126</sup> *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 742.

<sup>127</sup> *Id.* at 748.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 744.

<sup>130</sup> *Id.* at 748 (stating that the child will have less legal protection because they will not be able to inherit from the denied parent or receive health benefits from that parent's employer).

<sup>131</sup> *Id.* at 752. *See also* 23 PA. CONS. STAT. ANN. § 2901 ("Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated."). This gives trial judges discretion to decree a petition for adoption upon cause shown as to why the statutory requirements need not be met. *Id.*

opinion which focused heavily on the child/parent relationships that were already established and deserved legal recognition in these cases.<sup>132</sup> Judge Todd emphasized the impact of the majority's decision on the children involved and argued that second-parent adoption was consistent with Pennsylvania law based on the trial court's discretion to decree these adoptions pursuant to section 2901.<sup>133</sup> He found that second-parent adoption advances the welfare of the children involved because it recognizes a "real family" where the parents have co-parented the children since birth and are trying to provide for those children by gaining the legal rights and benefits associated with adoption.<sup>134</sup> These benefits "include the legal protection of the children's existing familial bonds, their rights to financial support from two parents instead of one, rights to inheritance from each parent and rights to obtain other available dependent benefits, such as health care, insurance and Social Security benefits, from either parent."<sup>135</sup> He concluded that the majority's failure to focus on the best interest of the child was erroneous, and further, that the trial court abused its discretion when it dismissed appellants' petition for adoption without holding a hearing to determine whether good cause had been shown to allow the adoption.<sup>136</sup>

### C. State High Court Decision

The Supreme Court of Pennsylvania granted appeal in both cases and consolidated the actions.<sup>137</sup> In *Adoption of R.B.F. and*

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<sup>132</sup> *Adoption of R.B.F. and R.C.F.*, 762 A.2d at 751.

<sup>133</sup> *Id.* at 752.

<sup>134</sup> *Id.* at 751.

<sup>135</sup> *Id.*

<sup>136</sup> *Adoption of R.B.F. and R.C.F.*, 762 A.2d 739, 744 (Pa. Super. Ct. 2000). See 23 PA. CONS. STAT. ANN. § 2724(a) (West 2003) (stating that "the court shall hear testimony in support of the petition and such additional testimony as it deems necessary to inform it as to the desirability of the proposed adoption").

<sup>137</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002). The actions were consolidated because they came to the Pennsylvania Supreme Court at essentially the same time and based on the similarity of facts. *Id.*

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*R.C.G.*, the Court decided whether the Adoption Act requires a biological or adoptive legal parent to relinquish his parental rights in cases where a same-sex partner seeks to adopt the legal parent's child.<sup>138</sup> On August 20, 2002, the Court unanimously vacated the orders of the Superior Court and remanded the appellants' cases to the trial court to determine whether "cause [was] shown" for the parental relinquishment requirements to be waived.<sup>139</sup> While the Court agreed with the lower court in the *E.M.A.* case in that the judiciary could not read exceptions into statutes,<sup>140</sup> the Court said that *E.M.A.* was distinguishable because of an amendment to section 2901 passed subsequent to the *E.M.A.* decision.<sup>141</sup> The Court stated:

There is no reasonable construction of the Section 2901 "cause shown" language other than to conclude that it permits a petitioner to demonstrate why, in a particular case, he or she cannot meet the statutory requirements. Upon a showing of cause, the trial court is afforded *discretion* to determine whether the adoption petition should, nevertheless, be granted.<sup>142</sup>

The Court further stated that in determining "cause" under section 2901, courts must consider what is the best interest of the child because otherwise there is no guarantee that children will be protected.<sup>143</sup> An evaluation of the child's best interest could be done prior to satisfying all of the statutory requirements.<sup>144</sup>

The Court expanded its interpretation and definition of "cause shown" by tracking the reasoning from a prior state court decision, *In Re Long*.<sup>145</sup> In *In re Long*, the adoptee sought access to her

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1201.

<sup>141</sup> *Id.*

<sup>142</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1201-02 (Pa. 2002) (emphasis in original).

<sup>143</sup> *Id.* at 1202.

<sup>144</sup> *See id.* at 1203 (stating that initially evaluating the child's best interest would speed the review immensely).

<sup>145</sup> *Id.* (quoting *In re Long*, 745 A.2d 673 (Pa. Super. Ct. 2000)). *In re Long* did not directly deal with section 2901 but did deal with "cause shown"

adoption records.<sup>146</sup> Section 2905 of the Adoption Act granted such access if requested pursuant to an order of the court finding cause shown.<sup>147</sup> In interpreting *In re Long*, the Pennsylvania Supreme Court “described cause for disclosure as a determination, by clear and convincing evidence, that the adoptee’s need for adoption information clearly outweighed the considerations behind the statute” of keeping adoption records closed.<sup>148</sup> Therefore the Court concluded that appellants should be given an opportunity at an evidentiary hearing to demonstrate that the component of section 2711(d) requiring the relinquishment of parental rights is unnecessary or is satisfied because of their individual circumstances.<sup>149</sup> For example, the appellants would have to show that there would be no violation of the biological or adoptive legal parent’s rights because that parent was voluntarily a party to the adoption petition from inception.<sup>150</sup>

### III. ANALYSIS

In deciding *In re Adoption of R.B.F. and R.C.G.*, the Pennsylvania Supreme Court found that the child’s best interest was served by allowing the petition to go forward without requiring the biological or adoptive legal parent to relinquish his parental rights.<sup>151</sup> This decision promotes the child’s best interest because it protects the liberty interest of the legal parent while promoting security for the child by offering her the benefits of two

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language from another section of the Adoption Act. *Id.*

<sup>146</sup> *Id.*; 23 PA. CONS. STAT. ANN § 2905(a) (2002). Section 2905 provides that all adoption records “shall be kept in the files of the court as a permanent record thereof and withheld from inspection except on an order of court granted upon cause shown . . .” *Id.*

<sup>147</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1204 (quoting *In re Long*, 745 A.2d 673 (Pa. Super. 2000); 23 PA. CONS. STAT. ANN. § 2905(a) (West 2000)).

<sup>148</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1204 (quoting *In re Long*, 745 A.2d 673 (Pa. Super. 2000)).

<sup>149</sup> *Id.* at 1205.

<sup>150</sup> *Id.* at 1203.

<sup>151</sup> *Id.*

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legally responsible adults.<sup>152</sup> The child receives the legal rights and benefits associated with adoption such as financial and health care insurance benefits, inheritance rights to two parents' estates, and legal recognition of already established bonds.<sup>153</sup> The Pennsylvania Supreme Court's decision recognizes the reality that many non-traditional families exist and offers these de facto families the legal protections of adoption.<sup>154</sup>

The Pennsylvania Supreme Court's decision, however, did not set a clear standard for when cause is shown; as a result, future litigants are left with the uncertainty that a trial judge may still determine that cause has not been met and deny a petition even when the facts are similar to those in *R.B.F.*<sup>155</sup> The court's failure to categorically hold that the parental termination clause of section

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<sup>152</sup> See Bruce D. Gill, *Comment: Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361 (2001) (concluding that denying same-sex couples legal parent status through adoption only hurts the children and is done because of judicial bias).

<sup>153</sup> See *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724, 737 (Pa. Super. Ct. 2000) (Todd, J., dissenting); *In re Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child's daily life but would entitle her to inheritance, support, and insurance from non-biological mother, and would grant the non biological mother custody if the biological mother died).

<sup>154</sup> See Glennon, *supra* note 30, at 282. Glennon argues that:

Adoption should depend on the demonstrated willingness and ability of an adult to provide a child with essential caretaking and nurturing. If a parent is willing to bring in another adult to share that burden and privilege, and the parent fully understands the consequences of allowing another adult to create a legal parent-child relationship with that child, the state should not refuse an adoption because of concerns about the legal status of the relationship between the adults.

*Id.*

<sup>155</sup> See Michael T. Morley, Richard Albert, Jennie L. Kneeder & Chrystiane Pereira, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 199 (2003) (arguing that despite many courts recognizing the ability for same-sex couples to adopt, "it still seems true that in family law cases involving a homosexual parent, the result 'will be determined more than anything else by the state in which the person lives and the judge who hears the case'").

2711 does not apply to second-parent adoptions when the legal parent, who is a party to the adoption, wishes to retain their parental rights, harms the children at issue because the rule fails to extend the full protection of the law to children existing in these non-traditional families.<sup>156</sup> A categorical holding refusing to apply the parental termination clause in second-parent adoption cases would provide these families a buttress, which would allow them to thrive under the same legal protections given to traditionally structured families.<sup>157</sup>

A. *The Best Interest of the Child*

The purpose of the Adoption Act is to serve the best interest of the child.<sup>158</sup> The analysis of the best interest of the child standard, used to determine the appropriateness of adoption, focuses on the emotional, physical, and mental needs and welfare of the child.<sup>159</sup> Interestingly, no statutory provision denies same-sex couples from jointly adopting a child who has no legal parents.<sup>160</sup> For example, section 2312 of the adoption law says, “anyone may adopt.”<sup>161</sup> Prohibiting adoptions merely because the children are either the biological or adopted children of one of the partners prior to filing of the adoption petition is illogical when juxtaposed with same-sex

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<sup>156</sup> See Becker, *supra* note 17, at 168 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not legally recognized through adoption).

<sup>157</sup> See Unif. Adoption Act, *supra* note 60 (stating that the states should “clarify the legal and economic consequences of different types of adoption so that, within these formal structures, the emotional and psychological aspects of adoptive parent and child relationships can flourish”).

<sup>158</sup> See 23 PA. CONS. STAT. ANN. § 2723 (West 2001) (stating that the court “[s]hall decide the desirability of an adoption on the basis of the physical, mental, and emotional needs and welfare of the child”); *In re Adoption of Hess*, 608 A.2d 10, 13 (Pa. 1992) (stating that the Adoption Act “clearly focuses on the needs of the child”).

<sup>159</sup> *In re Adoption of Hess*, 608 A.2d 10, 13 (Pa. 1992); see also 23 PA. CONS. STAT. ANN. § 2723 (defining the best interest of the child standard).

<sup>160</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1202 (Pa. 2002).

<sup>161</sup> 23 PA. CONS. STAT. ANN. § 2312 (1981) (stating “any individual may become an adopting parent”).

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couples' ability to adopt a child with no legal parents.<sup>162</sup>

Moreover, the adoption of a child by the parent's same-sex partner would only benefit the child, particularly when the parents and children want the adoption to go forward.<sup>163</sup> The court in *In re Adoption of R.B.F. and R.C.G.* stated, "It is a settled rule that in the construction of statutes, an interpretation is never to be adopted that would defeat the purpose of the enactment, if any other reasonable construction can be found which its language will fairly bear."<sup>164</sup> The best interest of the child, the primary purpose of the enactment, is served by having two legally recognized parents because adoption offers greater emotional and financial security.<sup>165</sup> The law should recognize the de facto parent-child relationship between a child and her parent's same-sex partner to protect the two from "remaining strangers in the eyes of the law."<sup>166</sup>

A recent study by the American Academy of Pediatrics found that the legal endorsement provided by second-parent adoption achieves the following:

1. Guarantees that the second-parent's custody rights and responsibilities will be protected if the first parent were to die or become incapacitated. Moreover, second-parent adoption protects the child's legal right of relationship with both parents. In the absence of coparent adoption, members

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<sup>162</sup> See Strasser, *supra* note 47, at 1046 (commenting on the absurdity of laws that allow gay and lesbian individuals to adopt but prohibit gay and lesbian couples from doing the same.).

<sup>163</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1203.

<sup>164</sup> *Id.* (citing *In re McQuinston's Adoption*, 86 A. 205, 206 (Pa. 1913)).

<sup>165</sup> See Glennon, *supra* note 30, at 260 (arguing that children do better emotionally if they have two legal parents); *Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child's daily life but would entitle her to inheritance, support, and insurance from non-biological mother, and would grant the non biological mother custody if the biological mother died).

<sup>166</sup> See Becker, *supra* note 17, at 116 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not legally recognized through adoption); see also Jacobs, *supra* note 9, at 350 (stating that the failure of the court to recognize the actual parental relationship in these second-parent cases means that many of these people are treated as mere third parties rather than as the parent they are to the child).



of the family of the legal parent, should he or she become incapacitated, might successfully challenge the surviving coparent's right to continue to parent the child, thus causing the child to lose both parents.

2. Protects the second-parent's right to custody and visitation if the couple separates. Likewise, the child's right to maintain relationships with both parents after separation, viewed as important to the positive outcome in separation or divorce of heterosexual parents, would be protected for families with gay or lesbian parents.

3. Establishes the requirement for child support from both parents in the event of the parents' separation.

4. Ensures the child's eligibility for health benefits from both parents.

5. Provides legal grounds for either parent to provide consent for medical care and to make education, health care, and other important decisions on behalf of the child.

6. Creates the basis for financial security for children in the event of the death of either parent by ensuring eligibility to all appropriate entitlements, such as Social Security survivor benefits.<sup>167</sup>

Based on these findings, the American Academy of Pediatrics supports legislative and legal efforts that provide the possibility for second-parent adoption.<sup>168</sup> Additionally, the Uniform Adoption

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<sup>167</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 3.

The American Academy of Pediatrics and its member pediatricians dedicate their efforts and resources to the health, safety and well-being of all infants, children, adolescents and young adults. The AAP has 57,000 members in the United States, Canada and Latin America. Members include pediatricians, pediatric medical subspecialists and pediatric surgical specialists. More than 41,000 members are board-certified and are called Fellows of the American Academy of Pediatrics.

Am. Acad. of Pediatrics, *AAP Fact Sheet*, available at <http://www.aap.org/visit/facts.htm> (last modified Jan. 5, 2004). See also *supra* notes 63-66 and accompanying text (discussing the report).

<sup>168</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 3.

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Act of 1994 seeks to approve second-parent adoptions where there is a demonstrable connection between the child and parent and it is in the best interest of the child.<sup>169</sup>

The Pennsylvania Supreme Court, while making strides in supporting second-parent adoption, could have better served the appellants in *R.B.F.*, future litigants, as well as the children involved, if they had followed the recommendations of the American Academy of Pediatrics and established clear standards on how to determine cause that would allow for simple approval of same-sex adoption.<sup>170</sup> Had the court categorically held that the parental termination clause of section 2711 does not apply to second-parent adoptions where the legal parent is a party to the adoption and wishes to retain his parental rights, the purpose of the Adoption Act to serve the “best interest of the child” would be met by granting two parents legal responsibility for the child.<sup>171</sup> Professor Jane Schacter maintains that in analyzing the issues raised by second-parent adoption, “the question for the court should be whether the child will receive the added legal, emotional and financial benefits that would result from acquiring a second legal (as opposed to merely functional) parent.”<sup>172</sup> By failing to establish clear standards and properly frame the analysis, the court leaves future litigants in same-sex adoption cases uncertain about where they stand in the eyes of the law.<sup>173</sup>

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<sup>169</sup> See Unif. Adoption Act, *supra* note 60.

<sup>170</sup> See AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4 (arguing that because these kinds of adoption cases are decided mainly by the courts on a case-by-case basis, “it is important that a broad ethical mandate exist nationally that will guide the courts in providing necessary protection for children through coparent adoption”).

<sup>171</sup> See Jacobs, *supra* note 9, at 391 (concluding that categorical acceptance of second-parent adoption after initially determining that the parent/child relationship exists and is healthy provides the most supportive environment for these families both legally and emotionally).

<sup>172</sup> Schacter, *supra* note 44, at 942.

<sup>173</sup> See Morley, Albert, Kneedler & Pereira, *supra* note 155, at 169 (discussing the confusion caused by current second-parent adoption law).

*B. The Rights of the Natural Parent and Finality of Adoption*

The Pennsylvania Supreme Court concluded that appellants should be given an opportunity at an evidentiary hearing to demonstrate cause as to whether the purpose of Section 2711(d)'s relinquishment of the parental rights component is unnecessary or whether it is satisfied because of the individual situation.<sup>174</sup> The purpose of the relinquishment provision is to protect the rights of biological parents and promote finality so the new family can develop in peace.<sup>175</sup> When the appellants have refused to relinquish their parental rights because they want to remain legally bound, it is superfluous to require appellants to show why it is unnecessary for them to relinquish those rights.<sup>176</sup> A court considering the unique situation of a second-parent adoption need not be concerned with either protecting the natural parents or promoting finality. Protecting the natural parent's rights is a non-issue when they are a party to the petition for adoption and wish for the adoption by their same-sex partner to take place. Severing the natural parent's rights instead decreases the legal protection extended to the child.<sup>177</sup> Moreover, promoting finality of adoption proceedings is actually accomplished when a second-parent adoption is granted because the family already exists, giving the legal parent, who is a party to the petition, no reason to challenge it later.<sup>178</sup>

The court should have held that the termination clause from

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<sup>174</sup> See *supra* notes 96-100 and accompanying text (discussing the implications of intentionally omitting the consent in the trial court cases).

<sup>175</sup> See *In re Adoption of E.M.A.*, 409 A.2d 10 (Pa. 1979) (holding that a parent's qualified consent to an adoption of his child by another who is not his spouse is not permissible under the law).

<sup>176</sup> *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1202 (Pa. 2002) ("When the requisite cause is demonstrated, Section 2901 affords the trial court discretion to decree the adoption without termination of the legal parent's rights under Section 2711(d).").

<sup>177</sup> See Unif. Adoption Act, *supra* note 60, § 2-401-409 (discussing the legal protections extended to a child when second-parent adoptions are granted).

<sup>178</sup> See *Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child's daily life).

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section 2711 does not apply in proceedings where the natural parent is both a party to, and in support of, the petition for adoption because the necessary cause has been shown by the fact of their participation in the petition.<sup>179</sup> The trial court should then have analyzed the best interest of the child to determine if this particular parent has the emotional and financial interests beneficial to the child warranting approval of the petition.<sup>180</sup> Rather than focusing on irrelevant statutory requirements, the court should instead evaluate whether the non-biological or non-adoptive petitioner has performed the obligations of parenthood for a substantial period of time and whether the relationship between the parent and child is publicly recognized. The court should consider whether the child believes the second-parent to be their parent.<sup>181</sup> If the potential adoptive parent has performed these obligations and the relationship is publicly recognized, then the intent of the petitioners to become legally bound to the child through adoption should be effectuated.<sup>182</sup>

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<sup>179</sup> *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000), *vacated by In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002) (Johnson, J., dissenting) (holding that the Pennsylvania legislature, in enacting section 2903, has already recognized that the trial judges who are on the front lines of these adoption proceedings are best situated to determine an appropriate procedure to follow in cases where there is a void of authority in the Adoption Act).

<sup>180</sup> *See In the Matter of the Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. 1993). The court stated:

[W]hile the families of the past may have seemed simple formations repeated with uniformity (the so called “traditional family”) families have always been complex, multifaceted, and often idealized. This court recognizes that families differ in both size and shape and within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.

*Id.* at 554-55.

<sup>181</sup> Jacobs, *supra* note 9, at 390.

<sup>182</sup> *See Duncan*, *supra* note 3, at 66 (citing *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996)) (finding that a same-sex partner standing “in loco parentis” to a child could seek partial custody if it would serve the best interest

A rule that grants these adoptions supports a beneficial relationship between prospective adoptive parent and child, and protects a natural parent's liberty interest in their parental rights. A rule such as this would also speed the inquiry as to the fitness of the adoptive parents because it would skip the examination of whether cause has been shown to determine if the petition could go forward, and instead would initially examine whether the parent is actually fit. An expedited process would effectuate the best interest of the child by shortening the time in which the child is without the protection of two legal parents.<sup>183</sup>

The court's failure to set a clear mandate that allows for same-sex adoption when the best interest of the child criteria is met fails the state's children who are part of non-traditional families.<sup>184</sup> While their decision to remand the case was correct, the court should have gone further to protect the children and effectuate the purpose of the Adoption Act by acknowledging that second-parent adoptions are generally in the best interest of the child, recognizable under current statutory law and therefore legitimate in Pennsylvania.

#### IV. LEGISLATIVE ACTION OR LACK THEREOF

The legislature should protect the best interests of the state, the children and the greater society by codifying second-parent adoption.<sup>185</sup> The law must acknowledge and reflect the reality that non-traditional families are raising children regardless of whether or not their petitions for adoption are approved.<sup>186</sup> Statutes that in

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of the child because the child has established a strong psychological bond with the person, and the petitioner has lived with the child and provided care, nurture and affection, assuming in the child's eye a statue like that of a parent).

<sup>183</sup> See Becker, *supra* note 17, at 133 (discussing the benefits for the child when the adoption is quickly adjudicated).

<sup>184</sup> See Glennon, *supra* note 30, at 271 (arguing that a court's focus should be on how the child will best thrive, not on what the particular family format should look like).

<sup>185</sup> See *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993).

<sup>186</sup> See Becker, *supra* note 17, at 128 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not

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practice deny adoption petitions by same-sex couples discriminate against them and their families, and in turn, sometimes fail to implement what is best for the child.<sup>187</sup> Denial of these petitions harms the children emotionally by depriving them of the greatest protection under the law—it denies the children two legal parents.<sup>188</sup> The legislature has a duty to clarify any ambiguities in the law to offer the highest level of legal protection to its children.<sup>189</sup> At a minimum, the legislature should make clear that it does not support second-parent adoption so that ambiguities about its legality are eliminated, and equal protection challenges can go forward.<sup>190</sup>

The National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>191</sup> recently supported the movement urging legislatures to support second-parent adoptions by approving the

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legally recognized through adoption); *see also* Schacter, *supra* note 44, at 942 (discussing the desirability of the law recognizing second-parents).

<sup>187</sup> *In re* Adoption of C.C.G. and Z.C.G., 762 A.2d 724, 735 (Pa. Super. Ct. 2000), *vacated by* *In re* Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pa. 2002) (Johnson dissenting) (stating that courts should design rules to serve children's best interest and by failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form).

<sup>188</sup> *See* Morley, Albert, Kneedler & Pereira, *supra* note 155, at 199 (discussing the status and implications of state laws for and against second-parent adoptions).

<sup>189</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 2 (stating that it is important that a broad ethical mandate exist nationally that will guide policy makers in creating initiatives that establish permanency for the children of same-sex partners through second-parent adoption).

<sup>190</sup> *See* Schacter, *supra* note 44, at 946-47 ("It is reasonable . . . to ask legislatures to be unmistakably clear if their will is to block second-parent adoption. Doing so would clarify the statutory issue, as well as force the constitutional question of whether children or their parents have any protected right to use the adoption laws made available to other families.").

<sup>191</sup> *See* MATTHEW BENDER, ADOPTION LAW AND PRACTICE (2001) (stating that "NCCUSL is a non-profit organization of state legislators, judges, lawyers, and law professors appointed by the governors of every state for the purpose of drafting and proposing uniform state legislation on topics normally subject to state legislative authority").

Uniform Adoption Act (UAA).<sup>192</sup> The Act attempts to manage the changing psychosocial and economic aspects of contemporary adoption by addressing the many different kinds of adoption that now occur and the various functions they serve.<sup>193</sup> Moreover, the Act encourages secure relationships between children and individuals committed to parenting them.<sup>194</sup> The American Academy of Pediatrics recommends that state legislatures take proactive measures to approve second-parent adoption and protect children in second-parent family situations.<sup>195</sup> If the legislature amended the law to explicitly authorize second-parent adoption, courts would not need to employ statutory interpretation to furnish the legal protection that adoption offers.<sup>196</sup> Legislative action would help define the best interest of the child standard and preempt conflicting lower court decisions in second-parent adoption cases.<sup>197</sup> A clear statutory provision would also establish the right for these children to have two parents legally obligated to care for them and recognize that these situations, though unconventional, are a reality for a growing number of children.<sup>198</sup>

#### CONCLUSION

Many gay and lesbian couples with children are still striving to create integrated families under the confines of adoption laws, and

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<sup>192</sup> See Unif. Adoption Act, *supra* note 60, at § 2-401-409.

<sup>193</sup> See MATTHEW BENDER, ADOPTION LAW AND PRACTICE, *supra* note 191.

<sup>194</sup> *Id.*

<sup>195</sup> AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 2 (concluding that the weight of evidence gathered during several decades showed children raised by lesbian or gay couples were normal and healthy and thus supporting the legal adoption of children by second-parents).

<sup>196</sup> Adoption of R.B.F. and R.C.F., 762 A.2d 739, 740 (Pa. Super. Ct. 2000) (Todd, J., dissenting) (stating that no legal mechanism other than adoption can offer the legal protection of existing familiar bonds, financial protection and two parents to these children).

<sup>197</sup> See Morley, Albert, Kneeder & Pereira, *supra* note 155, at 197 (discussing the confusion caused by current second-parent adoption law).

<sup>198</sup> See *supra* note 4 and accompanying text (discussing the growing number of same-sex parents).

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they often continue to be rebuffed.<sup>199</sup> The court's decision in *R.B.F.* makes possible legal recognition of the second-parent, but by failing to give the trial court categorical standards for approving second-parent adoption, the precedent offers limited support in promoting the best interest of the child.<sup>200</sup> The Pennsylvania legislature should revisit the issue of qualified consent in second-parent adoptions to bring the law in line with reality and maximize the legal protection available to children.

Second-parent adoption effectuates the main purpose of the Adoption Act to promote the best interest of the child.<sup>201</sup> Denying legal recognition to these families unfairly burdens them. To rectify this injustice, the state legislature should either codify approval of second-parent adoption, or the Supreme Court of Pennsylvania should categorically approve them to lift the injustice. Only then will these families be secure in their status under the law. The security provided by legal adoptive status is a vital step in upholding the statutory policy of protecting the best interest of the child.<sup>202</sup>

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<sup>199</sup> See, e.g., *In re Adoption of B.L.P.*, 16 Fiduc. Rep.2d 95, 98 (Montg. Co. Orphans' Ct. Pa. 1998) (rejecting the application of a lesbian partner to become an adoptive parent of a child).

<sup>200</sup> See *supra* notes 179-82 and accompanying text (discussing the implications of a categorical standard).

<sup>201</sup> See 23 PA. CONS. STAT. ANN. § 2723 (West 2001) (stating that the court "[s]hall decide the desirability of an adoption on the basis of the physical, mental, and emotional needs and welfare of the child"); *In re Adoption of Hess*, 608 A.2d 10, 13 (Pa. 1992) (stating that the Adoption Act "clearly focuses on the needs of the child").

<sup>202</sup> See 23 PA. CONS. STAT. ANN. § 2724(a)-(b) (West 2001) (setting forth factors taken into account in evaluating the child's best interests). Section 2724(b) states that:

The court shall hear testimony in support of the petition and such additional testimony as it deems necessary to inform it as to the desirability of the proposed adoption . . . . In any case, the age, sex, health, social and economic status or racial, ethnic or religious background of the child or adopting parents shall not preclude an adoption but the court shall decide its desirability on the basis of the physical, mental and emotional needs and welfare of the child.

*Id.*