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Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men

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COMMENTS

ADULT ADOPTION: A "NEW" LEGAL TOOL FOR LESBIANS AND GAY MEN

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Adult adoption is the adoption of one adult by another.[1] The idea of adults adopting each other is not a new concept and has existed as a recognized practice in most cultures and societies.[2] Despite its characterization as potentially dangerous to family law,[3] protective of immoral relationships,[4] and merely a means by which one may designate an heir,[5] adult adoption

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1. WADLINGTON & PAULSEN, CASES AND MATERIALS ON DOMESTIC RELATIONS 1034 (3d ed. 1978) (authors define adoption, in general, as a "device for establishing a legal relationship of parent and child between persons not already so related by law"). While a few commentators, notably Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566 (1969), have suggested that the adoption of adults, since it is so dissimilar to the adoption of minor children, be labelled differently, the suggestion has not been taken seriously. The legal terminology still refers to the adoption of minor children and the adoption of adults as simply, adoption.

2. Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332-35 (1922) (the author explains the early legal roots and widespread practice of adoption); Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744-48 (1956) (the author discusses the early Roman practice of adoption in contrast to the refusal of the English common law system to recognize the existence of adoption).

3. Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566, 566-67, 579 (1969) (the author asserts the dangerous potential of adult adoption to undermine the adoption of minors and family law in general, and cites what he considers to be the "classic examples" of such a propensity in a man's adoption of his mistress, and a homosexual's adoption of his similarly-inclined mate, concluding that the use of adult adoption in such circumstances would serve as a "shield for the protection of sexual promiscuity and homosexuality").

4. *Id.* at 579-80.

5. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 652 (1968) (the author asserts that the only motivation and purpose for adult adoption is the designation of an heir at law for the flexible devolution of property). *See also*, Martin v. Cueller, 131 Colo. 117, 279 P.2d 843 (1955) (the court held that under the Colorado adult adoption statute, a person over 21 years of age who adopts another person over 21 years of age does not stand in a position of "father" or "mother" within the meaning of wrongful death statutes and cannot maintain action for wrongful death of the adopted person).

serves as a persistent legal reminder that individuals often seek to establish a parent-child relationship where one does not exist biologically.[6]

Though often treated by statutes and courts as similar to the adoption of children,[7] adult adoption is functionally dissimilar. It serves different purposes and creates a markedly different relationship. In the case of lesbians and gay men contemplating adult adoption as a means to legitimate a stable, intimate relationship, an attorney should not only take great care to inform her/his clients as to the actual legal consequences of an adoption, but should assist her/his clients in identifying the exact motives for the adoption. Clarification of the reasons why adoption is sought or why it may be desirable in a particular situation is essential if an attorney is to represent her/his clients' interests adequately.

This Comment explores the current statutory framework for adult adoption, the parameters of the legal relationship created, and the scope of the right to privacy issues involved in the exercise of this statutory right. In addition, possible motives individuals may have for utilizing adult adoption, the need for attorneys to identify potential problem areas for their clients, and the potential disadvantages of such a legal relationship, particularly with respect to the dynamics of the individuals' relationship, are discussed.

Same-sex couples do not have a constitutional right to marry.[8] In addition, adult adoption establishes only the legal re-

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6. The concept of asserting parent-child ties between persons who are not so related dates from the Babylonian Code of Hammurabi. KOCOUREK & WIGMORE, EVOLUTION OF LAW, SOURCES OF ANCIENT AND PRIMITIVE LAW 426 (1915); Huard, *supra* note 2, at 745. The Romans extended the concept to the adoption of adults by means of "androgation" which applied only to the adoption of independent, *sui juris* adult males.

7. CLARK, *supra* note 5, at 653 n.4 (the author discusses instances where legislatures have been misled by the apparent similarity between adoption of children and adoption of adults).

8. Lesbians and gay men have no constitutional right to marry. The constitutionality of statutory restrictions prohibiting marriage between same-sex individuals has been the subject of several cases, all of which have held that there is no constitutionally-mandated right to marry for homosexuals. *See, e.g.*, Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); Jones v. Hallahan, 501 S.W.2d 588, (Ky. 1973); Baker v. Nelson, 291

lationship of parent and child. Thus, the use of adoption to create what some courts have termed a "pseudo-marriage" has encountered some judicial opposition.[9] These courts regard such a motive as an attempt to circumvent either the public policy against homosexual marriage or the legislative intent behind the adoption statutes.[10] This judicial response is consistent with the view that the courts are the gatekeepers of public morality and as such, have the responsibility to clarify society's interests in issues upon which statutes are silent. This judicial viewpoint allows for disapproval of adult adoptions as against public policy because a given state has a penal statute prohibiting sodomy, or because approval of an adoption between two adults amounts to condoning incest, adultery, or immorality.[11] However, the few

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Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972). For discussion of the issues involved in homosexual marriages, *see, e.g.*, Strickman, *Marriage, Divorce and the Constitution*, 22 B.C.L. REV. 935, 954-58 (1981); Cullem, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 TULSA L.J. 141 (1979); and Comment, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

9. *In re* Robert P., 117 Misc. 2d 279, 458 N.Y.S.2d 178 (1983), *aff'd mem. sub nom. In re* Pavlik, N.Y.L.J., Nov. 17, 1983, at 6, col. 3 (N.Y. App. Div.) (court denied an adoption petition on the basis that the parties were attempting to create a pseudo-marriage through use of the adult adoption statute). For a discussion of the case, *see infra* notes 156-162 and accompanying text. *See also, In re* Adult Anonymous II, 88 A.D.2d 30, 35, 452 N.Y.S.2d 198, 201 (1982) (Sullivan, J., dissenting).

10. The usual legislative intent behind the adoption statutes is to provide legally for the creation of the parent-child relationship between two individuals when such relationship is not present biologically. However, legislatures and courts have recognized that there may exist a wider range of motives for an adult adoption than is allowable in the case of a minor adoption. Similarly, courts have recognized even when legislatures have not, that the criteria and considerations are necessarily different between the adoption of a minor and the adoption of an adult. *See, e.g., In re* Adoption of Miller, 227 So.2d 73 (1969) ("[A] minor receives the special attention and solicitude of the court . . . . child custody, welfare, environment and support are important matters which the court must decide for the child . . . however, adults are cut loose to make such decisions for themselves, independently, and to exercise a wide discretion as to their legal status.") *Id.* at 75. Furthermore, as at least one New York court has stated: "The policy of the Legislature has been to extend the artificial relations created by adoption to the relations existing by nature." Carpenter v. Buffalo General Electric Co., 213 N.Y. 101, 104, 106 N.E. 1026, 1028 (1914) (court allowed siblings of adoptive parents to inherit from the adopted child).

11. *See, e.g., In re* Jones, 411 A.2d 910 (R.I. 1980) (Rhode Island Supreme Court affirmed lower court's denial of an adult adoption petition by a thirty-year-old married man to adopt his twenty-year-old girlfriend on the basis that a lower court can use judicial discretion when considering adult adoptions. The court weighed heavily the potentially incestuous relationship between the parties and the fact that both were married to other people at the time of the appeal). *See also, Annual Survey of Rhode Island Law: Adult Adoption—Probate Court Has Discretionary Power to Deny Petition When One Adult Seeks to Adopt Another*, 15 SUFFOLK U.L. REV. 730, 734 (1981) (author states that the *Jones* decision "exemplifies the role of the courts as gatekeepers of public policy,

courts that have considered public policy grounds for disapproval of adult adoptions have generally found them inapplicable or unconvincing,[12] but this is no guarantee that every court will so conclude. Therefore, in the context of same-sex relationships, this Comment reviews several recent court decisions in New York that have set the stage for the further development of the common law dealing with adult adoptions, while considering the utility of adult adoption as a potential legal tool for lesbians and gay men wishing to establish a cognizable legal relationship.

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when silences in statutory language precipitate perverse attempts to distort legislative intent"). It is unclear in those few states which define the crime of incest to include sexual relations between a parent and an adopted child, whether the law would apply to non-blood related consenting adults who have voluntarily created a parent-child legal relationship. *See, e.g.*, N.C. GEN. STAT. § 14-178 (1981); 18 PA. CONS. STAT. ANN. § 4302 (Purdon 1983); TEX. PENAL CODE ANN. § 25.02(a)(1) (Vernon 1974). Only Illinois expressly limits its statute's reach in cases of aggravated incest to sexual relations between parents and adopted minors under the age of 18 years, thereby implicitly acknowledging that adults have the right to decide for themselves what type of sexual relationships to pursue and with whom. *See*, ILL. ANN. STAT. ch. 38, § 11-10(2)(b) and (c) (Smith-Hurd 1979).

12. While a few courts have held that adult adoptions violate public policy or legislative intent in certain circumstances, appellate courts generally have reversed such determinations when the statutory provisions clearly allow voluntary adoptions between consenting, fully-informed adults. *See, e.g., In re* Adoption of Berston, 296 Minn. 24, 206 N.W.2d 28 (1973) (adoption of a mother by her adult son allowed); *Ex parte* Libertini, 244 Md. 542, 224 A.2d 443 (1966) (right of two unmarried, adult women to obtain an adoption upheld); Bedinger v. Graybill's Ex'r and Trustee, 302 S.W.2d 594 (Ky. 1957) (right of man to adopt his wife upheld); Brock v. Dorman, 339 Mo. 611, 98 S.W.2d 672 (1936) (right of one adult to adopt another upheld); Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896 (1927) (court allowed a bachelor to adopt his mistress since requirements for approval of an adult adoption petition met); Collamore v. Learned, 171 Mass. 99, 50 N.E. 518 (1898) (adult adoption was held valid). For a case specifically dealing with a gay male couple in which the court found that the "weight of authority in other jurisdictions appears to be against the notion that adult adoptions should be denied on public policy ground," *see, In re* Adoption of Adult Anonymous, 106 Misc. 2d 792, 804, 435 N.Y.S.2d 527, 531 (1981) (court distinguished this case from Stevens v. Halstead, 181 A.D. 198, 168 N.Y.S. 142 (1917), the only other reported New York case on public policy disapproval of adult adoptions at that time. In *Stevens*, the court upheld denial of a petition by a married man to adopt his mistress relying on criminal statute and public policy against adultery as grounds for denial). On the matter of incest itself, courts have held that the statute must be strictly construed. Therefore the possibility of incest is not applicable in most cases of adult adoption. *See, e.g.*, State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963) (court held that defendant who had sexual intercourse with his adopted adult daughter was not guilty of incest since crime of incest is purely statutory and based on consanguinity and excluded affinity); the statute was subsequently amended to encompass adoptive relationships, *see* N.C. GEN. STAT. § 14-178 (1981); *see also*, People v. Baker, 69 Cal. 2d 44, 442 P.2d 675 (1968).

I. BACKGROUND

A. THE HISTORY OF ADOPTION

Adoption is an institution so widely recognized in one form or another that although specific practices may vary, it can be characterized as a universal social function which transcends cultural boundaries.[13] Various motivations compel human beings to create and accept the legal fiction that the adoptee acquires "novel relationships that are reckoned as equivalent to congenital ones and either wholly or partially supersede the old ties."[14] While different cultures have recognized adoption as fulfilling various social functions from maintaining a family line and the right of inheritance to the care and raising of parentless children, most have utilized it as a means to guarantee property transfer through lineal inheritance or to benefit the adoptors, rather than to benefit or protect the adoptee.[15] While adoption is currently viewed more in terms of protection of the adoptee's interests, adult adoption is more reflective of the traditional function of adoption, and has long been viewed by both courts and commentators only in such terms.[16]

The right to adopt exists only when expressly provided for by statute[17] and has never been recognized as a natural right at common law.[18] Hence, adoption has come to be viewed as a pro-

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13. *See, e.g.*, 1 R. LOWIE, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 459-60 (1930). *See also*, Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677, 680 (1982).

14. LOWIE, *supra* note 13, at 459.

15. Huard, *supra* note 2, at 745; *see also*, CODE NAPOLEON, OR THE FRENCH CIVIL CODE arts. 343, 346 (Fr. 1804); *Laws of Adoption in China*, 15 CHI. L. NEWS 362 (1883); Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446 (1971); Kawashima, *Americanization of Japanese Family Law*, 16 LAW IN JAPAN, 54, 65-66 (1983).

16. *See, e.g.*, Bedinger v. Graybill's Ex'r and Trustee, 302 S.W.2d 594 (Ky. 1957); CLARK, *supra* note 5, at 652.

17. Wadlington, *supra* note 3, at 568; *see also, In re* Adoption of McKinzie, 275 S.W.2d 365 (Mo. App. 1955) (court termed adoption "repugnant" to the common law).

18. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 397, (1859); 2 AM. JUR.2d, *Adoption* § 2, at 861 (1962). ("there was no right of adoption under the common law of England"); *see, e.g., In re* Palmer's Adoption, 129 Fla. 630, 631, 176 So. 537, 539 (1937); Woodward's Appeal, 81 Conn. 152, 162, 70 A.453, (1908); Hockaday v. Lynn, 200 Mo. 456, 461, 98 S.W. 585, 586 (1906); Ross v. Ross, 129 Mass. 243, 262 (1878); *see also*, Hutton, *Concerning Adoption and Adopted Persons as Heirs in Pennsylvania*, 42 DICK. L. REV. 12, 15 (1937). Even where the custom of adoption was widely practiced by native Hawaiians, (*see, e.g.*, Kiaiaina v. Kahanu, 3 Hawaii 368 (1871); Melish v. Bal, 3 Hawaii 123 (1869); Estate of Nakuapa, 3 Hawaii 491 (1873)) and by Native American Indians,

cess in which the state has a major interest.[19] In 1851, Massachusetts became the first state to enact an adoption statute requiring judicial supervision and approval.[20] In 1853, Vermont

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(*see, e.g.*, J. P. REID, A LAW OF BLOOD, 191-99 (1970)), most courts were not receptive to the recognition of adoption outside the common law. *See, e.g.*, Non-She-Po v. Wa-Win-Ta, 37 Or. 213, 62 P.15 (1900); Henry v. Taylor, 16 S.D. 424, 93 N.W. 641 (1903). Nevertheless, it is clear that Louisiana and Texas, relying on civil law, were often willing to recognize the practice and legality of adoption. *See, e.g.*, Fuselier v. Masse, 4 La. 423 (1832) (adoption by notarial act failed because of improper procedure); Vidal v. Commagere, 13 La. Ann. 516 (1858) (concerned an adoption by special act of the Louisiana legislature wherein the word "adoption" was held by the court to be derived from the Roman law, and the adoptee became the child and heir of the adoptor with all the rights of a legitimate child); Teal v. Sevier, 26 Tex. 516, 521 (1863) (adoption failed because the Spanish law then in force forbade an adoptor who already had a legitimate child from adopting a stranger as co-heir with such child); *see also*, Ortiz v. De Benavides, 61 Tex. 60 (1884) (adoption upheld despite rather sketchy record of the adoption on presumption "that such a state of facts existed as would have authorized [adoptor] to adopt and thus make [the child] his sole heir.") *Id.* at 68.

As Huard comments:

> The doctrine of *stare decisis* and the well-known resistance of common law courts to innovations of any kind probably combined with other factors to prevent neighboring state tribunals from imitating the practice of Louisiana and Texas. Whatever the reason, adoption did not arise anywhere else in this country absent statutory authority.

Huard, *supra* note 2, at 747-48.

The attitude of the courts in using Roman law precedents to interpret adoption statutes was hardly surprising since courts are generally reluctant to recognize principles not incorporated in English common law. Yet several courts, while maintaining that adoption was merely a creature of the state, turned to Roman law and practice to decide adoption issues. *See, e.g.*, Morrison v. Session's Estate, 70 Mich. 297, 307, 38 N.W. 249, 253 (1888) (court decided that since Roman law and the Michigan statute had the same purpose, Roman practices could be incorporated into the court's decision); Markover v. Krauss, 132 Ind. 294, 31 N.E. 1047 (1892) (the court remarked that since the adoption rule is lifted from civil law, it is there that we must look for its interpretation: "It is established law that where a rule is borrowed from another body of laws, courts will look to the source from which it emanated to ascertain its effect and force." *Id.* at 300, 31 N.E. at 1049.

19. A Pennsylvania court has noted that the "purpose of the adoption statute is to promote the welfare of the child to be adopted, and any one desirous of adopting a child may invoke the power of the court of the county in which he or she may reside." Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 492 n.192 *citing* Wolf's Appeal, 22 W.N.C. 93 (1888).

20. Act of May 24, 1851, ch. 324, 1851 MASS. ACTS. 815. Though the Massachusetts statute is considered the first comprehensive adoption statute, earlier statutes that provided for simplified methods for recording adoptions, but did not provide for the welfare of the adopted children, were passed in Mississippi (1846), Texas (1850), and Vermont (1850). On the Mississippi law, *see generally*, McFarlane, *The Mississippi Law on Adoptions*, 10 MISS. L.J. 239, 240 (1938); on the Massachusetts statute, *see generally*,

became the first state expressly to authorize adult adoption.[21] At present, all American jurisdictions permit the adoption of minors, and most authorize some type of adult adoption.[22]

B. Adoption and the Right to Privacy

The state has long had an interest in regulating the adoption of minors based primarily on its interests in protecting minors' health and welfare and in promoting a sense of legitimacy and integrity in the adoption system. Such compelling state interests do not seem to be present when dealing with adult adoptions.[23] By contrast, adult adoption raises the constitutional issue of right to privacy which is not usually found in the adoption of minors.

The motives present in an adult adoption more than likely are different from those which motivate a minor adoption. In the case of adult adoptions, such motives legitimately may be of a legal or economic nature.[24] Absent compelling state interests,[25] some courts have expressed a willingness to find a right of adult

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Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 Wash. U.L.Q. 221, 222-23 (1943). Interestingly, the Hawaiian act that provided for written adoptions was passed in 1843, (*see* Estate of Nakuapa, 3 Hawaii 410, 414 (1873)) and as Presser points out, that would make the Hawaiian statute the oldest of all the American written laws on the subject of adoption. Presser, *supra* note 15, at 490 n.176.

21. 1853 Vt Acts No. 50, § 1.

22. *See, e.g.*, Shepard's Lawyer's Reference Manual 38-45 (1983). Two states do not authorize adult adoption: Ariz. Rev. Stat. Ann. § 8-102 (West Supp. 1983) ("Any child, or a foreign born person twenty-one years of age or less who is not an illegal alien, who is present within this state at the time the petition for adoption is filed may be adopted."); Appeal of Ritchie, 155 Neb. 824, 53 N.W.2d 753, 755 (1952) (the adoption of an adult is not authorized under Nebraska statutes).

23. *See, e.g.*, *In re* Adoption of Miller, 227 So.2d 73 (Florida 1969) (court allowed an adult adoption as a matter of the adoptee's individual rights and personal freedom regardless of the desires of the natural parent as long as the statutory procedures for the adoption are followed. In so allowing the court stated that adults are able to make important personal decisions for themselves and can "exercise a wide discretion as to their legal status.") *Id.* at 75.

24. *See, e.g.*, Sherman, *Undue Influence and the Homosexual Testator*, 42 U. Pitt. L. Rev. 225, 254-62 (1981).

25. Courts generally hold that the only compelling state interests present when considering an adult adoption petition in which the adoption is sought for valid legal and economic reasons and complies with established statutory procedures are those of a public policy or a public morality nature. *See, e.g.*, *In re* Adoption of Adult Anonymous, 106 Misc.2d 792, 435 N.Y.S.2d 527, 531 (1981) (court concluded that the homosexual relationship of the parties did not prevent the individuals from making use of the adoption statute).

adoption provided the petitioners meet all relevant statutory requirements.[26] Such willingness is based in part on the constitutional right to privacy, i.e., that two mature, legally competent adults have the right to decide for themselves whether to create a parent-child relationship at law and within the context of a given statute.[27]

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26. *See, e.g., In re* Adult Anonymous II, 88 A.D.2d 30, 31, 452 N.Y.S.2d 198, 199 (1982); *In re* Anonymous, 106 Misc. 2d 792, 793, 435 N.Y.S.2d 527, 529 (1981); *In re* Adoption of Berston, 296 Minn. 24, 206 N.W. 2d 28 (1973); Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965).

27. While there is no express right to privacy provision in the federal Constitution, the Supreme Court has held that such a right is rooted in the penumbra of various constitutional provisions thereby creating "zones of privacy" emanating from the First, Third, Fourth, Fifth, and Ninth Amendments. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)(the court held that the State of Connecticut could not interfere in the right of individuals to make personal decisions regarding birth control, and this right was constitutionally protected by the right of privacy). A majority of the Court has agreed that the right of personal privacy is "implicit in the concept of ordered liberty" protected by the Due Process Clause. Roe v. Wade, 410 U.S. 113, 154-55 (1973) (court found right of personal privacy covers an abortion decision though it is not an absolute right and is subject to some state-imposed limitations).

Justice Stevens, writing for a unanimous Court in Whalen v. Roe, 429 U.S. 589 (1977), further elaborated on the meaning of the right of privacy by explaining that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 U.S. at 599. For an excellent discussion of the right of privacy as the basis for finding constitutional protection for gay rights, *see*, Adamany, *The Supreme Court at the Frontier of Politics: The Issue of Gay Rights*, 4 HAMLINE L.R. 185 (1980).

While no explicit guarantee of privacy is present in the United States Constitution, several states have added express privacy provisions to their state constitutions. *See*, ALASKA CONST. art. I, § 22 (1983) ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 (West 1983) ("All people are by nature free and independent and have inalienable rights among[st] [which is] . . . privacy."); FLA. CONST. art. I, § 23 (West Supp. 1984) ("Every natural person has the right to be let alone and free from governmental intrusion into [her/his] private life except as otherwise provided herein."); HAWAII CONST. art. I, § 6 (Supp. 1983) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."); ILL. CONST. art. I, § 6 (Smith-Hurd 1971) ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.") MONT. CONST. art. II, § 10 (1983) ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

Courts have also recognized that such a right exists implicitly within their own constitutional structure. *See*, Pasevich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 71 (1905) (court held that right of privacy is derived from natural law); Moe v. Secretary

The United States Supreme Court has stated that the "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[28] The Court has found that it is the right of every individual, married or single, to be free from government intrusion into "matters so fundamentally affecting the person as the decision whether to bear or beget a child."[29] Further, in *Carey v. Population Services International*,[30] the Court stated that such 'personal decisions' relate to "marriage . . . procreation . . . contraception . . . family relationships . . . and child-bearing and education."[31]

Whether the Court is moving in the direction of expanding the scope of personal decision-making brought within the ambit of constitutional protection is debatable. Nonetheless, the constitutional foundation for such an expansion has been laid. The Court occasionally has demonstrated its willingness to recognize changes in social behavior, mores, and thought.[32] It has often waited for legislatures and lower courts to deal with social issues before determining the scope of constitutional protections involved. Since adoption is a matter of statutory domestic law

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of Admin. and Fin., 417 N.E.2d 387, 399 (Mass. 1981) (court held that constitutional right of privacy protects the individual from unwarranted governmental interference into decision whether to bear or beget a child); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 663-64 (1976), *cert. denied*, Gargo v. New Jersey, 429 U.S. 922 (1976) (court determined that the unwritten constitutional right of privacy is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances); Commonwealth v. Murray, 423 Pa. 37, 46, 223 A.2d 102, 110 (1966) (court held that eavesdropping amounting to trespass is an invasion of privacy protected by the state constitution). Of course, states can always choose to accord greater protection to the individual than is mandated under federal law. *See*, Cooper v. California, 386 U.S. 58, 62 (1967). As Barber, *Inspecting the Castle: The Constitutionality of Municipal Housing Code Enforcement at Point of Sale*, 20 LOY U. CHI. L.J. 1 (1978) notes: "Such a trend is already visible in criminal cases as some state supreme courts, reacting negatively to recent Supreme Court decisions, have begun to find new protections for individual rights in their own constitutions." *Id.* at 23.

28. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); *but cf.*, Schanuel v. Anderson, 708 F.2d 316 (7th Cir. 1983) (court held that the Equal Protection Clause does not require perfect logical consistency and legislatures have broad latitude, particularly where matters of social and moral welfare are involved).

29. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

30. 431 U.S. 678 (1977).

31. *Id.* at 685.

32. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court implicitly recognized the modern sexual practices and behavior of single, adult women); Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton 410 U.S. 179 (1973) (Court took judicial notice of modern medical and scientific thought regarding abortion).

usually reserved to the states, the Court might simply refuse to deal with the matter citing the lack of a constitutional issue. Individual states would be left free to legislate whatever statutory framework for adult adoption they saw fit, and the 'right' to adult adoption would remain as it always has—a statutory right at the state's discretion.

Alternatively, the Court could find that such a 'right' is within the scope of personal decision-making for which the Court has granted constitutional protection under the rubric of privacy. The right to parent is a fundamental right of personal decision.[33] In *Smith v. Organization of Foster Families for Equality and Reform*[34] the Supreme Court stated that "biological relationships are not exclusive determination of the existence of a family."[35] This language indicates that the Court may be willing to recognize that adoption is legally analogous to bearing a child. For many individuals or couples, adoption may be the only means available to establish a family. Since it is often the only practicable way for a lesbian or gay man to create a legal familial relationship with another, adoption should not be viewed as a less protected function of adult decision-making than child-bearing simply because the English common law system failed to recognize it as a legal right.[36] The Court could find that though adoption is a statutorily sanctioned mechanism designed expressly to facilitate the creation of family relationships,[37] it is an important personal matter with implications for both present and future family relationships and decisions.[38]

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33. *In re* J., S. and C., 129 N.J. Super. 399, 324 A.2d 90, 92 (1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (1976) ("Fundamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation . . . [t]he right . . . is a fundamental right protected by the First, Ninth and Fourteenth Amendments to the United States Constitution"); *see also*, People v. Onofre, 51 N.Y.2d 476, 479, 415 N.E.2d 936, 939, 434 N.Y.S.2d 947, 950 (1980), *cert. denied*, 451 U.S. 987 (1981) ("There is no disagreement that a fundamental right of personal decision exists.").

34. 431 U.S. 816 (1977).

35. *Id.* at 843.

36. POLLOCK & MAITLAND, *supra* note 18, at 396.

37. WADLINGTON & PAULSEN, *supra* note 1, at 1034. The United States Supreme Court has noted that adoption "is recognized as the legal equivalent of biological parenthood." Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 N.51 (1977).

38. *In re* Del Moral Rodriguez, 552 P.2d 397, 399 (Okla. 1976) (the effect of adop-

Certainly, it represents a major decision involving permanent legal consequences, obligations, and responsibilities for all parties involved.[39] Adult adoption, especially in light of its origins in social relationships and religion,[40] and its legal roots in property and contract law,[41] should be regarded as a natural right deeply rooted in the creation of fundamental human relationships.[42]

II. THE LEGAL RELATIONSHIP CREATED

Adoption creates the legal relationship of parent and child between the parties to the adoption,[43] although the adoptive parent in an adult adoption bears no legal duty of support for her/his adult child.[44] This is true despite statutory language providing for the same rights and responsibilities between an adopted adult and the adoptive parent as exist between a natural child and her/his parents.[45] While adult adoption alters the legal relationship between two individuals by creating a parent-

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tion is to "readjust a fundamental human relationship and to establish a family status at law").

39. *In re* Fox, 567 P.2d 985, 987 (Okla. 1977) (adoption has all the "legal consequences, obligations and incidents arising and growing out of the status of natural parent and child"); *but cf.* First Nat. Bank of Dubuque v. Mackey, 10 FAM. L. REP. (BNA) 1010 (Iowa 1983) (court held that a person adopted as an adult is not a legally adopted child for purposes of a class gift bequest).

40. Huard, *supra* note 2, at 743-44.

41. Presser, *supra* note 15, at 448-55; *see, e.g., In re* Estate of Griswold, 140 N.J. Super. 35, 354 A.2d 717, 726 (1976) ("Adoption of adults is ordinarily quite simple and almost in the nature of a civil contract"). *Id.* at 52. *See also*, Silverstein, *Adoption in Jewish Law*, 48 CONN. B.J. 73, 75 (1974) (author explores the contract law origins of adoptions in traditional Jewish law).

42. *See*, Kawashima, *supra* note 13, at 677, where the author points out that it was the Massachusetts Act which "introduced into the common law the notion that the parent-child relationship could be conferred through a pattern of conduct, a state of mind defined in part by the mutuality of emotional bonds."

43. *See, e.g.*, CAL. CIV. CODE § 277p(a) (West 1983) ("[t]he agreement of adoption shall . . . set forth that the parties agree to assume toward each other the legal relation of parent and child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation."); FLA. STAT. ANN. § 63.032 (10) (West 1983) (" 'Adoption' means the act of creating the legal relationship between parent and child where it did not exist"); GA. CODE ANN. § 19-8-16 (1982) ("the relation between the petitioner(s) and the adopted adult shall be, as to their legal rights and liabilities, the relation of parent and child."). *Contra*, COLO. REV. STAT. § 14-1-101 (Comment 1973) ("No obligation whatsoever is placed upon the person adopted with respect to the adoptive parent and [s]he is granted no rights whatever, other than the acquisition of an heir at law."); for a discussion of the Colorado statute, *see infra* note 48.

44. Sherman, *supra* note 24, at 257.

45. *Id.*

child relationship, it does not create obligations not otherwise existing between a parent and her/his natural adult children.[46]

While some statutes provide that the adoption of an adult has the same legal consequence as if the adoptee had been adopted as a child,[47] others provide that an adult adoption gives the adoptee the same legal status as a natural child.[48] This distinction is relevant only where a statutory scheme differentiates between the rights of natural-born children and adopted children, and is most commonly encountered in the area of inheritance rights.[49] In addition, the adoption of a minor totally severs the relationship with the natural parents, both legally and in fact, whereas the adoption of an adult severs only the legal relationship.[50] This may mean that an adult adoptee loses the right to inherit from her/his natural parents and relatives should such relatives die intestate. Similarly, natural parents and relatives will lose the right to inherit from an individual who is later adopted by another adult. If such a result is an important consideration for the individual to be adopted, careful thought

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46. *Id.*

47. *See*, DEL. CODE ANN. tit. 13, § 954 (1981) ("Upon the issuance of a decree of adoption and forever thereafter, all the duties, rights, privileges and obligations recognized by law between parent and child shall exist between the petitioner or petitioners and the person or persons adopted, as fully and to all intents and purposes as if such person or persons were the lawful natural offspring or issue of the petitioner or petitioners.").

48. GA. CODE ANN. § 19-8-16 (1982) ("Thereafter the relation between the petitioner(s) and the adopted adult shall be, as to their legal rights and liabilities, the relation of parent and child."); KY. REV. STAT. § 405.390 (1970) ("An adult person over eighteen years of age may be adopted in the same manner as provided by law for the adoption of a child and with the same legal effect, except that [her/his] consent alone to such adoption shall be required."); *contra*, COLO. REV. STAT. § 14-1-101 (Comment 1973) ("No obligation whatsoever is placed upon the person adopted with respect to the adoptive parent, and [s/he] is granted no rights whatever, other than the acquisition of an heir at law."); *accord*, Martin v. Cueller, 131 Colo. 117, 279 P.2d 843 (1955) (court denied legal standing of the adoptive parent to maintain action under wrongful death statute in death of such adopted person). The Colorado statute, therefore, does not create a parent/child legal relationship but merely establishes an heir at law status for the person adopted.

49. 2 AM. JUR.2d, Adoption § 88, at 930-31; *see also*, Annot., 21 A.L.R.3d 1012 §§ 14-19; Leutza & Roth, *Rights of Adopted Persons in California Estates and Trusts*, 4 EST. PLAN. & CALIF. PROB. REP. 117 (1983).

50. *See, e.g.*, Bedinger v. Graybill's Ex'r and Trustee, 302 S.W.2d 594, 598 (Ky. 1957); Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896, 899 (1927).

should be given to whether adoption is the best legal mechanism to employ under the circumstances.

III. POSSIBLE MOTIVES FOR UTILIZING ADULT ADOPTION

> Historically, more frequently than not, adoption has served as a legal mechanism for achieving economic, political and social objectives rather than the stereotype parent-child relationship. (citation omitted) Adoption is often utilized by adults for strictly economic purposes, especially inheritance. Other considerations include insurance, tax impact, and . . . [housing]. Such a material concern is one of sober life reality and should not be regarded by the court as a cynical device to evade the strictures of the . . . policy of the adoption law.[51]

The following considerations may provide the motive for many lesbian and gay individuals to seek adult adoptions. This is by no means an exhaustive listing, but may serve to illustrate how adult adoption is the best way for some lesbian and gay couples to create a legal relationship.

A. INHERITANCE

Courts have acknowledged that the primary purpose of adult adoption is to make the adoptee the adoptor's heir. The designation of an heir is an acceptable purpose and does not undermine the validity of the adoption.[52] In every American jurisdiction, if an unmarried intestate decedent is survived by an adopted child, but no natural-born descendants, the adopted child inherits the entire estate.[53] Adoption, therefore, suggests

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51. *In re* Adult Anonymous II, 452 N.Y.S.2d at 200.

52. *In re* Stanford's Estate, 49 Cal. 2d 120, 315 P.2d 681 (1957) (the validity of adoption for inheritance purposes upheld); Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W.2d 896 (1927) (inheritance is a valid motive for adoption). *See also*, COLO. REV. STAT. § 14-1-101 (Comment 1973) ("No obligation whatsoever is placed upon the person adopted with respect to the adoptive parent, and [s/he] is granted no rights whatever, other than the acquisition of an heir at law."); for discussion of Colorado Statute, *see supra* note 48.

53. *E.g.*, the Illinois Probate Code states that proceeds shall be distributed as follows: "[i]f there is no surviving spouse but a descendant of the decedent: the entire es-

itself as a technique for ensuring that the lover of a lesbian or gay testator inherit the testator's property.[54] However, an adult adoption should not be entered into for the purpose of relying on the intestacy laws rather than a will for the devolution of property. Such reliance is risky.[55] Instead, adult adoption should be used to nullify the testator's blood relatives' status as heirs so that they will be without standing to contest a will.[56]

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tate to the decedent's descendants *per stirpes*."); ILL. ANN. STAT. ch. 110 ½, § 2-1(b) (Smith-Hurd Supp. 1983) and § 2-4(b) reads:

> An adopting parent and the lineal and collateral kindred of the adopting parent shall inherit property from an adopted child to the exclusion of the natural parent and lineal and collateral kindred of the natural parent in the same manner as though the adopted child were a natural child of the adopting parent, except that the natural parent and the lineal or collateral kindred of the natural parent shall take from the child and the child's kindred the property that the child has taken from or through the natural parent or the lineal or collateral kindred of the natural parent by gift, by will or under intestate laws.

ILL. ANN. STAT. ch. 110 ½, § 2-4(b) (Smith-Hurd 1978).

54. Adoption of a stranger-in-blood may bring about favorable inheritance tax advantages in some states. McLaughlin v. People, 403 Ill. 493, 87 N.E.2d 637 (1949) (court held that though an adult could not legally be adopted at that time under the laws of the forum, an adult legally adopted in another jurisdiction is taxed at the lowest rate and is given the highest exemption since the law makes no restriction or condition as to the age of the child when adopted). *Contra*, MICH. COMP. LAWS ANN. § 205.202 (2)(1) (Supp. 1983) ("If the relationship began before the seventeenth birthday the transfer of property of the clear market value of $10,000 is exempt from all taxation."). The inheritance tax advantage extended by California to adult adoptees was repealed along with the state inheritance tax in 1982. For a discussion of former California law, *see generally*, Note, *Adoptees and the California Inheritance and Gift Tax Classifications*, 18 STAN. L. REV. 494 (1966).

55. Two recent cases may provide a better legal theory for claiming real property left intestate. Weekes v. Gay, 243 Ga. 784, 256 S.E.2d 901 (1979) (A gay male who owned real property in his own name, but had purchased it jointly with his lover, died intestate. The property was claimed by the decedent's heirs by intestate succession, but the decedent's surviving lover asserted that he was entitled to the property on a theory of implied trust, since he had furnished substantially all the consideration for the original purchase. The court held that the lover should prevail in equity.); Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80, 84 (1980) (court, citing the *Weekes* case with approval, held that an individual who had been in a long-term, established homosexual relationship with decedent was entitled to inherit on an implied trust theory from his lover's estate).

56. *See, e.g., In re* Adoption of Brundage, 134 N.Y.S. 2d 703 (1954), *aff'd* 285 A.D. 1185, 143 N.Y.S. 2d 611 (1955), *appeal denied*, 286 A.D. 1013, 144 N.Y.S.2d 921 (1955) (adoptive parent's blood relatives are estopped from questioning validity of adoption order). Though blood relatives may not have standing to contest the will except in Illinois, *see infra* note 57, they would have standing in a number of states to bring a collateral

In situations where there is no valid will and the adoptor is the first to die, the adoptee will inherit by intestacy to the exclusion of the adoptor's blood relatives. However, in a situation where the adoptee is the first to die, adoption would cut off the right of the adoptee's natural parents and their relatives to inherit from the adopted child if she/he dies intestate. In every jurisdiction but one, such a situation would leave the adoptee's natural parents without standing to contest any will that the adoptee might execute.[57]

Since in most states an adoptee loses her/his right to inherit from or through her/his natural parents,[58] the possibilities of familial inheritance may be an important factor for a couple to consider before proceeding with an adoption. It suggests perhaps that where the statutory scheme allows it, the person with wealthier relatives do the adopting.[59] However, in the majority of instances, the possibility or expectation of inheritance from one's natural parents or relatives may be a minor factor in deciding whether to use adult adoption as a means to legitimate a lesbian or gay relationship and designate one's own heir.

B. "Next-of-Kin" Regulations

Adult adoption may provide a method for lesbian and gay lovers to be recognized as one another's next-of-kin, i.e., the two individuals' nearest living relatives. The practical advantage to be gained by such a designation becomes apparent when institutions such as hospitals, jails, and governmental agencies restrict visitation privileges or consent authorizations to an individual's immediate family or legal relatives. Often, lesbians and gay men

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challenge to the adoption decree. Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896 (1927); Phillips v. Chase, 203 Mass. 556, 89 N.E. 1049 (1909), *appeal dismissed*, 216 U.S. 616 (1910); Tucker v. Fisk, 154 Mass. 574, 28 N.E. 1051 (1891); Stevens v. Halstead, 181 A.D. 198, 168 N.Y.S. 142 (1917); *In re* Adoption of Russell, 170 Pa. Super. 358, 85 A.2d 878 (1952).

57. Ill. Rev. Stat ch. 110 ½, § 2-4(b) (Smith-Hurd Supp. 1983). *See supra* note 53, for text of statute.

58. *In re* Estate of Topel, 32 Wis. 2d 223, 145 N.W.2d 162 (1966) (court held that adoption makes the adopted person a lawful descendent of adoptive parents and terminates that status as to natural parents). *Contra, In re* Tiliski's Estate, 390 Ill. 273, 61 N.E.2d 24 (1945) (right of heirship from blood parents enjoyed by a natural child should not be taken away merely because of the child's adoption by others).

59. *See, e.g., In re* Adult Anonymous II, 452 N.Y.2d at 200; *In re* Adoption of Adult Anonymous, 435 N.Y.S.2d at 528. *See also*, Sherman, *supra* note 24, at 257.

are not aware of the import of such regulations until they are involved in an emergency and are prevented from either visiting or making important personal decisions for their lovers. In these circumstances, an adopted child or parent is the nearest relative and is therefore entitled to make those important decisions.[60]

C. Housing and Zoning Restrictions

Limitations or restrictions based on the legal or familial relationship of individuals contained in residential leases, landlord-tenant agreements, or municipal zoning ordinances may provide a motive for adult adoption. In such instances, adoption serves as a legitimate means by which to avoid such occupancy or zoning restrictions.[61] If the scope or degree of relationship permitted between individuals who live together is controlled by local ordinance, then there is little likelihood that a parent-child relationship between individuals will fall outside the scope of permitted relationships for purposes of residential occupancy.[62]

D. Insurance Benefits

Before they will issue life insurance policies, insurance companies often require evidence of a close relationship between the insured and her/his proposed beneficiary. While an individual may designate anyone she/he wishes as beneficiary, and some states prohibit carrier discrimination in the issuance of policies

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60. While this situation may be adequately addressed through the use of other legal mechanisms such as a power of attorney or a guardianship, adoption will create a more widely recognized legal relationship to which institutional officials or administrators more readily respond. *See, e.g.,* California Hospital Association, Consent Manual 15-16 (11th ed. 1982). At least one court has indicated, albeit in *dictum*, that in some cases it is appropriate for a relative to give consent; Cobbs v. Grant, 8 Cal. 3d 229, 244 (1972) ("[If] the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative.").

61. *In re* W.D.A. v. City and County of Denver, 632 P.2d 582 (Colo. 1981) (court, while refusing to reach the question of whether a father-son adult adoption creates a relationship which the local zoning board must recognize, reversed a juvenile court's order opening the otherwise confidential adoption records to the local zoning board. The court held there was no good cause shown on the record to justify the release of the adoption proceedings to the zoning authorities).

62. *See, e.g.,* City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436 (1980) (court held that restrictive zoning on basis of close family relationships is not permitted).

on the basis of sexual orientation,[63] prospective heirs might raise undue influence to attack the deceased policyholder's designation of beneficiary. In such instances, adoption may provide persuasive factual evidence as to the relationship between the beneficiary and the insured thus countering an allegation of undue influence.

E. Employment Benefits

Employment benefits, if dependent upon the parent-child relationship, may be a motive for adoption between lovers. Normally extended as the result of specific employment situations or contractual agreements, they are typically: medical or health insurance; retirement benefits; death benefits; education or tuition benefits; and various types of absence or leave benefits, such as funeral leave, family illness leave, and parenting leaves.[64]

Though such benefits are relatively easy to identify, few are based solely on the parent-child relationship. In addition, it is necessary to clarify which benefits apply to any child regardless of age, and which apply only to minor dependents. For example, the designation of a beneficiary for an individual's retirement or

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63. *See, e.g.*, California Administrative Code:

> No person or entity engaged in the business of insurance in this state shall refuse to issue any contract of insurance or shall cancel or decline to review such contract because of the sex, marital status or sexual orientation of the insured or prospective insured. The amounts of benefits payable, or any term, condition or type of coverage shall not be restricted, modified, excluded or reduced on the basis of sex, marital status or sexual orientation of the insured or prospective insured.

CAL. ADMIN. CODE tit. 10, art. 15 § 2560.3.

There exists ample authority that an individual may designate anyone she/he wishes as a beneficiary. *See, e.g.*, Bynum v. Prudential Ins. Co. of America, 77 F. Supp. 56, 59-60 (E.D.S.C. 1948) (the owner of a life insurance policy may properly designate his mistress as a beneficiary); Morris v. Providential Life & Accident Ins. Co., 162 So. 443, 444-45 (La. Ct. App. 1935) (there is nothing in Louisiana law to prevent a person from taking out a policy on his or her own life, paying the premium, and naming as the beneficiary thereon any person s/he may choose).

64. *See, e.g.*, GOLDEN GATE UNIVERSITY STAFF HANDBOOK 11-12, 16-21 (1983); [hereinafter cited as HANDBOOK]; *Agreement Between United Jewish Community Centers [San Francisco Bay Area] and Social Services Union, Local 535, S.E.I.U., A.F.L.-C.I.O.* 6-9 (1983-1984) [hereinafter cited as *Agreement*]. For an overview of parental benefits policies *see* KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES: AN INTERNATIONAL REVIEW (1980); and KAMERMAN & KAHN, CHILD CARE, FAMILY BENEFITS AND WORKING PARENTS (1981).

death benefits is not usually dependent upon the age of the beneficiary.[65] Likewise, the use of funeral leave benefits by an employee does not rest on the age of the deceased parent or child but merely upon the legal relationship involved.[66] While use of family illness leave by a working parent is often limited to circumstances involving the illness of a minor child,[67] some employers have expanded such leave to include any immediate family member who is ill.[68] Education or tuition benefits, other than those directly for the use of the employee, particularly when the employer is an educational institution, have traditionally been limited to the spouse and children attending the institution itself.[69]

Before proceeding with an adoption, the individuals involved should carefully consider whether the potential to receive various employment benefits is a satisfactory basis for the adoption. The legal relationship of parent and child may not always be a requisite to obtain such benefits.[70] When balanced against

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65. This is not to suggest that there might not be other considerations which govern the legal distribution of such benefits, such as the pertinent law in community property jurisdictions.

66. Most employers or contractual agreements specifically define the legal relationships brought within the scope of 'immediate family' for purposes of funeral leave when the term is used. *See, e.g.*, HANDBOOK, *supra* note 64, at 12 (family defined as "husband or wife, son or daughter, mother or father, brother or sister, son or daughter-in-law, mother or father-in-law, aunt, uncle, or grandparents"); *Agreement, supra* note 64, at 6 ("immediate family" defined as "mother, father, child, grandchild, grandparent, husband, wife").

67. *See, e.g.*, HANDBOOK, *supra* note 64, at 17.

68. *See, e.g., Agreement, supra*, note 64, at 6.

69. *See, e.g.*, HANDBOOK, *supra* note 64, at 23 (tuition remission benefits extended to "staff members, their wives or husbands, and their dependent children").

70. Many employment benefits are either 'spousal' or 'dependent child' benefits and are reflective of society's stereotypical picture of a 'family.' Even when employment benefits are designated on the basis of a parent-child relationship, most are available only for dependent children, and research has revealed few available for adult children of an employee. The extent to which current litigation against employers will clarify the picture is as yet unknown, though a recent California Workers' Compensation Appeals Board decision may indicate a willingness to extend certain "employment benefits" to lesbians and gay men. *See*, Donovan v. W.C.A.B., 48 CAL. COMP. CASES ____ (1983) L.A. Daily J., Dec. 14, 1983, at 2, col. 5, (California Worker's Compensation Appeals Board reversed 1978 ruling and awarded the gay lover of a Los Angeles County deputy district attorney death benefits. The deputy district attorney had committed suicide because of job-related stress. The Board stated that homosexual relationships must be given the same credence as those between heterosexual couples under the California state supreme

the possibility of unemployment, the potential for employment mobility and advancement, and other employment-related factors, individuals should weigh seriously the permanent nature of an adoption as opposed to the more transient nature of a specific employment situation. In some cases, individuals may decide that the right to certain employment benefits sufficiently outweighs the permanent consequences of the legal relationship created by adoption. In such cases, the individuals may wish to pursue adoption as a means by which to take full advantage of such benefits. However, in cases where the individuals have given little thought to the long-range legal implications of adoption, or where an adoption would not be advisable for other reasons, availability of specific employment benefits on the basis of a parent-child relationship may not be sufficient motive to warrant the use of adult adoption.

F. IMMIGRATION

The United States Immigration and Naturalization Service and the courts' hostile response to both the utilization of adult adoption[71] and attempts by lesbian and gay citizens to gain immigration benefits for their partners[72]indicate that visa preference benefits[73] should not be used as a primary motive for pro-

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court's 1976 *Marvin* decision, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976) and that the existence of a homosexual relationship should not preclude the lover's rights as the decedent's primary dependent. While intestate succession was unavailable to the lover under California law, worker compensation cases operate under rules of dependency, rather than legal inheritance rights.) The Board's ruling in the benefits appeal case was in response to a court-ordered remand for further proceedings in the case following a reversal on the issue of whether the suicide was job-related. *See* Donovan v. W.C.A.B., 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).

71. *See, e.g.*, Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975) *cert. denied*, 423 U.S. 832 (1975) (court upheld the limitation on visa preferences open to adopted persons as applying only to those persons adopted as children, i.e., before the age of fourteen); Despotakis v. INS, No. 75-Civ. 4848-CSH, *slip. op.* (S.D.N.Y. Sept. 16, 1977) (citing to *Nazareno*, court upheld denial of visa preferences to individuals adopted as adults). The age was subsequently amended to sixteen-years-old.

72. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 102 S. Ct. 3494 (1982) (no visa preference under spouse classification for same-sex couples). The INS, citing *Boutilier v. INS*, 387 U.S. 118 (1967), considers any homosexual alien excludable under § 212(a)(4) of the Immigration and Nationality Act (8th ed. 1982) and could either deny entry or deport on those grounds.

73. Immigration and Nationality Act, § 201(b), 8 U.S.C. 1151 § 201(b) (8th ed. 1982) (section defines "immediate relatives" as "the children, spouses, and parents of a citizen of the United States." Immediate relatives who are otherwise qualified for admission as immigrants shall be admitted as such without regard to numerical limitations, provided,

ceeding with an adult adoption. The current provisions of the United States Immigration and Nationality Act regarding the eligibility for visa preference of unmarried aliens adopted by United States citizens restricts the meaning of "adopted child" to one validly adopted before the age of sixteen.[74] There is little case law on the availability of adult adoption as a method to obtain immigrant status for an alien "child" but the case law that does exist is firmly opposed to its use.[75] Courts have generally viewed the use of adult adoption in such circumstances as a disingenuous attempt to circumvent the immigration laws and gain improved immigration status. Therefore, when the prospective adoptee is an alien, counsel should carefully explore the possible use of adult adoption for immigration reasons before proceeding.

G. Creation of a Family Unit

It is always possible that the emotional and psychological relationship of two individuals may develop into what is a *de facto* parent-child relationship. These individuals may wish to legitimate such a relationship. Adoption statutes, while not always facilitating such a goal, are expressly designed for this purpose.[76] Commenting that the realities of contemporary urban life

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that in the case of parents, such citizen must be at least twenty-one years of age).

74. Immigration and Nationality Act, § 101(b)(1)(e), 8 U.S.C. § 1101(b)(1)(e) (8th ed. 1982) ("The term 'child' means an unmarried person under twenty-one years of age who is . . . a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years.").

75. *See, e.g.*, Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 832 (1975) (court upheld the limitation on preferences open to adopted persons as applying only to those persons adopted prior to the age of fourteen (now sixteen), reasoning that such a limitation would prevent the use of adoption, especially adult adoption, as a fraudulent means of gaining improved immigration status); *see also* Despotakis v. INS, No. 75-Civ. 4848-CSH, slip op. (S.D.N.Y. Sept. 16, 1977).

76. *See, e.g.*, Cal. Civ. Code § 227p(a) (West 1983) ("the agreement of adoption shall . . . set forth that the parties agree to assume toward each other the legal relation of parent and child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation"); Fla. Stat. Ann. § 63.032(10) (West 1983) (" 'Adoption' means the act of creating the legal relationship between parent and child where it did not exist"); Ga. Code Ann. § 19-8-16 (1982) ("the relation between the petitioner(s) and the adopted adult shall be, as to their legal rights and liabilities, the relation of parent

often invite creation of may different types of "nontraditional families," one court described a family relationship as "a continuing relationship of love and care, [in which] responsibility for some other person [is assumed]."[77] In determining the legitimacy of an adult adoption, sexual orientation or preference should be viewed by the courts as an irrelevant factor[78] in much the same way that some courts are beginning to hold it irrelevant in determining child custody and visitation cases.[79]

Adoption statutes were designed to imitate nature.[80] Nonetheless, courts have begun to recognize that times have changed and that what used to be considered "normal" patterns of family life and interpersonal relationships are now often the exception, not the rule.[81] The traditional nuclear family arrangement is no longer the only model of family life in America.[82] Creation of a "family unit" is both a valid and genuine motive for two individuals contemplating adult adoption as a legal means to reinforce their relationship. In addition to attaching a legal status to the

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and child"); N.Y. DOM. REL. LAW § 110 (McKinney Supp. 1983) ("An adult unmarried person . . . may adopt another person.").

77. *In re* Adult Anonymous II, 452 N.Y.S. 2d at 201.

78. Payne, *The Law and the Problem Parent*, 16 J. FAM. L. 797, 802 (1977), suggests that at least some courts are beginning to show "[a] willingness to transcend stereotypical conceptions of 'the' homosexual lifestyle, and a realization that personal stability and homosexuality are not mutually exclusive."

79. *See, e.g.*, Doe v. Doe, 16 Mass. App. Ct. 499 (1983) (court upheld the right of a lesbian mother to joint custody stating that the mother's homosexuality was irrelevant and insufficient grounds for severing the natural bond between parent and child); *see also*, People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973) (court upheld custody right of a lesbian mother); Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979) (court held that gay father could not be denied visitation rights based solely on his sexual orientation); *But cf.*, D.H. v. J.H., 418 N.E.2d 286 (Ind. App. 1981) (court held the mother's lesbianism irrelevant but awarded custody to the natural father on basis of best interests standard). *See also, Doe v. Doe*, 222 Va. 736, 284 S.E.2d 799 (1981) (court held that homosexuality does not make a parent unfit). *See generally*, Williams v. Williams, 431 So. 2d 856, 858 (La. Ct. App. 1983) (court, in sustaining trial court's custody award to a mother who had been involved in adulterous conduct, reiterated that in considering the question of whether a parent's sexual lifestyle should be a cause for denying child custody, the courts have "consistently held the ultimate determination must be whether the behavior was damaging to the child"). For discussions of the current state of case law, *see generally*, Comment, Doe v. Doe: *Destroying the Presumption that Homosexual Parents are Unfit—The New Burden of Proof*, 16 U. RICH. L. REV. 851 (1982); Note, *Parent and Child: An Analysis of the Relevance of Parental Homosexuality in Child Custody Determinations*, 35 OKLA. L. REV. 633 (1982).

80. *See generally*, Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, 10 (1982).

81. *In re* Adult Anonymous II, 452 N.Y.S.2d at 201.

82. *Id.*

couple's relationship, adult adoption creates legal relationships between the partners and any children they later bear or adopt. This underscores the integrity of their family unit. For example, once a lesbian or gay male couple has entered into an adoptive relationship with one another, any children they adopt or bear are legally related to both individuals either as siblings or as grandchildren depending on which partner is the natural or legal parent. The establishment of such legal relationships could provide courts with a persuasive basis to award child custody to the surviving lover if the other should die leaving a minor child.[83] Likewise, these legal relationships might provide a court requisite grounds to grant visitation privileges in the event of the couple's separation.[84]

IV. OVERVIEW OF VARIOUS STATUTORY RESTRICTIONS ON ADOPTION

Before proceeding with an adoption petition, any lesbian or gay couple must consider whether apart from motive, they can meet pertinent statutory requirements. Those commonly imposed are explored in the next section. That section is merely an overview and does not in any way purport to be a definitive list of all legal considerations or factors present in every situation. Only the attorney can make the appropriate determination as to whether to proceed with an adoption petition based on the facts of the case at hand. Furthermore, in determining the individual's ability to comply with the relevant adoption statute, it is the attorney's responsibility to elicit accurate information from her/his clients.

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83. Subsequent to a lesbian or gay male couple's utilization of adult adoption, any children adopted or born into the relationship would be related legally to both individuals. This further legal bond would be as a grandchild of the adoptive parent whose lover either adopted or gave birth to a child, or as a sibling of the adopted child whose adoptive parent either gave birth to a child or adopted another person.

84. While neither grandparent nor sibling has a legal right to custody of a related minor, a court, when presented with the option of awarding custody to either a sibling or grandparent in the event of the parent's death or incapacity, may be persuaded that placement with the legal relative is in the child's best interests. Likewise, in states which statutorily grant grandparents visitation rights, adult adoption may create the necessary legal relationship to grant such visitation rights in the event the court determines it is in the child's best interest. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.27b (Supp. 1983).

A. Legal Relationship and Minimum Age Requirements

Frequently, statutory requirements dictate the parties' age difference or blood relationship.[85] In most cases, this means that the adoptor must be older than the adoptee[86] or that there must be a relationship between the parties which the law views as providing the 'motive' for the adoption.[87] In some cases, this requirement is satisfied by a legal relationship,[88] while in others the requirement is satisfied by the showing of a designated period of time spent by the adoptee in the home of the adoptor.[89]

Since adoption was unknown at common law,[90] one must look to the specific statutory adoption provision in each jurisdiction.[91] Most early adoption statutes did not provide expressly for adult adoption, but courts often permitted it by construing the statutory language broadly to include persons of all ages.[92] The modern trend in statutes is to use language authorizing the adoption of "any person" and the vast majority of states takes

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85. *See generally*, Wadlington, *Minimum Age Difference as a Requisite for Adoption*, Duke L.J. 392, 404-05 (1966) [hereinafter cited as Wadlington, *Minimum Age Difference*].

86. *See, e.g.*, Cal. Civ. Code § 227p(a) (West Supp. 1984) (adoptee must be younger); Conn. Gen. Stat. Ann. § 45-67 (West Supp. 1983-84) (adoptee must be younger); Mass. Gen. Laws Ann. ch. 210, § 1 (West Supp. 1983) (adoptee must be younger); Nev. Rev. Stat. § 127.190 (1983) (adoptee must be younger); N.J. Stat. Ann. § 2A:22-2 (Supp. 1983-84) (adoptee must be at least ten years younger); P.R. Laws Ann. tit. 31, § 531 (1968) (adoptee must be at least sixteen years younger). *See also*, Unif. Adoption Act § 2, 9 U.L.A. 20 (1979) (act suggests minimum age difference of ten years between adoptor and adoptee).

87. For a critique of such requirements, *see*, Clark, *supra* note 5, at 653 n.4.

88. *E.g.*, Hawaii Rev. Stat. § 578.1.5 (1976) (adoption of adults is limited to adoptor's nieces, nephews, and stepchildren); Idaho Code § 16-1501 (1979) (adults may be adopted only if they would have been adopted as minors but for the inadvertence of the adoptor).

89. *E.g.*, Ill. Rev. Stat ch. 40, § 1504 (1980) (an adult who is not a blood relative may not be adopted unless s/he has previously resided with the adoptor for more than two years); Ohio Rev. Code Ann. § 3107.02 (Page Supp. 1984) (an adult may be adopted only if he or she is permanently disabled, mentally retarded, or established a child-foster parent or child-stepparent relationship while still a minor); Va. Code § 63.1-222 (1980) (the adult adoptee must have resided with adoptor for at least one year while adoptee was a minor).

90. Pollock & Maitland, *supra* note 18, at 396.

91. Wadlington, *supra* note 3, at 568-69.

92. *See, e.g.*, Atchison v. Atchison's Ex'rs, 89 Ky. 488, 12 S.W. 942 (1890); State *ex rel.* Buerk v. Calhoun, 330 Mo. 1172, 52 S.W.2d 742 (1932); *In re* Moran's Estate, 151 Mo. 555, 52 S.W. 377 (1899); Craft v. Bliss, 8 Tenn. App. 498 (1928).

this approach.[93] Several states, if they authorize adult adoption at all,[94] deal with it separately from minor adoptions.[95]

Despite the modern trend toward allowing any person to be adopted, the artificial legal relationship that results is everywhere conceptually patterned after that of parent and natural child.[96] Typically, this means the adoptor must be older than the adoptee. However, even in states with no requisite age differential, courts are sometimes reluctant to approve adoption petitions where the adoptee is older than the adoptor.[97] Consequently, an adoption is often judged on the basis of how closely it conforms to traditional social concepts of what constitutes a parent-child or family relationship.

Even when a lesbian or gay couple has met the legal requisites for approval of an adult adoption, courts have denied the adoption petition on the basis that the relationship was not in the best interests of society, or that the legislature did not intend the statute to be used this way.[98] Lesbian and gay relationships often are regarded skeptically by the courts and rejected as failing to conform to the prevailing social stereotype of a "normal" family. Lesbian and gay relationships are more likely to be rejected out-of-hand as immoral, unhealthy, and unstable.[99] Perhaps the most successful way to counter such judicial attitudes is to rely on the pertinent statutory language and its applicability to same-sex couples regardless of sexual orientation, preference, or lifestyle.

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93. *See, e.g.*, COLO. REV. STAT. ANN. § 14-1-101 (1973); CONN. GEN. STAT. ANN. § 45-67 (West 1981); KAN. STAT. ANN. § 59-2101 (1976); MINN. STAT. ANN. § 259.22 (West 1982); N.Y. DOM. REL. LAW § 110 (McKinney Supp. 1983).

94. *See supra* note 22 and accompanying text.

95. *See, e.g.*, CAL. CIV. CODE §§ 227, 227p(a) (West Supp. 1983).

96. In fact, courts may refuse to recognize adoptions from other countries where the institution is not so oriented. Non-recognition of adoptions due to dissimilarity in approaches, traditions, and customs is criticized in Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954).

97. *See, e.g., In re* Adoption of Adult Anonymous II, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (1981). ("Approval of such an adoption violates the legislative intent of the Domestic Relations Law and does violence to the public policy that generates this state's laws on adoption.")

98. *Id.*

99. Wadlington, *supra* note 3, at 579-80.

B. Jurisdiction and Residency Requirements

Jurisdiction, which refers to a court's authority to hear an adoption petition, may be challenged either at the outset of an adoption proceeding or later when another court is asked to recognize the adoption decree. In the latter situation, common doctrine holds that unless there was jurisdiction over the original adoption proceeding, the decree need not be recognized.[100] In a few cases, the Full Faith and Credit Clause (which constitutionally requires all states to give full recognition and credit to final judgments rendered by other states) has been held to require interstate recognition of adoption decrees.[101]

Jurisdiction over the subject matter of the adoption turns on the provisions of local statutes. Attention should be paid to any special residence or other jurisdictional requirements imposed by local statute. All states have statutes authorizing particular courts to grant adoptions. The appropriate court may be one of general jurisdiction,[102] or specialized jurisdiction such as a probate,[103] family,[104] or juvenile court.[105] Either the local statute or court rules should be consulted in order to determine the ap-

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100. Hughes v. Industrial Commission, 69 Ariz. 193, 211 P.2d 463 (1949) (refusal to recognize a decree of another court in the same state which was determined to have lacked jurisdiction); Brown v. Hall, 385 Ill. 260, 52 N.E.2d 781 (1944) (refusal to recognize the decree of another state for lack of jurisdiction); *see also*, Ross v. Pick, 199 Md. 341, 86 A.2d 463 (1952) (jurisdiction of another state may be questioned).

101. *In re* Morris' Estate, 56 Cal. App. 2d 715, 133 P.2d 452 (1943) (adoption decree entitled to full faith and credit and recognition once valid jurisdiction is found to have existed in foreign forum); *see also*, Woodward's Appeal, 81 Conn. 152, 70 A. 453 (1908); McLaughlin v. People, 403 Ill. 493, 87 N.E.2d 637 (1949); Succession of Caldwell, 114 La. 195, 38 So. 140 (1905); Anderson v. French, 77 N.H. 509, 93 A. 1042 (1915); Zanzonico v. Neeld, 17 N.J. 490, 111 A.2d 772 (1955); Delaney v. First National Bank, 73 N.M. 192, 386 P.2d 711 (1963); Cribbs v. Floyd, 188 S.C. 443, 199 S.E. 677 (1938); Finley v. Brown, 122 Tenn. 316, 123 S.W. 359 (1909). Two other cases suggest, but do not hold, that the full faith and credit clause applies to adoption decrees: Hood v. McGehee, 237 U.S. 611 (1915) (court held that an Alabama statute of descent which excluded children adopted by proceedings in other states was constitutional since it gave full faith and credit to the adoption decrees and only denied such children the right to inherit land in another state); Munson v. Johnston, 16 N.J. 31, 106 A.2d 1 (1954) (court raised constitutional issue of full faith and credit but rested recognition of a Massachusetts adoption decree on the grounds of comity).

102. Cal. Civ. Code § 227p(a) (West Supp. 1983) (adoptor and adoptee may file in the superior court of the county in which either resides).

103. *See, e.g.*, Kan. Stat. Ann. § 59-2280 (1976).

104. *E.g.*, Del. Code Ann. tit. 13 § 951 (1981).

105. *E.g.*, Minn. Stat. Ann. § 259.23 (West 1982).

propriate court of jurisdiction, whether the petition hearing can be informal, and whether the parties' physical presence in court is required.

Usually, adoption statutes require that the petition be filed in a specific location. This is commonly the county of the petitioner's residence,[106] or the county of the adoptee's residence.[107] A few statutes impose the further requirement that the petitioner have been a resident of the state for one year.[108] It is obvious that any residence or filing requirements must be complied with in order to satisfy jurisdictional strictures.

C. Standard Review for Granting the Petition

1. *Consent*

Adult adoption depends on the voluntary consent of both parties.[109] It is necessary, therefore, that courts ascertain whether the adoptee has given a fully informed and voluntary consent.[110] Normally this means the court will determine if the parties fully understand the legal ramifications of the adoption,[111] and whether or not there is a mutual and uncoerced desire to seek the adoption.

2. *Notice*

Some states require notice to specific individuals.[112] Courts

106. *E.g.*, Cal. Civ. Code § 227p(a) (West Supp. 1983) (adoptor and adoptee may file in the superior court of the county in which either resides).

107. *Id.*

108. *E.g.*, Minn. Stat. Ann. § 259.22 (West 1982).

109. Clark, *supra* note 5, at 653.

110. It is assumed that by filing the petition the prospective adoptor consents to the adoption.

111. *See, e.g., In re* Adoption of Adult Anonymous, 435 N.Y.S.2d at 527-28.

112. Only Illinois requires both notice to the natural parents and their consent to an adult adoption. Ill. Ann. Stat. ch. 4, § 9.1-8(e) (Smith-Hurd 1975); *cf.*, Fla. Stat. Ann. § 63.062(4) (West Supp. 1984) (requires either natural parent consent or proof of notice); however, a recent Florida case held that the requirement of natural parent consent is not required by due process since the consent of the adult adoptee alone is consistent with

in these states must therefore determine whether the interested parties, including parents, guardians, conservators, and spouses have been given sufficient and appropriate notice of the adoption petition.[113]

3. *Motive*

Though courts are generally not interested in why parties seek adoption, they must be satisfied that the adoption is not being sought for criminal or fraudulent purposes.[114] While the parties may wish to state for the record why they seek the adoption, courts generally do not require them to do so as long as they meet the specific requirements laid out in the pertinent statute(s).

4. *Agency Involvement*

When adult adoptions are sought, involvement by a social services agency generally is not required.[115] However, involvement, usually in the form of a report or recommendation to the court on the proposed adoption, may be required by statute. Consultation with the appropriate agency[116] is recommended to

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the adult's legal rights. *In re* Adoption of Miller, 227 So. 2d 73, 75 (Fla. 1969). California is the only other state providing for notice to interested parties. CAL. CIV. CODE § 227p(a) (West Supp. 1983).

113. Likewise, courts will determine whether the requisite consent has been given by statutorily interested parties such as spouses. *See, e.g.*, Succession of Dupree v. Miller, 433 So. 2d 372 (La. Ct. App. 1983) *cert. denied*, 440 So. 2d 732 (La. 1983) (court held that an adult adoption is not valid unless the adoptor's spouse concurs).

114. *See, e.g., In re* Adult Anonymous II, 452 N.Y.S.2d at 199.

115. *See, e.g.*, CAL. CIV. CODE § 227p(a) (West Supp. 1983):

> No investigation or report to the court by any public officer or agency is required, but the court may require the county probation officer or the State Department of Social Services to investigate the circumstances of the proposed adoption and report thereon, with recommendations, to the court prior to the hearing.

Id.

116. *E.g.*, such agencies may be a state department of social services (Arkansas, California, Colorado, Hawaii, Iowa, Maryland, Massachusetts, Michigan, New York, North Carolina, North Dakota, Puerto Rico, and South Dakota); a department of human resources (Georgia, Kentucky, Louisiana, Nevada, and Texas); a department of human services (Maine, New Jersey, New Mexico, and Tennessee); or a department of welfare (Indiana, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Pennsylvania, Virginia, Wisconsin, and Wyoming). For a complete listing, *see*, SHEPARD'S LAWYER'S REFERENCE

determine whether an investigation and report are necessary before the court will approve the adoption petition. The investigation and report may be little more than a collection for the court of personal data about the petitioners, or it may consist of a household interview with both parties to the adoption. Whether the report takes the form of a recommendation on the proposed adoption depends on both the statute and court procedure. Whether the sexual orientation or preference of the parties is an appropriate piece of information for an agency investigation is usually a matter of administrative policy.[117]

5. *Best Interests*

Most statutes maintain the traditional standard for determining the approval of an adoption, namely, whether it is in the "best interests" of the adoptee.[118] This standard is meaningless when applied to a voluntary adoption between two competent adults.[119] In this situation, at least one court has refused to substitute its judgment for that of the consenting adults as to what constitutes those adults' "best interests."[120] While the trend may be to reject or minimize this standard in the case of adult adop-

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MANUAL, 38-45 (1983).

117. *See, e.g.*, N.Y. Dept. of Social Services Administrative Directive Transmittal No. 82-ADM-50 (August 11, 1982):

> Regulation: (3) Exploration of sexual preferences and practices of applicants, where found necessary and appropriate, shall be carried out openly with a clear explanation to the applicant of the basis for, and relevance of, the inquiry. *Id.* at 15.

118. *See, e.g.*, CAL. CIV. CODE § 227p(a) (West Supp. 1983) ("If the court is satisfied that the adoption will be for the best interests of the parties and in the public interest. . . .")

119. Wadlington, *Minimum Age Difference, supra* note 85, at 409.

120. *In re* Adoption of Adult Anonymous, 435 N.Y.S. 2d at 530. The court rested this refusal on language in the New York Court of Appeals decision, People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (court held state sodomy statute unconstitutional as violation of right of privacy) and concluded that "[w]hile *Onofre* deals with a penal statute, and we are here concerned with an adult adoption . . . judicial interference with the statutory right of adult adoption, because of the sexual preference of the parties . . . will not advance the cause of public morality." *In re* Adoption of Adult Anonymous, 435 N.Y.S.2d at 531. The court held that "the 'best interests of the child' standard may not be used to thwart an adult adoption between two competent consenting adults" and concluded that there were "no public policy or public morality considerations which operate as a bar to such an adoption." *Id.*

tions,[121] many judges still feel compelled to apply this standard just as they would in minor adoptions.[122]

Some statutes require the court to determine if the adult adoption is in the best interests of the public.[123] This standard virtually compels the court to inquire into the parties' motives for the adoption. Such a standard might invite abuse by judges whose personal views as to what constitutes the public interest can easily be imposed on the parties. The open-endedness of the best interests standard may allow the influence of pervasive judicial homophobia[124] to go relatively unchecked.[125] Furthermore, use of this standard for adult adoptions will inevitably result in

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121. *In re* Adoption of Adult Anonymous, 435 N.Y.S.2d at 531; *see also, In re* Adult Anonymous II, 452 N.Y.S.2d at 200; *contra, In re* Adoption of A., 118 N.J. Super. 180, 183, 286 A.2d 751, 754 (Essex County Ct. 1972).

122. *See supra* notes 23-27 and accompanying text. It is against such an imposition of the best interests standard that the right to privacy argument has greatest relevance and application.

123. *See, e.g.*, CAL. CIV. CODE § 227p(a) (West Supp. 1983) ("If the court is satisfied that the adoption will be for the best interests of the parties and in the public interest . . ."). As of this date there is no reported case involving adult adoption of gay or lesbian adults where the court has applied the public interest standard. In California, the provision requiring the judge to find the adult adoption in the best interest of the public is a recent change. It had its origin in the desire to obtain judicial determination of genuine and fully informed consent by the adoptee. This was prompted by several highly publicized adoptions among the "Moonies" religious sect in the early 1970s. The provision has apparently never been used to thwart adoptions by homosexuals.

124. Homophobia is defined as the "irrational fear of homosexuality or homosexuals." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 578 (1983). For a thorough discussion of the emergence of the word and its current use, *see* Sherman, *supra* note 24 at 225 n.2. Some courts have begun to acknowledge its existence within the legal and judicial system. *See*, M.V.R. v. T.M.R., 115 Misc. 2d 674, 454 N.Y.S.2d 779 (1982):

> There is no question gay people have historically been oppressed by the laws and the court system, and that anti-homosexual views, conscious or otherwise, have dominated the legal arena. Given the pervasiveness of cultural bias against gays, judges themselves are frequently not free from anti-homosexual preferences.

M.V.R. at 677-78, 454 N.Y.S.2d at 783-84.

For two particularly vehement recent examples of judicial homophobia, see, J.L.P. v. D.J.P., 9 FAM. L. REP. (BNA) 2163 (Mo. Ct. App. 1982); and L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982). *See generally*, Dressler, *Judicial Homophobia, Gay Rights Biggest Roadblock*, 5 CIV. LIB. REV. 19 (1979); Hitchens and Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1979).

125. For a discussion of such cases, see Rivera, *Our Straight-laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 883-904 (1979) and Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 327-36 (1980).

inconsistent intra- and inter-jurisdictional decisions.[126]

6. *Statutes of Limitations*

Most states have statutes of limitation requiring that actions to vacate adoption decrees be brought within a certain period of time.[127] Some courts have held that, in the case of adult adoption, the statute "commences to run only when the fraud is or reasonably should be discovered."[128] One may infer from this position that if a lesbian or gay adoptor/adoptee informs her/his prospective heirs of the adoption when it occurs, it is likely that the otherwise prospective heirs must either object to the adoption immediately or acquiesce in it permanently.[129] Most prospective heirs may be unwilling to challenge the adoptor/adoptee face to face; likewise, many individuals may be unwilling to inform their blood relatives of the adoption in the first place.[130] Since an action to vacate an adoption decree most often occurs pursuant to a will contest, it would seem legally advantageous not to keep an adoption secret, but to reveal it to potentially interested relatives thereby heading off later collateral attacks on the validity of the adoption.[131] However, the mere fact that the adoption was kept secret does not give prospective heirs sufficient reason to attack the validity of the adoption decree.[132]

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126. This is precisely what has happened in New York where the Appellate Division allowed contradictory results in *In re* Adult Anonymous II and *In re* Pavlik. *See infra* notes 160-61 and accompanying text.

127. *See, e.g.*, CAL. CIV. CODE § 227d (West Supp. 1983) (limitations period is either three or five years, depending on the grounds for seeking vacation of the adoption decree); DEL. CODE ANN. tit. 13, § 918 (1981) (two-year limitations period to vacate decree); N.C. GEN. STAT. 48-28 (1976) (no collateral attacks on adoption decrees permitted); ORE. REV. STAT. § 109.381 (1981) (one-year limitation period); *but cf. In re* Estate of O'Dea, 29 Cal. App. 3d 759, 105 Cal. Rptr. 756 (1973) (statute of limitations may not apply if decree rendered in other than forum state).

128. *In re* Adoption of Sewall, 242 Cal. App. 2d 208, 51 Cal. Rptr. 367 (1966) (statute of limitations begins to run only when the fraud is, or reasonably should have been, discovered by prospective heir).

129. *See, e.g.*, N.C. GEN. STAT. 48-28 (1976) (no collateral attacks on adoption decrees permitted).

130. This may be particularly true when lesbians or gay men have been disowned, rejected, or ostracized by their families for their sexual orientation, preference, or lifestyle, or where a particular relationship is not accepted by blood relatives.

131. Sherman, *supra* note 24, at 260-61.

132. While the parties may be unwilling to inform their blood relatives of the adop-

Even in the absence of a statute of limitations, an action by the prospective heirs to vacate an adoption decree may be barred by laches.[133] However, a court may be reluctant to apply the doctrine in the case of an adult adoption where, unlike with children, no compelling reason is present to maintain the finality of the adoption decree.

V. RECENT ADULT ADOPTION CASES INVOLVING SAME-SEX COUPLES

A. THE NEW YORK CASES

Since 1980, three New York adult adoption cases have drawn considerable legal and popular attention because of the way the New York courts addressed the issue of whether lesbians and gay men have the 'right' to seek adoption under the New York adult adoption statute.[134] Additionally, these cases dealt with the issue of whether adult adoption can be used to circumvent the public policy prohibition against homosexual marriage, thereby legalizing a relationship contrary to legislative

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tion, the mere fact that the adoption is kept secret will not be regarded as grounds for setting aside the adoption decree. *See, In re* Adoption of Brundage, 134 N.Y.S.2d 703 (1954), *aff'd*, 285 A.D. 1185, 143 N.Y.S.2d 611 (1955), *appeal denied*, 286 A.D. 1013, 144 N.Y.S.2d 921 (1955).

133. Garcia v. Enriquez, 313 S.W.2d 918 (Tex. Civ. App. 1958) (nine-year delay in bringing action to vacate constituted laches); *see also*, Sherman, *supra* note 24, at 261.

134. Research has not revealed any other reported cases dealing directly with the issue of whether the sexual preference of the parties to an adoption proceeding prohibits the approval of the petition. It has been suggested by several lesbian and gay practitioners that the dearth of reported cases of adult adoption involving lesbians and gay men is primarily reflective of at least three factors: (1) many lesbians and gay men who are in a relationship simply do not wish to transform it into a legal one modeled after the parent-child fiction; (2) various statutory restrictions or requirements for an adoption cannot be met, making the adoption impossible in their state of residence; and (3) many lesbians and gay men prefer not to publicize their relationships or sexual orientation unnecessarily to either families or society, in light of the complex emotional, legal, and discriminatory reactions they encounter in most communities. Interviews with Roberta Achtenberg, Equal Rights Advocates, Inc. and Lesbian Rights Project, in San Francisco, California (July 15, 1983, and January 16, 1984); interviews with Matthew A. Coles, Coles & Nakatani, in San Francisco, California (June 30, 1983, and January 16, 1984); interview with Donna J. Hitchsen, Equal Rights Advocates, Inc. and Lesbian Rights Project, in San Francisco, California (July 12, 1983, and January 16, 1984); telephone interviews with David Langer, Silverstein & Langer, in New York, New York (June 29, 1983, and October 28, 1983); telephone interview with Michael J. Lavery, Esq., in New York, New York (December 13, 1983); and telephone interview with the Honorable Mary Morgan, Judge, San Francisco Municipal Court, in San Francisco, California (January 13, 1984).

intent.[135]

1. In re *Adoption of Adult Anonymous*[136]

This case presented an issue of first impression in New York, i.e., whether to grant the petition of an unmarried twenty-two year-old male to adopt a twenty-six year-old male with whom he shared a home. The two men admitted to a homosexual relationship but insisted that they were not attempting to use the adoption statute to create a pseudo-marriage.[137] They conceded their awareness that there were other ways in which they could effectuate a legal relationship,[138] but both contended that they wished to establish a permanent legal bond.[139] The adoptee testified that his family did not approve of the relationship,[140] and that he feared his family might attempt to set aside any property arrangements between him and his lover if they were not legally related through adoption.[141]

The court discussed the language of the adoption statute[142] and the amendment which changed the designation of adoptee from "child" to "person."[143] The court distinguished this case from the only reported New York case deciding whether adult adoption might be against public policy.[144] The court found that there was no longer any state public policy in New York against consensual homosexual relationships.[145] Therefore, the adoption

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135. *See supra* note 8 and accompanying text.

136. 106 Misc. 2d 792, 435 N.Y.S.2d 527 (1981). *See generally*, N.Y. Times, Feb. 22, 1981, at 42, col. 1, (discusses implications of the court's ruling for lesbians and gay men).

137. *In re* Adoption of Adult Anonymous, 106 Misc. 2d at 793, 435 N.Y.S.2d at 528.

138. *Id.*.

139. *Id.*.

140. *Id.*.

141. *Id.*.

142. *Id.*.

143. N.Y. DOM. REL. LAW § 110 (McKinney Supp. 1983), as amended 1938; *see In re* Anonymous Adoption, 177 Misc. 683, 31 N.Y.S.2d 595, 598 (1941).

144. Stevens v. Halstead, 181 A.D. 198, 168 N.Y.S. 142 (1917) (court upheld denial of petition by married man to adopt his mistress relying on criminal statute and public policy against adultery as grounds for denial).

145. *In re* Adoption of Adult Anonymous, 435 N.Y.S.2d at 531. As of this writing, twenty-seven states have either legislatively or judicially decriminalized private, consensual homosexual acts. For listing, *see e.g.*, Rivera, Book Review, 132 U. PA. L. REV. 391,

could not be denied on the basis that it encouraged a criminal act or was against public morality.

Finally, the court turned to the issue of what constitutes the 'best interests' of two competent adults who wish voluntarily to enter into an adoptive relationship. On this point, the court found that the legislature did not mean for the same standard of best interests to be used in both adult and minor adoptions. The court stated that it was unthinkable that the legislature intended the courts to intervene in personal lives of competent adults, and determine 'best interests' for them in the same way a court would determine 'best interests' for young children.[146] The court concluded that both the legislature and the judiciary lacked the requisite arrogance, much less ability, to do so.[147] The petition for adoption was approved.[148]

2. In re *Adult Anonymous II*[149]

This case considered an appeal to the New York Appellate Division from the denial of an adult adoption for which a thirty-two year-old married male who wished to adopt his forty-three year-old roommate had petitioned.[150] In this case, the parties readily admitted their close emotional relationship and stated that one of their chief motives for seeking the adoption was to formalize their family unit.[151] The parties wished to use the adoption as a means to acknowledge publicly their emotional bond and consolidate their property.[152]

The court, after reviewing the statutory language which expressly provided that "an adult unmarried person . . . may adopt another person,"[153] reversed the family court's denial of the petition.[154] The court disagreed with the family court judge's

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396 n.36, 410 nn. 127-32 (1984) (reviewing D'Emilio, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983)).

146. *In re* Adoption of Adult Annoymous, 435 N.Y.S.2d at 530.

147. *Id.*

148. *Id.* at 531.

149. 88 A.D. 2d 30, 452 N.Y.S.2d 198 (1982).

150. *Id.* at 31, 452 N.Y.S.2d at 199.

151. *Id.* at 32, 452 N.Y.S.2d at 200.

152. *Id.*.

153. N.Y. DOM. REL. LAW § 110 (McKinney Supp. 1983).

154. *In re* Adult Anonymous II, 452 N.Y.S.2d at 201.

conclusion that the approval of such an adoption would violate both the legislative intent of the statute and the public policy that generates the state's laws on adoption.[155]

The court below had held that "[w]here adoption will not result in the creation of a parent-child relationship, the court must disapprove the petition."[156] The appellate division, however, found no basis in the law for disapproval of the petition. It stated that "the statutes involved do not permit this court to deny a petition for adoption on the basis of this court's view of what is the nature of a family."[157]

3. In re *Robert P.*[158]

In this proceeding, a fifty-seven year-old unmarried male wished to adopt a fifty year-old unmarried male. The two individuals had lived together for twenty-five years, maintaining both a close personal and business partnership. The two also had a homosexual relationship. They sought an adoption for a number of reasons: to prevent the family of the adoptor from interfering in the distribution of his estate; to protect their work product which consisted of a large body of art work; to continue residing in their apartment without interference from their landlord should one of them die or move; and to have the psychological and emotional satisfaction that would result from legalizing their relationship.

The family court analyzed each separate motive for the adoption rather than whether the individuals met the statutory requirements.[159] The court denied the petitions on the grounds

155. The family court judge had held such an adoption would be against the legislative intent behind the domestic relations statutory framework for adoption.

156. *In re* Adult Anonymous II, 111 Misc. 2d 320, 323, 443 N.Y.S.2d 1008, 1009 (1981).

157. *In re* Adult Anonymous II, 452 N.Y.S.2d at 201.

158. 117 Misc. 2d 297, 458, N.Y.S.2d 178 (1983), *aff'd mem. sub nom, In re* Pavlik, N.Y.L.J., Nov. 17, 1983, at 6, col. 3 (N.Y. App. Div.), *aff'd sub nom, In re* Robert Paul P., N.Y.L.J., Oct. 18, 1984, at 1, col. 6 (N.Y. Ct. App. slip op., (1984). See, Addendum, *infra*, at 710.

159. 117 Misc. 2d 280, 458, N.Y.S.2d at 178-79.

that (1) other business and legal arrangements could satisfy the parties' motives for the adoption;[160] (2) their intent was to evade other laws;[161] and (3) the parties had failed to make a showing that they had a *parent-child* relationship to legitimate and formalize.[162] The court concluded that to approve the petition would encourage others to forego appropriate legal arrangements and choose instead the convenience of adoption proceedings. Lastly, the court stated it could not condone an attempt to utilize adoption in place of marriage; to do so would allow same-sex couples to create "pseudo-marriages."[163]

Unfortunately, this ill-reasoned and legally incorrect denial of the adoption petition was summarily affirmed on appeal by a unanimous panel of the New York Appellate Division.[164] This summary affirmance of the family court decision apparently disregarded the earlier appellate division opinion in *Adult Anonymous II* and creates contradiction and confusion within current New York case law as to the right of lesbian and gay couples to utilize adult adoption.[165]

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160. *Id.* at 281, 458 N.Y.S.2d at 180.

161. *Id.* Presumably, the court was referring to the tax and inheritance laws as well as the law against homosexual marriage, but nowhere in the opinion are any specific statutes cited by the court as the laws it presumes the parties are interested in attempting to evade by means of this adoption.

162. The court incorrectly assumes that parties to a prospective adult adoption must have already developed a parent-child relationship when seeking an adoption. The applicable statute contains no such prerequisite.

163. *In re* Robert P., 117 Misc. 2d 281, 458, N.Y.S.2d at 180. The court testily rejects the use of the adoption statutes by any and all gays as "not now the law of the State, nor has it yet been clearly declared the law of the State by any Appellate Court." The court belittles the adoption petition by stating that "the parties herein do not even pretend to have a parent-child relationship, no matter how liberal one's definition of that term." The court further characterizes the parties' desire for the adoption as motivated by a desire simply to evade "existing inheritance laws.")

164. *In re* Pavlik, N.Y.L.J., Nov. 17, 1983, at 6, col. 3 (N.Y. App. Div.).

165. According to the attorney who handled this case, the fact that the family court decision was affirmed unanimously precludes an automatic appeal to the New York Court of Appeals. A motion to re-argue was denied by the Appellate Division, First Department. However, leave to appeal to the N.Y. Court of Appeals was granted on January 5, 1984. The case is now before New York's highest court. This appeal will clarify the current state of the law since the family court had expressly rejected the position the Appellate Division took in *In re* Adult Anonymous II. Letter from Michael J. Lavery, attorney for petitioner in *Matter of Adoption of Robert Paul P.*, to Peter Fowler (Jan. 31, 1984).

B. Adult Adoption and the Dearth of Case Law

1. *California*

There are no reported opinions in California dealing with the precise issue of whether lesbians and gay men have the right to use California's adult adoption statute. This is not meant to suggest, however, that there are no instances of lesbians and gay men availing themselves of the statute. On the contrary, it reflects the fact that superior courts in California routinely approve such adoption petitions.[166] The statute requires only that the adoptive parent be the older petitioner.[167] While this undoubtedly reduces somewhat the number of lesbian and gay couples interested in making use of the statute, it has not prevented adoptions from taking place. It is difficult to ascertain exactly how many adult adoptions are granted in the state in a given year since no attempt is made to separate adult from minor adoptions.[168] Most knowledgeable practitioners estimate that approximately two to three hundred adult adoptions are approved annually, with lesbian and gay adoptions accounting for approximately thirty to forty percent of the total.[169]

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166. Interview with Roberta Achtenberg, Equal Rights Advocates, Inc. and Lesbian Rights Project, in San Francisco, California (January 16, 1984); interview with Matthew A. Coles, Coles & Nakatani, in San Francisco, California (June 30, 1983); and interviews with Donna J. Hitchens, Equal Rights Advocates, Inc. and Lesbian Rights Project, in San Francisco, California (July 12, 1983 and January 16, 1984).

167. *See*, Cal. Civ. Code § 227p(a) (West 1983) ("Any adult person may adopt any other adult person younger than himself or herself . . .").

168. It is not possible to obtain exact figures since the Department of Social Services does not collect statistics regarding the number of adult adoptions. Letter from Ms. Elsie Shilin, Social Services Consultant, Adoption Branch, Department of Social Services, State of California to Peter Fowler (January 18, 1984). Furthermore, since all adult adoption petitions are directly filed with local superior courts, and the information in those records becomes confidential, as do all adoption records, there is no way to document the number of these petitions publicly. Telephone interview with Frederick Wisman, Executive Officer, Superior Court of the City and County of San Francisco (January 17, 1984).

169. *See supra* note 166.

2. *Florida*

The ability of lesbians and gay men to utilize the Florida adoption statutes for either adult or minor adoptions has been significantly impeded by a blatantly homophobic and discriminatory restriction that any homosexual is ineligible to adopt another person.[170] There are no reported opinions dealing with the right of lesbians and gay men to adopt, but one cannot draw the conclusion that, as in California, the lack of reported case law is indicative of lower court approval of these petitions. In addition, Florida retains a penal statute prohibiting consensual sodomy. This may be a factor used to bolster a court's determination that an adoption between openly gay couples would be against public policy and morality.

3. *Ohio*

Ohio has a very restrictive adult adoption statute[171] which prohibits its availability to lesbian and gay couples. However, Ohio does have a rather unique statute which allows an individual to designate an heir.[172] This 'designation-of-heir' statute provides adults who wish to leave their estate to an unrelated adult a legal basis for defeating the intestacy laws' inherent bias in favor of blood relatives. The statute may satisfy most lesbian and gay couples who wish to use adult adoption as a guarantee that their estate will be inherited by their lovers, but it fails to provide for those who wish to use adoption as a means to legitimate an intimate, committed, emotional relationship.

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170. FLA. STAT. ANN. § 63.042(3) (West Supp. 1984) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.")

171. OHIO REV. CODE ANN. § 3107.02(b)(1)-(3) (Page Supp. 1984) (statute restricts adult adoptees to those disabled, mentally retarded, or who established a child-foster parent or child-step-parent relationship with the adoptor while still a minor).

172. OHIO REV. CODE ANN. § 2105.15 (Page 1983):

> A person of sound mind and memory may . . . file a written declaration declaring that, as [her/his] free and voluntary act, [she/he] did designate and appoint another . . . to stand toward [her/him] in the relation of an heir at law in the event of [her/his] death. . . . Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as [she/he] could if a child born in lawful wedlock. The rules of inheritance will be the same between [her/him] and the relations by blood of the declarant, as if so born.)

Id.

C. CRITIQUE

The dearth of reported cases on the issue of adult adoptions, combined with the deep-seated distrust of the legal system's ability to deal objectively with lesbians and gay men, has led to a general reluctance by lesbian and gay couples to utilize adult adoption statutes. This combination of factors makes the outcome of any case dealing with adult adoption particularly important. In an area where there are few precedents by which the courts can be guided, all cases take on disproportionate importance.

There is nothing especially unique about lesbians or gay men in New York, nor about the New York legal system. Rather, the importance of those decisions lies in the fact that the issue has been raised there first. Courts in other states will confront this issue eventually, but they will do so without a wealth of judicial opinion upon which to rely. Lacking direction from their own supreme courts, courts, as well as attorneys, will naturally look to any reported decisions from other states for persuasive authority. For this reason, the preceding New York cases are important. They provide the basis for future decisions and they are the authority for establishing the right of lesbians and gay men to use adoption to create legal relationships. Above all, they establish whether lesbians and gay men are to be treated equally and fairly under the law, or officially relegated to the position of second-class citizens.

In considering alternatives to adult adoption, the Ohio designated heir statute bears watching because it affords an easy legislative response to the practical concerns of lesbians and gay men in regard to inheritance problems. Other legislative attempts to create a viable and legally cognizable relationship or status for unmarried adults living together should be encouraged and evaluated in terms of their applicability to the needs of lesbian and gay couples.[173] Such legislative proposals and solutions

173. On November 29, 1982, the San Francisco Board of Supervisors passed an ordinance extending health benefits to the "domestic partners" of all city employees which in effect gave legal recognition to both lesbian/gay and unmarried heterosexual relation-

will take time to move through the political and legislative system even in the most progressive and hospitable states. However, the mere fact that they are now considered and discussed at all attests to politicians' greater willingness to acknowledge the existence of lesbians and gay men, and to the increasingly higher levels of public acceptance and tolerance for lesbians and gays in American society.[174] The success over the past decade in linking lesbian/gay rights to the civil rights movement has resulted in the passing of much nondiscrimination legislation despite various groups' efforts and attempts to deny civil rights protection to lesbians and gay men.[175] The fact that such legal protection has generally been adopted at the municipal and county level is evidence that local government is better equipped than the federal government to respond directly to the needs of lesbian and gay citizens.[176] Greater success lies ahead as the momentum for state and federal nondiscrimination legislation grows.[177]

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ships in the City of San Francisco. *See*, N.Y. Times, Nov. 30, 1982, at 16, col. 6. Following the passage of this ordinance on a vote of 8-3, Mayor Dianne Feinstein vetoed the ordinance on December 17, 1982. Later she issued an executive order which prohibited discrimination on the basis of sexual orientation as to visitation privileges in the city's jail and hospital systems, and reaffirmed a previous executive administrative directive which extended funeral leave absences to lesbian and gay couples. Additionally, the San Francisco Retirement Board voted 3-1 to grant survivor's death benefits to Scott Smith, the lover of assassinated city supervisor Harvey Milk. *See*, L.A. Times, Jan. 1, 1984, at 34, col. 1.

174. *See*, L.A. Times, Jan. 1, 1984, at 34, col. 1; *see also* NEWSWEEK, Aug. 8, 1983, at 33, col. 2.

175. Most notably, such groups have included Anita Bryant's Save Our Children Campaign in Miami, Florida, and Rev. Jerry Falwell's Moral Majority. *See*, N.Y. Times, Feb. 11, 1981, at 12, col. 6; N.Y. Times, Nov. 10, 1981, at 31, col. 1; and L.A. Times, Jan. 1, 1984, at 33, col. 4. For discussion of an earlier historical period, *see generally*, J.D. EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970 (1983).

176. For a complete listing of state, county, and municipal legislation and executive orders prohibiting discrimination on the basis of sexual orientation or preference, see, NATIONAL GAY TASK FORCE, GAY RIGHTS PROTECTION IN THE UNITED STATES AND CANADA (rev. ed. 1984).

177. *See, e.g.*, WIS. STAT. ANN. §§ 111.31, 66.39, 66.40 (West Supp. 1983). Though Wisconsin is presently the only state which has enacted Legislation prohibiting discrimination on the basis of sexual orientation or preference, several other states are currently considering legislation to do so, particularly in the area of employment discrimination, with California and Massachusetts as the next most likely states to pass such legislation. *See* L.A. Times, Jan. 1, 1984, at 34, col. 2-3. On February 16, 1984, by a vote of 22-16, the California State Senate passed a bill which added "sexual orientation" to a list of bases upon which employers in the State of California cannot discriminate. San Francisco Examiner, Feb. 16, 1984, at 1, col. 4. The State Assembly passed the measure by a vote of 42-35 on Mar. 1, 1984, sending it to the Governor for his signature. San Francisco Exam-

VI. OTHER CONSIDERATIONS

A. IRREVOCABILITY

Parties considering adult adoption must examine its unique disadvantage—its irrevocability.[178] Except in very narrow circumstances,[179] or unless the statute provides for it,[180] once an individual has adopted her/his lover, the adoption cannot be abrogated. The adoptee is a legal heir forever unless by chance or design the adoptee is subsequently adopted by someone else.[181] As a result, although either individual always has the power to

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iner, Mar. 1, 1984, at 1, col. 5. However, Republican Governor George Deukmejian vetoed the bill on Mar. 13, 1984, stating that in his opinion there was no need for such legislation. San Francisco Examiner, Mar. 13, 1984, at 1, col. 1. The Massachusetts Supreme Judicial Court recently issued an advisory opinion to the Senate of the Commonwealth indicating that a proposed Act to eliminate discrimination on the basis of sexual preference would be constitutional. See, Opinion of the Justices to the Senate, 390 Mass. 1201, 458 N.E. 2d 1192 (1984). The opinion clears the way for legislative action by the state senate; the bill has already passed the state house of representatives.

178. Sherman, *supra* note 24, at 261.

179. *See, e.g., In re* Adoption of a Minor, 350 Mass. 302, 214 N.E.2d 281 (1966); *In re* Adoption of L., 56 N.J. Super. 46, 151 A.2d 435 (Essex County Ct. 1959); Kirsheman v. Paulin, 155 Ohio St. 137, 98 N.E.2d 26 (1951); Allen v. Allen, 214 Or. 664, 330 P.2d 151 (1958); Stanford v. Stanford, 201 S.W.2d 63 (Tex. Civ. App. 1947).

180. *See, e.g.*, Pierce v. Pierce, 522 S.W.2d 435, 436-37 (Ky. 1975) (fraud or undue influence allowed as potential grounds for vacating adult adoption decree). *See also* CAL. CIV. CODE § 227(b)(5) (West Supp. 1983) (provides that the adopted adult may file a petition to terminate the parent/child relationship after written notification to the adoptive parent, with the procedure apparently effective unless the adoptive parent disagrees with the termination, in which case she/he may petition the court to terminate the adoptive relationship). *See generally*, Note, *Domestic Relations: Adult Adoption*, 13 PAC. L.J. 683 (1982).

181. There is some disagreement in case law as to the effect of successive adoptions. Some cases hold that the second adoption cuts off the adoptee's rights as an heir to the first adoptive parent. *See, e.g.*, Quintrall v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957); Leichtenberg's Estate, 7 Ill. 2d 545, 131 N.E.2d 487 (1956); *In re* Talley's Estate, 188 Okla. 338, 109 P.2d 495 (1941).

Others hold that the adoptee continues as an heir of the first adoptive parent, as well as the second. *See, e.g.*, Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920); Dreyer v. Schrick, 105 Kan. 495, 184 P. 30 (1919); Succession of Gambino, 225 La. 674, 73 So. 2d 800 (1954); *In re* Egley's Estate, 16 Wash. 2d 681, 134 P.2d 943 (1943). However, no cases deal with adult adoptions, so there is room for speculation as to how the courts might deal with successive adult adoptions. For a further discussion of more recent cases dealing with this issue, see, *Survey of Nebraska Law, Trusts and Wills, Adoption: A Twice-Adopted Child May Not Inherit from the Former Adoptive Parent*, 14 CREIGHTON L. REV. 473, 481-86 (1980).

disinherit the other,[182] the adoption gives either the adoptor or adoptee the standing to contest the other's will, even if s/he has long since ended the relationship.

B. Psychological/Emotional Ramifications

While little has been written concerning the psychological impact of adult adoption on the dynamics of a relationship, the potential emotional or psychological effects on the individuals, particularly when the decision to adopt is an outgrowth of an ongoing sexual and emotional relationship, need to be fully explored. In addition, where a statute allows either party to adopt, the long-term effect of the younger person becoming the adoptive parent should be given careful attention. Likewise, study is needed as to the emotional, psychological, and legal impact of an adoption between young adults of relatively the same age. The subtle shift in the psychological positions of the individuals as a result of the creation of a parent-child relationship may be detrimental to a relationship established on the basis of equality and mutuality. On the other hand, the creation of a legal relationship between two individuals may have a positive effect on the relationship by reinforcing a sense of commitment and mutual responsibility between the individuals. Considering the general lack of institutional or social support systems for lesbian and gay couples, the creation of a legal relationship may be viewed as an important, socially recognized bond between two individuals.

VII. CONCLUSION

Adult adoption creates a permanent legal relationship between two unrelated individuals and has as its major advantage the recognition such a relationship garners from both society and the law. It is by no means a modern invention, but is now used more openly by lesbian and gay couples who wish to establish a legal relationship. However, it is not for everyone. Lesbian

182. *See, e.g.*, Ennis v. Chichester, 187 A.D. 53, 175 N.Y.S. 244, 251 (1919) *aff'd*, 227 N.Y. 663 (1919) (court upheld the right of the adoptive parent to disinherit by will the adopted child); *contra*, La. Const. art. 12, § 5 ("No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinheritance shall be provided by law.")

and gay couples contemplating use of an adult adoption statute must consider its pitfalls. Foremost amongst these is the fact that the legal relationship established is, almost without exception, permanent or fails to achieve the legal objectives or goals of the parties involved. In addition, lesbian and gay couples attempting to use adult adoption statutes frequently meet with resistance from courts and legislatures. Adult adoption may also cause unanticipated and perhaps undesirable shifts in the parties' psychological bond. Despite these factors, adult adoption is a 'new' tool with great potential for those who wish to use it in making the legal system work to meet the needs of lesbians and gay men.

Addendum

The New York Court of Appeals recently handed down a decision in *In re* Robert Paul P., N.Y.L.J., Oct. 18, 1984, at 1, col. 6 (N.Y. Ct. App., *slip op.*, Oct. 16, 1984), in which the Court by a 4-2 vote affirmed the denial of an adoption petition to a gay male couple on the basis of the Family Court's finding that no parent-child relationship was evidenced or intended. The Court of Appeals stated that "adoption is not a means of obtaining a legal status for a non-marital sexual relationship." *Id.* at 16, col. 5. While acknowledging that "there are many reasons why one adult might wish to adopt another that would be entirely consistent with the basic nature of adoption," the Court drew a distinction with adult relationships "utterly incompatible with the creation of a parent-child relationship." *Id.* The Court concluded that if sexual partners are to be permitted use of the adoption statutes for the purpose of giving a non-matrimonial legal status to their relationship, it is the Legislature which must give that permission, not the courts. *Id.* at col. 6. The dissent accused the majority of disregarding the conclusion in *People v. Onofre*, 51 N.Y.2d 476 (1981), that government interference with a private consensual homosexual relationship was unconstitutional because it would "restrict individual conduct and impose a concept of private morality chosen by the State." *Id.* at 490. The dissent found the majority wrong in assuming that a parent-child relationship is a condition precedent to an adoption when it is in fact the legal result of the adoption proceeding. Additionally, the dissent, rejecting the majority's view that adoption under the New York statute imitates nature, accused the majority of ignoring the clear fact that the Legislature placed no restrictions or conditions on who could or could not utilize the adoption statutes, pointing out that "the court is not at liberty to restrict by conjecture, or under the guise or pretext of interpretation, the meaning of the language chosen by the Legislature" even if the resulting relationship remains morally offensive to many." *Id.* at 17, col. 1 (Meyer, J., dissenting).