2000

Second-Parent Adoption

Patricia J. Falk
Cleveland State University, p.falk@csuohio.edu

Original Citation

Patricia J. Falk, Second-Parent Adoption, 48 Cleveland State Law Review 93 (2000)

SECOND-PARENT ADOPTION

PATRICIA J. FALK[1]

I. INTRODUCTION

My topic for today's presentation is second-parent adoption. I hope to accomplish four things in my discussion. First, I will define second-parent adoption and give some reasons that it is desirable for both parents and children. Second, I will summarize the state of the law in terms of legislative enactments and case law in the United States. Third, I will discuss the role of social science in second-parent adoption cases. Finally, I will discuss some of the implications of recognizing these adoptions.

II. SECOND-PARENT ADOPTION

A. What is it?

Second-parent adoption usually arises under the following scenario. A lesbian couple[2] decides to have a child together. One of the women is artificially inseminated with sperm from a known or unknown donor. She carries the child to term and gives birth. As the biological mother of the child, this woman has a legally recognized relationship to her offspring. But what about the lesbian woman's partner, who has planned for the birth and plans to participate in parenting the child?

---

[1]Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. J.D., 1983, University of Nebraska-Lincoln; Ph.D. (social psychology), 1988, University of Nebraska-Lincoln.

[2]Gay males may jointly adopt a child; *see, e.g., In re* M.M.D & B.H.M., 662 A.2d 837 (D.C. 1995); Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions,* 7 TEMP. POL. & CIV. RTS. L. REV. 255, 255 n.2 (1998) (discussing New Jersey case involving joint adoption by two gay men).

She is not the biological parent of the child, has not contributed any genetic material to the child (such as being an egg donor), and is not legally married to the child's parent. In short, the woman's partner has no legal relationship to the child. Second-parent adoptions, then, are a mechanism by which the biological mother's partner can achieve a legally recognized relationship with the child by going to court and adopting the child, without terminating the biological mother's rights.

B. Why is it Desirable?

Without an adoption, the partner of the biological mother faces certain disadvantages. She is not legally entitled to participate in making major life decisions concerning the child, for example in terms of medical care. If the couple separate, she would not be able to claim custody or visitation rights, although a few cases have used equitable principles to entertain such claims. If the biological mother were to die, the partner would not automatically have custody of the child. In essence, she would stand as a stranger to the child.

From the child's perspective, without adoption, the child would not have the right to support from the partner, the right to inherit from her, or to obtain social security benefits should she die.[3] The child would not be eligible for health care coverage under the partner's health plan. If the biological mother died, the child might lose the only remaining "parent" he or she has ever known. Thus, at both ends of the equation, the partner and the child face clear legal disadvantages without second-parent adoption.

It is for these reasons that lesbian women have turned with increasing frequency to the courts to recognize a legal relationship between the non-biological mother and her partner's child. These efforts have met with some success although, as Professor Susan Becker will tell you shortly, not in the state of Ohio.

III. WHAT IS THE CURRENT STATE OF THE LAW?

To comprehend the current state of the law with respect to second-parent adoption, it is necessary to understand that adoption is a statutory creation. It did not exist at the common law. Therefore, it is important to remember that the availability of second-parent adoption in any given state will turn on two crucial things: first, the state's adoption statutes and second, courts' interpretation of those statutes.

A. The Statutes

Most state adoption statutes do not explicitly cover this situation. In fact, most were written well before the idea of second-parent adoption was even contemplated. Two exceptions to this general rule exist at the polar extremes. On the one hand, Vermont's adoption statute, revised in 1995, specifically recognizes the right to second-parent adoption. It provides: "If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[4] In addition, New Jersey has a formal statewide policy mandating that lesbian, gay, or other unmarried couples

[3]Glennon, *supra* note 2, at 258.

[4]VT. STAT. ANN. tit. 15A, § 1-102(b) (1999).

should be evaluated using the same standards as heterosexual, married couples.[5] New York has enacted regulations providing gay people the same level of eligibility in adoption as non-homosexual applicants.[6]

On the other hand, Florida has a global ban on adoption by lesbian or gay individuals.[7] This statute has withstood attack based on constitutional arguments that it discriminates against gay or lesbian individuals.[8] New Hampshire also had such a global ban. That statute was preceded by an opinion of the New Hampshire Supreme Court that such a statute would not violate any state or federal constitutional provision.[9] However, New Hampshire recently amended its adoption statute to remove the prohibition on adoption and foster parenting by homosexual persons.[10]

B. Cases Interpreting State Adoption Statutes

In the absence of a state statute explicitly permitting or banning adoption by gay and lesbian persons, courts have had to interpret existing statutory enactments to determine whether second-parent adoption is permissible under the terms of the statute.

Broadly speaking, state adoption statutes usually permit adoption under two general categories. The first is so-called stranger adoptions. These include instances in which the biological parents of a child terminate their parental rights and a new person or couple adopts a child. These are called stranger adoptions because most often they involve strangers to the child. It is interesting to note in this regard that Ohio has permitted a gay man to adopt a child.[11]

The second category of adoptions permitted under many state statutes concerns adoptions by stepparents. These situations occur when a biological parent remarries and the parent's new spouse wishes to legally adopt the child. When stepparents adopt, the rights of the biological parent are not terminated (although the other biological parent's rights are terminated)--thus, leaving the child with two parents.

One common avenue used by lesbian couples in adopting is to argue that their cases resemble stepparent adoptions.[12] The major legal obstacle encountered in these cases is that the statutes provide for the termination of the biological parent's rights because they are not stepparents. This would lead to an anomalous result in the case of second-parent adoption. In order for the nonbiological mother to adopt, the biological mother's rights would have to be terminated. Courts in these cases, then, have to decide whether that usual termination provision prevents such second-parent adoptions or can be avoided.

---

[5]Gay Couple Allowed to Adopt Second Child, N.Y. TIMES, May 18, 1999, § B, at 6.

[6]Vincent C. Green, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 417 n.113 (1996).

[7]FLA. STAT. ch. 63.042(3) (1999).

[8]Cox v. State Dep't of Health and Rehabilitative Servs., 656 So.2d 902 (Fla. 1995).

[9]Opinion of the Justices, 525 A.2d 1095 (N.H. 1987).

[10]N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1999).

[11]*In re* Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990).

[12]Lesbian and gay couples have also jointly adopted children; *see, e.g., In re* M.M.D & B.H.M., 662 A.2d 837 (D.C. 1995).

To date, the case law in this area is a mixed bag. Three state supreme courts have held that second-parent adoption is permitted within their states--Massachusetts,[13] Vermont,[14] and New York.[15] Intermediate courts have permitted second-parent adoptions in the District of Columbia,[16] Illinois,[17] and New Jersey.[18] According to one source, lower courts have approved second-parent adoptions in Alabama, Alaska, California, Indiana, Iowa, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania (conflicting decisions), Rhode Island, Texas, and Washington.[19] A considerable number of opinions in this area are unpublished, making it difficult to determine the precise number of states that permit this practice. The fact that the opinions are unpublished seems significant because of their unavailability for subsequent citation.

On the other hand, two state supreme courts, Wisconsin[20] and Connecticut,[21] have held that second-parent adoptions are not permissible within the statutory language of their adoption laws. The Connecticut opinion was just released in 1999. Lower courts in Colorado,[22] Pennsylvania,[23] and Ohio[24] have also prohibited second-parent adoption. Professor Susan Becker will discuss a recent Ohio case on this question.

IV. THE ROLE OF SOCIAL SCIENCE IN SECOND-PARENT ADOPTION CASES

Social science information has played a significant role in some of the opinions recognizing second-parent adoption.[25] In the past, courts used social science in

---

[13] *In re* Tammy, 619 N.E.2d 315 (Mass. 1993).

[14] Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).

[15] *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

[16] *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995).

[17] *In re* K.M., 653 N.E.2d 888 (Ill. App. Ct. 1995).

[18] In the Matter of the Adoption of two children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[19] Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 HUM. RTS. 7, 10 (1999).

[20] In the Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994), *reconsideration denied* 525 N.W.2d 736 (1994).

[21] *In re* the Adoption of Baby Z., 724 A.2d 1035 (Conn. 1999).

[22] Matter of the Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996), *reh'g denied* (Aug. 1, 1996) and *cert. denied* (Jan. 21, 1997).

[23] *In re* Adoption of B.L.P., 16 Fiduc. Rep. 2d 95, 98 (Montg. Co. Orphans' Ct.) (1996), *reconsideration denied,* 16 Fiduc. Rep. 2d 118 (Montg. Co. Orphans' Ct. 1996); *cited in* Glennon, *supra* note 2, at 257-75.

[24] *In re* Adoption of Jane Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

[25] Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science*, 2 DUKE J. OF GENDER L. & POL'Y 207 (1995); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995).

family law cases to decide matters of custody and visitation.[26] A typical case involved a married couple who were divorcing and fighting for custody of, or visitation with, their children. One of the parents identified him- or herself as homosexual. To combat negative assumptions and stereotypes about homosexuality, the gay parent often presented, and courts frequently incorporated in their written opinions, relevant social science. This growing body of empirical research showed that no significant differences existed between children raised in gay and heterosexual households. It also demonstrated that many of the assumptions about harm to children by being raised by a gay parent were false.

Likewise, in deciding to permit the mother's partner to adopt (and that it is in the child's best interest to do so), many courts have relied upon extant social science documenting the fact that children are not harmed by being raised in gay households. For example, in one case the court wrote: "Concern that a child would be disadvantaged by growing up in a single sex household is not borne out by the professional literature examined by this court."[27] Similarly, another New York court commented: "In addition, upbringing by same sex parents does not negatively impact the children involved, incidence of same sex orientation among the children of gays and lesbians occurs as randomly and in the same proportion as it does among children in the general population and social stigma is an unfounded concern." [28]

Thus, courts are relying in these cases on one of the most well-developed bodies of social science information in the homosexual literature--namely the effects on children of having a lesbian or gay parent. The same body of social science information that has been used, often successfully, in child custody and visitation cases is now appearing in the new contexts of second-parent adoption and even the gay marriage cases in aid of the recognition of these new legal relationships. The leap from custody and visitation cases involving the breakup of a heterosexual family unit to those involving homosexual unions was a logical progression. In this way, social science continues to have a significant impact on the development of gay rights in the family law arena.

One final note on the impact of social science information in gay family law cases is that there has been a recent attack on the underlying social science. One legal scholar, Lynn Wardle, has argued that the social science that courts have used in these cases is methodologically flawed.[29] In some senses, this attack on the

---

[26]Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1989); Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases*, *in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT (Adele E. Gottfried & Allen W. Gottfried eds., 1994); Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1 (1994).

[27]In the Matter of Evan, 153 Misc. 2d 844, 851 n.1, 583 N.Y.S.2d 997, 997 (1992).

[28]In the Matter of the Adoption of Caitlin, 163 Misc.2d 999, 999, 622 N.Y.S.2d 835, 835 (1994) (headnotes).

[29]Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997); *see also* Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998); Lynn D. Wardle, *Fighting With Phantoms: A Reply to Warring With Wardle*, 1998 U. ILL. L. REV. 629 (1998).

underlying basis for the decisions in some cases seems to indicate that the social science has had a powerful effect.

V. IMPLICATIONS OF SECOND-PARENT ADOPTIONS

A. The Good News

On the positive side, participants at a recent gay rights conference heralded second-parent adoptions as the single most significant advance in gay rights in recent years.[30] Several aspects of this trend are worthy of closer consideration.

First, second-parent adoption represents a second generation of legal developments in the recognition of gay rights. Without the previous efforts by gay litigants to go to court and fight for their legal rights and without the success of those earlier custody and visitation cases, it is hard to imagine that courts would be considering the kinds of cases that they are hearing today. This new genre of family law cases is built on the foundation of prior successful litigation efforts.

Second, these new cases also differ from the preceding cases. Unlike the custody and visitation cases discussed earlier, second-parent adoption cases involve the creation of a new legal status for the biological mother's partner, namely legal parenthood, not simply awarding custody or visitation rights.

Finally, and most importantly, the unique nature of second-parent adoption cases is underscored by the fact that two lesbian women now have legally recognized relationships with a child although they have no legal relationship between them. In short, the three members of this family form an imperfect triangle; two sides are legally complete, but the third side is not legally acknowledged. In a limited sense, then, second-parent adoption may be viewed as an end-run around the traditional prohibition of gay marriage. As one court wrote: "Helen and Susan, recognizing that the laws of the Commonwealth do not permit them to enter into a legally cognizable marriage, believe that the best interests of Tammy require legal recognition of her identical emotional relationship to both women."[31]

B. Critiques of Second-Parent Adoptions

Second-parent adoptions have been criticized from both within and outside the gay-lesbian community. In a recent article entitled A Lesbian-Centered Critique of Second-Parent Adoptions, Professor Julie Shapiro has argued that these adoptions only benefit some, but not all, lesbian mothers.[32] They reinforce the notion that there are "real" mothers (those who are able to adopt) and other lesbian mothers. Also they tend to be available to only a certain kind of lesbian woman--professionals who are well-educated, own property, and raise children within planned nuclear families. Shapiro calls these women, "but for" lesbians, because but for their lesbianism they would be perfect.[33] These adoptions are not available to low-income women or women who have certain characteristics.

---

[30]Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

[31]Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993).

[32]Shapiro, *supra* note 30, at 29.

[33]*Id.* at 31-32.

Moreover, second-parent adoptions validate "but for" families, reinforcing the model of a two-parent, nuclear family as the preferred family form.[34] Finally, availability of second-parent adoptions may undermine the claims of women who have not completed one. In a recent Vermont case, the court held it against the biological mother's partner that she had failed to adopt.[35]

Shapiro does not ultimately argue against second-parent adoption, but instead thinks that it is important not to overlook the fact that many lesbian women are "non-legal" mothers.[36] In essence, second-parent adoption is only a partial solution. She also advocates continuing to seek a solution for those who cannot take advantage of second-parent adoptions.[37]

VI. CONCLUSION

I would like to end with the language from one second-parent adoption case. In this opinion, a New York trial court noted that second-parent adoption is simply a legal recognition of the diversity of current families in the United States:

> This Court is aware that these cases present family units many in our society believe to be outside the mainstream of American family life. The reality, however, is, that most children today do not live in so-called "traditional" 1950 television situation comedy type families with a stay-at-home mother and a father who works from 9:00 to 5:00. According to Bureau of the Census statistics, 25% of children today are born out of wedlock to single women, mostly young, minority, and impoverished; half of all marriages end in divorce; and married couples with children now make up only 26% of United States households. It is unrealistic to pretend that children can only be successfully reared in an idealized concept of family, the product of nostalgia for a time long past.[38]

Returning to the theme of this panel "Reconstructing Families: Adoption of Children by Same-Sex Partners," it seems obvious that American families have already undergone considerable reconstruction. Now, the task at hand is gaining legal recognition for the multiple variations of modern family life as they already exist.

---

[34] *Id.* at 32.

[35] Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997); *see also* Shapiro, *supra* note 30, at 32-35 (discussing the case).

[36] Shapiro, *supra* note 30, at 37.

[37] *Id.*

[38] In the Matter of the Adoption of Caitlin, 163 Misc.2d 999, 1008, 622 N.Y.S.2d 835, 841 (1994); *see also* Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993) where the Vermont Supreme Court wrote:

> We are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not, the fact remains that Deborah has acted as a parent of B.L.V.B. and E.L.V.B. from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore the public policy of this state, as expressed in our statutes affecting children.