The Rights of Lesbian and Gay Parents and Their Children

by
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Introduction

This article reviews legal trends and substantive law affecting the security of parent-child relationships between lesbian and gay parents and their children. It focuses principally on custody and visitation after divorce, adoption developments, other protections for parent-child relationships and intended families, related constitutional issues, and advice to practitioners.

I. The Practice of Representing Lesbian and Gay Parents and Their Children

As matrimonial lawyers enter the 21st century, there is currently no state whose law affirmatively allows gay or lesbian couples to marry.[1] One state, Vermont, allows same-sex couples to enter into "civil unions," to which attach all the state-based

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1 Several court challenges to marriage laws have been mounted, most famously in Hawaii, but none has yet resulted in a final victory. *See* Baehr v. Lewin, 74 Haw. 530, 74 Haw. 645, 852 P.2d 44 (1993) (holding marriage law presumptively unconstitutional); Baehr v. Mi'ike, 910 P.2d 112 (Haw. 1997) (Table) (referencing memorandum order dismissing case). At least two cases are pending. Goodridge v. Department of Public Health, 14 Mass. L. Rptr. 591 (Mass Super. 2002), *review granted* (Mass. Sept 18, 2002), Lewis v. Harris, No. L-00-4233-02 (N.J. Super. Ct., Hudson City). No state has legislated affirmative marriage rights for same-sex couples. Many states have passed laws or constitutional amendments outlawing performance and/or recognition of marriages between people of the same sex, *e.g.*, NEB. CONST. ART. I, § 29, and the federal Defense of Marriage Act declines federal recognition of such unions. 28 U.S.C. §1738C. Despite this landscape, there remains a sense of inevitability in many quarters about equal marriage rights especially with Canada allowing same-sex couples to wed as of June 2003. When it comes to pass, it will likely occur incrementally, state by state, creating immensely greater protection for married lesbian and gay couples and their children. Other than to note this future sea

incidents of marriage.[2] Many same-sex couples also enter into religious marriages or secular commitment ceremonies of great personal importance.[3] But generally speaking, lesbian and gay relationships remain in the category of "unmarried" relationships in the eyes of courts.

The law has generally adjusted to protect the parent-child relationships of single parents and heterosexuals who have children together outside of marriage, for the sake of the children as well as the adults, even though marriage is encouraged as a general public policy. Custody and visitation statutes protecting the rights of all married parents do apply to lesbian and gay parents who had children during a previous marriage. But the law – particularly positive law – has not yet fully adjusted to lesbian and gay families. In these homes, the parents are not only unmarried at law (often involuntarily so) but also may include both a biological and a nonbiological (or de facto) parent.[4] The security that parents and children in married families take for granted does not exist for these families.

The route to finding security for lesbian and gay parent-child relationships outside of marriage often leads through a legal maze, and sometimes still results in a dead end. But overall, in every major area of law affecting lesbian and gay parents and their children, there have been dramatic advancements in improving the security of parent-child ties notwithstanding a parent's sexual orientation. These trends toward family security are expected to continue, though not uniformly. Many states con-

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change in the lives of lesbian and gay families, this topic is outside the scope of this article.

[2] 2000 Vt. Laws 91, passed in response to Baker v. State, 74 A.2d 864, 886 (Vt. 1999) (holding that Vermont had a state constitutional obligation under the common benefits clause to provide same-sex couples the common benefit, protection, and security that Vermont law provides opposite-sex married couples.").

[3] Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997) (*en banc*) (upholding the firing of an attorney by the Georgia Attorney General because of participation in a Jewish wedding ceremony with a lesbian partner).

[4] In this article, the term "biological parent" is used for convenience to connote both biological and adoptive parents. A "nonbiological parent" or "de facto parent" refers to persons raising children in a parental capacity but without a biological or adoptive tie to the child. A "legal parent" refers to a parent recognized as such under state statutes or common law and in some circumstances may include de facto or nonbiological parents.

tinue to decline or have not yet considered key protections for children and adults in lesbian and gay families. Even where the law is settled in a positive direction, individual judges may be disinclined to follow it or may need education on these issues to get into a comfort zone.

The practitioner wading into lesbian and gay family law matters, therefore, must navigate the legal and political waters well and take nothing for granted, even with substantial evidence or settled law in a client's favor. Lesbian and gay families remain a political lightning rod in many jurisdictions, notwithstanding overall gains in social acceptance, and of course this fact affects the judiciary. Much energy is still spent in the "culture wars" on this topic, long after a consensus formed among reputable social science experts and professional organizations that lesbian and gay parents are as qualified to be parents as their heterosexual counterparts, and that their children are equally healthy and well-raised.[5] Dissident legal voices are still heard[6] and uneasiness remains in the minds of many judges. Attorneys must therefore accept that in many courtrooms the fact that a parent is lesbian or gay will start out as the proverbial "elephant in the room" in a family law case, threatening to tower over all other

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5 *See, e.g.*, Frederick W. Bozett, *Gay and Lesbian Parents* (1987); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620 (1975); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992); Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity in* LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH AND CLINICAL APPLICATIONS 156-72 (Beverly Greene & Gregory M. Herek eds., 1994). *See also* Judith Stacey & Timothy J. Biblarz, *(How) Does Sexual Orientation of Parents Matter*?, 66 AM. SOC. REV. 159, 169, 171 (2001) (reporting that studies find no differences in children in measures of self-esteem, anxiety, depression, behavioral problems, school performance, sports participation, friendships, use of counseling, unsociability or other emotional difficulties; points out other possible differences suggested by preliminary research but not confirmed; contains lengthy bibliography of studies); Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (Feb. 2002).

6 *See, e.g.,* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (agreeing that published social science studies establish no adverse effects from having lesbian and gay parents but questioning bias in and reliability of data). *But see* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (responding to Wardle article).

considerations rather than assuming its proper proportion in a best interests of the child inquiry or legal analysis.[7] This may be because a judge is so personally hostile to gay and lesbian families, or so concerned about political backlash, that this factor is all that stands out in – and may cloud – the judge's mind.[8] More often, a generally fairminded judge lacks familiarity with gay and lesbian families and comes into court preoccupied with unstated misconceptions and discomfort that are prevalent in our society.

The practitioner representing a lesbian or gay client therefore has a unique responsibility to the client and the court to *address* sexual orientation issues in order to keep them from assuming undue importance. An attorney should never assume that a judge has the necessary background to put these issues in context, or that the court's past rulings on other issues, or even a judge's own sexual orientation are reliable predictors of outcomes. Nor should the practitioner be lulled into thinking that any case is a sure thing based on some generalized sense of justice or on evidence regarding other issues that usually would suffice. These are common mistakes, particularly among members of the bar who do not practice frequently in this area. The attorney must get educated and seek assistance[9] and then give the court as much evidence, legal context and expert social science evidence as necessary to ensure that misconceptions and possible judicial discomfort are addressed, and that a record is made. Likewise, an attorney serving as a guardian *ad litem* for the child of a lesbian or gay parent also has a unique responsibility to get educated about these families and the unique legal needs of their children.

Representation of a lesbian or gay couple seeking family security through adoption or otherwise raises ethical concerns that are not as common when representing a married couple or two legal parents whose rights are clear, and may vary by state. First,

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7 Pleasant v. Pleasant, 628 N.E.2d 633 (Ill. App. Ct. 1993).

8 *Id.; see also* In re C.M.A., 715 N.E.2d 674 (Ill. App. Ct. 1999).

9 Several organizations offer resources, written materials and advice to practitioners across the country in lesbian and gay family law, including Lambda Legal Defense and Education Fund (headquartered in New York with regional offices in Los Angeles, Chicago, Atlanta and Dallas) (*www.lambdalegal.org),* National Center for Lesbian Rights (San Francisco), Gay and Lesbian Advocates and Defenders (Boston) and the American Civil Liberties Union (New York).

questions arise whether an attorney can or should jointly represent the interests of both members of a couple who may stand in entirely different legal shoes *vis-a-vis* a child even if they intend the same result. Second, it is often difficult to state with certainty what legal principles will govern if the couple splits up. A good faith agreement of the parties may not be worth the paper it is written on. On the other hand, a biological mother may not fully understand the autonomy she gives up through allowing her partner to adopt. At a minimum, an attorney must fully disclose to the parties their respective legal positions, any uncertainties in the law that may affect their intentions or the enforceability of commitments, as well as the attorney's likely obligation to withdraw if disputes arise.

Representation of one lesbian or gay parent against another in a family law dispute raises other issues. Because the law in this area is relatively undeveloped, any legal rulings may affect a great many other people, people to whom the client may have great loyalty. An attorney should not automatically follow a "scorched earth" approach without discussing with a client how success, or failure, might negatively impact the evolution of the law for the community as a whole, and how the result might affect even the client's future rights. Bad facts and "good facts" can make very bad law for the larger gay community of which the client may feel a part. A client who is a biological parent may prefer, for example, that an attorney not challenge the standing of nonbiological parents to seek visitation with children they planned and jointly raised, but only to contest whether granting it would be in the child's best interests. Or, the client may not have considered whether she herself may one day be the nonbiological parent of a child. She is likely in any event to have many friends affected by the legal position she takes.

Finally, attorneys must examine forthrightly and early on their own capacity to advocate zealously for a lesbian or gay client, or a child of a lesbian and gay family. Many clients report that their attorneys appear uncomfortable in addressing sexual orientation issues, causing clients to doubt their representation and judges to treat the clients disrespectfully. Parents complain that guardians *ad litem* focus on helping a judge explain why it is impossible to help a child, rather than on what should be done to serve the child's best interests. Most of what is true about lawy-

ering domestic relations cases remains true in this realm – but the attorney must be careful to not contribute to making what is different seem unduly consequential for a parent or child. Be prepared to fight hard for the court to respect the client and the family, or do not take the case.

II. The Rights of Lesbian and Gay Parents After Divorce

The most developed body of law on the rights of lesbian and gay parents and their children arises in the context of custody and visitation disputes following divorce. Many lesbian and gay people realize or come to terms with their sexual orientation only after entering into opposite-sex marriages and having children. When such marriages end in divorce, the gay parent's sexual orientation is sometimes made an issue by the other parent or the court in the context of framing custody and visitation orders or shared parenting decrees. Such cases have arisen across the country for many years and there is a relatively large body of case law upon which to draw. This case law has traced a clear arc, moving from *per se* rules disfavoring lesbian and gay parents to a more neutral, evidentiary and child-centered approach. The experience of courts with lesbian and gay families in this area has provided a legal and evidentiary foundation for the treatment of lesbian and gay parents and their children that extends to other areas of family law.

The overwhelming modern trend is not to attach negative presumptions about parenting ability or conduct to a parent's sexual orientation in determining who should have custody, but to look at whether there is any evidence of harm to children that the court should take into account.[10] This approach is supported by a consistent body of social science research demonstrating that children raised by lesbian and gay parents are as psychologically healthy and well off as other children.[11] A related trend affecting custodial and noncustodial parents shows the courts stepping back from rigid rules about when lesbian and gay par-

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[10] *See infra* Section II-A.

[11] *See supra* note 5.

ents may bring their children and partners together, or make known their sexual orientation to their children.[12]

A. *Custody and Sexual Orientation*

1. *Clear Trend Toward Evidence-Based Tests*

A clear majority of states employ tests that demand evidence of harm before a parent's sexual orientation will be held against him or her in matters of custody or in awarding visitation.[13] These tests, variously known as "nexus" or "adverse impact" or "direct effects" tests, essentially treat sexual orientation as neutral unless demonstrated otherwise. In these jurisdictions, a parent's sexual identity assumes no importance in and of itself in determinations of the child's best interests, and parental behaviors or concerns of others related to a parent's sexual orientation are not given more importance for gay parents.[14]

In some of these states, courts hold that sexual orientation is a "nonissue"[15] or is "irrelevant" to custody.[16] Other states phrase their views less absolutely, allowing for the possibility that sexual orientation could cause relevant problems. In practical effect, however, the focus of all courts with evidence-based tests is on conduct, behavior and any effects on children, rather than on sexual orientation itself. Even when a court opinion attributes impacts to "sexual orientation," close examination usually reveals that it is not the fact that a parent is lesbian or gay but something he or she has done, or that others have done, that has caused the court concern.[17] Practitioners must be on the lookout

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12 *See infra* Section II-B.

13 *See, e.g.,* Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000); Marriage of R.S., 677 N.E.2d 1297 (Ill. App. Ct. 1996). *See generally* Stephanie R. Reiss, Meghan Wharton and Joanne Romero, *Child Custody and Visitation*, 1 GEORGETOWN J. GENDER & L. 383, 392-97 (Spring 2000) (collecting cases).

14 A subset of cases has grappled with whether a custody order is open to modification if, after entry, it is learned that a parent is lesbian, gay or bisexual. Standards for reopening custody orders vary by state. Typically the initial legal issue is whether this fact constitutes a "changed circumstance" that enables a parent to seek reconsideration of an existing custody order, with the ultimate issue being whether new facts justify a reallocation of rights. *See, e.g.,* Inscoe v. Inscoe, 700 N.E.2d 70 (Ohio Ct. App. 1997).

15 *In re* Marriage of Cupples, 531 N.W.2d 656 (Iowa Ct. App. 1995).

16 Bezio v. Petenaude, 410 N.E.2d 1207 (Mass. 1980).

17 *In re* Marriage of Martins, 645 N.E.2d 567 (Ill. App. Ct. 1995).

for invocations of neutrality regarding sexual orientation followed by double-standards as to the weight attached other issues in the case.

2. *The Erosion of* Per Se *Unfitness Rules*

Parental sexual orientation alone is not a basis upon which visitation is denied. And, in recent years, even states generally considered most socially conservative on issues of homosexuality and parenting have disclaimed any *per se* rule restricting custody for lesbian or gay parents on the basis of sexual orientation alone.[18] This trend is consistent with the generally accepted focus in custody matters on the circumstances and best interests of individual children. However, the lack of a *per se* rule is not always synonymous with neutrality. In some states there remains legal hostility toward lesbian and gay parents gaining custody, particularly where the parent is in a relationship with a partner, and concerns about "moral fitness" still work against lesbian and gay parents.[19]

B. *Custody, Visitation and "Cohabiting" Partners*

Much litigation in the area of visitation and custody rights for lesbian and gay parents has focused on the parents' intimate relationships with same-sex partners.[20] Like other divorced parents, lesbian and gay parents are likely at some point to date new people and may settle down with new partners. Modern cases apply a sexual-orientation neutral approach that focuses on

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[18] *See, e.g.,* J.A.D. v. F.J.D. III, 978 S.W.2d 336 (Mo. 1998) ("A homosexual parent is not *ipso facto* unfit for custody"); Tucker v. Tucker, 910 P.2d 1209 (Utah 1996) (holding that a mother's status as lesbian would not by itself disqualify her from custody); Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (stating that the fact that a parent is gay does not render that parent *per se* unfit to have custody).

[19] *See, e.g.,* Lundin v. Lundin, 563 So.2d 1273 (La. Ct. App. 1990). *See also* Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998). Reiss, et al., *supra* note 13, at 394-96.

[20] *See generally* Elizabeth Trainor, Annotation, *Custodial Parent's Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order*, 65 A.L.R. 5th 591 (2000).

shielding children from true harms and from sexual conduct, and moves away from imposing blanket restrictions.[21]

In some areas of the country, it is fairly routine for domestic relations courts to impose "non-cohabitation" orders on divorcing spouses, although laws criminalizing cohabitation and similar offenses generally have been repealed or are unenforced. These orders vary in scope, as do understandings of what is meant by "cohabitation." Some restrictions are limited to avoiding sexual intimacy in front of children – an expectation that exists of all parents regardless of whether specifically ordered. Others also limit parents from having any unmarried partners in the home overnight while the children are present. And some additionally limit parents from sharing a residence with an unmarried partner.

Heterosexual parents can "cure" restrictions regarding the presence of unmarried partners by marrying a new partner, but a gay or lesbian parent cannot,[22] even though a gay parent's relationship may be every bit as committed as the relationship of a remarried spouse.[23] Despite their different legal standing with regard to marriage, some courts still maintain that such non-cohabitation rules are nondiscriminatory.[24] Above and beyond these general rules, some state judges subscribe to the view that children should be shielded from lesbian and gay people in a broader sense and have tried to restrict gay parents from having any lesbian or gay person around the children, or from attending "gay pride" functions and the like.[25]

Regardless of sexual orientation or marital status, of course, a parent's conduct of intimate relationships can have negative impacts by making a child's home life unstable or even dangerous. The general trend, however, is in the direction of avoiding

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21 *See, e.g.*, Downey v. Muffey, 767 N.E. 2d 1014, 1021 (Ind. App. Ct. 2002) (finding error in imposing standard overnight restriction on lesbian parent without finding of harm or adverse effect on children).

22 However, some trial courts have adopted sexual-orientation neutral cohabitation restrictions that make indicia of commitment rather than (but including) marriage the operative consideration.

23 In re Marriage of R.S., 677 N.E.2d 1297 (1996).

24 *See, e.g.,* Taylor v. Taylor, 47 S.W.3d 222 (Ark. 2001).

25 *See, e.g.*, *Pleasant*, 628 N.E.2d at 637-39, 642 (overturning order of supervised visitation for lesbian mother that prevented her from having son interact with lesbian partner or any lesbian or gay people or attend any gathering place of a "homosexual nature" including gay and lesbian pride parade).

formulaic rules, stereotypes and unwarranted restrictions, and focusing on harm that is based on specific evidence.[26]

Courts have recognized that it infringes on parental autonomy to impose a particular moral framework on the family absent evidence of harm, and that great damage can be done to parent-child relationships by limiting visitation, particularly in ways that communicate negative messages about a parent or partner.[27] Courts also have found it unrealistic, inappropriate and/or counterproductive to require a parent to hide his or her sexual orientation from a child or handle its disclosure in a court-ordered way.[28] Instead, they indicate that a general level of discretion and good judgment is expected of all parents with respect to their intimate relationships, but move out of the realm of imposing moral dictates or trying to regulate the coming out process between parents and children.[29]

These trends parallel the evolving legal treatment of "immoral conduct" in custody disputes between divorced, opposite-sex couples.[30] States generally have moved from assuming harm to children from a divorced parent's sexual or live-in relationships with non-marital partners to requiring an evidence-based

[26] *See, e.g.,* Boswell v. Boswell, 721 A.2d 662 (Md. 1998) (lifting ban on visitation in presence of gay parent's non-marital partner and surveying growing consensus in case law). *See also* K.T.W.P. v. D.R.W., 721 So.2d 699, 702 (Ala. Civ. App. 1998) (rejecting per se rule that visitation restrictions required in cases involving gay parent); Dorworth v. Dorworth, 33 P.3d 1260 (Colo. Ct. App. Aug. 30, 2001) (vacating ban on overnight guests in father's home during visitation); Jacoby, 763 So. 2d 410 (reversing ruling based on speculation about harm resulting from contact with mother's partner); *In re* Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990) (reversing requirement that "no unrelated adult" be present when gay father exercised visitation); Weigand v. Houghton, 730 So. 2d 581, 587 (Miss. 1999) (vacating prohibition on presence of father's male partner); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987) (reversing requirement that "no unrelated adult" be present when gay father exercised visitation); Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001) (unanimous ruling vacating ban on overnight visitation while mother's lesbian partner in the home).

[27] Boswell, 721 A.2d at 674-79 (and cases cited therein).

[28] *See, e.g.*, *In re* Marriage of Kraft, 2000 WL 1289135 (Iowa Ct. App. 2000); Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992).

[29] *Pleasant*, 628 N.E.2d at 640-42 (and cases cited therein).

[30] *Compare* Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979) *with In re* Marriage of Thompson, 449 N.E.2d 88 (Ill. 1983). *See also* Boswell, 721 A.2d at 672-74.

demonstration that the conduct adversely affects a child's best interests before contact with a parent will be limited or custody modified.[31]

C. *Issues of Private Bias and Community Moral Standards*

Counsel frequently argues that a non-gay parent should be awarded custody so that children are not subjected to harm stemming from private bias against or negative moral judgments toward a gay, lesbian or bisexual parent. Some trial courts have agreed with these arguments, expressing concern for the best interests of the child.[32] Usually the concern is to prevent children from having to face expected taunts or other harassment because of who their parents are, or to appease the children's anticipated discomfort or embarrassment. But the clear trend of decisions reasons in the other direction, that limiting parent-child relationships to shield children from negative or internalized social attitudes is inappropriate, ineffective and even unconstitutional.

It is not generally argued that parents should lose custody because they are individually unpopular or part of a stigmatized social group that may face harassment. This has certainly occurred, as when some courts in the past acted to restrict the parental rights of divorced parents in interracial relationships.[33] But the idea that members of religious minorities, parents with disabilities or weight problems, or those pursuing nontraditional employment or even political careers, should lose custody because of negative social attitudes or public insults generally strikes people as repugnant.[34]

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[31] *Boswell*, 721 A.2d at 677-78.

[32] *Marriage of R.S.*, 677 N.E.2d at 1301-02.

[33] Langin v. Langin, 276 N.E.2d 822, 823 (Ill. App. Ct. 1971) (reversing custody decision in which court sought to avoid placing children into mother's racially mixed family).

[34] *See, e.g.*, *Blew*, 617 A.2d at 35 ("The trial judge is appropriately sensitive to the fact that Nicholas is embarrassed, confused and angry over other people's reactions to his mother and Sandy E.'s relationship. However, the merits of a custody arrangement ought not to depend upon *other people's* reactions. Would a court restrict a handicapped parent's custody because *other people* made remarks about the handicapped parent which embarrassed, confused and angered the child? We think not.") (emphasis in original).

Case law has eschewed making parental relationships turn on public attitudes. The Supreme Court struck this note in *Palmore v. Sidoti*,[35] an equal protection case that involved a parent's interracial relationship and its presumed negative impact on a child. The Court held that it was true that people harbored private biases that could conceivably inflict injury upon the children, but that the states could not constitutionally take them into account in making judicial decisions. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[36]

Several decisions involving gay parents and custody or visitation have applied the reasoning of *Palmore* or parallel state law principles to reject taking the consequences of private bias or negative moral judgments against homosexuality into account in determining custody issues.[37] Courts additionally have held that it is false reasoning to argue that a change of custody will insulate a child from any negative reactions to a gay or lesbian parent.[38] Several courts also have indicated that children must be allowed to come to terms with their parent's sexual orientation and any negative public attitudes, and can grow from doing so.[39] And

[35] 466 U.S. 429 (1984).

[36] *Id.* at 433.

[37] *Conkel*, 509 N.E.2d at 987 (citing *Palmore* and holding that the "court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship"); *Blew*, 617 A.2d at 35 (citing *In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d 111 (1982) (holding in cases involving interracial homes that a "court must never *yield* to prejudice because it cannot *prevent* prejudice. Let the court know that prejudice will condemn its award, [still] it must not trim its sails.") (emphasis in original). *See also* S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); M.P. v. S.P., 404 A.2d 1256 (N.J. Super Ct. 1979); Inscoe, 700 N.E.2d 70.

[38] *Marriage of R.S.*, 677 N.E.2d at 1302 (citing expert testimony that risk of social condemnation "would not be eliminated by awarding custody of the children to their father" rather than bisexual mother); *Conkel*, 509 N.E.2d at 987 (same). *See also M.P.*, 404 A.2d at 1263 ("Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody. Hard facts must be faced.").

[39] *M.P.,* 404 A.2d at 1263 (postulating benefits to children of overcoming popular prejudices); *Conkel*, 509 N.E.2d at 987 (same). *See also Blew*, 617 A.2d at 36 (limiting contact with lesbian mother "fails to permit him to confront his life situation, however unconventional it may be. * * * Nicholas' best interest is

many courts, refusing to rely on assumptions, cite a lack of evidence of public animosity affecting children and/or of lasting negative effects on children.[40]

III. Adoption by Individuals, Couples and Partners

Acting on the same impulses to parenthood that many Americans share, lesbian and gay people increasingly are intentionally planning for children. Some seek to do so as single parents, many do so as couples and some form other familial arrangements. For lesbian and gay people, adoption offers the most complete security for nonbiological parent-child relationships that are otherwise legally vulnerable. The clear trend is for adoption to be made universally available on a nondiscriminatory basis to lesbian and gay individuals, and increasingly available to couples through joint adoption and to partners through so-called "second-parent adoption," an analogue to stepparent adoptions. Many of the same legal and policy principles govern both adoption of foster children and private placement adoptions (arranged without the direct involvement of the state) though the statutory schemes governing each may be separate in particular states.[41]

A. *Adoption by Lesbian and Gay Individuals*

The typical adoption statute in this country allows any unmarried individual to adopt.[42] These provisions have been con-

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served by exposing him to reality and not fostering in him shame or abhorrence for his mother's nontraditional commitment.").

40 *Marriage of R.S.*, 677 N.E.2d at 1301-02; *Blew*, 617 A.2d at 36. There are parallels in the experiences of children raised amid societal prejudice of other kinds, and scant evidence that children of lesbian and gay parents are harmed in any lasting way by negative attitudes toward their parents. *See, e.g.,* Knud S. Larsen *et al.*, *Anti-Black Attitudes, Religious Orthodoxy, Permissiveness and Sexual Information: A Study of the Attitudes of Heterosexuals Toward Homosexuality*, 19 J. Sex Research 105 (1983).

41 Adoptions may bring into the mix private or public agencies or government officials unwilling to place children in openly gay or lesbian homes, thus preventing the adoption before it ever goes to a court, or driving the parent(s) into the closet about their sexuality.

42 *See, e.g.*, 23 Pa. Cons. Stat. Ann. § 2312 (2003).

sistently interpreted to grant lesbian and gay individuals standing to adopt.[43] As of 2003, there is no legal bar to lesbian and gay individuals adopting children in 49 states.[44] Only one state – Florida – bans lesbian and gay individuals from adopting.[45] The Florida law was upheld by the Florida Supreme Court against due process, privacy and vagueness challenges in 1995.[46] In August 2001, a federal trial court upheld the law against federal equal protection and due process claims on behalf of gay foster parents, including one father who had raised three foster children for ten years, all of whom had tested HIV-positive at birth.[47] The second to last holdout state, New Hampshire, repealed its ban in 1999.[48]

B. *Second Parent Adoption and Joint Adoption*

In the last two decades, lesbian and gay partners have witnessed important progress in securing parental rights for more than one parent through joint adoption by couples and second parent adoption by partners. This trend is expected to continue, though it is not uniform in the states.[49]

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43 *See e.g.* Petition of K.M., 653 N.E.2d 888, 892 (Ill. App. Ct. 1995) ("Nothing in the Act suggests that sexual orientation is a relevant consideration, and lesbians and gay men are permitted to adopt in Illinois.").

44 However, in March 2000, Utah signed into law a measure barring placement of children in any home in which unmarried adults – of any sexual orientation – are living together in an intimate relationship. UTAH CODE ANN. § 78-30-1 (3)(b)(2003). This effectively disqualifies gay and lesbian would-be adoptive parents even as individuals *if* they are living with partners.

45 FL. STAT. § 63.042(3) (2003). Florida's law, originally passed in 1977 amid Anita Bryant's anti-gay campaigns in that state, also was the first such law. It does not prohibit lesbians and gay men from becoming foster parents. Matthews v. Weinberg, 645 So.2d 487 (Fla. Dist. Ct. App. 1994).

46 Cox v. Florida Dept. of Health & Rehabilitative Services, 656 So.2d 902 (Fla. 1995) (remanding for further proceedings on an equal protection claim, but the petition was subsequently withdrawn).

47 Lofton v. Kearney, 157 F.Supp.2d 1372 (S.D. Fla. 2001), *app. pending* (11th Cir., No. 01-16723-DD).

48 Prior to its passage, the New Hampshire House of Representatives had obtained a legal opinion from the Supreme Court of New Hampshire (then including Justice David Souter) that such a law would be constitutional. Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

49 Marcus C. Tye, *Lesbian, Gay, Bisexual, and Transgender Parents: Special Considerations for the Custody and Adoption Evaluation*, 41 FAM. CT. REV. 92, 96 (2003)

When a couple is legally married, if all other legal requirements are satisfied, they may adopt a child jointly to whom neither is a parent, or one spouse may adopt the other spouse's child through what is known as stepparent adoption. Stepparent adoption is the most common exception to the general rule that a child's ties to all legal parents must be ended before adoption by another adult can occur; the stepparent's spouse (the existing legal parent) retains parental rights in such an adoption.[50] The stepparent exception developed at common law in some states despite express statutory language to the contrary because it was manifestly consistent with the best interests of children not to end their existing parent-child relationship in such cases.[51]

A series of more modern cases has similarly recognized that children being raised by lesbian or gay couples should not be limited to one legal parent-child relationship, but should be able to have the security and practical benefit of a legal bond with their second parent, if otherwise in their best interests.[52] These cases can present even stronger equities than stepparent cases for creating a secure parent-child relationship because many of these children were planned by the couple jointly and always have been parented by both members of the couple. In cases addressing second-parent adoption, the right of lesbian and gay couples jointly to adopt a child to whom neither is a parent is often also addressed.[53]

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50 *See, e.g.,* 23 Pa. Cons. Stat. Ann. § 2903 (2003).

51 Marshall v. Marshall, 239 P. 26 (Cal. 1925).

52 *In re* M.M.D. and B.H.M., 662 A.2d 837 (D.C. App. 1995); In re Adoption of M.M.G.C., 785 N.E. 2d 267 (Ind. App. Ct. 2003)(second parent may adopt without divesting first adoptive parent of rights); Petition of K.M., 653 N.E.2d 888; Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); In re Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. 1995); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995); *In re* Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002); *In re* Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). Trial courts in almost half the states also have allowed second-parent adoptions. *See, e.g.*, *In re* Hart, 806 A.2d 1179 (Del. Fam. Ct. 2001). *See generally* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev. 933 (2000).

53 *Adoption of Tammy*, 619 N.E.2d at 319; *Adoption of R.B.F.*, 803 A.2d at 1202.

Although some states now expressly permit second-parent adoption by statute,[54] most cases approving second parent adoption arise under adoption statutes that do not specifically mention these families. These cases raise recurring legal and policy issues. But a consensus is growing that it is in the best interests of children to make such adoptions possible.

C. *"Who May Adopt" Provisions*

Adoption statutes typically state that "any person" or "any individual" or "an unmarried person" may petition to adopt, and then contain additional provisions relating to married persons and spousal consent.[55] In states in which a second-parent adoption petition is brought in the name of the adopting parent only, eligibility to petition is not an issue.[56] Further, adoption statutes are almost always subject to a rule of construction interpreting singular words to include the plural.[57] This rule of construction, for example, allows more than one child to be adopted in a single petition, although the statutes typically speak of a petition to adopt a "child" or a "minor."[58] Applying such rules to eligibility to adopt, the provisions for individuals have been read not to bar joint petitions brought by two individuals, or a second-parent adoption petition by an adopting parent and existing parent where the law requires both to petition together.[59]

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[54] *See* CONN. GEN. STAT. § 45a-724 (a)(3)(2003), *superseding In re* Adoption of Baby Z., 724 A.2d 1035 (Conn. 1999); 15A VT. STAT. ANN. § 1-102(b)(2002), *codifying* B.L.V.B., 628 A.2d 1271. *See also* UNIF. ADOPTION ACT § 4-102 cmt., 9 U.L.A. 69 (Supp. 1999).

[55] *See, e.g.,* N. Y. DOM. REL. LAW §110. Separate language for married spouses and marital consent requirements arose so as to avoid surprise as to inheritance rights and expectations. Watts v. Dull, 56 N.E. 303 (Ill. 1900). *Compare* 1867 ILL. LAWS., 133-34, § 1 *with* ILL. COMP. STAT. Ch. 4 §§ 1-8 (Hurd, 1874).

[56] *In re* Angel Lace M., 516 N.W.2d 678, 682 (Wis. 1994).

[57] *See, e.g*., *Petition of K.M*., 653 N.E.2d at 897-98 (and cases cited therein).

[58] WIS. STAT. § 48.81(2003).

[59] *Petition of K.M*., 653 N.E.2d at 894-99; *Adoption of Tammy*, 619 N.E.2d at 319.

D. *Consent and Termination of Parental Rights Provisions*

More complicated to navigate for second-parent adoption petitioners are provisions relating to consent to adopt, voluntary relinquishment or involuntary termination of parental rights ("cut-off" provisions) and related stepparent exceptions. For reasons unrelated to second-parent adoption, courts are accustomed to applying termination, relinquishment and consent provisions strictly so as to be certain that a legal parent truly wants to extinguish a parent-child relationship and permit a child to be adopted, and so that a new adoptive parent will have inviolate family security. After all, the most typical adoption is a closed adoption that contemplates absolute finality, with the child severing existing family ties and beginning entirely new ones.[60]

Toward these ends, though structured differently, states commonly have cut-off provisions and related consent requirements that bear upon the feasibility of second-parent adoptions.[61] In some states, a child is not considered eligible to be the subject of an adoption petition unless the parents' rights already have been terminated or relinquished.[62] In other states, parental rights are not divested until the adoption is finalized.[63] While some statutes contain express language allowing termination requirements not to be applied in all cases, such as when a parent is also a petitioner,[64] or there is "cause shown,"[65] or termination provisions do not divest an adoptive parent's rights,[66] often no express statutory exception exists other than for stepparents – and even stepparents may have to rely on common law or other statutes rather than an express exception to retain a biological parent's legal rights.[67]

A second-parent adoption cannot be accomplished if the existing legal parent's rights must be relinquished or terminated in

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60 Schacter, *supra* note 52, at 936-37.

61 *Id*.

62 *See, e.g.,* Colo. Rev. Stat. § 19-5-203 (1995 Cum. Supp.), applied to bar second-parent adoption in *In re* Adoption of T.K.J. and K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996), *cert. denied* (1997).

63 Ohio Rev. Code § 3107.15 (A)(1) (2002)

64 *See, e.g.,* Petition of K.M., 653 N.E.2d at 703.

65 23 Pa. Cons. Stat. Ann. § 2901 (2003).

66 *Adoption of M.M.G.C.*, 785 N.E.2d at 270.

67 Schacter, *supra* note 52; Neb. Rev. Stat. § 43-111 (2003).

order for the parent's partner to adopt the child. Several states have ruled on this ground that such adoptions are legally impossible notwithstanding their benefits for children.[68] But many other state courts have read their statutes to permit second-parent adoptions.[69] Where literal application of cut-off provisions would seem to bar these adoptions, these courts have determined not to apply them as written. This is because the goals of family security, protecting parental autonomy and providing permanency that are generally served by strict application of termination or relinquishment of parental rights provisions are thwarted in a situation in which the legal parent and would-be adoptive parent want to have a unified family and continue jointly raising a child.[70] Likewise, they reason, the overarching purpose of adoption statutes – to serve the best interests of children by creating emotional and economic security – is undermined by literal application of cut-off provisions.[71] Exceptions for stepparent adoptions sprang up based on these same understandings and, where now embodied in statutes, they also reflect legislative intent to have different treatment of children seeking to secure an existing, second parent-child tie rather than to create a new family through adoption.[72]

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[68] *Adoption of T.K.J.*, 931 P.2d at 492-93; *In re* Adoption of Luke, 640 N.W. 2d 374 (Neb. 2002); *In re* Adoption of Jane Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); *Angel Lace M.*, 516 N.W.2d at 681-85. It may be possible in some states for the same result sought through second parent adoption to be accomplished through a joint adoption. *See* note 53, *supra*. Under this approach, where possible, a biological parent consents to termination of parental rights conditioned on simultaneous adoption of the child by specific petitioners, namely herself and her partner. This approach raises emotional issues for some biological parents, and may have legal risks and disadvantages as compared to a second-parent adoption. An attorney would have to be certain of many factors before recommending this process, including that there is no period in which the child is in legal limbo outside the biological parent's control, and that the court is absolutely required either to grant the adoption or return the child to its existing parent. There also may be intestacy consequences for the child (who assumes the status of adopted child rather than biological child of the original parent) in states in which the law continues any distinctions between biological and adoptive children.

[69] *See supra* note 52.

[70] *Adoption of B.L.V.B.*, 628 A.2d at 1272-74.

[71] *Id.*; H.N.R., 666 A.2d 535.

[72] *In re Jacob*, 660 N.E.2d at 398-99.

Courts allowing second-parent adoptions generally apply specific principles of statutory construction – sometimes legislatively directed – that instruct them to interpret the law to accomplish the overriding purpose of the act and to avoid absurd results flowing from literal application of statutes.[73] Courts often also rely upon a rule of liberal construction that is found in the adoption act or held to apply because of its remedial ends;[74] but even courts who use strict construction under the principle that adoption is in derogation of common law have approved second-parent adoption.[75] Using these rules and principles, these opinions decline to apply literally provisions that otherwise would require the biological parent to relinquish parental rights, or construe them affirmatively to permit second-parent adoptions.[76]

E. *Reasons Why Second Parent Adoptions Are Favored*

Courts granting second parent adoptions are motivated by an understanding of the deficit faced by a child who has no legally recognized relationship with a second parent who is in the child's life every day.[77] Adoption by the second parent, on the most practical level, brings the child a myriad of economic and health protections that can be critical. These include access to social security benefits in the event of the adoptive parent's death or disability, health insurance coverage, life insurance coverage, rights of inheritance, the right to sue for wrongful death and the right to child support. Adoptive parents can make medical decisions for the child in case of emergencies. Most importantly from an emotional standpoint, parenthood means presumptive custodial rights and, upon death of the biological parent or a breakup of the adults' relationship, continuity in the child's relationships with the second parent and relatives.[78]

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73 *M.M.D.*, 662 A.2d at 844-45, 859-62; *Adoption of R.B.F.*, 803 A.2d at 1202.

74 *Petition of K.M.*, 653 N.E.2d at 892-95.

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

76 Schacter, *supra* note 52, at 938-39.

77 *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459 (1990); Theresa Glennon, *Building the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255 (1998).

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

It is sometimes assumed that parents can provide these protections to their children without having the partner adopt, such as through wills and guardianship and beneficiary designations. While it is possible for people of means to cobble together certain legal protections, varying by state, that provide a degree of security to children, they cannot approach the security adoption provides. Wills and guardianships not only can be revoked but can be challenged by third parties or rejected by courts. Powers of attorney for medical care may be ignored or left at home. As a practical matter, many couples cannot afford or never quite get around to translating their intentions into a range of legal documents. And many rights and benefits turn exclusively on parenthood or dependency in any event. In short, absent marital protections, for providing security to a child and a parent-child relationship in a lesbian or gay family, there is no substitute for adoption.[79]

These realities are compelling to courts, no matter their view of the adults' relationship to one another, which is legally unchanged by adoption. Opponents of these adoptions often point not only to the language of the statutes, seeking strict and literal construction of termination and stepparent provisions, but to indicia of a state's preferential treatment of married, opposite-sex couples. In particular, they may point to explicit statutory bans on same-sex marriages and ask the court to read into these provisions a broader legislative intent not to recognize lesbian and gay families in any form.[80] Because adoption has no effect on the adults' relationship to one another, is available to single people, and historically has been focused on the welfare of children, arguments to limit the security of some children based on their parents' capacity to marry – an accident of the child's birth – are out of step with adoption law generally. But an adoption practitioner must make sure that the case is made from a child-centered perspective, and on the basis of the state's adoption law, taking care to explain why the adults' capacity to marry should not be dispositive.

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[79] *See generally* Polikoff, *supra* note 77 (surveying risks and inadequacies of legal protections absent adoption).

[80] *Jane Doe*, 719 N.E.2d at 292 (Wise, J. concurring).

IV. Custody and Visitation Disputes Involving Nonbiological, De Facto Parents

Many lesbian and gay people are having and parenting children with a partner. If the relationship ends by death or separation, the parent-child relationships of nonbiological de facto parents may be cast into legal limbo. Typical cases involve a long-term lesbian or gay couple who had decided jointly to raise a child as equal parents, chosen one partner to be a biological or adoptive parent, followed through on their agreement and some years later broke up. In the throes of the relationship's end, or shortly after, the biological parent denies the parties' understanding and the nonbiological parent goes to court to protect her de facto parent-child relationship. While protection is uneven across the states, a number of jurisdictions now protect the child's relationship to both parental figures, applying multi-factor tests that balance relevant interests of the adults and children and take account of the liberty interest in parental autonomy safeguarded by the Due Process Clause.[81]

These cases are but one strand in an ongoing national debate about the circumstances under which a "nonparent" at law may obtain custody or visitation over the objections of a fit legal parent. They also implicate who the state considers a parent or accords parental rights. Many state courts and legislatures are grappling with where to draw lines that protect both legal and de facto parents and children's critical bonds with nonparents. Every state has laws relating to grandparent and/or nonparent visitation, and there has been an explosion of case law in this area.[82]

Unanswered constitutional questions also come into play about the degree of protection afforded legal parents, de facto parents and children. The recent United States Supreme Court decision in *Troxel v. Granville*,[83] which declared a nonparent visi-

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[81] *See generally* Robin Cheryl Miller, Annotation*, Child Custody and Visitation Rights Arising From Same-Sex Relationship*, 80 A.L.R. 5th 1 (2001). *See also Principles of the Law of Family Dissolution: Analysis and Recommendations*, A.L.I. (2002).

[82] *See generally* Stephen Almo Everett, *Grandparent Visitation Right Statutes*, 12 B.Y.U. J. Pub. L. 355 (1999).

[83] 530 U.S. 57 (2000).

tation statute unconstitutional as applied to the grandparents before it, clarified some of the constitutional minimums that must be respected in resolving such cases.[84] Some state courts already had gone further under state constitutional provisions, erecting high barriers that employ strict scrutiny in all cases; these decisions make fit parents' decisions as to a denial of visitation or custody virtually unassailable, unless harm to a child is shown.[85] After *Troxel* it is clear that the Court is not inclined toward a uniform strict scrutiny requirement under the federal constitution.

Lesbian and gay families have important interests on both sides of these constitutional and policy debates and, because of their unique legal position, have had a head start in navigating the minefields in this area of law. Lesbian and gay nonbiological parents are vulnerable to losing parent-child relationships altogether.[86] Biological lesbian and gay parents often have relatives and ex-spouses unaccepting of their sexual orientation or relationships and willing to contest the parent's custodial and other child rearing choices upon death or sooner.[87] While it remains difficult to protect any lesbian or gay parent fully, a consensus has emerged in a series of court decisions over the last decade as to how to balance the need of fit biological parents for parental autonomy with the interests of children and *de facto* parents in securing and continuing their relationships, through multi-factor tests for custody or visitation.[88]

A. *The Liberty Interest in Parental Autonomy and Federal Constitutional Minimums*

1. *The Supreme Court's History of Calibrated Protections*

It has long been established that legal parents have a liberty interest in the care, custody and rearing of their children that merits both procedural protection and substantive recognition

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84 *See generally*, Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 Rutgers L.J. 825 (Spring, 2001).

85 Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995).

86 See *infra* note 123.

87 *Bottoms*, 457 S.E.2d 102 (grandmother awarded custody of child over lesbian mother).

88 *See infra* Section IV-B.

under the Due Process Clause of the Fourteenth Amendment. The Supreme Court has described both this parental autonomy interest and the interest in family autonomy and privacy in broad terms, and as "fundamental," "deeply rooted" or "of basic importance."[89] But the Court has made plain that no single test or level of protection governs claims of infringement of such rights. Rather, the constitutional stakes vary with the extent and nature of the infringement at issue, and the interests of the children and involved others.[90]

2. *Measuring the Infringement on Parental Autonomy*

The Court looks first at the extent of the government's interference with the exercise of fundamental rights bearing upon "the decision to marry . . . procreation, childbirth, child rearing, and family relationships," distinguishing incursions which "interfere directly and substantially with the right," from lesser, more indirect invasions.[91] The liberty interest in parental autonomy encompasses a range of decisions and, from the perspective of the state, a range of possible infringements. The Court has not imposed a uniform test such as strict scrutiny or deferential rational basis review in assessing the constitutionality of these infringements on parental autonomy.[92]

Likewise, the Court has recognized a continuum of governmental infringements affecting procedural protections that must be afforded to parents, distinguishing, for example, among termination of parental rights, loss of custody and paternity determinations.[93] In measuring whether procedural standards are adequate to protect parental liberty, the Court also has considered a child's interests in the stability of her bonds with active caregivers. The Constitution does not, for example, require the states to afford rigorous protection to genetic parental links

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89 M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

90 *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 128-30 (1989); Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

91 Zablocki v. Redhail, 434 U.S. 374, 386, 387 (1978).

92 *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 534-34 (1925) (deciding that statute compelling parents to send children to public schools "unreasonably interferes" with parental liberty).

93 *M.L.B.*, 519 U.S. at 121, 127-8.

where the parent has not sought or developed a meaningful connection to a child.[94] Parents who do not participate in child rearing or in creating an actual parent-child bond cannot claim "substantial protection under the due process clause" for the inchoate parent-child relationship.[95]

Court proceedings to fend off a visitation or custody petition, court orders for visitation, and custody orders all infringe on parental autonomy to varying degrees. None is a minimal intrusion, though none approaches the gravity of terminating parental rights. Custody in the traditional sense is "a status which 'embrace[s] the sum of parental rights with respect to the rearing of a child.'"[96] Granting custody to a nonparent is an extraordinary infringement on parental rights, mitigated of course if it is shared rather than sole custody. Visitation orders, if not excessive,[97] are less intrusive. Still they inject not only an uninvited person but a continuing obligation into a parent's schedule and a family's routine, requiring the parent to accommodate his plans for a child to particular times and places imposed by a court, diminishing parental freedom to direct a child's upbringing and undercutting parental authority. And court proceedings themselves are problematic. They require a parent, if she can, to marshal resources in defense of her family, and cause worry and doubt about outcomes as well as financial and emotional costs. These considerations rationally may cause a parent to bargain away her rights. For these reasons, many courts and legislatures correctly reason that there must be threshold standards that adequately bar the door against unwarranted petitions.

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[94] Lehr v. Robertson, 463 U.S. 248, 262 (1983) (determining that rights of putative father with no actual relationship to child were given adequate protection by availability of registry; notice of adoption proceedings was not required).

[95] *Id*. at 261; *Quilloin*, 434 U.S. at 253, 254-55 (holding that best interest of the child standard in adoption proceeding, rather than right to veto adoption, sufficiently protected liberty interest of biological father who never petitioned to legitimate child, had visited sporadically, provided only irregular support and "had never been a de facto member of the child's family unit").

[96] *Michael H*., 491 U.S. at 118-19 (quoting 4 CAL. FAM. L. § 60.02[1][b] (C. Markey ed., 1987)).

[97] *See, e.g.,* Herndon v. Tuhey, 857 S.W.2d 203, 210 (Mo. 1993) (*en banc*) (overturning grandparent visitation order where visitation awarded was "on a par with [non-custodial] parental visitation in custody matters").

3. *Factoring in the Interests of Others and the State*

To infringe on parental autonomy, the state must have a sufficient reason, the strength of which will affect how far it may intrude. Classic reasons include parental unfitness, incompetence, abuse or neglect. But even where a parent is fit, the interests of children and adults in continuing important relationships may trump parental objection. Most states' nonparent visitation standards erect hurdles that must be cleared before a petition may be pursued, let alone succeed, but set the bar well below parental unfitness.[98] Many give preferential standing to grandparents or limit court intervention to instances of "disruption" in the family.[99] As a constitutional matter, it is clearly appropriate for the state to look to demonstrated bonds, as the Court does in assessing the rights of biological parents.[100] These establish a reason for the state even to consider, in the child's behalf, intruding upon parental autonomy via court proceedings, namely to avoid an emotional or other detriment to a child. But if parental autonomy is to be guarded in a meaningful way, threshold standards must act to keep out the vast majority of even loving relatives and well-meaning acquaintances. A biological father with no actual "custodial, personal or financial relationship" to his child enjoys no guarantee that a state must "listen to his opinion of where the child's best interests lie."[101] A *nonparent* without significant ties to a child can claim no greater protection by virtue of blood ties alone.

In some circumstances, however, the interests of children and third parties are quite strong. The Constitution's protections for families are not limited to married, two-parent couples.[102] The Court has attached parental autonomy rights to nonparents serving in the capacity of custodial parents.[103] Many states have

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98 *See generally* Everett, *supra* note 82.

99 *Id*. at 357-61. The "disruptions" which permit these states to consider nonparent visitation typically include divorce, death of one parent or an ongoing custody dispute. *Id*.

100 *Lehr*, 463 U.S. at 261-62; Blixt v. Blixt, 774 N.E.2d 1052, 1061 (Mass. 2002).

101 *Lehr*, 463 U.S. at 262.

102 *Michael H*., 491 U.S. at 123 n.3; *Moore*, 431 U.S. at 505.

103 Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that aunt and legal guardian enjoyed parental autonomy rights).

acted to protect unusually significant relationships between adults and children to foster stability in a child's life. Children also have independent constitutional rights, the contours of which are not fully developed, that may trump the parent's interests in a given case.[104] Unlike cases in which a state acts to limit fundamental rights for its own reasons, cases involving parental autonomy rights often implicate the rights of children and others to such a degree or in such a manner that the deference afforded the fit parent will be lessened. The parent's own actions in building a child's relationships may affect the state's interest in the case. A showing that an involved parent exercised her autonomy to permit or encourage the child to form an exceptionally strong bond with another adult, affirming its importance to the child's best interests, gives the state cause to treat more skeptically the parent's claim that ending the relationship is now what serves the child's welfare.[105]

4. Troxel v. Granville *and the "Material Weight" Test*

In *Troxel*, the Court made its calibrated, fact-specific approach to assessing infringements on parental autonomy clearer.[106] It did so under a Washington statute that accorded standing to "any person" at "any time" to seek court-ordered visitation without any additional showing, and then allowed a petitioner to obtain court-ordered visitation, against a parent's

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104 *See generally Troxel*, 530 U.S. at 88-91 (Stevens, J., dissenting); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994). *See also* Webster v. Ryan, 729 N.Y.S.2d 315 (N.Y.Fam.Ct., June 21, 2001).

105 In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995), *cert. denied,* 516 U.S. 975 (1995). *Compare* Smith v. Organization of Foster Families, 431 U.S. 816, 846-47 (1977) (giving substantial weight to the fact that the parent expressly intended not to subordinate autonomy to the claim of the foster parent in denying foster parent visitation; the parent's agreement to allow a relationship with the foster parent to form was contingent on the contract to regain full autonomy). *See also* Reno v. American Civil Liberties Union, 521 U.S. 844, 865, 876 (1997) (holding that the state's interest in prohibiting "indecent" communications to minors is not as strong where parent wishes to disseminate messages to children for their benefit).

106 *Troxel*, 530 U.S. at 73 ("we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care'.").

wishes, whenever in the opinion of a trial judge it served the best interests of the child.[107] The Court was struck by the "breathtakingly broad" scope of the statute.[108] The Washington Supreme Court, employing strict scrutiny, had struck down the statute on its face for lack of a substantial harm requirement.[109] It held that the judiciary could not disturb a fit parent's decision as to who will visit her child – or as to any other matter – without first applying a strict scrutiny test and finding that harm to the child merited state intervention.[110]

The United States Supreme Court affirmed the Washington Supreme Court's judgment, but pointedly did not adopt its reasoning.[111] The Court declared the state statute unconstitutional as applied by the Washington courts.[112] While the Justices issued six opinions in *Troxel*, they agreed on basic constitutional principles affecting domestic relations law, and the 6-3 vote for affirmance is effectively a 7-2 (or even 8-1) lineup on the substantive issues.[113] Both Justice O'Connor's plurality opinion and Justice Souter's concurrence describe the constitutional error as giving boundless discretion to judges simply to substitute their views of

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[107] *Id*. at 67.

[108] *Id*.

[109] *See* In re Smith, 969 P.2d 21 (Wash. 1998).

[110] *Id*.

[111] *Troxel*, 530 U.S. at 63, 73. *See also id.* at 80 (Stevens, J., dissenting). *See also* Butler v. Harris*,* 112 Cal.Rptr.2d 127 (2001) *review granted and opinion superseded by* In re Marriage of Harris, 37 P.3d 379 (Cal., Jan. 3, 2002).

[112] *Troxel*, 530 U.S. at 67.

[113] Most of the disagreement among the Justices in *Troxel* relates to standards for facial and as applied constitutional challenges. The holding of the Court is derived from the plurality opinion of Justice O'Connor for four Justices which declares the statute unconstitutional as applied and therefore provides the narrowest ground for decision. The concurring opinion of Justice Souter adopts much of the plurality's reasoning (but would have affirmed the decision below declaring the statute unconstitutional on its face, though not on the ground that it lacked a substantial harm requirement). Similar criticisms of the decisions below are made in the dissenting opinions of Justices Kennedy and Stevens. Justice Thomas (concurring) and Justice Scalia (dissenting) opined that the Due Process Clause does not offer any substantive protection against state intrusions on parental liberty, though Justice Thomas, noting no such challenge was made in the case, states that if the Clause does offer substantive protections to parental autonomy, a strict scrutiny test should apply.

a child's best interests for that of fit parents, without giving any weight to the parent's views.[114]

In *Troxel*, the grandparents seeking visitation had seen their grandchildren principally when their late son exercised infrequent visitation, because he happened to live in their home. The children's mother had never denied them visitation but merely sought to limit its scope because there were many competing demands on her blended family's time. But the trial judge in *Troxel* held the view that grandparental relationships are inherently valuable to children unless it can be shown that "their lifestyles are going to impact adversely upon the children."[115] Because he determined the mother had made no such showing – a burden the court placed on her – and the grandparents offered music lessons and access to cousins he thought beneficial, the judge overrode the mother's wishes and ordered expanded visitation.[116]

In rejecting this approach the Supreme Court stated in several places that a court must in some manner give "material weight" or "at least some special weight" or "deference" to a fit parent's view as to visitation, since a fit parent is presumed to act in a child's best interests.[117] A court may not simply substitute its own judgments for that of a fit parent regarding a child's welfare.[118] Notably, no Justice in *Troxel* adopted the state court's substantial harm standard – the Court reserved for another day a precise statement of any constitutional mandates.[119] Instead, seven Justices expressed broad agreement that while deference is due fit parents in determining the best interests of their children, it is far from absolute. The Court cites approvingly to a variety of state standards attempting to protect parental autonomy in different ways, and to account for the interests of children and other concerned parties.[120]

While *Troxel* has been cited often for its instruction to give deference to fit parents as to the best interests of children, *Troxel*

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114 *Troxel*, 530 U.S. at 67, 73 (plurality); *id*. at 78-79 & n.2 (Souter, J., concurring).

115 *Troxel*, 530 U.S. at 69 (plurality).

116 *Id*. at 60, 69, 71.

117 *Id.* at 69, 70, 72-73.

118 *Id*. at 72-73.

119 *Id*. at 73.

120 *Id*. at 70, 71-72.

did not so much change the law as signal more clearly that, contrary to the assumptions of many courts, strict scrutiny is not always the appropriate test for reviewing infringements on parental autonomy and, in fact, far lesser standards will apply in some cases. The "material weight" standard that the Court applied in *Troxel* is quite a distance from a harm standard, though not necessarily the last word. After setting forth this constitutional minimum – needing nothing more to decide the case – the Court then stepped back. In doing so, the Justices heeded the call of many *amici*[121] and their own inclinations[122] to go no further than necessary. The Justices' restraint allows continued state experimentation in crafting appropriate standards without undue federal intervention in this traditionally state-based legal realm.

B. *Protecting De Facto Parent-Child Relationships in Lesbian and Gay Families*

Against this constitutional backdrop and a lack of positive law specific to their families, a series of cases has wrestled with the custody and visitation claims of nonbiological lesbian and gay parents, and the competing claims of biological parents to unilateral autonomy after a couple separates. While many nonbiological parents' claims have been dismissed as legally unauthorized,[123] over the last decade other states have arrived at an informal consensus about when such a petitioner should have standing to seek visitation and/or custody. Using state-specific statutory and common law, a series of cases has settled on similar multi-factor tests that seek to balance the competing concerns in such cases in a constitutional manner and to protect nonbiological parent-child relationships. This trend is expected to continue, particularly while same-sex marriage is unrealized and adoption is not universally available, as it addresses a glaring need in a measured way.

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121 *See, e.g.,* Brief of Lambda Legal Defense and Education Fund, Inc. et al. in *Troxel*, 1999 WL 1186733.

122 *See, e.g., Santosky*, 455 U.S. at 770-73 (Rehnquist, J., dissenting).

123 *See, e.g.,* In re C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999); Nancy S. v. Michele G., 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991); White v. Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997).

The recent New Jersey Supreme Court case of *V.C. v. M.J.B.,*[124] for example, announced a test for standing to seek custody under which a petitioner must show four factors. First, the legal parent must have consented to and fostered the petitioner's relationship with the child. This is a direct nod to parental autonomy since it affirms the parent's role in allowing the relationship to develop and grow in importance, presumably in the belief it was in a child's best interests. The parent under the *V.C.* test must have "ceded over to the third party a measure of parental authority and autonomy" and granted "rights and duties *vis-a-vis* the child" her status would not usually warrant.[125]

Second, a petitioner must show that she lived together as a family with the legal parent and child. This factor eliminates many persons who might have significant contact with a child but were not viewed as part of the family, such as roommates or paid child care workers. Third, the petitioner must show she performed significant parental duties. This factor eliminates people whose contact with a child is casual or intermittent, rather than having the aspects of continuity and intensity that mark parental caretaking. It is "determined by the nature, quality, and extent of the functions undertaken by the third party and the response of the child to that nurturance."[126] Fourth, the petitioner must show a parent-child bond, a showing that varies with the child's age but gets at the "actuality and strength" of the relationship.[127]

The *V.C.* decision builds upon the Wisconsin Supreme Court's leading decision in *In re H.S.H-K*,[128] which announced a similar test and recognized a lesbian nonbiological mother's standing to seek visitation under its equitable jurisdiction.[129] Other states have considered similar factors in granting standing

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124 748 A.2d 539 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000). *See also* Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000) (adopting New Jersey test as grounds for court to assert equitable jurisdiction to hear petition).

125 *V.C.*, 748 A.2d at 552.

126 *Id*. at 553.

127 *Id*.

128 533 N.W.2d 419 (Wis. 1995), *cert. denied sub nom*. Knott v. Holtzman, 516 U.S. 975 (1995).

129 *See also* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), *cert. denied,* 528 U.S. 1005 (1999) (approving standing for lesbian nonbiological parent); Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (holding that de facto parent may be awarded custody).

to petitioners under the doctrine of *in loco parentis*.[130] Several decisions, finding similar elements of consent and parental conduct, have enforced agreements under which a parent consented to relinquish parental rights and the parties had acted in reliance upon those agreements.[131]

Several Justices in *Troxel* indicated they would look favorably at a claim from a de facto parent denied visitation. Justice Stevens speaks approvingly of awarding visitation to a "once-custodial caregiver" or an "intimate relation."[132] Justice Souter notes the Washington statute's lack of a threshold showing of a "substantial relationship" with a child before one may proceed to a best interests evaluation.[133] Justice Kennedy suggests a continuum, using a best interests test for former caregivers and de facto parents, all the way to a harm standard for virtual strangers: "Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with a concomitant motivation to act in a responsible way to ensure the child's welfare."[134] And the plurality cites favorably standards that turn on whether a parent's denial of visitation was unreasonable, or test whether visitation would truly significantly interfere with the parent-child bond.[135]

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[130] *See, e.g.,* J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996) (petitioner who establishes parent-like relationship "as a result of the participation and acquiescence of the natural parent [her former same-sex partner]" and discharges parental duties found to have standing), followed by T.B. v. L.R.M., 786 A.2d 913 (Pa. 2002); Buness v. Gillen, 781 P.2d 985 (Alaska 1989) (nonbiological parent with "significant connection" to child has standing to seek custody; severing bond may be "clearly detrimental").

[131] *See, e.g., Rubano*, 759 A.2d at 976 (by conduct and agreement allowing former same-sex domestic partner to "assume an equal role as one of the child's two parents * * * DiCenzo rendered her own parental rights with respect to this boy less exclusive and less exclusory th[a]n they otherwise would have been * * *"); A.C. v. C.B., 829 P.2d 660 (N.M. 1992) (lesbian nonbiological parent had standing to seek custody based on agreement with former partner and relationship to child); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000), *cert. denied*, 531 U.S. 1011 (2000) (where parties agreed to joint legal custody, partner had standing to seek custody). *See also* In re Bonfield, 780 N.E.2d 241 (Ohio 2002) (parent's agreement to grant custody to or share custody with another person is enforceable).

[132] *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting)

[133] *Id*. at 77 (Souter, J., concurring).

[134] *Id*. at 98-99, 100-01 (Kennedy, J., dissenting).

[135] *Id.* at 70, 71-72 (plurality).

While the tests of *V.C.* and similar cases focus on petitioners in parent-like relationships – and parents are presumptively entitled to visitation as a general rule – visitation by nonparents does not routinely depend on petitioners establishing a relationship of that quality and depth. *Troxel* does not hold that it should, and numerous grandparent and nonparent visitation statutes stop well short of this standard. Whether a state views a lesbian or gay second parent as a legal parent, therefore, should not foreclose visitation. Rather, visitation should be possible upon a showing that the petitioner and child had an unusually significant relationship that the legal parent fostered.[136] Custody, however, is a far more significant incursion on parental autonomy than visitation. It is therefore fitting that, as in *V.C.*, courts have required a parental relationship and bond to be established before a petitioner may seek custody.

Finally, people asserting the role of parent in a child's life are finding that courts may impose on them equitable, contractual, or statutory obligations of child support similar to those typically imposed on legal parents by statute.[137]

V. Other Parenthood Issues

Several other emerging issues of law affecting lesbian and gay families (though not unique to them) bear upon who is considered a parent at law. Although full discussion of any is beyond the scope of this article, several will be mentioned briefly.

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[136] *Lehr*, 463 U.S. at 261-62; *Blixt*, 774 N.E.2d at 106. *See also* Brief of Lambda Legal Defense and Education Fund, Inc. et al., in Troxel v. Granville, 1999 WL 1186733.

[137] Dunkin v. Boskey, 98 Cal. Rptr.2d 44, 56-57 (Cal. App. 2000) (declaring parties' contract as to parental rights and obligations, including support, enforceable); In re Parentage of M.J., 2003 WL 253806 (Ill., Nov. 10, 2002) (recognizing enforceability of intended parent's promise of support); L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (imposing equitable obligation of child support on lesbian who sought custody rights). *But see* State ex rel. D.R.M., 34 P.3d 887 (Wash. App. 2001).

A. *The Legal Status of Sperm Donors*[138]

One recurring issue is the legal status of a man who donates sperm to an unmarried lesbian woman for use in conception. Many people avoid these issues by using an unknown donor, typically through a sperm bank, and/or complying with the requirements of state laws governing donor insemination and parenthood. Lesbian and gay family law practitioners strongly advise people to use an unknown donor to limit any problems with respect to parenthood. But it is not uncommon for lesbian single mothers and couples to approach men they know to provide sperm and assist them in creating a family. Many people proceed informally based on a skewed understanding of their legal rights and liabilities. Often, the understanding from the outset is that the man will not have a paternal role in the child's life (beyond perhaps being identified to the child when he or she reaches majority) and will not assert parental rights (or will have them terminated). Sometimes the parties envision limited contact for the donor, but at the discretion of the mother(s). In general, however, the donor is only chosen from among other options – and his sperm only put into the woman's body – based on an agreement that he will not seek to establish parental rights.

After a child is born, however, people may profess different understandings of what the arrangements were to be, change the agreement formally or by conduct – or simply change their minds.[139] The donor may move immediately or later to assert paternity or block an adoption. Legal proceedings that may ensue when there is no longer a meeting of the minds may distill to a typical paternity dispute, or may involve complex questions of constitutional, estoppel and contract law.

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[138] *See generally* Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEORGETOWN J. GENDER & L. 57 (Fall 2000). *See also* Thomas S. v. Robin Y., 618 N.Y.S. 2d 356 (1994); Marriage of Leckie and Voorhies, 875 P.2d 521 (Or. Ct. App. 1994). The legal status of sperm donors and participants in many other modern forms of reproduction would be affected by any state's passage of currently proposed, controversial revisions to the Uniform Parentage Act. *See Uniform Parentage Act* (2000) (with Unofficial Annotations by John J. Sampson, Reporter), 35 FAMILY L.Q. 83 (Spring 2001) (containing text, commentary and numerous case law citations).

[139] *See* Tripp v. Hinckley, 736 N.Y.S.2d 506 (2002)(declining to enforce parties' agreement where donor actively exercised parental rights).

B. *Surrogacy Contracts*[140]

Another recurring issue important to the gay community and other families involves the enforceability of surrogacy arrangements, which gay men sometimes initiate to create families. The woman who carries the child may be a gestational surrogate or also a genetic parent to the child. The men may or may not provide their own sperm. These arrangements implicate many of the same issues as donor agreements and may be formal or informal. State laws vary (or are silent) as to whether and when surrogacy contracts are enforceable and the principles that govern parenthood among the parties to such an agreement. In general, this is often an unreliable route to parenthood for all concerned, but remains one of the best options for gay men.

C. *Intended Parenthood, Genetic and Birth Mothers*[141]

Related issues also arise when lesbian couples conceive a child by having one partner donate her eggs for use by the other partner. The ovum is fertilized through in vitro fertilization and implanted into the partner's womb, resulting in a genetic mother and a birth mother. Whether one or both can obtain a declaration of maternity under the Uniform Parentage Act or other statutes is, again, uncertain and may vary by state.

VI. Conclusion

Lesbian and gay families are gaining greater acceptance and legal protection as stereotypes dissipate and our courts and statutes catch up with the needs of these and other modern families. It is now well understood that the children and parents in these families are every bit as committed to one another as are parents and children in other homes, and no less deserving of legal secur-

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[140] *See* Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183 (Spring 1995). *See also In re* Baby M., 537 A.2d 1227 (N.J. 1988).

[141] *See* Shannon Minter & Kate Kendell*, Beyond Second-Parent Adoption: The Uniform Parentage Act and the "Intended Parents": A Model Brief*, 2 GEORGETOWN J. GENDER & L. 29 (Fall 2000). *See also* Johnson v. Calvert, 5 Cal. 4th 84 (1993), *cert. denied*, 510 U.S. 874 (1993); *In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998), *rvw. denied* (1998); Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Com. Pleas. 1994).

ity. This undeniable reality continues to fuel a remarkable expansion of legal shelters for lesbian and gay parent-child relationships under which they are finding some refuge from uncertainty and a measure of respect, if not full equality.