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LEGAL PROTECTION FOR ALL THE CHILDREN: DUTCH-AMERICAN COMPARISON OF LESBIAN AND GAY PARENT ADOPTIONS

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ABSTRACT: *The purpose of this article is to examine the recent developments concerning same-gender parent adoptions in the Unites States and the Netherlands, comparing the different routes these changes have taken. The first section of the article examines the present status of the case law in both countries. It begins with an analysis of the court decisions in the United States, where case law now makes it legal in numerous states for gays and lesbians to adopt, either as >co-parents= or as >strangers= of the child. The section also includes an analysis of the recent Dutch case before the highest court in the Netherlands, the Hoge Raad, involving a request for a co-parent adoption by two women who were raising their children together as a family. The next section of the article sets out the current status of Dutch law as it affects gay and lesbian co-parents, including present adoption laws, joint parental authority, and registered partnerships. The article=s fourth section examines proposed legislation in the two countries concerning the right of same-gender couples, and homosexuals in general, to adopt. The article then concludes with a comparison and analysis of the Dutch and American legal histories concerning same-gender co-parent adoptions. This section examines the differences in the two countries= legal systems, the social status of homosexuals, the social acceptance of adoption, and each country=s underlying assumptions about family law. The article concludes by pointing out how recognition of same-gender co-parent adoption is in the best interest of the children raised by same-gender couples.*

KEYWORDS: Legal Protection, Children, Dutch-American Comparison, Lesbian, Gay, Parent Adoptions

INTRODUCTION

The lesbian baby boom made the front cover of the November 1996 *Newsweek*,[1] which is widely distributed in both the Netherlands and the United States. Estimates are that 20,000 children are being reared in Dutch lesbian and gay families.[2] The number in the United States varies from 1.5 to 5 million depending on which study is consulted.[3] The parents of these children nurture, educate, pamper and generally raise them in the same ways heterosexual parents raise their children.[4] Even though children in same-gender relationships are reared by two loving parents,

[1] Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50. American >[e]stimates range from 6 million to 14 million children with at least one gay parent. Adoption agencies report more and more inquiries from prospective parents - especially men - who identify themselves as gay, and sperm banks say they=re in the midst of what some call a Agayby boom@ propelled by lesbians.= *Id.* Rock star Melissa Etheridge made headlines when she announced that she and her long-time domestic partner, Julie Cypher, were going to have a baby. Etheridge and Cypher have declined to reveal how the baby was conceived. Etheridge plans on adopting the baby after the birth. Mark Miller, *We=re a Family and We Have Rights*, NEWSWEEK, Nov. 4, 1996, at 54.

[2] Hans Warmerdam and Annemies Gort, MEER DAN GEWENST: HANDBOEK VOOR LESBISCHE EN HOMOSEKSUELE OUDERS (Amsterdam: Schorer, 1996).

[3] Garry Cooper, *Network Briefs*, FAM. THERAPY NETWORKER, July/Aug. 1997, at 15.

[4] A. Breweays, DONOR INSEMINATION: FAMILY RELATIONSHIPS AND CHILD DEVELOPMENT IN LESBIAN AND HETEROSEXUAL FAMILIES (Leiden: Rijksuniversiteit Leiden, 1997) (in which the book=s general conclusion states that lesbian families do not raise their children differently from heterosexual families). Recently, at the Society for Research and Development on Child Development, papers were presented on studies of children in lesbian and non-lesbian homes.

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for most of these couples the nonbiological parent does not have the same legal options to establish the rights and responsibilities that heterosexual couples have in relation to the children they are raising. However, recent developments in both the United States and the Netherlands have begun to change the precarious legal status of the nonbiological parent in these families.

The policies of both the Netherlands and the United States recognize that, if possible, it is best to have two parents in the household.[5] For instance, if a parent dies and the remaining parent remarries, the adoption legislation in both countries makes it possible for the stepparent to adopt a child born of the previous union.[6] In addition to the stepparent situation, it is the general policy in the United States that adoption is preferable either to institutionalization or foster care.[7] On the other hand, in other than the stepparent context, adoption in the Netherlands has not been a widely accepted legal solution for children whose parents are unable, or unwilling, to care for them.[8] In fact, it has only been in 1997 that the Dutch legislature extended adoption rights to persons other than married couples;[9] in April of 1998, single persons and unmarried heterosexual couples were allowed to adopt for the first time in modern Dutch history.[10]

While both the Netherlands and the United States have policies allowing stepparent adoptions,

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The studies were done in the U.S., Britain, and the Netherlands. The findings showed there were no significant differences except in one aspect: >. . . 90 percent of the lesbian coparents took an active role in raising the children, while only about 37 percent of the heterosexual fathers did the same.= Cooper, *supra* note 4.

5 For example, in cases of stepparent adoptions, the judge has the authority to waive certain statutory requirements, such as a social worker=s report on the appropriateness of the adoptive home. *See* MASS. ANN. LAWS ch. 210, ' 5A (Law. Co-op. 1994). In other states, these reports may not be required at all in stepparent adoptions. *See* ARK. CODE ANN. ' 9-9-212(c) (Michie 1993); IND. CODE ANN. ' 31-19-7-1 Sec. 1 (West Supp. 1997); KAN. STAT. ANN.' 59-2132(h) (1994); MONT. CODE ANN. ' 40-8-122(1) (1995); N.D. CENT. CODE ' 14-15-11(5) (1991).

6 Between 1980 and 1990, stepparent adoptions of Dutch children have more than tripled, from 105 in 1980 to 357 in 1990. Nora Holtrust, AAN MOEDERS KNIE: DE JURIDISCHE AFSTAMMINGSRELATIE TUSSEN MOEDER EN KIND (Nijmegen: Ars Aequi Libri, 1993), at p. 191 and pp. 205-10.

7 For instance, in Alabama, subsidies are given after an adoption, ALA. CODE ' 26-10-25 (1992); Florida says in its statute that >[t]he Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year and that permanent homes could be found for many of these children if their status were reviewed periodically . . .,= FLA. STAT. ANN. ' 39.45(1) (West 1988); Maryland states that one of its goals is to >encourage efforts at adoption of the child,= MD. CODE ANN., FAM. LAW ' 5-544 (1991); the Nebraska legislature states that >[t]he Legislature finds that there are children in temporary foster care situations who would benefit from the stability of adoption,= NEB. REV. STAT. ' 43-155 (1993); Nevada is particularly concerned about special-needs children and states that it has a >fundamental interest in promoting adoption for children with special needs because the care, emotional stability, and general support and encouragement required by such children can be best, and often only, obtained in family homes with a normal parent-child relationship,= NEV. REV. STAT. ' 127.410, Art. 1(b) (1995).

See the new Dutch adoption laws, *Stb*. 1997, 772, Art. 227-232 BW (1997) (allowing both unmarried heterosexual couples and single persons to adopt).

8 In the United States, there are over 100,000 children who are eligible for adoption. *See* Proclamation No. 7145, 3 C.F.R., 1998 Comp., p. 111, 63 Fed. Reg. 59,203 (1998). >Preliminary reports from 42 states for federal fiscal year 1998 project adoptions of at least 36,000 foster children, which includes increases of 7,859 over the average number of adoptions from the previous three years.= Joe Kroll, *1998 U.S. Adoptions from Foster Care Projected to Exceed 36,000*, North American Council on Adoptable Children, Adoptalk, Winter, 1999, http://members.aol.com/nacac/1998_Adoptions.html. About 50 to 100 Dutch children are available for adoption each year. DE GROTE ALMANAK VOOR INFORMATIE EN ADVIES (Utrecht: NIZW, 1997), at 525; *Kamerstukken II* 1994/95, 22 700, nr. 5, p. 13. In 1996, 704 foreign-born children were adopted by Dutch citizens; in 1995, there were 661; and in 1994, only 594. *Persbericht Ministerie van Justitie*, 13 maart 1997.

9 Wet van 24 december 1997 tot herziening van het afstammingsrecht alsmede van de regeling van adoptie, *Stb*. 1997, 772, Art. 227-232 BW (1997).

10 The persons adopting must be 18 years older than the child, and the parents (the legal parents, not a donor or biological father who has not recognized the child) must consent to the adoption request; *Stb*. 1997, 772, Art. 228 lid 1 sub c and d BW (1997). The criteria for adoptions by couples require that the couples have cohabited for three continuous years before the adoption request and that they have taken care of and brought up the child for at least one year; *Stb*. 1997, 772, Art. 227 lid 2 BW (1997); *Stb*. 1997, 772, Art. 228.1.f. BW (1997). A single person must have taken care of and brought up the child for three continuous years before he or she can adopt; *Stb*. 1997, 772, Art. 228.1.f. BW (1997).

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legal obstacles have existed in both countries if the adoption petitioners were lesbians or gay men, even if these individuals were the de facto parents of the children they sought to adopt. However, recent court decisions in several of the United States have granted same-gender parent adoptions, and a legislative proposal in the Netherlands[11] would allow same-gender couples to adopt, jointly, the children they have been raising together.

The purpose of this article is to examine these recent changes and compare the different routes these changes have taken. The first section of the article examines the present status of the case law in both countries. It begins with an analysis of the court decisions in the United States, where case law now makes it legal in numerous states for gays and lesbians to adopt, either as >co-parents=[12] or as >strangers=[13] of the child. The section also includes an analysis of the recent Dutch case before the *Hoge Raad*, involving a request for a co-parent adoption by two women who were raising their children together as a family. The next section of the article sets out the current status of Dutch law as it affects gay and lesbian co-parents, including present adoption laws, joint parental authority, and registered partnerships. The article=s fourth section examines proposed legislation in the two countries concerning the right of same-gender couples, and homosexuals in general, to adopt. The article then concludes with a comparison and analysis of the Dutch and American legal histories concerning same-gender co-parent adoptions. This section examines the differences in the two countries= legal systems, the social status of homosexuals, the social acceptance of adoption, and each country=s underlying assumptions about family law. The article concludes by pointing out how recognition of same-gender co-parent adoption is in the best interest of the children raised by same-gender couples.

Case law

American case law

Co-parent adoptions

Many gay men and lesbians have children.[14] Gay men may have children from prior marriages, they may find a willing surrogate to carry their child, they may father children born to lesbian friends, or they may adopt a child as a single parent. Lesbians may also have children from previous marriages or they may adopt a child as a single parent; most often, however, lesbian couples decide that one or both of the women will have children by alternative insemination,[15] either with a known donor or an anonymous donor through the services of a sperm bank.[16] In many of these situations, the co-parent wants to adopt the children so there is legal protection for

[11] Wijziging van Boek 1 van het Burgerlijk Wetboek (adoptie door personen van hetzelfde geslacht), *Kamerstukken II* 1998/99, 26 673, nr. 2 (voorstel van wet) en nr. 3 (memorie van toelichting). For an English translation of the text of the bill, *see* the summary translation by Kees Waaldijk (Leiden University), posted to the Internet on July 28, 1999, http://www.coc.nl/index.html?file=marriage

[12] >Co-parent= adoptions refer to those adoptions in which a person in a same-gender relationship who does not have a legal relationship to the child adopts his or her partner=s child, without severing his or her partner=s parental rights to the child.

[13] >Stranger= adoptions refer to those adoptions in which neither adoptive parent has a prior legal relationship with the child.

[14] Kantrowitz, *supra* note 2; Warmerdam and Gort, *supra* note 3.

[15] The term >alternative insemination= is used in place of >artificial insemination= because of the connotation of the word >artificial,= which implies that the child conceived under this procedure is not real. >Alternative insemination= as used in this article refers to medically assisted alternative insemination as well as self-insemination.

[16] Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1351 (1997).

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the children who are being raised in a two-parent household.[17]

There is only one state in the United States that has specific legislation prohibiting homosexuals from adopting children, Florida.[18] In the other 49 states, however, it is possible for lesbians and gays to file a petition in court requesting to adopt a child, either as a single person seeking to adopt or as joint petitioners seeking to adopt together. The court then must decide whether the petition falls within, or outside, the language of the state=s adoption code. Consequently, same-gender co-parent adoption petitions have been attempted in several states in the United States.

Because there is no specific legislation that authorizes same-gender co-parent adoptions in these states, individuals in civil-law countries may assume, incorrectly, that when the state courts issue rulings on same-gender co-parent adoptions, the courts= decisions are not >law.=[19] This is a misunderstanding of the status of a court=s decision in the common-law system. When an appellate state court interprets its state=s adoption code concerning whether to allow same-gender co-parent adoptions,[20] that interpretation attaches to the adoption code and the court=s interpretation becomes the **law** of the state. Under the common law, in all subsequent adoption cases, the adoption code must be applied according to the appellate court=s interpretation.[21] It is through this lawmaking ability of the common-law courts that the law concerning same-gender co-parent adoptions has been established in several states, even though that state=s legislation does not address, specifically, these types of adoptions.

Both trial[22] and appellate courts[23] have ruled on same-gender co-parent adoptions. Among these courts, there have been three[24] state appellate courts that have denied the adoptions requested by

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17 *See infra* notes 25-28 for citations to the American cases. *See also* the Dutch case HR 5 september 1997, *NJ* 1998, 686, rek.nr. 8940.

18 FLA. STAT. ANN. ' 63.042(3) (West 1985). New Hampshire also had a statute prohibiting homosexuals from adopting children, N.H. REV. STAT. ANN. ' 170-B:4 (1994). However, on May 3, 1999, the statute was repealed, H.B. No. 90, 1999 Sess. (NH 1999). The Florida statutory prohibition may be challengeable under a recent U.S. Supreme Court decision, *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), in which a Colorado law was declared unconstitutional. The Colorado law had the effect of prohibiting any discrimination protection for gays and lesbians; the Supreme Court found the law violated the equal protection clause of the fourteenth amendment to the U.S. Constitution. The American Civil Liberties Union is preparing a lawsuit in Florida to challenge the constitutionality of the Florida statute, *see* Joan Lowy, *Resistance Organizes Nationwide Against Gays Adopting*, THE COMMERCIAL APPEAL (Memphis, TN), Mar. 14, 1999 at A21, 1999 WL 4140884.

19 *Kamerstukken II* 1996/97, 22 770, nr. 22, p. 2. *Verslag van een onderzoek naar de wetgeving inzake interlandelijke adoptie en toepassing daarvan in de praktijk in een aantal landen van herkomst en landen van ontvangst* (Den Haag: Ministerie van Justitie, 1996), pp. 19-29 and pp. 24-25. This quote misstates the status of the cases that have been decided in the U.S. state courts.

20 To suggest that adoption petitions may not be filed by unmarried partners of the same or opposite sex because the legislature has only expressed a desire for these adoptions to occur in the traditional nuclear family constellation of the 1930's ignores the reality of what is happening in the population. . . . Courts have long construed statutes to meet the changing needs of our growing society, providing the interpretation honors the inherent legislative purpose.
In the Matter of an Adoption by S.M.Y. of Camilla, 163 Misc. 2d 272, 279-80, 620 N.Y.S.2d 897, 902 (1994).

21 This will remain the law of the state unless the legislature enacts legislation specifically prohibiting same-gender co-parent adoptions.

22 A lower trial court=s interpretation of a state statute must be followed by the parties in the case, but that interpretation does not apply in any other of the state=s courts.

23 A state appellate court=s interpretation of a state statute becomes state-wide law, and the appellate court=s ruling must be followed in all of that state=s lower courts.

24 **Colorado:** *In re* Adoption of T.K.J. and K.A.K., Children, 931 P.2d 488 (Colo. Ct. App. 1996), NO. 95CA0531, 95CA0532, *rehearing denied* (1996), *cert. denied*, (1997); **Connecticut**: *In re* Adoption of Baby Z, 247 Conn. 474, 1999 WL 33449 (1999); **Wisconsin:** *In re* Angel Lace M., et al., 184 Wis.2d 492, 516 N.W.2d 678 (1994). There also have been two trial courts in Pennsylvania that have ruled against same-gender co-parent adoption petitions, *In re* Adoption of R.B.F. and R.C.F., PICS Case No. 98-2395 (C.P. Lancaster Oct. 22, 1998) Cullen, J. and *In re* Adoption

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same-gender co-parents, while six states= higher appellate courts[25] and at least[26] seven states= lower trial courts[27] have decided in favor of same-gender co-parent adoptions. Regardless of the differences in the outcome of the decisions, however, the courts= analyses usually start from the same place, with an examination of the statutory language of the state=s adoption code. Most of the court decisions initially point out that adoption was unknown in the common law - adoption has been created totally by legislative enactment. Consequently, the courts must use rules of statutory construction and interpretation to determine whether same-gender co-parent adoptions are permitted within the adoption code. As mentioned earlier, however, the adoption codes are silent on this issue.

Generally the courts deciding this issue start from the foundational rule of statutory construction, the plain-meaning rule. According to this rule, the court must apply the statutory language according to its plain meaning. To ascertain the plain meaning of the statutory language, courts often resort to common dictionary definitions of the words. When the words themselves are ambiguous in their meaning or application, however, the courts also consider the legislative intent of the words for additional guidance. The use of this statutory-interpretation procedure, however, has resulted in contradictory decisions in the cases involving same-gender co-parent adoptions.

In the decisions of the three appellate courts that denied the adoption petitions filed by same-gender co-parents, the courts first relied on the plain meaning of the words of the adoption code to find that the words did not include situations involving same-gender co-parent adoption petitions. The courts used a strict, formalistic construction of the words involved in the codes.

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of C.C.G. and Z.C.G., reported by Danielle Rodier, *Another Setback for Same-Sex Parents= Rights*, PENNSYLVANIA LAW WEEKLY, July 19, 1999, http://www.lawnewsnetwork.com However, in another Pennsylvania trial court, the judge has granted a same-gender co-parent adoption petition, *see In re* Adoption of E.O.G. & A.S.G., 14 Fiduc. Rep.2d 125 (Pa. C. P. York County Apr. 28, 1994).

[25] **District of Columbia:** *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. Cir.1995); **Illinois:** *In re* Petition of K.M. and D.M., 274 Ill.App.3d 189, 653 N.E.2d 888, 210 Ill. Dec. 693 (1995); **Massachusetts:** Adoption of Galen, 425 Mass. 201, 680 N.E.2d 70 (1997), Adoption of Tammy, 416 Mass. 205, 619 N.E.2d 315 (1993), Adoption of Susan, 416 Mass. 1003, 619 N.E.2d 323 (1993); **New Jersey:** *In re* Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 666 A.2d 553 (1995); **New York**: Matter of Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995) (also involving Matter of Dana, which the court combined with Matter of Jacob); **Vermont:** Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368, 628 A.2d 1271, 27 A.L.R.5th 819 (1993).

[26] Because most trial-court decisions are not published, an accurate number of how many states= trial courts have granted same-gender co-parent adoptions is difficult to obtain, particularly since adoption cases in many states are confidential. According to a 1996 report by the Lambda Legal Defense Fund, courts in at least 21 states have granted same-gender co-parent adoptions. John Cloud, *A Different Fathers= Day*, TIME, Dec. 29, 1997-Jan. 5, 1998, at 106.

[27] **Alaska**: *In re* A.O.L. No. 1JU-85-25-P/A (Alaska 1st Jud. Dist. July 23, 1985), *In re* Adoption of a Minor (C), No. 1-JU-86-73 P/A (Alaska 1st Jud. Dist. Feb. 6, 1987); **California**: *In re* Adoption of N.L.D., No. 18086 (Cal. Super. Ct. San Francisco County Sep. 4, 1987), *In re* Adoption Petition of Achtenberg, No. AD 18490 (Cal. Super. Ct. San Francisco County, 1989), *In re* Adoption of Carol, No. 18573 (Cal. Super. Ct. San Francisco County, 1989), *In re* Adoption of Nancy M., No. 18744 (Cal. Super. Ct. San Francisco County, 1990); Emily Doskow reported being the attorney of record for more than 50 adoptions in the county courts of California in *Adoption Options for Gay and Lesbian Couples: An Interview with Emily Doskow*, 20 FAM. ADVOC. 40, 44 (Summer 1997; hereinafter cited as *Adoption Options*); **Indiana**: *In re* Adoption of Hentgen-Moore, No. 91CO1-9405-AD-009 (Ind. Cir. Ct. White County Mar. 24, 1995); **Oregon**: *In re* Adoption of M.M.S.A., No. D8503-61930 (Or. Cir. Ct. Multnomah County Sept. 4, 1985); **Pennsylvania**: *In re* Adoption of E.O.G. & A.S.G., 14 Fiduc. Rep.2d 125 (Pa. C. P. York County Apr. 28, 1994); **Texas**: Suzanne Bryant reported an adoption in a Texas court, Suzanne Bryant, *Second Parent Adoptions: A Model Brief*, 2 DUKE J. GENDER L. & POL=Y 233 n.a (Spring 1995); **Washington**: Interest of E.B.G. No. 87-5-00137-5 (Wash. Super. Ct. Thurston County Mar. 29, 1989), *In re* Adoption of Child A and Child B, No. 88-5-00088-9 (Wash. Super Ct. 1988), *In re* Adoption of Child No. 1 and Child No. 2, No. 89-5-00067-7 (Wash. Super. Ct. Thurston County 1989); John Stevenson reported an adoption in a Washington state court, John Stevenson, *Judge Postpones Decision on Lesbian Custody: Lawyer Argues that N.C. >Public Policy= Invalidates Adoption*, HERALD-SUN (DURHAM, N.C.), July 11, 1997 at C1.

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For example, if the code stated that a single person, a married couple, or a stepparent were allowed to adopt a child, the court would find that a same-gender couple did not fit within this statutory language. The same-gender couple was not adopting as a >single person= because the adoption petition was for a >joint= adoption, and since same-gender couples were not >married,= they could not adopt as a >married couple.= Finally, because the same-gender couple was not married, there could be no >stepparent= or >spouse= within the formalistic use of the plain-meaning rule.[28]

It also appears that in the three states in which the appellate courts denied the same-gender co-parent adoptions, the adoptions were more highly regulated. For example, the Connecticut statute required that, if the child was not being adopted by the legal parent=s >spouse= or >blood relative,= then the only way the adoption could occur was by the natural parent=s rights being terminated and a state agency >placing= the child for adoption.[29]

In addition, the three appellate courts that denied the adoptions found that the legislative intent did not support these adoptions because the legislative history was silent on the issue, leading the judges to conclude the legislature probably did not contemplate same-gender co-parent adoptions. Consequently, the courts deferred to the legislature to decide this issue, stating that the legislature was a more appropriate body to determine the question of same-gender co-parent adoptions.[30]

Interestingly, two of the three courts= decisions actually stated that granting the requested adoptions would be, in fact, in the best interests of the children.[31] However, a majority of the judges decided that the statutory language and legislative intent required the exercise of judicial restraint, preventing the courts from granting the adoptions.

The vigorous dissents in the Wisconsin and Connecticut Supreme Court decisions expressed dismay with the majority opinions= unwillingness to apply the statutory-interpretation provisions in the adoption and children=s codes, which state that the codes are to be >liberally construed to effect the objectives contained in this section,=[32] or that the codes must be >liberally construed in the best interests of the child.=[33] Even in the Colorado case, which did not contain a dissenting opinion, Judge Ruland concurred specially, stating >. . . if one assumes again that the adoption is in the best interests of the child, then why should the child be deprived of the legal commitments and benefits from a decree which provides a second parent to that child?=[34] Judge Ruland ended his concurring opinion with a statement in which he hoped >that the issue will be addressed soon

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28 *See In re* Adoption of Baby Z, 247 Conn. 474, 1999 WL 33449 (1999).

29 *Id*.

30 >The determination whether this legislative decision is or is not in keeping with the changing social mores of the public at large is the role of the democratic process and not of the courts.= *In re* Adoption of T.K.J. and K.A.K., Children, 931 P.2d 488, 496 (Colo. Ct. App. 1996), NO. 95CA0531, 95CA0532, *rehearing denied* (1996), *cert. denied*, (1997). >I write separately only to encourage the Wisconsin legislature to visit ch. 48 in light of all that is occurring with children in our society. The legislators, as representatives of the people of this state, have both the right and the responsibility to establish the requirements for a legal adoption, for custody and for visitation. This court cannot play that role. We can only interpret the law, not rewrite it.= *In re* Angel Lace M., et al., 184 Wis.2d 492, 519-20, 516 N.W.2d 678, 687 (1994) (Geske, J., concurring).

31 >In the present case, everyone involved agrees that the adoption is in Angel=s best interests.= *In re* Angel Lace M., et al., 184 Wis.2d 492, 523, 516 N.W.2d 678, 688 (1994) (Heffernan, C.J., dissenting). >We recognize that all the child care experts involved in this case have concluded that the proposed adoption would be in Baby Z=s best interests.= *In re* Adoption of Baby Z, 247 Conn. 474, 1999 WL 33449, 21 (1999).

32 *In re* Angel Lace M., et al., 184 Wis.2d 492, 521, 516 N.W.2d 678, 687 (1994) (Heffernan, C.J., dissenting).

33 *In re* Adoption of Baby Z, 247 Conn. 474, 1999 WL 33449, 29 (1999) (Berdon, J., dissenting).

34 *In re* Adoption of T.K.J. and K.A.K., Children, 931 P.2d 488, 497 (Colo. Ct. App. 1996), NO. 95CA0531, 95CA0532, *rehearing denied* (1996), *cert. denied*, (1997) (Ruland, J., specially concurring).

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either by the General Assembly or in an appropriate court proceeding [challenging the adoption code as violating constitutionally mandated equal protection rights.]=[35]

Although three state appellate courts have declined to grant same-gender co-parent adoptions, a much larger number of courts have granted the adoption petitions.[36] In granting same-gender co-parent adoptions, these courts also have applied the plain-meaning rule of statutory construction, as well as relying on the legislative intent of the adoption codes. The use of the plain-meaning rule has resulted in the courts, in general, finding the codes= language >ambiguous= because the codes do not address, directly, the situation in which a same-gender couple is seeking to adopt a child together, particularly if one of the petitioners is the child=s legal parent. In attempting to deal with this ambiguity, the courts have adopted one of two main analyses. The most common analysis is that the same-gender co-parent adoption is analogous to the codes= provisions authorizing stepparent adoptions. Consequently, since the co-parent adoptions are factually similar to stepparent adoptions, the courts apply these provisions to grant the adoptions. This approach is known as the >functional equivalent= analysis and, most commonly, it is applied in situations in which the co-parent is seeking to adopt, with the consent of the legal parent.[37] This is the approach also used by America=s most eminent legislative study group, the National Conference of Commissioners on Uniform State Laws,[38] which incorporated the adoption of a child by a same-gender co-parent into the Uniform Adoption Act,[39] under the provision entitled >Adoption of Minor Stepchild by Stepparent.= The official Comment to the code cites, with approval, state-court decisions that have used the >functional equivalent= approach in granting these adoptions.[40]

The other, less common, analysis is to treat the adoption request as a joint petition of adoption by two single adults. In this situation, the legal parent and the co-parent file a joint petition of adoption, usually with the legal parent also filing a consent to the adoption by the co-parent. In granting the joint petition, the court first cites the section of the adoption statute that allows a

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35 *Id*.

36 *See supra*, notes 26, 27 , and 28.

37 Matter of Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995) (also involving Matter of Dana, which the court combined with Matter of Jacob); Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368, 628 A.2d 1271, 27 A.L.R.5th 819 (1993).

38 The National Conference of Commissioners on Uniform State Laws is a legislative study group and is comprised of numerous committees, the membership of which includes eminent judges, lawyers, and law professors who study and propose legislation in an area of law in which the committee members have particular expertise.

39 UNIF. ADOPTION ACT ' 4-102 Standing to Adopt Minor Stepchild, ' 4-102 (1994), 9 U.L.A. Comment, Electronic Pocket Part Update (1998). The Uniform Adoption Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1994. The Uniform Act does not have the force of law, but is the National Conference=s proposal of what its committee members believe a model code for adoption should include. Legislatures in the U.S. states can enact the Uniform Adoption Act as law if the majority of legislators vote in favor of the Uniform Act.

40 In addition to permitting individuals who are within the formal definition of >stepparent= to adopt a minor stepchild under this Article, Section 4-102 allows an individual who is a de facto stepparent, but is not, or is no longer, married to the custodial parent, to adopt as if he or she were a de jure stepparent. To file a petition under this Article, the de facto stepparent or >second parent= has to have the consent of the court and the custodial parent, whose parental rights will not be terminated by an adoption under this Article. In addition, for the court to grant the petition, the other requirements of this Article have to be met, including the court=s determination that the adoption is in the minor adoptee=s best interests. See e.g., Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993) (de facto stepmother allowed to adopt her unmarried [female] partner=s biological children because it >serves no legitimate state interest= to deny the children >the security of a legally recognized relationship with their second parent=). See similar analysis in Matter of Evan, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Surr. 1992).

UNIF. ADOPTION ACT ' 4-102 Standing to Adopt Minor Stepchild, ' 4-102 (1994), 9 U.L.A. Comment, Electronic Pocket Part Update (1998).

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single adult to adopt. Then the court cites the rule of statutory construction that states the singular includes the plural, thereby allowing two single adults to adopt together. Finally, since the statute is silent about the consequences of a joint adoption by two single adults, the court rules that, as joint petitioners, the two adults both become legal parents upon the granting of the adoption.[41]

The courts that grant same-gender co-parent adoptions also rely on the legislative intent of the adoption codes to support their statutory-interpretation analysis. Most states= adoption codes specifically state that the adoption statutes should be interpreted to promote >the best interests of the child.= Even if the code does not state this principle specifically, under the common law, all proceedings involving children, including adoptions, are governed by this general, and overriding, legal principle; court decisions involving children must be made >in the best interests of the child.= Because of the facts presented in these cases, the courts find that to deny the adoption contravenes this overriding legal principle.

Although the various state-court decisions that grant the adoptions are interpreting statutory language that differs from state to state, the factual analysis and rationale in these co-parent adoption cases are remarkably similar. The cases generally involve a lesbian relationship in which the couple has decided to have children and one, or both, of the women have had a child by alternative insemination.[42] The children have been born into a two-parent family and have been raised by both women as equal co-parents. The petition for adoption by the co-parent is an attempt by the couple to legalize what is occurring in fact - that the children have two parents. The adoption is the only legal solution that creates this parent-child relationship. The language of the first case in which the highest state-appellate court granted a same-gender co-parent adoption clearly shows this analysis:

> The intent of the legislature was to protect the security of family units by defining the legal rights and responsibilities of children who find themselves in circumstances that do not include two biological parents.
>
> To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.
>
> By allowing same-sex adoptions to come within the stepparent exception of ' 448, we are furthering the purposes of the statute as was originally intended by allowing the children of such unions the benefits and security of a legal relationship with their de facto second parents.
>
> [I]t is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children=s financial support and emotional well-being by developing theories of parenthood, so that >legal strangers= who are de facto parents may be awarded custody or visitation or reached for support. Case law and commentary on the subject detail the years of

41 *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. Cir. 1995).

42 *See* the following highest-appellate-court opinions in the states of Vermont, New York, and Massachusetts: Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368, 628 A.2d 1271, 27 A.L.R.5th 819 (1993), Matter of Jacob, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995) (also involving Matter of Dana, which the court combined with Matter of Jacob), Adoption of Galen, 425 Mass. 201, 680 N.E.2d 70 (1997), Adoption of Tammy, 416 Mass. 205, 619 N.E.2d 315 (1993).

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> litigation spent in settling these difficult issues while the children remain in limbo, sometimes denied the affection of a >parent= who has been with them from birth.
>
> It is surely in the best interests of children, and the state, to facilitate adoptions in these circumstances so that legal rights and responsibilities may be determined now and any problems that arise later may be resolved within the recognized framework of domestic relations law.
>
> We are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not, the fact remains that [the co-parent petitioning for the adoption] has acted as a parent of [these two children] from the moment they were born. To deny legal protection of their [parent-child] relationship, as a matter of law, is inconsistent with the children=s best interests and therefore with the public policy of this state, as expressed in our statutes affecting children.[43]

The courts granting the adoption discuss the importance of providing legal protection to the emotional reality that the children of same-gender partnerships have two parents. In addition, the social and economic implications of granting the adoption in the United States are quite significant. The highest appellate court in the state of New York spoke directly to these issues when it stated:

> The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent=s death or disability, the right to sue for the wrongful death of a parent, the right to inherit under the rules of intestacy and eligibility for coverage under both parents= health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child=s economic support.
>
> Even more important, however, is the emotional security of knowing that in the event of the biological parent=s death or disability, the other parent will have presumptive custody, and the children=s relationship with their parents, siblings and other relatives will continue should the coparents separate.[44] [Citations omitted]

A review of the various court=s descriptions of the facts in these cases shows that the judges are using the legal standard of >best interests of the child= within the real-life context of the child=s present circumstances. The factual findings of the courts reveal that the gay or lesbian parents have deliberately planned to have children and arranged their lives so that both parents could be involved in raising their children. For example, the facts of the cases in the highest appellate courts describe the co-parents as persons who have >shared parenting responsibilities= and who have >arranged their separate work schedules around the child=s needs.=[45] It was not uncommon

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[43] Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368, 373, 375, 376; 628 A.2d 1271, 1274, 1275, 1276, 27 A.L.R.5th 819 (1993). Contrary to the American courts, the Dutch courts do not truly look at the best interest of the child in every situation; *see* HR 5 september 1997, *NJ* 1998, 686, rek.nr. 8940.

[44] Matter of Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995) (also involving Matter of Dana, which the court combined with Matter of Jacob).

[45] >G.M. and P.I. [co-parents] have shared parenting responsibilities since Dana=s birth and have arranged their separate work schedules around her needs.= *Id.* N.Y.2d at 657, N.E.2d at 398, N.Y.S.2d at 171. >For some time prior to the

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for one of the co-parents to quit her employment in order to be in the home and raise the child.[46] In fact, a study comparing children in lesbian and nonlesbian American, British, and Dutch homes found that >90 percent of the lesbian coparents took an active role in raising the children, while only about 37 percent of the heterosexual fathers did the same.=[47] Another recent study in the state of Minnesota found that >[i]n general, gay/lesbian families tended to score most consistently as the healthiest and strongest of the family structures . . .= with married couples and their families scoring a strong second place for the healthiest and strongest family structure.[48]

Therefore, when the facts presented at the adoption hearing overwhelmingly supported that the children in same-gender co-parent households were clearly benefitted by the court granting the adoption, the American courts that grant these adoptions did so by interpreting the adoption statutes as allowing these adoptions because the overriding purpose of the adoption codes is to further >the best interests of the children.=

Regardless of the legal analyses used in the state courts to grant same-gender co-parent adoptions, these adoptions have exactly the same force in law as all other adoptions granted to opposite-gender couples. Therefore, in the common-law system, all adoption decrees have exactly the same legal status and legal consequences, regardless of whether the court grants the adoption to an opposite-gender couple pursuant to the direct statutory language, or the court grants the adoption to a same-gender couple pursuant to the court=s broad interpretation of that statutory language. There is no distinction between the legal rights and responsibilities of both sets of adoptive parents. The only distinction is a factual one - for example a child, jointly adopted by his or her legal mother and the mother=s female partner, will have two legal parents who are women and will not have a legal parent who is a man, because the father=s parental rights will have been terminated by the adoption.

Stranger adoptions

If an opposite-gender couple petitions to adopt a child who does not have a previous legal relationship with the petitioners, both the U.S. and the Netherlands[49] permit and, in the U.S., encourage[50] such activity.[51] In addition, in U.S. states where gays and lesbians have filed

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birth of Galen, Nancy and Laura planned together for one of them to have a child, and in 1995 Galen was conceived by Nancy from an anonymous donor from California. . . . The petitioners share all parenting responsibilities, including all decisions concerning Galen=s health, education, and welfare.= Adoption of Galen, 425 Mass. 201, 202; 680 N.E.2d 70, 71 (1997). >For several years prior to the birth of Tammy, Helen and Susan planned to have a child. . . . Susan successfully conceived a child through artificial insemination. . . . Since her birth, Tammy has lived with and been raised and supported by, Helen and Susan. Tammy views both women as her parents, calling Helen Amama@ and Susan Amommy.@ Tammy has strong emotional and psychological bonds with both Helen and Susan. . . . Both women jointly and equally participate in parenting Tammy . . .= Adoption of Tammy, 416 Mass. 205, 207, 619 N.E.2d 315, 316 (1993).

46 >In July 1996, Nancy was not working so that she could be at home with Galen, and Laura financially supported both Nancy and Galen.= Adoption of Galen, 425 Mass. 201, 202; 680 N.E.2d 70, 71 (1997).

47 Cooper, *Network Briefs*, *supra* note 4.

48 The least strong family structures in the Minnesota study were co-habiting heterosexual families, especially when there were children present in the home. The researchers hypothesized as follows:

The strength of the gay/lesbian families is striking, particularly in contrast to those heterosexual couples who are cohabiting. While neither group is legally married, their results in terms of family strength are at opposite ends of the spectrum. Perhaps same-sex couples, in their struggle to adapt in a relatively hostile culture, have developed certain strengths - better communication skills or support systems, for example.

Judy Watson Tiesel, *Minnesota Family Strength Project, Research Summary*, 5 (Oct. 1997) (on file with the authors).

49 Unmarried opposite-gender couples can also adopt; *Stb*. 1997, 772, Art. 227-228 BW (1997).

50 I.R.C. ' 23 (CCH 1997) provides a tax credit up to $5,000 ($6,000 in the case of a child with special-needs) for >qualified adoption expenses= which include reasonable and necessary adoption fees, court costs, attorney fees, and

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petitions for >stranger= adoptions, most have ended in a favorable decision for the petitioners. Single persons can adopt children in 49 states and the District of Columbia.[52] The American public policy that supports adoption by single individuals is the legislative position that it is in the best interest of a child to be placed permanently with an adoptive parent in a home environment, rather than the child living in an institution or in temporary foster care, which in the United States can result in numerous placements for the child.[53] This public policy also saves the government the cost of keeping a child in an institution or in foster care.

In the reported decisions that have granted stranger adoptions, the courts have applied the previously discussed rules of statutory construction, together with the general legislative intent of furthering >the best interests of the child.= For example, in the Ohio case of *In re* Adoption of Charles B.,[54] the trial court granted the adoption of an eight-year-old boy, who had serious physical and mental disabilities, to a gay man. The case was appealed, and the Ohio Court of Appeals reversed the adoption, finding as a matter of law that homosexuals were not eligible to adopt.[55] The highest court in Ohio, the Ohio Supreme Court, overturned the Court of Appeals= ruling and reinstated the adoption. In doing so, the Ohio Supreme Court cited the Ohio statute that stated >an unmarried adult=[56] may adopt >any minor.=[57] By using the plain-meaning rule,

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other expenses. In addition, several states offer subsidies for adopting special needs children. For example, *see* KAN. STAT. ANN. ' 38-319 et seq. (1993), the Adoption Support Act, which gives the Secretary of Social and Rehabilitation Services the discretion to provide either a lump sum payment or continuing financial assistance to families who adopt a >hard-to-place= child. A child may be considered hard to place due to age, racial or ethnic background, mental, emotional, or physical handicap, or because the child is part of a sibling group. Factors to be considered in setting the amount of payment include the size of the family, the usual living expenses of the family, the special needs of any family member, and the family income.

51 Stranger adoption is not encouraged in the Netherlands mainly because there are few Dutch children available for adoption, see *supra* note 9. Most Dutch children who might be considered for adoption are placed in foster care, *see supra* note 6. If opposite-gender Dutch people want to adopt, they look for children born in >Third World= countries, *see supra* note 9. Added to the burden of adoption by same-gender couples, it is the assumption by Dutch officials that Third World countries would refuse to allow adoption if they were aware that the parents are gays or lesbians; *Kamerstukken II* 1996/97, 22 700, nr. 22, p. 3, *Kamerstukken II* 1997/98, 22 700, nr. 23, p. 4, and *supra* note 9, *Kamerstukken II* 1994/95, at pp. 6, 7, and 8.

52 ALA. CODE ' 26-10A-5 (Michie 1996); ALASKA STAT. ' 25.23.020(2) (1996); ARIZ. REV. STAT. ANN. ' 8-103 (West 1997); ARK. CODE ANN. ' 9-9-204(2) (1995); CAL. FAM. CODE ' 8601 (West 1994); COLO. REV. STAT. ANN. ' 19-5-202(1) (West 1997); DEL. CODE ANN. tit. 13, ' 903 (1996); D.C. CODE ' 16-302 (1997); FLA. STAT. ANN. ' 63.042(b) (West 1997); GA. CODE ' 19-8-3(a) (1997); HAW. REV. STAT. ANN. ' 578-1 (Michie 1996); IDAHO CODE ' 16-1501 (Michie 1997); 750 ILL. COMP. STAT. ANN. 50/2 (West 1997); IND. CODE ANN. ' 31-3-1-1 (West 1997); IOWA CODE ANN. ' 600.4 (West 1997); KAN. STAT. ANN. ' 59-2113 (1996); KY. REV. STAT. ANN. ' 199.470(1) (West 1997); LA. CH. CODE ANN. art. 1198 (West 1997); ME. REV. STAT. ANN. tit. 19, ' 531 (West 1981); MD. CODE ANN., FAM. LAW ' 5-309 (Michie 1996); MASS. GEN. LAWS ANN. ch. 210, ' 1 (West 1997); MICH. COMP. LAWS ANN. ' 710.24 (West 1997); MINN. STAT. ANN. ' 259.22 (West 1997); MISS. CODE ANN. ' 93-17-3 (1996); MO. ANN. STAT. ' 453.010 (West 1997); MONT. CODE ANN. ' 40-8-106 (1996); NEB. REV. STAT. ' 43-101 (1996); NEV. REV. STAT. ' 127.030 (1995); N.H. REV. STAT. ANN. ' 170-B:4 (1995); N.J. STAT. ANN. ' 9:3-43 (West Supp. 1997); N.M. STAT. ANN. ' 32A-5-11 (1997); N.Y. DOM. REL. LAW ' 110 (West 1997); N.C. GEN. STAT. ' 48-1-103 (Michie 1996); N.D. CENT. CODE ' 14-15-03 (Michie 1997); OHIO REV. CODE ANN. ' 3107.03 (West 1997); OKLA. STAT. ANN. tit. 10, ' 60.3 (West 1997); OR. REV. STAT. ' 109.309 (1996); 23 PA. CONS. STAT. ANN. ' 2312 (West 1997); R.I. GEN. LAWS ' 15-7-4 (1996); S.C. CODE ANN. ' 20-7-1670 (1996); S.D. CODIFIED LAWS ' 25-6-2 (1997); TENN. CODE ANN. ' 36-1-115 (1996); TEX. FAM. CODE ANN. ' 162.001 (West 1997); UTAH CODE ANN. ' 78-30-1 (Michie 1997); VT. STAT. ANN. tit. 15A, ' 1-102 (1996); VA. CODE ANN. ' 63.1-221 (Michie 1997); WASH. REV. CODE ANN. ' 26.33.140 (West 1997); W. VA. CODE ' 48-4-2 (Michie 1997); WIS. STAT. ANN. ' 48.82 (West 1997); WYO. STAT. ' 1-22-104(B) (1997). Some of the adoption statutes have allowed single persons to adopt children since the first enactment of adoption codes in the United States. For example, in 1895 the U.S. Congress enacted an adoption code that specifically allowed a single person to file a petition for adoption. Law of February 26, 1895, ch. 134, 28 Stat. 687.

53 *See supra* note 8.

54 50 Ohio St.3d 88, 552 N.E.2d 884 (1990).

55 As stated earlier, only one state=s adoption code prohibits homosexuals from adopting. *See supra* note 19.

56 OHIO REV. CODE ANN. ' 3107.03 (B)(Banks-Baldwin 1995).

57 OHIO REV. CODE ANN. ' 3107.02 (A)(Banks-Baldwin 1995).

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the court found that this statutory language did not exclude Mr. B. from being an adoptive parent. Next, the Ohio Supreme Court stated the >polestar by which courts in Ohio, and courts around the country, have been guided is the best interest of the child to be adopted.=[58] In reviewing the evidence presented at trial, the Ohio Supreme Court found that, despite many attempts to place Charles B. in the homes of married couples, no couple would follow through with adopting the boy.[59] Mr. B. was Charles=s psychological counselor and the evidence showed >Mr. B. has been the one consistent and caring person in the life of Charles B.=[60] All the witnesses, except the Administrator of Social Services, testified in favor of the adoption. In affirming the trial court=s granting of the adoption, the Ohio Supreme Court cited the holding in a prior Ohio adoption case that stated:

> Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.[61]

The Ohio Supreme Court ruled the adoption was in the best interests of Charles B. and affirmed the trial-court decision, granting the adoption.

In a similar case in California, the state Department of Social Services recommended against the adoption of a two-year-old boy,[62] who had contracted AIDS from his mother in the womb, by two lesbian partners who had served as the boy=s foster parents since he was six weeks old. This joint adoption by two same-gender adults was one of the first of such adoptions in California in 1989. The Alameda County Superior Court judge rejected the Department=s recommendation against the adoption and granted the joint adoption. Since then, numerous joint adoptions by same-gender parents have been granted in California and other states.[63] The courts in these cases are finding that same-gender couples who have similar characteristics to a married couple, such as a long-term committed relationship and the skills to be good parents, are just as appropriate adoptive parents as married heterosexual couples.[64]

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58 *In re* Adoption of Charles B., 50 Ohio St.3d 88, 90, 552 N.E.2d 884, 886 (1990).

59 *Id.* at 89. At the time Mr. B. filed his petition to adopt Charles B., the boy had been in four different foster-care homes and all of the married couples chosen as potential adoptive parents by the County Department of Human Resources demonstrated a lack of commitment to adopting Charles.

60 *Id.* at 91.

61 *Id.* at 93-94 (citing *In State, ex rel. Portage Cty. Welfare Dept., v. Summers*, 38 Ohio St.2d 144, 154, 67 O.O.2d 151, 157, 311 N.E.2d 6, 13 (1974)).

62 Elaine Herscher, *AIDS Child with 2 Lesbian Moms/How Couple Fought State for Adoption*, S.F. CHRON., Nov. 27, 1989, at A8. Interestingly, some state agencies that regulate adoptions have established guidelines stating unmarried persons will not be recommended as adoptive parents, even though the state statutes specifically provide that a single person can file a petition for adoption. In California, for example, the Department of Social Services has a policy against recommending single persons as adoptive parents. However, if the facts show that the adoption is in the best interests of the child, the recommendation will set out the evidence that supports the adoption, even though the final recommendation is against the adoption because the state agency has a policy against recommending adoptions to unmarried people. Invariably, the court grants these adoptions, despite the Department=s recommendation against them, using the agency=s favorable factual evidence to support the adoption. *See Adoption Options*, *supra* note 28.

63 *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. Cir.1995) and *In re* Petition for Adoption of a Minor Child, No. A-8-94 (D.C. Super. Ct. May 4, 1995) which is an appendix thereto. *See also* Cloud, *A Different Fathers= Day*, *supra* note 27, which reported an adoption of a foster child by two gay men, and Karen Buckelew, *Lesbian Adoption Ignites Protest*, THE DAILY RECORD (BALTIMORE, MD), Jan. 13, 1999, which reported an adoption of twins by two lesbians.

64 For example, in a case that authorized the adoption of a two-year-old girl by two gay men, the Court of Appeals for the District of Columbia ruled as follows: >unmarried couples, whether same-sex or opposite-sex, who are living together

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Dutch case law

The disparity in how Dutch law treats children in heterosexual relationships when compared with children in gay or lesbian relationships was challenged in a recent test case[65] before the *Hoge Raad*.[66] In this case, two women had a committed relationship and were living together. They had each given birth to children who had been conceived with the sperm of the same donor father.[67] The two jointly requested the court to allow them to adopt each other=s children. The couple argued that the Dutch adoption laws that prevented co-parent adoption violated the European Convention on Human Rights (ECHR).[68] The ECHR prevents the state from interfering with family life, which would include the relationship between these two women.[69] Consequently, the petitioners argued that the application of Dutch law, which prevents two women from adopting while allowing a married man and woman in similar circumstances to adopt, was a violation of the equal-treatment clause of the ECHR.[70]

In an analysis similar to the American court decisions that refused to allow same-gender couples to adopt,[71] the *Hoge Raad* declined to decide this case based on the division of powers within the different branches of government. The *Hoge Raad* said that this type of decision was a political decision and should be determined by the legislative branch, not the judiciary. It stated that same-gender parent adoptions require a >more elaborate legal recognition . . . than is now the case in national law= and >the way in which this should be provided requires legal-political choices which . . . go beyond the legal task of the Judge.=[72] By taking this position, the *Hoge Raad* avoided any discussion of the legal issue raised by the petitioners that there is a conflict between the Dutch Adoption Laws and the ECHR. Instead, it immediately deferred to the legislature.

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in a committed personal relationship, are eligible to file petitions for adoption under D.C. Code ' 1-305. We so hold.= *Id.* at 862. *See also Adoption Options*, *supra* note 28, at 45.

One of the main arguments against adoption by homosexuals is that the child will also adopt the sexual orientation of the parent. This myth has been refuted in scientific studies. >There are few, if any, data pointing to a role-modeling influence of a parent=s homosexual orientation on the sexual orientation of a child. It may appear facile, but nevertheless is accurate, to state that nearly all homosexuals had heterosexual parents.= Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 2, 167 (1986). Another argument against homosexual adoptions is that the child will be stigmatized by other children and teased. A counter-argument is:

almost all children experience being different from others in one way or another. That sensation can be valuable or traumatizing or, occasionally, both. Many children today, for example, live in divorced, bi-racial, or single-parent families; alternately, their families may be culturally, ethnically, religiously, or physically different from those of classmates and neighbors. There can be no question that such children will be teased by playmates. Teasing is what children do . . . Perhaps, in fact, fostering respect for diversity can come to be seen as an important task for government, social welfare organizations, schools, churches, and, indeed, for society itself.

Wendell Ricketts and Roberta Achtenberg, HOMOSEXUALITY AND FAMILY RELATIONS (Frederick Bozett and Marvin Sussman eds., Binghamton, N.Y.: Harrington Park Press, 1990), at 90.

65 HR 5 september 1997, *NJ* 1998, 686, rek.nr. 8940.

66 The *Hoge Raad* is comparable to the United States Supreme Court.

67 The donor father, in the presence of a lawyer known as a *notaris* (civil-law notary), signed an agreement between the donor and the petitioners stating that the donor would not exercise any rights nor have any duties regarding the children. *Id.*

68 Art. 8, European Convention on Human Rights. In 1994, the European Parliament passed a resolution which calls for an end to the unequal treatment of homosexuals relating to the legal and administrative provisions of the social-security system, adoption laws, laws on inheritance, housing, criminal law, and any other legal provisions. Resolution on Equal Rights for Homosexuals and Lesbians in the European Community 61/40, 1994 *OJ* (C Series) (Feb. 8, 1994) (Resolution A3-0028/94).

69 Arts. 8 and 12, European Convention on Human Rights.

70 Art. 14, European Convention on Human Rights.

71 *See supra* note 31.

72 *See supra* note 66.

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Although the *Hoge Raad*=s stance seems logical at first glance, it ignores the fact that it did not follow this >hands-off= policy in other cases involving the protection of children within a heterosexual relationship. For example, the *Hoge Raad*=s prior decisions extended joint parental authority to unmarried and divorced heterosexual couples. When unmarried and divorced heterosexual couples asked the *Hoge Raad* to recognize their joint parental authority, it agreed to address the issue and found that these couples could have joint authority.[73] These decisions were treated as advisory to the legislature.[74] After the *Hoge Raad* decisions, the legislature changed the law.[75] Consequently, the decision of the *Hoge Raad* involving the lesbian couple, which it deferred to the legislature, has been criticized, particularly because of the *Raad*=s unwillingness to decide the questions concerning violations of the European Convention on Human Rights.[76]

Another criticism of the *Hoge Raad*=s decision addresses its language in the opinion in which the *Hoge Raad* expresses concern that same-gender adoptions would leave intact the parental rights of the biological parent who is of the opposite gender of the adoption couple. For example, it stated that, in the situation of two women adopting a child, >not every relationship with the biological father is broken= by adoption.[77] Also, according to the *Hoge Raad*, when the adoption petitioners are men, >the legal relationship with the biological mother remains.=[78] This analysis creates a different set of rules for adoptions by same-gender couples in comparison with adoptions by opposite-gender couples. Under the present law concerning stepparent adoptions, the legal father or mother can veto the adoption; if, however, a sperm donor is not a legal father, then he has no right to veto an adoption.[79] Consequently, if a single woman has a child through alternative insemination, for example, there is no legal father. However, if she later marries or cohabits with a man, he can adopt the child as the child=s stepparent and there is no concern about cutting off the rights of the >biological= father. The *Hoge Raad*=s assumption that adoption by a female co-parent in the same situation would leave intact the unrecognized rights of the donor father simply does not make sense. Also, under the current adoption law, when a biological mother consents to her child=s adoption, the adoption decree severs her legal ties with the child.[80] The *Hoge Raad*=s decision, however, suggests the opposite result if the adopting couple consists of two men.[81] Again, if the biological mother consents to a joint adoption by two persons, then it seems logical that her rights would be abolished, regardless of whether the adopting couple are heterosexuals or two men.

Although the *Hoge Raad* did not want to address the substantive claims of the petitioners in this case, it did address some of the factors the legislature might consider in studying the >legal-political choice= of recognizing same-gender co-parent adoption. For example, the *Raad* stated: >Thus the question should be answered which requirements should be made [in granting

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73 The *Hoge Raad* created joint parental authority for divorced parents; HR 4 mei 1984, *NJ* 1985, 510. The *Hoge Raad* allowed joint parental authority for nonmarried parents; HR 21 maart 1986, *NJ* 1986, 585.

74 This may seem contrary to the concept that there is no judicial review in civil-law countries. In many ways, the Dutch do practice a limited form of judicial review, of which the previously cited cases are examples. *Id.*

75 Wet van 24 december 1997 tot herziening van het afstammingsrecht alsmede van de regeling van adoptie, *Stb*. 1997, 772, Art. 251 lid 2 BW.

76 >If the international fundamental rights that are directly applicable are invoked, it is the task (and the duty) of the Supreme Court to pronounce a judgment on this.= Elsbeth Boor, Noot. *Rechtspraak - Nr. 833 HR 5 September 1997*, 14 NEMESIS 1, 22 (1998) (trans. Duck Obbink). *See supra* note 66.

77 *See supra* note 66.

78 *Id*.

79 Art. 228 lid 1 sub d BW.

80 Art. 229 lid 1 BW.

81 *See supra* note 66. *See also* Elsbeth Boor, Noot, *supra* note 77, and Frieda van Vliet, *Van achterdeur naar zij-ingang: Commissie Kortmann en gelijkgeslachtelijke leefvormen*, 14 NEMESIS 1, 13 (1998).

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adoptions] - be it in the way of marriage or not - of a long-lasting relationship between the adopting person and his or her partner in order to do right in the interest of the child.=[82] This statement by the Court, however, suggests that the legislature should assess whether same-gender parent relationships will be >long lasting,= so that the adoption is in the interest of the child. By requiring a detailed, factual inquiry into the nature and duration of a same-gender couple=s relationship, the *Hoge Raad* scrutinizes gay and lesbian relationships much more closely than their heterosexual counterparts.

A far better solution is the one the Dutch government recently came up with. In a press release announcing the Government=s bill on adoption by same-gender couples, it stated the following:

> Under the terms of the bill, couples of the same gender wishing to adopt a child must meet the same criteria as partners of different gender. For example, they must have been jointly caring for the child for at least one year and must have been living together for at least three years. There is no requirement that they should be married or officially registered as partners. A new condition which will apply for all adoptions within the Netherlands is that all possibility of the child being cared for by its original parent(s) must have disappeared.[83]

Consequently, the most appropriate solution is for the legislature to enact the same requirements for all adopting couples, regardless of whether the couples are of the same or opposite genders - i.e. that the couple has cohabited for at least three years continuously prior to the filing of the adoption request[84] and that the couple has taken care of and raised the child for at least a year prior to the filing of the adoption request.[85] This type of enactment would be consistent with Dutch constitutional law, which prohibits discrimination against gays and lesbians,[86] it would be in line with the Dutch position on complete legal protection to all Dutch families,[87] and, finally, this approach would not violate the provisions of the ECHR.

CONCLUSION

The recently proposed Dutch legislation that would allow same-gender co-parent adoptions steps away from the mythical biological model of parenthood and adopts a more child-centered approach, which also is found in the American court decisions granting same-gender co-parent adoptions. The Dutch legislative proposal and the American court decisions provide legal protection for the child and are based on the psychological and economic best interests of the child.

Recognizing same-gender co-parent adoptions means that the co-mothers or co-fathers have equal parental authority and responsibilities. Both parents will be responsible financially for the child, reducing the chances that the state will have to supplement the raising of a child in

82 *See supra* note 66.
83 RVD/Directie Voorlichting, 13 november 1998. *See supra* note 12.
84 Art. 227 lid 2 BW2.
85 Art. 228 lid 1 sub f BW.
86 Art. 1 of the Dutch Constitution.
87 *Notitie Gezin: De maatschappelijke positie van het gezin* (Rijswijk: Ministerie van Volksgezondheid, Welzijn en Sport [Ministry of Public Health, Welfare and Sports], sept. 1996), p. 5. This position appears to grant complete protection to Dutch lesbian and gay families. Because the law does not detail any specific legal protection, however, these rights are nebulous.

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economic terms. Not only will there be two parents financially responsible for the child, but the child can also inherit without the parents incurring the additional expense of hiring an attorney to assist them in drafting wills. The child will also be able to have not only the nationality of the birth mother, but also the nationality of the adopting parent. And in the event that the partnership ends, both parents will have equal custody and visitation rights. If one of the parents dies, the child, as long as he or she is a minor, can claim social-security benefits. With adoption, the child has a greater chance of being surrounded by extended family members who will care for and be an ongoing support system for the life of that child. Finally, and maybe most importantly, adoption provides legal protection for the reality of the child=s life - the fact that this child does have two parents.[88]

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[88] Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459 (1990).

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