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Protecting the Child's Best Interest: Defending Second-Parent Adoptions Granted Prior to the 2002 Enactment of California Assembly Bill 25

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COMMENT

PROTECTING THE CHILD'S BEST INTEREST:

DEFENDING SECOND-PARENT ADOPTIONS GRANTED PRIOR TO THE 2002 ENACTMENT OF CALIFORNIA ASSEMBLY BILL 25

INTRODUCTION

Imagine a child with two parents. Imagine a child who, from birth, looked to these two people for support, food, shelter, clothing, and love. This child knows that these two people are her parents. Should something go wrong, this child will turn to these two people for help. Yet, only one of the child's parents is her legal parent. This child has two parents of the same-sex. One of her mothers was artificially inseminated. The child's other mother was there every step of the way helping the biological parent. In every sense of the word, the nonbiological mother is the child's parent. Yet, courts and legislatures do not always recognize this relationship. This child's parent does not fit neatly into the legal definition of a parent. Even though a child has two parents, only one of them is the legal parent.

Imagine the child has started school. The teacher has planned a field trip to the zoo. The teacher passes out permission slips for the parents to sign. The permission slip needs to be signed by the child's legal guardian or parent. The child's biological parent is on a business trip and will not be home in time to sign the permission slip. The nonbiological parent is not the child's legal guardian. While the teacher will accept the nonbiological parent's consent on the permission slip, in other instances, the nonbiological parent's consent is not enough. This one issue regarding the child's field trip is

trivial compared to the actual legal issues facing children of same-sex parents.

Imagine that the child is playing in the schoolyard during the school day. The child suffers a serious injury and needs to go to the hospital. The hospital contacts the nonbiological mother and she meets her child at the hospital. She talks to the doctor, the doctor informs her that the child is in need of a medical procedure, and legal consent is required. The child's legal mother is not in town. The child's nonbiological mother cannot give consent. Only one parent is the child's legal parent. Only one parent can consent to life-saving medical procedures or portray herself as the child's legal parent.

One method in which courts have recognized the relationship between children and their nonbiological parent is through second-parent adoptions. Much like stepparent adoptions, second-parent adoptions allow the child's nonbiological parent to become the child's legal parent. Courts grant the adoption without severing the parental rights of the biological parent. This concept of second-parent adoptions first surfaced in the 1980s.[1] Second-parent adoptions have allowed many children the benefit of having two, legally recognizable parents. Yet, in California, the legal relationship between children in same-sex, second-parent relationships and their non-biological parent are in jeopardy.

A ruling by the California Court of Appeal threatens the validity of these second-parent adoptions. *Sharon S. v. Superior Court* [2] is pending review before the California Supreme Court. This case may nullify second-parent adoptions granted in California prior to the enactment of Assembly Bill 25, which gave same-sex domestic partners the statutory right to adopt their partner's children.[3] Section I will examine the factual history and majority and minority opinions in *Sharon S.* Next, Section II of this comment will survey the history of

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[1] The National Center for Lesbian Rights, *Second-Parent Adoptions: An Information Sheet*, *available at* http://www.nclrights.org/publicatons/2ndparentadoptions.htm (last updated September 2002). *Id.* The National Center for Lesbian Rights originated the idea of second-parent adoptions. *Id.*

[2] Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107 (Cal. App. 2001) *rev. granted* 39 P.3d 512 (Cal. Jan. 29, 2002).

[3] *See* CAL. FAM. CODE § 9000 (West 1994 & Supp. 2002); A.B. 25, 2000-2001 regular session (Cal.).

adoption law and California Assembly Bill 25. Finally, Section III of this comment will consider differing state court opinions regarding second-parent adoptions. Section III will also offer remedies to counteract potential nullification of second-parent adoptions granted in California before January 1, 2002.

I. SHARON S. V. SUPERIOR COURT STATEMENT OF THE CASE

Sharon S. v. Superior Court concerns two women, Sharon S. and Annette F. Annette and Sharon while attending college and began a lesbian relationship.[4] The two moved to San Diego in 1990.[5] Annette and Sharon expressed their commitment to each other through a commitment ceremony in 1992.[6] The two also entered a "living together agreement" in 1992.[7]

When the couple first decided to have children, Sharon and Annette chose an anonymous sperm donor and Sharon was artificially inseminated.[8] On October 15, 1996, Sharon gave birth to Zachary S.[9] Annette and Sharon began adoption proceedings shortly after Zachary's birth and the court granted Annette's adoption petition.[10] The San Diego Superior Court allowed Annette to adopt Zachary without terminating Sharon's parental rights.[11] In 1998, Sharon was again artificially inseminated with the same anonymous donor and

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[4] Petitioner Sharon S.'s Answer Brief on the Merits at 2-9, Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107 (Cal. App. 2001) *rev. granted* 39 P.3d 512 (Cal. Jan. 29, 2002) (No. S102671) [*hereinafter* Sharon's Brief]. (Pagination to the brief is not available. The brief can be found on Westlaw at 2002 WL 1926003. Citations to this brief will refer the reader to the page range available in the brief and the Westlaw page number.)

[5] *Id.* and 2002 WL 1926003, at *7.

[6] *Id.*

[7] *Id.* A living together agreement acts like a prenuptial agreement for homosexual couples that make a commitment to live their lives together. Rainbow Law, *Living Together Agreement,* (2002), *available at* http://www.rainbowlaw.com/htmls/together.html. A living together agreement sets forth the property of each party to the agreement and provides for resolution of disputes that may arise should the relationship end. *Id.*

[8] Sharon S., 113 Cal. Rptr. 2d at 110.

[9] Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at * 7.

[10] Sharon S., 113 Cal. Rptr. 2d at 110.

[11] Real Party in Interest Annette F.'s Opening Brief on the Merits at 4-7, Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107 (Cal. 2001) *rev. granted* 39 P.3d 512 (Jan. 29, 2002) (No. S102671), [*hereinafter* Annette's Brief]. (Pagination to the brief is not available. The brief can be found on Westlaw at 2002 WL 985011. Citations to this brief will refer the reader to the page range in the brief and the Westlaw page number.)

Sharon gave birth on June 18, 1999 to Joshua S.[12] In July 1999, Annette and Sharon met with an attorney so that Annette could petition the court to adopt Joshua.[13]

As with Zachary's adoption, Annette sought to adopt under the Independent Adoption Act codified in Sections 8800 through 8823 of the California Family Code.[14] When Sharon and Annette initiated proceedings for Annette to adopt Zachary, neither wanted Sharon's parental rights terminated.[15] Section 8617 of the California Family Code, however, requires the court to terminate Sharon's parental rights.[16] To prevent termination of her parental rights, Sharon filed an addendum to the adoption agreement expressly stating that she did not intend to terminate her parental rights.[17] Sharon intended to retain her parental rights while concurrently conferring parental rights to Annette.[18] Prior to granting the adoption, the San Diego Department of Health and Human Services submitted a report recommending that the superior court allow Annette to adopt Joshua, finding that the adoption was in Joshua's best interest.[19] In July 2000, incidences of violence erupted between the couple[20] and shortly thereafter, Sharon requested that the court take the proposed adoption proceeding off calendar.[21]

A. THE SUPERIOR COURT GRANTED ANNETTE'S ADOPTION PETITION BUT THE APPELLATE COURT REVERSED

After Sharon requested the court take the adoption proceedings off calendar, Annette filed an Order to Show Cause seeking sole physical custody of Zachary and Joshua and filed a Petition to Establish Parental Relationship on September 22,

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[12] Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at * 7; Sharon S., 113 Cal. Rptr. 2d at 110.

[13] *Id.* Sharon S. acknowledged she signed the fee agreement with Annette July 27, 1999 but stated she never actually met the attorney until July 14, 2000. *Id.*

[14] Sharon S., 113 Cal. Rptr. 2d at 110, 112.

[15] *Id.* at 110.

[16] CAL. FAM. CODE § 8617 (West 1994).

[17] Sharon S., 113 Cal. Rptr. 2d at 110.

[18] Annette's Brief, *supra* note 11, at 4-7 and 2002 WL 985011, at * 8.

[19] Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at * 9.

[20] *Id.* Sharon alleged that Annette had hit her. *Id.* This caused Sharon to seek a temporary restraining order from the court. *Id.* It was granted. *Id.*

[21] *Id.*

2000.[22] Then on October 23, 2000, Annette moved to adopt Joshua.[23] Annette argued that the adoption was in Joshua's best interest. She further called to the court's attention that Sharon had not withdrawn her consent to Joshua's adoption. Sharon did not withdraw her consent despite the fact that she sought to take the adoption proceedings off calendar. Annette argued that due to the doctrine of parenthood by estoppel, she could petition to adopt Joshua.[24] Although Sharon and Annette temporarily agreed to a custody plan, they failed to agree on a final plan during mediation on November 2, 2000.[25] On November 8, 2000, Sharon filed a motion to withdraw her consent to the independent adoption.[26] On that same day, the Department of Health and Human Services filed a supplemental report reaffirming their finding that the adoption was in Joshua's best interest.[27]

Notwithstanding the Department's recommendation, Sharon filed a motion to dismiss the adoption petition on December 11, 2000.[28] Sharon argued that she did not consent to the adoption, therefore the court could not grant Annette's petition.[29] Since Sharon did not fully withdraw her consent, the statutory requirements of the Independent Adoption Act had not been met.[30] Therefore, the altered agreement was not legally enforceable.[31] Sharon also mentioned, but did not fully discuss that superior courts did not have the jurisdiction to grant second-parent adoptions.[32]

On March 19, 2001, the San Diego County Superior Court granted the adoption.[33] Sharon appealed the decision.[34] On October 2001, the appellate court reversed the trial court's decision and denied Annette's petition for adoption.[35] The

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22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at 2-9 and 2002 WL 1926003, at *9-10.
28 *Id.* at 2-9 and 2002 WL 1926003, at *10
29 *Id.*
30 Sharon S., 113 Cal. Rptr. 2d at 112.
31 Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at *10.
32 Sharon S., 113 Cal. Rptr. 2d at 115.
33 Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at *10.
34 *Id.* at 107.
35 *See id.* at 115-116.

appellate court denied the adoption because it found that the California legislature had not previously prescribed second-parent adoptions in the adoption statutes.[36]

B. THE MAJORITY STRICTLY CONSTRUED THE ADOPTION STATUTE THEREBY DENYING ANNETTE'S PETITION FOR ADOPTION

In reviewing the petition for adoption, the majority examined the three types of adoptions available in California—agency adoption, independent adoption and stepparent adoption. In an agency adoption, the birth parents relinquish their parental rights to a licensed adoption agency or social services.[37] The agency then has exclusive control to oversee the child's adoption.[38] In an independent adoption, the birth parents relinquish their parental rights directly to the adoptive parent.[39] In a stepparent adoption, the spouse of the birthparent petitions to adopt the birthparent's child without terminating the birthparent's parental rights.[40]

The appellate court decided whether a second-parent adoption could properly proceed as an independent adoption.[41] The court answered in the negative.[42] Although Annette argued that the adoption statutes should be liberally construed to promote the best interest of the child, the appellate court refused to do so, thus preventing Annette from adopting Joshua.[43] Annette relied heavily on *Marshall v. Marshall*,[44] a 1925 California Supreme Court case that discussed stepparent adoptions. In *Marshall*, the California Supreme Court liberally construed the adoption statutes so that the natural mother's parental rights were not terminated when the stepfather adopted the children.[45] Even though stepparent adoptions did

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36 *Id.*
37 *Id.* at 111.
38 *Id.*
39 *Id.* at 112.
40 *Id.*
41 *Id.* at 114.
42 *Id.*
43 *Id.* at 112, 115-116.
44 Marshall v. Marshall, 239 P. 36 (Cal. 1925).
45 *See generally id.* In *Marshall*, the natural mother permitted the stepfather to adopt the children. *Id.* at 237. In the adoption, the stepfather adopted the children which caused the mother to lose her parental rights. *Id.* at 237. The stepfather then

not then exist by statute, the California Supreme Court paved the way for future legislation.[46] After *Marshall*, the California legislature not only amended the independent adoption statute but also created a new classification—stepparent adoptions.[47]

The *Sharon* S. majority regarded the *Marshall* decision as dicta and not as precedent for the court to follow.[48] The majority reasoned that application of *Marshall* would undermine the express statutory language that for a person to adopt a child in an independent or agency adoption, the natural parent's rights must be terminated.[49] Furthermore, courts were not required to question legislative intent, but rather apply the unambiguous language of the statute, which requires termination of parental rights.[50] Based on the strict application and construction of the Family Code, the majority dismissed the adoption petition.[51]

C. THE DISSENTING JUDGE IN SHARON S. SAW THAT GRANTING THE ADOPTION WAS IN JOSHUA'S BEST INTEREST

Presiding Judge Kremer stated that he would have granted Annette's adoption petition since he found Marshall decision to be controlling.[52] Judge Kremer disagreed with the dismissal of the adoption petition since Annette and Sharon obviously intended the adoption to occur.[53] He argued that dismissal of the petition affected a result so plainly opposite to the parties' original intent.[54] According to the dissent, the *Marshall* court effectively read a stepparent adoption into the

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attempted to clear himself of child support obligations after his divorce from the natural mother by allowing the mother to readopt the children. *Id.* at 237. The California Supreme Court liberally construed the then existing adoption statutes by saying that it was preposterous that the mother's parental rights would be terminated solely because the stepfather had adopted the children. *Id.* at 237-238.

[46] Sharon S., 113 Cal. Rptr. 2d at 118 (2001) (Kremer, P.J., dissenting).

[47] *Id.*

[48] *Id.* at 113.

[49] *Id.* at 114.

[50] *Id.* (*discussing* California Teacher Ass'n. v. Governing Bd. of Rialto Unified School Dist., 927 P.2d 1175 (Cal. 1997)).

[51] *Id.* at 115.

[52] *Id.* at 116 (Kremer, P.J., dissenting).

[53] *Id.* at 118 (Kremer, P.J., dissenting) (*citing* Times Mirror Co. v. Superior Court, 813 P.2d 240, 245 n.7 (1991)).

[54] *Id.* (Kremer, P.J., dissenting) (*citing* Marshall, 239 P. at 767).

statute.[55] Based on the precedent from *Marshall*, the *Sharon S.* dissent examined the existing independent adoption statute.[56] Through his examination, Judge Kremer liberally construed the adoption statute to allow a second-parent adoption to occur.[57]

Analogizing *Marshall* to Annette and Sharon's situation, the dissent found that second-parent adoptions petitioned through the independent adoption act are a legitimate procedure.[58] Using the guidance of *Marshall*, the court recognized the necessity to liberally construe adoption statutes to effectuate decisions to protect the child's welfare.[59] The guidance of *Marshall* and the remedies discussed in Section of this comment, allow the California Supreme Court to preserve those second-parent adoptions granted prior to the enactment of California Assembly Bill 25.[60]

II. BACKGROUND

A. THE STATE, NOT THE COMMON LAW, CREATED ADOPTION LAW

An adoption recognizes a nonbiological parent as the legal parent of the child. "Adoption, properly considered, refers to persons who are strangers in blood."[61] The relationship formed out of an adoption "implies that the natural relationship between the child and its parents by blood is superceded."[62] Adoption law was not known at common law, but it was known in Roman law.[63] Since the first adoption statute enacted by Massachusetts in 1851, state legislatures have established adoption laws in the United States.[64]

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[55] *Id.* at 118 (Kremer, P.J., dissenting).

[56] *Id.* (Kremer, P.J., dissenting).

[57] *Id.* at 117 (Kremer, P.J., dissenting).

[58] *Id.* (Kremer, P.J., dissenting).

[59] *Id.* at 117 (Kremer, P.J., dissenting) (*citing* Dept. of Social Welfare v. Superior Court., 459 P.2d 897, 899 (1969)).

[60] A.B. 25, 2000-2001 regular session (Cal.). California Assembly Bill 25 is discussed in Part C of this Section.

[61] Blythe v. Ayres, 31 P. 915, 916 (Cal. 1892) (action by illegitimate child through her mother to determine heirship and title to father's estate).

[62] Estate of Dye, 112 Cal. Rptr. 2d 362, 366 (2001) (*quoting* Estate of Jobson, 128 P. 938 (1912)).

[63] *Id.* at 365.

[64] Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court*

Therefore, "[t]he right of adoption is wholly statutory."[65] Historically, when interpreting adoption statutes, judges defer to the plain language of the statute.[66] The judicial common law approaches adoption laws with hostility because the state invented the concept of adoption law.[67]

Adoption law progresses with societal development and shifts to reflect the changing societal definition of a family.[68] In the United States in 1998, there were 1,674,000 same-sex partnerships.[69] Of these partnerships, 167,000 couples were raising children.[70] Thus, the traditional nuclear family[71] is no longer the only one that exists in today's society. More recently, an increase in nontraditional families has lead to heightened acceptance of gay and lesbian families.[72] Today, only one-fourth of families fit the concept of a traditional nuclear family.[73]

Today, stepparents file the majority of adoption petitions.[74] In a stepparent adoption, after the court terminates one natural parent's parental rights, the stepparent becomes the legally recognized parent of his or her spouse's child.[75] In a stepparent adoption, one biological parent remains the legal parent of the child.[76] Adoptions also occur through agency and independent adoptions. These adoptions contrast stepparent adoptions in one important way. Whereas one parent retains his or her parental rights to the child in stepparent adoptions,

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Opinions, 40 ARIZ. L. REV. 1497, 1498-1499 (1998). Massachusetts was the first state to enact an adoption statute. *Id.* at 1499.

[65] *In re* Brandel's Estate, 112 P.2d 976, 977 (Cal. 1941).

[66] *See* In re Sharon's Estate, 177 P. 283, 286 (Cal. 1918) (courts originally strictly construed adoption statute). *See also* In re Crutcher, 215 P. 101, 102 (Cal 1923).

[67] Dye, 112 Cal. Rptr. 2d at 365. Starr, *supra* note 64, at 1499.

[68] *See* Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship between the Non-Biological Lesbian Parent and her Child*, 43 HASTINGS L. REV. 177 (1991).

[69] Kitty Mak, *California's New Domestic Partnership Registration Act may Aid Same-Sex Partners in Providing a Legal Basis for Their Life Relationship*, L.A. LAWYER, July/Aug. 2001, at 35.

[70] *See id.* at 35.

[71] By traditional nuclear family, this author is referring to families consisting of a married father and mother and their children.

[72] Starr, *supra* note 64, at 1513.

[73] *Id.*

[74] National Adoption Information Clearinghouse, *State Laws Regarding Adoption by Gay and Lesbian Parents: Second Parent Adoptions* (Nov. 13, 2002) *available at* http://www.calib.com/naic/pubs/l_same.cfm.

[75] Sharon S., 113 Cal. Rptr. 2d at 112.

[76] *Id.*

in independent and agency adoptions, the natural parent's parental rights are terminated.[77] Within these adoption frameworks, same-sex second-parents are left with little statutory ability to become the adoptive parent of their partner's child.

B. CHANGING FAMILIES HAVE PROMPTED CHANGING ADOPTION LAWS

As society has become increasingly accepting of alternative and diverse lifestyles, courts have increased legal rights to these newly emerging families.[78] Specifically, courts are more often likely to grant second-parent adoptions, rather than denying the adoptions because they do not fit into the statutory scheme of adoptions. Courts permit second-parent adoptions because they recognize that an adoption provides many benefits to the family. It bestows legal protections to the parents and child. [79] The adoption also benefits the child psychologically. [80] The adoption gives the child security in knowing it has two legally recognizable parents. Lastly, some courts recognize that the adoption promotes the best interests of the child.[81]

The best interest of the child standard originated from custody proceedings[82] and is intended to "maximize a child's opportunity to develop into a stable, well-adjusted adult."[83] Courts originally regarded children as property of the father and automatically granted the father custody rights.[84] Once courts recognized the rights of the mother, they shifted their focus to the "tender years" presumption. With the "tender years" presumption, when parents divorced, courts would

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[77] *Id.* at 111.

[78] Delaney, *supra* note 68 , at 206-207.

[79] *Id.* at 179.

[80] *Id.*

[81] *Id.* at 215.

[82] Sheryl C. Sultan, Note and Comment, *The Right of Homosexuals to Adopt: Changing Legal Interpretations of "Parent" and "Family,"* 10 J. SUFFOLK ACAD. L 45, 59 (1995).

[83] *In re* S.B., 2000 WL 575934, at *3 (Tenn. Ct. App. 2000) (two siblings were placed in foster care and were placed with two different families and one family contested other adoption because need for siblings to remain together court found that it was in child's best interest to continue placement with two separate families); Adoption of Michelle T., 117 Cal. Rptr. 856, 858 (1975).

[84] Sultan, *supra* note 82, at 59.

presumptively grant custody to the mother if the child was of tender years.[85] Adoption law progressed again from automatically granting custody of a child of tender years to the mother, to instead facilitating the best interest of the child. [86]

To facilitate the best interest of the child, courts review all relevant information available.[87] Courts consider the following factors: the child's desires, the child's present and future need for emotional and physical support, parental abilities and the stability of the home.[88] These factors, however, cannot be "ascertained by crude calculation."[89] By crude calculation, the court recognized that a rigid set of criteria for prospective parents to fulfill would not further determination of the best interests of the child.[90] Instead, courts should review adoption petitions on a case-by-case basis.[91]

When granting same-sex second-parent adoptions, courts look to the participation of the partner in the child's life as well as a bond between the child and partner.[92] Courts regard the best interests of the child as paramount when granting adoptions.[93] Children benefit both financially and emotionally by having two, legally recognized parents. When granting second-parent adoptions, a majority of states and courts view this benefit to be in the child's welfare.[94] For example, California courts initially considered homosexual conduct as a factor in determining the best interest of the child.[95] The

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[85] *See* Browne v. Browne, 141 P.2d 428, 429 (Cal. Ct. App. 1943); Loomis v. Loomis, 201 P.2d 33, 36 (Cal. Ct. App. 1948); Wilson v. Wilson, 13 P.2d 376, 378 (Cal. Ct. App. 1932). "As is said in Russell v. Russell, 129 P. 467, 468, 'There cannot be any fixed and certain age of minority which, in all cases and for all purposes, can be said to constitute a child of "tender years"' (*See also* Ludlow v. Ludlow, 89 Cal. App. 2d 610, 616, 201 P.2d 579)." Denham v. Martina, 29 Cal. Rptr. 377, 379 (1963).

[86] Sultan, *supra* note 82, at 59; Wilson v. Wilson, 13 P.2d at 378.

[87] *In re* Adoption of Hess, 562 A.2d 1375, 1380-1381 (Pa. Super. 1989) (evidence from grandparents, along with adoption agency's findings, was needed to make a decision in the best interest of the child).

[88] McGuire v. Brown, 580 S.W.2d 425, 429 (Tex. App. 1979).

[89] *In re* S.B., 2000 WL 575934, at *3. *See also* Adoption of Michelle T., 44 Cal. App. 3d 699, 704. "The best interest of the child is an elusive guideline that belies rigid definition." *Id.*

[90] *In re* S.B., 2000 WL 575934, at *3

[91] *Id.*

[92] *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 539 (N.J. Super. 1995).

[93] *In re* Adoption of Bird, 6 Cal. Rptr. 675, 679 (1960) (*citing* In re Hickson, 40 Cal. App. 2d 89, 92).

[94] Starr, *supra* note 64, at 1499.

[95] Chaffin v. Frye, 119 Cal. Rptr. 22, 25 (1975). "In exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court

courts in California, however, no longer follow this standard.[96] Conversely, Florida prohibits homosexuals from adopting.[97] Utah prohibits cohabitating, non-married couples from adopting children.[98] Yet, a New Jersey court acknowledged that no inherent difference exists between homosexual parents and heterosexual parents, thereby refusing to tacitly support the unfounded stereotypes held by people against same sex parents.[99]

In *Matter of the Adoption of a Child by J.M.G.*,[100] the New Jersey superior court granted a same-sex, second-parent adoption petition by a non-biological mother.[101] In granting the adoption, the court first looked to the concerns voiced by other

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could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests." *Id* at 26.

[96] In re Marriage of Birdsall, 243 Cal. Rptr. 287 (1988) (In custody dispute after parents' divorce, mother attempted to bar father from having overnight visits because father was a homosexual. *Id.* at 288. The court vacated the order of the trial court that prevented the father from the child being in the presence of any homosexual friend or acquaintance of the father. *Id.* at 291. The fact that the father is homosexual does not automatically create a presumption that father is unfit to care for his child. *Id.* at 289.

[97] Debra Caraaquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children, and Unequal Treatment*, 41 B.C.L. REV. 883, 894. *See* FL ST § 63.042(3): "No person eligible to adopt under this statute may adopt if that person is a homosexual." *Id.*

[98] Hedges, *supra* note 97, at 896. *See* UTAH CODE ANN. § 78-30-9 (2001): "(3)(a) The Legislature specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. Nothing in this section limits or prohibits the court's placement of a child with a single adult who is not cohabiting as defined in Subsection (3)(b); (3)(b) For purposes of this section, 'cohabiting' means residing with another person and being involved in a sexual relationship with that person." UTAH CODE ANN. § 78-30-9.. The Utah State Legislature added the provision prohibiting non-marital couples to adopt children in March 2000. Hedges, *supra* note 97, at 896. The Utah legislature added this provision soon after New Hampshire lifted its ban on adoptions by homosexuals. *Id.* While the Utah statutes does not expressly prohibit same-sex couples from adoption, since same-sex couples do not have the option to marry, this code does prevent them from adopting children if they lived together in a committed relationship. *Id.* While the Utah statute this statute does not expressly prohibit same-sex couples to adopt, the state legislature only recently added in the provision about non-marital, cohabitating couples from adoption in March 2000, soon after New Hampshire repealed its statute prohibiting homosexuals from adoption. *Id.* While nonmarital, cohabitating couples include both heterosexual and homosexual couples, homosexual couples do not have the opportunity to marry legally and therefore are disparately impacted by Utah's legislation. *See id.* at 901-902.

[99] Sonja J. Larsen, J.D., *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54, 65 (1995) (*discussing* Matter of the Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. 1993)).

[100] Adoption of a Child by J.M.G., 632 A.2d 550

[101] *Id.* at 555.

courts that the children of same-sex partnerships would face harassment from the children's peers.[102] The court refused to bolster the notion that denying the adoption petition would save the child from this perceived harassment.[103] The evidence before the court demonstrated that the adoption would promote the best interest of the child, regardless of the parents' sexual orientation. [104] The court implied that children in homosexual households do not differ from children in heterosexual households.[105]

The American Academy of Pediatrics unequivocally supported the holding of the New Jersey court when it announced its landmark policy towards gay and lesbian parents in February 2002.[106] The American Academy of Pediatrics stated that gay and lesbian parents possess the desire to have and raise children just as heterosexual parents possess the desire to have and raise children.[107] In fact, children of gay and lesbian parents have some advantages over children of heterosexual parents, namely that children of same-sex parents tolerate diversity more than children of heterosexual parents do.[108] Further, "[d]enying legal parent status through adoption to coparents or second-parents prevents these children from enjoying the psychologic and legal security that comes from having two willing, capable, and loving parents."[109]

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102 *Id.* at 552.

103 *Id.*

104 *Id.* at 554.

105 *Id.*

106 *See* Committee on Psychosocial Aspect of Child and Family Health, *Coparent or Second-parent Adoption by Same-Sex Parents*, 109 Am. Acad, of Pediatrics, Feb. 2002 at 339 [*hereinafter* Child and Family Health Comm.] *available at* http://www.aap.org/policy/020008.html. *See also* Ellen C. Perrin, MD, et al, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Am. Acad. of Pediatrics, Feb. 2002, at 341 [*hereinafter* Perrin] *available at* http://www.aap.org/policy/020008t.html.

107 Perrin, *supra* note 106, at 341-344.

108 *Id.* Besides being more tolerant to diversity, children of gay and lesbian parents are also found to be more nurturing of younger children, more affectionate, and responsive whereas children of heterosexual children were seen as domineering, bossy and negative. *Id.* Children of gay and lesbian parents had higher self esteem and were more open to the possibility of having a same-sex partner, yet the proportion of gay and lesbian children raised by gay and lesbian parents were the same proportions of gay and lesbian children raised by heterosexual parents. *Id.*

109 Child and Family Health Comm., *supra* note 106, at 339-340.

With the sharp rise in nontraditional families and their increased acceptance, families have turned to the courts to obtain legal protection and rights. Slowly adoption law has evolved to meet the changing shape of families.[110] Not only has homosexuality been removed in many states as a bar to adoption, but also courts and legislatures consider homosexual parents equally capable as heterosexual parents in having and raising well-adjusted children. The increased acceptance has led states, like California, to pass legislation that recognizes the right of nonbiological parents to adopt.

C. CALIFORNIA ASSEMBLY BILL 25 LEGALLY RECOGNIZES SECOND-PARENT ADOPTIONS GRANTED AFTER JANUARY 1, 2002.

The California legislature furthered the evolution of adoption law by enacting California Assembly Bill 25 for the regular 2000-2001 session.[111] California Assembly Bill 25 is a collection of changes to existing state law that conferred a number of rights on registered domestic partners.[112] California recognized domestic partnerships in 1999 with the enactment of Section 297 of the Family Code.[113] California now legally recognizes domestic partners in part due to the increase in and acceptance of, cohabitating, nonmarital couples.[114] Thus, a

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110 *See generally* Delaney, *supra* note 68.

111 *See* A.B. 25, 2000-2001 regular session (Cal.).

112 When Governor Gray Davis signed this piece of legislation, he issued the following statement: "To the Members of the California Legislature: I am signing Assembly Bill 25 which would enable domestic partners to make medical decisions for incapacitated loved ones, adopt their partner's child, use sick leave to care for their partner, recover damages for wrongful death, and allow the right to be named a conservator of a will. In California, a legal marriage is between a man and a woman. I believe the only things that can undermine the bonds of a strong marriage are ignorance and fear. This legislation does nothing to contradict or undermine the definition of a legal marriage, nor is it about special rights. It is about civil rights, respect, responsibility, and, most of all, it is about family. Therefore, I am honored to sign one of the strongest domestic partner laws in the nation. Sincerely, GRAY DAVIS." CAL. CIV. CODE § 1714.01 (West Supp. 2002). This author will not comment on the political reasons Governor Davis signed Assembly Bill 25, but this statement sees the need to recognize all families, not just the traditional family with two heterosexual parents.

113 CAL. FAM. CODE § 297 (West Supp. 2002). When examining Section 297, it would seem to this author the main purpose of this statute would be to allow two mutual caring adults to share one another's lives in an intimate and committed relationship.

114 Grace Ganz Blumberg, Article, *The Regulation of Nonmarital Cohabitants: Rights and Responsibilities of the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1296 (2001).

domestic partnership is a new legal status that contains some of the legal rights of marriage and yet, it still falls short of its definition,[115] most importantly a marriage can only occur between a man and a woman.[116]

One of the rights gained by same-sex domestic partners through the Assembly Bill 25's amendment to Section 9000 of the California Family Code is the right for a registered domestic partner to adopt the child of his or her registered domestic partner without terminating the rights of the biological parent.[117] In essence, the statute allows same-sex domestic partners to seek stepparent adoptions. Prior to the changes to Section 9000 of the California Family Code, courts granted same-sex, second-parent adoptions under a number of doctrines, including *in loco parentis*,[118] de facto parenthood,[119] and intended parentage.[120] Courts relied on these doctrines because they lacked the statutory ability to grant second-parent adoptions to same-sex couples. *In loco parentis*, de facto parenthood and intended parentage contributed to the evolution of adoption law and the enactment of California Assembly Bill 25.

"A California appellate court has described the concept of *in loco parentis* in the following terms:

> [A] person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to legal adoption,...stand[s] in loco parentis, and the rights, duties and liabilities of such person are the same as those of the lawful parent."

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115 *Id.* at 1272.

116 CAL. FAM. CODE § 308.5. (West Supp. 2000). This comment will not explore the similarities and differences in heterosexual marriages and domestic partners except for the ability to adopt under Section 9000 of the California Family Code.

117 Note the parallelism in subparts (a) and (b) of Section 9000 of the Family Code: (a) A stepparent desiring to adopt a child of the stepparent's spouse may for that purpose file a petition in the county in which the petitioner resides. (b) A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides. In substituting the language for stepparent with domestic partner, the California legislature has legally recognized second-parent adoptions by same-sex partners. CAL. FAM. CODE §§ 297, 9000.

118 *See* Delaney, *supra* note 68, at 187-188.

119 *Id.* at 188.

120 Mak, *supra* note 69, at 40.

A court first applied the common law doctrine of *in loco parentis* to a same-sex, second-parent adoption in 1991.[121] Courts most often apply this doctrine in stepparent adoptions.[122] *In loco parentis* adoptions provide a viable option for same-sex parents because this doctrine allows the second-parent to become a legal parent without divesting the biological parent of his or her rights.[123]

A de facto parent is one who assumes the role of a parent.[124] Courts also consider de facto parents as psychological parents.[125] "A psychological parent fulfills not only the child's physical needs, but also the child's psychological needs through continuing interaction, companionship, interplay and emotional mutuality on a day to day basis."[126] Same-sex couples seeking to adopt under the de facto parenthood doctrine, however, have recognized the ineffectiveness of this doctrine.[127] De facto parenthood fails to give nonbiological parents equal rights with the biological parent.[128] De facto parents do not receive legal rights over the child.[129]

The doctrine of intended parentage bestows legal rights on the gay or lesbian partner of the biological parent in two ways.[130] First, if the nonbiological partner jointly decides with the biological parent to conceive a child through artificial insemination, the nonbiological parent can obtain a pre-birth declaration of parentage from the court.[131] Second, if the nonbiological parent assists the biological parent in finding a surrogate mother to conceive their child, the nonbiological

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121 *Id.* at 195; *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (1991) (Nancy S. arose out of a custody dispute involving two lesbian parents who decided to have one of the women become artificially inseminated. *Id.* at 213. "[I[n loco parentis has been used to impose the same rights and obligations imposed by statutory and common law upon parents." *Id.* at 217. The court was unwilling to extend this doctrine to the nonbiological mother in this case. *Id.* at 219.)

122 Delaney, *supra* note 68, at 194.

123 *Id.*

124 Nancy S., 279 Cal. Rptr. at 217.

125 Delaney, *supra* note 68, at 202; *In re* B.G., 523 P. 2d 224 (Cal. 1974).

126 Vanessa L. Warznski, Comment, *Termination of Parental Rights: The "Psychological Parent" Standard,* 39 VILL. L. REV. 737, 748 (1994).

127 Delaney, *supra* note 68, at 191.

128 *Id.*

129 *Id.* at 190.

130 Mak, *supra* note 69, at 40.

131 *Id.*

parent can obtain a pre-birth declaration of parentage from the court. [132] In both of these methods, the nonbiological and biological parents participate in raising the child and provide the child with emotional and financial support.

Same-sex parents, however, no longer rely on these methods. When the California legislature allowed for same-sex, domestic partners to register with the state, the author of that bill noted that the amendments were "designed to strengthen, protect, and promote committed family relationships." [133] Allowing same-sex couples to adopt each other's child legally protects the family relationship and extends the idea to promote committed family relationships. The California legislature indicated they passed Assembly Bill 25, in part, because same-sex couples and their children needed proper legal protections.[134]

California adoption law has evolved with the statutory ability for registered domestic partners to legally adopt their partner's children.[135] Same-sex couples no longer need the doctrines of *in loco parentis*, de facto parenthood, and intended parentage because Section 9000 of the California Family Code allows second-parent adoptions by registered domestic partners. California public policy recognizes that the parent-child relationship consists of the conduct of the parent and the bond between parent and child rather than the blood relationship.[136] The only problem remaining is the validity of second-parent adoptions granted before enactment of Assembly 25 challenged by the decision in *Sharon S. v. Superior Court.*

III. ANALYSIS

A. GRANTING SECOND-PARENT ADOPTIONS ABSENT EXPRESS STATUTORY LANGUAGE

Trial courts in California have granted approximately 10,000 to 20,000 second-parent adoptions over the past fifteen

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[132] *Id.*

[133] *Committee Report for 1999 California Senate Bill No. 75,* 1999-2000 regular session (Aug. 30, 1999) [*hereinafter* SB 75 Comm. Report].

[134] *Committee Report for 2001 California Assembly Bill No. 25,* 2000-2001 regular session (Apr. 18, 2001) [*hereinafter* AB 25 Comm. Report].

[135] CAL. FAM. CODE § 9000.

[136] *In re* Jerry P., 116 Cal. Rptr. 2d 123, 141 (2002).

years.[137] *Sharon S.* questioned the validity of second-parent adoptions.[138] Because establishment of a domestic partnership was not available when courts first granted same-sex, second-parent adoptions,[139] the Sharon S. decision has placed the legal status of those adoptions at risk.[140] Jordan Blum, staff attorney for the San Diego office of the American Civil Liberties Union notes that second-parent adoptions, where the partners may have moved out of state and cannot establish California residency are in peril.[141] He further stated that children whose birth parents have died face difficulty if the court deems that the second-parent adoptions have no legal merit.[142] Thus, the child would essentially be an orphan.[143] Moreover, nullification of these adoptions would place the child in financial jeopardy.[144] The court can avert the situation children will find themselves in by liberally constructing the adoption statutes and granting second-parent adoptions.[145]

In states that strictly construct adoption statutes, the courts defer to the plain language of the statute.[146] Even if a statute does not promote the justice the court desires, the statute requires the court to follow its language.[147] Courts

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[137] Bob Egelko, *Big Adoption Issue goes to High Court—Same Sex families to be affected*, S.F. CHRON., Jan. 30, 2002, at A1 ("vast majority of these adoptions [are] by same sex couples).

[138] *See* Sharon S., 113 Cal. Rptr. 2d at 107.

[139] Since the amendment to § 9000 of the California Family Code was enacted on January 1, 2002, only those domestic partners who had or have registered as domestic partners pursuant to § 297 of the Family Code are statutorily eligible to adopt the biological children of their partner. CAL. FAM. CODE §§ 297, 9000.

[140] Lambda Legal, *California Supreme Court to Review Second Parent Adoption Decision*, Lambda Legal Press Release (Jan. 30, 2002) *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=987 [*hereinafter* Lambda Legal Jan. 30, 2002).

[141] Lambda Legal, *Civil Rights Groups Denounce Court Decision in Second Parent Adoptions*, Lambda Legal Press Release (Oct. 26, 2001) *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=907 [*hereinafter* Lambda Legal Oct. 26, 2001].

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See generally* Sharon S., 113 Cal. Rptr. 2d at 116-120 (Kremer, P.J, dissenting).

[146] Adoption of Luke, 640 N.W.2d 374, 378 (Neb. 2002).

[147] *See* Nancy S. v. Michelle G., 279 Cal. Rptr. 212. ("We agree ... that the absence of any legal formalization of her relationship to the children has resulted in a tragic situation...[w]e do not, however agree that the only way to avoid such an unfortunate situation is for the courts to adopt appellant's novel theory by which a nonparent can acquire the rights of a parent." *Id.* at 219.

must strictly construe the adoption statutes.[148] Yet, courts do not always follow this mandate.[149] To act in the best interest of the child, courts liberally construe adoption law to conform to the courts' sense of justice.[150] While some courts do not always strictly construe adoption statutes, a California court warned against "ingenious" interpretation of the adoption statutes.[151] The court may not create ambiguity in the statute order to achieve the result it desires but should interpret adoption statutes in such a way to leave no ambiguity for later courts.[152] Further, the court should act in the best interest of the child.[153]

To validate the second-parent adoptions granted before January 1, 2002, the California Supreme Court must liberally construe the adoption statutes. In examining this proposition, a look at sister states strengthens the trend to liberally construe adoption statutes. States that strictly construe adoption statutes and deny adoptions based on the parent's sexual orientation ignore evidence that sexual orientation does not detriment a child.[154] Whereas, states that liberally construe adoption statutes are able to grant adoptions that promote the best interest of the child, regardless of the parent's sexual orientation.[155]

1. Denying Adoption Petitions Based on the Sexual Orientation of the Parents Hinders the Promotion of the Best Interest of the Child.

When acting in the best interest of the child, judges should base their decision on the home the parents provide for the child, not the sexual orientation or marital status of the

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148 Adoption of Luke, 640 N.W.2d at 377. "The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed." *Id.*

149 *In re* Interest of Peter Hart and George Hart, 806 A.2d 1179, 1183 (Del. Fam. Ct. 2001).

150 *Id.* at 1185 (In an action involving a same-sex, second-parent adoption, the court said, "[I]t is inconceivable to conclude, given the statutory mandate to read the statute in the best interest of children, that our Legislature would have meant to exclude loving and nurturing two parent homes...." *Id.*)

151 Adoption of Thevenin, 11 Cal. Rptr. 219, 222 (1961).

152 *Id.*

153 *Id.*

154 *See Ex Parte* J.M.F., 730 So. 2d 1190 (Ala. 1998).

155 *See* Adoption of EOG, 28 Pa. D. & C. 4th 262 (1993).

parents.[156] No inherent difference exists between children raised in homosexual or heterosexual households.[157] It is not the sexual orientation of the parent, but the quality of the home life, that judges should examine. In the states that do not expressly prohibit homosexuals to adopt, many courts have not allowed the sexual orientation of the parents to preclude such homosexual adoptions.[158] In *Adoption of EOG*, the court decided whether an adoption by a homosexual was in the best interest of the child.[159] From the outset, the Pennsylvania court stated that the judges' own personal biases and standpoints towards a homosexual lifestyle could not mar the court's judgment.[160] The *EOG* court granted the adoption based on the extensive evidence that the adoption was in the best interest of the child.[161] The decision by the court to put aside its personal feelings about homosexual parents contrasts with the reasoning used by the Alabama Supreme Court in *Ex Parte J.M.F.*[162]

In *Ex Parte J.M.F.*, a case involving the potential termination of the biological mother's parental rights by way of stepparent adoption, the court openly disapproved of the mother's lifestyle.[163] Based on trial court findings, the Alabama Supreme Court said that a lesbian mother wrongfully portrayed to her children that a homosexual partnership was the moral and social equivalent of a heterosexual marriage.[164] The court refused to support this illegal and immoral relationship despite the evidence that the mother may have been a good parent.[165] The court instead granted custody to the father and remanded the case back to the trial court to determine the issue of visitation.[166] The court placed the child

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156 Delaney, *supra* note 68, at 215.

157 *See* Child and Family Health Comm., *supra* note 106, at 339-340; *see also* Perrin, *supra* note 106, at 341-344.

158 *See* Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990); Doe v. Doe, 284 S.E.2d 799 (Va. 1993); Adoption of EOG, 28 Pa. D. & C. 4th 262.

159 Adoption of EOG, 28 Pa. D. & C. 4th at 265, 269.

160 *Id.* at 265.

161 *Id.* at 269.

162 *Compare Ex Parte* J.M.F., 730 So. 2d 1190 *with* Adoption of EOG, 28 Pa. D. & C. 4th 262.

163 *Ex Parte* J.M.F., 730 So. 2d at 1196.

164 *Id.* at 1195.

165 *Id.* at 1196.

166 *Id.*

in a household with her biological father and stepmother where the two advanced view that a heterosexual marriage is the societal and moral norm.[167] The court focused on the sexual orientation of the parents, rather than the relationship between the mother and child.

Recognizing the need to focus on the best interest of the child, instead of the parent's sexual orientation, is pivotal in extending current California state law to those adoptions that may be adversely affected by the *Sharon S.* decision. State courts, which deny second-parent adoptions, more often disapprove of the parent's sexual orientation instead of looking at the parental abilities of the homosexual parent.[168] Whereas state courts which have granted second-parent adoptions, do so based on the parental abilities of the parent.[169] The courts which grant same-sex, second-parent adoptions recognize that granting the second-parent adoption promotes the best interest of the child, absent express statutory language otherwise permitting such adoptions.

State courts refusing to consider whether the prospective adoptive parent acts in the best interest of the child blatantly deny the legislative purpose of the adoption statutes. In *Adoption of Luke*,[170] the Nebraska Supreme Court failed to consider this evidence and produced a result counter to the child's best interest. For an adoption petition to be successful in Nebraska, the petitioner must fulfill four factors.[171] These four factors include an inquiry into whether the petitioner is eligible to adopt, whether the child is eligible for adoption, whether the parties complied with the applicable statues, and whether the adoption was in the child's best interest.[172] The

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167 *Id.* at 1195.

168 *See generally id.*

169 *See generally* cases cited *supra* note 158.

170 Adoption of Luke, 640 N.W.2d 374.

171 *Id.* at 378.

172 *Id.* at 377. The Nebraska legislature does not bar homosexuals from adopting. NEB. REV. STAT. § 43-109. An unmarried person is eligible to adopt. NEB. REV. STAT. § 43-101. In *Adoption of Luke*, the parties underwent a home study to determine if the child's best interest would be promoted by the adoption. Adoption of Luke, N.W.2d at 377. The adoption specialist, who conducted the study, recommended the adoption. *Id.* However, the Nebraska Supreme Court refused to liberally construe the adoption statutes and grant the second-parent adoption. *Id.* The Court held that the limited relinquishment of parental rights insufficiently followed the requirements of the statute. *Id.* The court briefly mentioned that the adoption specialist recommended the adoption and that the adoption has to be in the best interest of the child. *Id.*

court considered all four factors as having equal weight. Noncompliance with one factor barred the adoption petition. The parties did not comply with the adoption statutes because the statute required that the biological parent terminate her parental rights so that the nonbiological parent could adopt the child.[173] Although a home study noted that the adoption would be in the child's best interest, the court could not overlook the fact that the parties did not comply with the adoption statutes.[174] Equating whether the adoption occurs in the best interest of the child with the need for strict construction of the adoption statute, the court defeated the adoption statutes' objective to act in the best interest of the child. Adherence to this view by the California Supreme Court will jeopardize the thousands of children who enjoy the legal protection from a same-sex, second-parent.[175] The child in *Adoption of Luke* lost the benefit of having two legally recognized parents. A household with two legally recognized parents provides more benefits to a child[176] than a household with only one legally recognized parent—a result of strict construction of adoption statutes. Permitting same-sex second-parent adoptions affords the child the benefits to a child to have two, legally sanctioned parents.

Both the Nebraska and Pennsylvania state legislatures, like other state legislatures, discourage "absurd" results arising from construction of the adoption statutes.[177] In Nebraska, the court determined that allowing a second-parent adoption would lead to an absurd result while a Pennsylvania court found that not granting the second-parent adoption petition would lead to an absurd result.[178] Strict construction should not obstruct fostering families with two adults who want to raise children. Failure to allow second-parent adoptions that occurred before January 1, 2002 will produce an equally absurd result.

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[173] Adoption of Luke, 640 N.W.2d at 377, 383.

[174] *Id.* at 376. The parents did not have another option in which to adopt the child. *See generally id.*

[175] Lambda Legal Jan. 30, 2002, *supra* note 140.

[176] *See* PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, U.S. COMMISSION ON CHILD AND FAMILY WELFARE, (1996), at 11. While this report discusses heterosexual relationship, it does argue that children brought up in two-parent households have a better advantage. *See generally id.*

[177] Adoption of Luke, 40 N.W.2d at 382; *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002).

[178] Adoption of Luke, 40 N.W.2d at 382; Adoption of R.B.F., 803 A.2d at 1230.

Thousands of children will be left without one of their legal parents.[179] It would be illogical for the California Supreme Court to sever a parent-child relationship because the legislature, at the time, had not expressly permitted it. The California legislature passed California Assembly Bill 25 to recognize the benefit children enjoy by having a legally recognized relationship.[180]

2. Granting Same-Sex Second-parent Adoptions Based on Legislative Intent and Existing Statutory Framework

Through liberal construction of its adoption statutes, other state courts have been able to grant same-sex, second-parent adoptions absent explicit language in the statute. The approach by state courts, such as New Jersey, Pennsylvania, Delaware, and New York recognizes the need to act in the child's best interest. As already seen, the New Jersey court refused to tacitly support biases held against homosexual parents when an adoption would be in the child's best interest.[181] A Pennsylvania court refused to construe its adoption statutes in a way that prevented second-parents from adopting.[182] These two courts offer guidance to the decision before the California Supreme Court that could possibly nullify second-parent adoptions that were granted before January 1, 2002. Likewise, Delaware and New Jersey courts offer even more guidance for the California Supreme Court. A Delaware court granted an adoption because the legislature intended that an adoption occur in the best interest of the child.[183] A New York court granted a second-parent adoption by searching for a statutory scheme to model.[184] By liberally constructing adoption statutes, some sister states grant same-sex second-parent adoptions, a method the California Supreme Court should also employ.

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179 Lambda Legal Oct. 26, 2001, *supra* note 141.
180 A.B. 25, 2000-2001 regular session (Cal.)
181 Adoption of a Child by J.M.G., 632 A.2d at 551.
182 Adoption of R.B.F., 803 A.2d at 1202.
183 Interest of Hart, 808 A.2d at 1183 n.5.
184 Matter of Jacob, 660 N.E.2d 399 (N.Y. 1995)

a. State Legislatures Intend that Courts Grant Adoption Petitions to Promote the Best Interest of the Child.

The Family Court of Delaware approved a second-parent adoption, noting it was in the best interest of the child in *In re Interest of Peter Hart and George Hart*.[185] The court found the plaintiffs, homosexual partners, to be exemplary parents. The codified adoption statute, however, obstructed granting of the adoption petition.[186] The Delaware legislature had not provided for second-parent adoptions when drafting the adoption statutes.[187] In granting the adoption, the Court had to choose between strictly construing the statute and ignoring the overwhelming evidence that the adoption promoted the best interest of the child.[188] The court bypassed the requirement that courts strictly interpret adoption statutes since they were unknown at common law.[189] Since the statute did not directly address second-parent adoption, the court could reach two differing conclusions as to whether to permit the adoption.[190] To harmonize the two possible outcomes, the court investigated the legislative intent and applied the construction that fulfills the purpose to act in the best interest of the child.[191] The legislature's purpose in the adoption statute is to act in the best interest of the child; the common law rule requires judges to strictly construe adoption statutes. Thus, applying the legislative purpose, rather than the common law rule, Delaware courts can grant second-parent adoptions that are not expressly allowed for in the statute.

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[185] Interest of Hart, 808 A.2d 1179. Gene Hart adopted the two children, biological brothers, in the action after first being the children's foster parent. *Id.* at 1180. Gene Hart was in a relationship with Burke Shiri. *Id.* at 1182. The two men had lived together in a committed relationship for twenty-two years. *Id.* Gene adopted Peter in 1999 and George in April 2001. *Id.* In June 2001, Gene's partner, Burke, filed petitions in the Delaware Family Court so that he could be become the legal parent alongside Gene. *Id.* at 1182. Numerous reports and affidavits exemplified that adoption by Burke was in the best interest of the children. *Id.* at 1188-1190. Although the babies were born addicted to cocaine, through the parenting of Burke and Gene the children thrived in their new environment despite the substantial obstacles in their way. *See id.*

[186] *Id.* at 1183.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

In California, the legislature's purpose can be found in Section 8612 of the California Family Code.[192] Section 8612 allows an adoption to be granted if the court is satisfied that the adoption will promote the best interest of the child.[193] Based on California Family Code § 8612, California courts have repeatedly acted in the best interest of the child.[194] In *Sharon S.*, the Department of Health and Human Services twice found that granting Annette's adoption petition would be in the best interest of the child.[195] Even after Sharon received a temporary restraining order against Annette, the Department of Health and Human Services still recommended the adoption because it found that it furthered the children's best interest to have Annette as a legally recognized adoptive parent.[196]

With thousands of second-parent adoptions at stake in California, courts must apply the legislative purpose to act in the best interest of the child. Failure to do so may result in nullification of these adoptions.[197] The potential nullification of these adoptions runs counter to the legislative purpose.[198] Dissolving the parental rights of second-parents will leave the intended beneficiaries of the adoption statute—the children—without the emotional, financial and psychological benefits they receive through the adoption.[199] Such ramifications are not in the best interest of the child and would defeat, rather than promote, the legislative purpose to act in the best interest of the child.

b. Existing Statutory Framework Allows Second-Parent Adoptions To Be Granted

Another method by which the California Supreme Court can reaffirm the second-parent adoptions granted prior to January 1, 2002, is to review whether other instances exist in

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192 CAL. FAM. CODE § 8612 (c) (West 1994).

193 *Id.*

194 *See generally* Henwood's Guardianship, 320 P.2d 1 (Cal. 1958); Adoption of Lenn E., 227 Cal. Rptr. 63 (1986); Adoption of McDonald, 274 P.2d 860 (Cal. 1954); Adoption of Thevenin, 11 Cal. Rptr. 219 (1961).

195 Sharon's Brief, *supra* note 4, at 2-9 and 2002 WL 1926003, at *7.

196 *Id.*

197 Lambda Legal Oct. 26, 2001, *supra* note 141.

198 *Id.*

199 Delaney, *supra* note 68, at 177.

which an adoption can occur without severing parental rights. In *Matter of Jacob*,[200] the New York Court of Appeals first noted that it must liberally construe the adoption statutes in order to discharge the legislative purpose to act in the best interest of the child. [201] The court then realized that following the mandate to strictly construe the adoption statute could place potential adoptive parents in a "Catch-22."[202] Even though both the biological and nonbiological parent choose to co-parent the child, the courts are prohibited from allowing the nonbiological parent to become the child's legal parent without severing the right of the child's biological parent.[203] To grant the second-parent adoption, the court looked to other statutory schemes that allow adoption of a child without severing the natural parent's parental rights.[204]

In New York, stepparent adoptions, underage father adoptions, or open adoptions occur without severing the parental rights of the natural parents.[205] Based on the three statutory schemes, the court determined that one person could obtain legal, parental rights without severing the natural parent's right.[206] The court then took its reasoning one step further and held that the court could grant a second-parent adoption.[207] Before the decision in *Matter of Jacob*, second-parents faced the possibility that their New York adoption petitions would be deemed invalid.[208] By liberally constructing adoptions, the *Jacob* court allowed parents who adopted their partner's biological child to remain the child's parent.

In New York, the *Jacob* Court looked for a legislative scheme that allowed adoptions to occur without terminating existing parental rights. To determine if a second-parent adoption was possible before January 1, 2002, the California Supreme Court should also look for an existing statutory scheme that allows the biological parent to retain parental

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200 Matter of Jacob, 660 N.E.2d 399.

201 *See generally id.*

202 *Id* at 401.

203 *Id.* Upon birth, the child's biological mother is considered the child's legal parent. *Id.*

204 *Id.*

205 *Id.* at 404. Open adoptions occur in agency placements where the birth parent will retain post adoption contact with the child. *Id.*

206 *Id.*

207 *Id.* at 405.

208 *Id.*

rights in a second-parent adoption. In California, a legislative scheme does exist through stepparent adoptions. [209] Using the method by New York, California can grant second-parent adoptions based on statutory framework already existing that recognizes some adoptions occur without terminating the rights of the biological parent.

California courts should follow the example set by the New York court. The New York legislature failed to provide for second-parent adoptions. The California legislature, until 2002, similarly failed to provide for second-parent adoptions. All California adoptions predating January 1, 2002, face an identical dilemma as the parties in *Matter of Jacob* faced.[210] Had the New York Court of Appeals denied the same-sex, second-parent adoption petition, the legal status of previous second-parent adoptions would have been affected.[211] The *Jacob* court did not want to deprive the children at issue from having two legally recognizable parents.[212] The New York court did not rewrite the statutes when deciding whether to grant the adoption.[213] It looked to the intent of the legislature and the language of the statute.[214] The intent of the legislature was to act in the child's best interest.[215] The language did not expressly forbid homosexual women from adopting a child.[216] Like New York, California does not forbid a homosexual person from adopting a child.[217] Further, the purpose of the adoption statute is to act in the best interest of the child.[218] The New York court granted the adoption because no express language in the statutes prohibited it.[219] Since January 1, 2002, California expressly allows second-parent adoptions through the enactment of California Assembly Bill 25; such previously granted adoptions can be achieved and are not counter to the language of adoption statutes.[220]

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209 *See* CAL. FAM. CODE §§ 8548, 9000 (West 1994).
210 Matter of Jacob, 660 N.E.2d at 405.
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*
220 *See* CAL. FAM. CODE § 9000.

Further, the California legislature broadened the legislative scheme to include adoptions by same-sex, registered domestic partners.[221] The California legislature defined domestic partner as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[222] The definition may accurately describe the relationship status of same-sex couples when they decided to either have a child or have the non-biological parent adopt the child.[223] Courts grant adoptions in the best interest of the child;[224] the state legislature requires adoptions to promote the interest of the child.[225] Liberal construction of section 9000 of the Family Code, in light of the mandate to operate in the best interest of the child, highlights the intent of the state legislature to allow same-sex, registered domestic partners to adopt their partners biological children. Society has slowly accepted the changing family lifestyle[226] and the legislature only recently amended the Family Code to reflect this change.[227] The Delaware and New York courts had less statutory direction from the legislature when they granted second-parent adoptions than do the California courts. Liberal construction of the adoption statute lends itself to an outcome that neither creates ambiguity nor misconstrues the statute, but rather fits into the legislative scheme and more importantly, promotes the best interest of the child.

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221 *See id.*; *see also* A.B. 25, 2000-2001 regular session (Cal.) "This bill would authorize the employment of procedures applicable to stepparent adoption to the adoption by a domestic partners, as defined, of the child of his or her domestic partner." *Id.*

222 CAL. FAM. CODE § 297.

223 *See generally,* Nancy S., 279 Cal. Rptr. 212 (women had performed a commitment ceremony in 1969 and decided to have two children together through artificial insemination prior to split in 1985); Curiale v. Reagan, 272 Cal. Rptr. 520 (1990).

224 *See generally* case cited, *supra* note 194.

225 CAL. FAM. CODE § 8612(c).

226 Delaney, *supra* note 68, at 206.

227 A.B. 25, 2000-2001 regular session (Cal.)

B. JURISDICTION OF THE SUPERIOR COURTS TO GRANT SECOND-PARENT ADOPTIONS ABSENT EXPLICIT AUTHORIZATION FROM THE STATE LEGISLATURE.

Thousands of second-parent adoptions face potential nullification in the state of California.[228] When deciding the outcome of *Sharon S. v. Superior Court*, the California Supreme Court should decide whether California's superior courts had the jurisdiction to grant second-parent adoptions before January 1, 2002. [229] If the superior courts did have jurisdiction to grant the adoptions, further challenges to these thousand adoptions would not face the challenges they currently do. If not, further judicial action or legislative decree must be set forth to keep these adoptions from being overturned in the future. California's superior courts have jurisdiction to grant adoptions so long as the child or the adoptive parent was domiciled in the state at the time of the adoption proceeding.[230] Although the state legislature statutorily mandates adoptions, they occur by judicial decree.[231] Therefore, superior courts have the authority to grant adoptions as they see fit. The California Superior courts had the authority to grant the 10,000 to 20,000 adoptions facing possible nullification.[232] These courts acted in the best interest of the child[233] because this standard has been established by the legislature and is followed by the courts.[234] Judges usually construe the statutes liberally in order to effectuate acting in the best interest of the child.[235] Regardless of the outcome of the *Sharon S.* case, liberal construction of the Independent

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[228] Egelko, *supra* note 137 at A1.

[229] In *Sharon S.*, neither Sharon nor Annette raised the issue of jurisdiction of the superior courts to grant second-parent adoptions. Sharon S., 113 Cal. Rptr. 2d at 115. The majority noted that the jurisdiction of the superior courts might not have been valid. *Id.* However, since the neither party argued the issue in their briefs, the court chose not to discuss this issue. *Id.*

[230] 10 Witkin Parent & Child § 29 (a) (1) (1990) (*citing* Rest. 2d, Conflict of Laws § 78; Estate of Smith, 86 Cal. App. 2d 456, 468, 195 P.2d 842 (1948); see 33 A.L.R.3d 176)

[231] *Id.* at § 29 (a) (3).

[232] *See generally* Sharon S., 113 Cal. Rptr. at 116-120 (Kremer, P.J., dissenting); *see also* Egelko, *supra* note 137 at A1.

[233] *See generally* cases cited *supra* note 194.

[234] San Diego Dept. of Public Welfare v. Superior Court of San Diego, 496 P.2d 453, 463 (Cal. 1972).

[235] *Id.* at 463.

Adoption Act should not hinder the California Supreme Court in reaffirming the validity of the thousands of second-parent adoptions that the superior courts granted.

C. APPROACH CALIFORNIA SHOULD TAKE

The *Sharon S.* dissent correctly analyzed *Marshall*, but failed to offer remedies for adoptions granted before the changes to Section 9000 of the California Family Code. Remedies are needed to curtail further challenges to second-parent adoptions. To prevent the potential reversal of second-parent adoption petitions granted by trial courts without express statutory approval, the legislature should amend, and retroactively apply, Section 8617 of the California Family Code.

Section 8617 of the California Family Code hinders second-parent adoptions. This section of the Family Code requires that the birth parent terminate all parental rights before the adoption of the child.[236] Section 8617 currently reads: "The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child."[237] In adoptions granted under the Independent Adoption Act,[238] birth parents have amended the adoption statute so that full termination of parental rights does not occur.[239] Birth parents, like Sharon S. amend the petition so the biological parents retain their parental rights, much like in stepparent adoptions.[240] The California state legislature should amend Section 8617 of the Family Code to read:

> The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child unless an addendum has been filed in the Superior Court, prior to January 1, 2002, retaining the parental rights of one of the minor's birth parents.

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[236] This does not apply to stepparent adoption where one birth parent retains parental rights. *See* CAL. FAM. CODE § 8548.

[237] CAL. FAM CODE § 8617.

[238] CAL. FAM. CODE §§ 8800—8823 (West 1994 & Supp. 2002).

[239] *See* Sharon S., *supra* note 4, at 2-9 and 2002 WL 1926003, at * 7.

[240] *See id. See* CAL. FAM. CODE § 8548.

This proposed changes explicitly applies to those adoptions occurring before the changes to Section 9000 of the Family Code implemented on January 1, 2002.[241] The legislature recognized the importance of fostering same-sex, second-parent adoptions when it amended Section 9000 of the Family Code.[242] Retroactive application of a statute is not novel. The California Supreme Court noted a family code provision could be retroactively applied if it neither denied due process of the law nor infringed upon a vested property right.[243] While the court did not apply the statute retroactively, it did not see lack of express direction from the legislature as a bar.

A statute can be applied retroactively as long as it follows legislative intent and does not violate due process of the law.[244] In *Marriage of Buol*, a California case, the legislature enacted statutes amending designation of community and separate property while the case was pending on appeal.[245] The legislature intended that the statute be retroactively applied for dissolution proceedings occurring within a given time frame.[246] The amended statute applied to the *Buol* dissolution proceedings.[247] The court did not retroactively apply the statute because retroactive application divested the wife of her property right without due process of the law.[248] Should the California legislature amend California Family Code § 8617, retroactive application will not deprive the parties due process of the law. Retroactive application will not adversely affect the child's life and the continued adoption will provide emotional and legal security to the child and assure the child continued parental support.[249] "The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and

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241 CAL. FAM. CODE § 9000.

242 AB 25 Comm. Report, *supra* note 134.

243 Marriage of Heikes, 899 P.2d 1349, 1353 (Cal. 1995).

244 In re Marriage of Buol, 705 P.2d 354, 356-357 (Cal. 1985).

245 *Id.* at 356.

246 *Id.*

247 *Id.*

248 *Id.* at 357.

249 Adoption of EOG, 28 Pa. D. & C. 4th at 266 (listing factors used by the court when deciding whether to grant a second-parent adoption).

child."[250] Further extension of the California adoption statute would fulfill the aforementioned purpose of the adoption statutes.

The dissent of *In the Interest of Angel Lace M.*,[251] offers insight into how California's courts can grant a second-parent adoption without express statutory language. The dissent noted the interest to the public in granting adoption—with the decreasing number of children who live traditional in two-parent homes, a second-parent adoption would allow more children to live in two-parent households.[252] The Wisconsin adoption code contains a statute similar to Section 8617 of the California Family Code.[253] The Wisconsin code stated, in part:

After the order of adoption is entered the relationship of parent and child between the adopted person and the adoptive person's birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.[254]

The dissenting judge looked to ways to interpret the statute that would facilitate the best interest of the child in light of the fact that the word *shall* was written into the statute.[255] While *shall* implies that the object of the statute is mandatory, the dissent interpreted the language as directory.[256] The dissent examined four factors before determining whether *shall* is directory or mandatory. The dissent analyzed the statute's purpose, the statute's history, the alternative outcomes of the adoption and penalties for violation of the statute.[257] The Wisconsin legislature had determined that adoptions should promote the best interest of the child.[258] When the *Angel Lace M.* majority did not grant the adoption, the dissent surmised that this did not fulfill the

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250 Estate of Santos, 195 P. 1055, 1057 (Cal. 1921).

251 In the Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994).

252 *Id.* at 689 (Heffernan, C.J., dissenting).

253 *See id.* at 683 n.9 (*citing* sec. 48.92(2), Stats.) and Cal. Fam. Code § 8617.

254 *See* Interest of Angel Lace M., 516 N.W.2d at 683 n.9 (*citing* sec. 48.92(2), Stats.).

255 *Id.* at 690, 691.

256 *Id.* at 691.

257 *Id.* (Heffernan, C.J., dissenting) (*quoting* Eby v. Kozarek, 153 Wis. 2d 75, 80, 450 N.W.2d 249 (1990) (quoting State v. Rosen, 72 Wis. 2d 200. 207, 240 N.W.2d 168 (1976)).

258 *Id.* (Heffernan, C.J., dissenting).

legislative intent.[259] Because the majority did not fulfill the legislative intent, the dissent concluded that *shall* in section 48.92 should be liberally construed as permissive rather than mandatory.[260]

The dissent did not rely on its own proposition in determining whether to bypass the language in the statute that requires a court to sever the biological parent's parental rights.[261] In following the precedent set by the Vermont Supreme Court[262] and the Massachusetts Supreme Judicial Council,[263] the *Angel Lace M.* dissent devised a means to grant the adoption despite contrary language in the statute.[264] The Wisconsin legislature mandated liberal construction of the adoption statutes yet the majority did not grant the same-sex, second-parent adoption.[265] Whereas the Vermont and Massachusetts legislatures did not mandate such liberal construction and the courts nevertheless granted the same-sex, second-parent adoptions.[266] Because the adoptions furthered the best interest of the children, the Vermont and Massachusetts courts chose to bypass the language in the statutes requiring the severing of the biological parents' rights toward the child.[267]

The reasoning applied by the Wisconsin dissent would allow an interpretation of the existing California Family Code Section 8617 to permit same-sex, second-parent adoptions. The reasoning would also allow the California legislature to properly amend the statute to permit same-sex, second-parent adoptions granted before January 1, 2002. Until such time that the California legislature amends the adoption statute, a judicial decree by the California Supreme Court permitting second-parent adoptions will preserve the legal benefits the

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259 *Id.* at 693 (Heffernan, C.J., dissenting).

260 *Id.* at 691 (Heffernan, C.J., dissenting).

261 *Id.* at 692 (Heffernan, C.J., dissenting).

262 *Id.* (Heffernan, C.J., dissenting) (*citing* Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1995)).

263 *Id.* (Heffernan, C.J., dissenting) (*citing* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)).

264 *Id.* (Heffernan, C.J., dissenting).

265 *Id.* (Heffernan, C.J., dissenting).

266 *Id.* (Heffernan, C.J., dissenting) *citing* Adoption of Tammy, 619 N.E.2d 315; Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271)

267 *Id.* (Heffernan, C.J., dissenting) *citing* Adoption of Tammy, 619 N.E.2d 315; Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271).

child currently enjoys. If the legislature does not amend Section 8617, liberal construction of the adoption statutes still allows the California courts to grant second-parent adoption without express statutory language.

IV. CONCLUSION

Children may lose legal protections if the California Supreme Court deems void the second-parent adoptions granted before January 1, 2002. Finding these adoptions void will harm the children at issue. In interpreting and applying adoption statues, courts must look to the legislative intent and the statutory language. If the adoption statute does not expressly forbid the adoption sought and the adoption would fulfill the legislative intent, the court should grant the adoption. If courts strictly construe adoption statutes, they deny children important benefits. Children would not be best served by severing the legal relationship with one of their parents. Children are best served by enjoying legal relationships with both the biological and nonbiological parents.

The California Supreme Court should liberally construe the adoption statutes in similar fashion to courts in Pennsylvania, New York, New Jersey, and Delaware, so that thousands of children could retain the legal protections offered by their second-parent. Currently, California expressly allows same-sex, second-parents to adopt, but the statute does not benefit those adoptions granted before January 1, 2002. Liberally constructing the California adoption statutes would not run against express statutory language and would promote the best interest of the child—the primary concern of the adoption statues.

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