AN ESSAY ON INTER-JURISDICTIONAL ISSUES IN ADOPTION: WHERE IS THIS CHILD NOT MY CHILD?*

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The minute we saw you we knew that we loved you. You felt like the sun shining inside us.[1]

PREFACE

For most of its history, adoption law in Anglo-American jurisprudence has appeared as a plain, simply-made cloth. However, adoption itself, as practiced by the many cultures comprising the United States, is a fabric of many colors and textures, intricate in its design. In reality, the threads of the law are interwoven with the threads of practice; however, the interlacing threads of practice are not often recognized by the American legal system. Nonetheless, the material that law and practice creates must clothe and shelter the adopted child. Whether it covers the child and provides comfort, warmth, and protection is dependent upon how well we weave answers to the needs and rights of adopted children.

Legal answers to these needs and rights must reach into the child's future. When the law wraps those answers, like a blanket, around a child's shoulders, will they provide shelter as the child matures and grows? Will the garment be sturdy as well as soft? Will it last through the child's lifetime? Durability is a critical issue for children who are able to attach to their adoptive parents.

In the past an adopted child, if the adopted status was known outside the immediate family, was stigmatized for a number of reasons beyond the child's control. For example, children can be traumatized by factors such as illegitimacy at birth, the supposed meretriciousness of the child's conception, and the myth of being "unwanted" by the birth parents. However, adoption as a means of creat-

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1. PHOEBE KOEHLER, THE DAY WE MET YOU (Simon & Schuster Books 1990).

ing a family has not only survived, but has also overcome non-supportive attitudes and social prejudices as well. Additionally, the experiences of adopted children have improved considerably over the last few decades; one need only consider the number of international and transracial adoptive placements observed in daily life.

Today, we are not surprised to see an Asian-born child nurtured by her white mother and father; few are taken aback upon seeing a black or brown child nurtured by a white mother and father.[2] Just as interracial marriage has given us the opportunity to accept and embrace children born of two or more races, adoption has done the same. Single parenthood has also given American society the opportunity to embrace the parent-child dyad as a family. Similarly, national and international social service efforts to meet the needs for disabled or other so-called "hard to place" children have opened the doors to adoptive parenthood for single men and women. As courts are confronted with inter-jurisdictional recognition of marriage and the interstate enforcement of the incidents of marriage-style relationships, an important question becomes whether the adoptions by gay and lesbian adults of minor children shall be legally recognizable in all states if one state recognizes such adoptions.

Before answering that question, however, an underlying issue should be addressed: Will lawmakers choose to imprint the child's name upon the adoption quilt pieced from law and practice with thread that cannot be broken? For if the sheltering security provided by one state's adoption laws can be abruptly taken from the child when another state disagrees with its design, we have failed in our work. We are a society struggling to accept all persons, and as adults we must take care to protect our young from the debilitating experiences of losing attachments and predictability in their relationships.

What explanation shall the child be given upon learning that adoption can mean a family and home in one state, but not in another? How will the adopted child understand that to move or even to travel from one state to another is to risk unraveling the legal seams of the quilted shelter we champion as enduring for the child's lifetime? Because adoptive parenting, when expanded to include same-gender couples, invariably attracts some measure of wrath and prejudice, the children of same-gender couples need a new and more accurate assessment of the tapestry of American adoption law.

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2. Perhaps the now dominant white culture of the United States shall also grow to accept the reverse as well.

I. INTRODUCTION

This paper examines the emerging possibilities for the American adoption model as American society continues to grow and evolve in its understanding of the needs and rights of children to have permanent, secure family settings in which to develop and mature. Specifically, this paper addresses the strengthening of some of the weaker threads of contemporary judicial adoption decrees which confer rights on persons who choose to assume parental roles for children and who are not exclusively heterosexual.[3]

It is my purpose to look at adoption as it is traditionally understood in American jurisprudence — the legal recognition of an adult's parental rights to a child who is not a birth child, and, in turn, the reciprocal rights of the child to that adult's care and support.[4] In particular, this article addresses two traditionally defining aspects of American adoption: closed records and parental replacement. Further, this article suggests alternatives which support the adoption of children by persons who are not exclusively heterosexual. Ultimately I intend to glean, from these two facets of adoption, a standard for the inter-jurisdictional recognition and enforcement of *all* judicial decrees of adoption made in compliance with the laws of the decreeing forum, without reference to the gender or sexual orientation of the adoptive parent(s).

This article will then confront the topic before the law: Are the adoptions of minor children by gay and lesbian adults legally binding in all states after one state has decreed such an adoption? In other words, are such adoptions to be given full faith and credit as the lawful judgments of one state when issues of recognizing or enforcing the adoption are considered in another state?

Although the main topic of this Conference, the inter-jurisdictional recognition of marriage, exists largely at a theoretical level and is largely influenced today by the actions of the Hawai'i Supreme Court, the issue of children adopted by same-gender couples in any state is ripe for legal action. Perhaps the American legal system will soon be confronted with just such a jurisdictional question. The ques-

3. In the last decade, for a brief time, some persons who could not achieve legal recognition as a family unit attempted to engage in a legal adoption of one adult member by the other adult of the couple — instead of creating a legal partnership or seeking a specific form of marriage. This article does not address that form of adoption process, because those so-called "adoptions" were a misuse of the legal process. Clearly, from the context in which these adoptions arose, parenthood was *not* the true goal of the participants.

4. *See* Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983).

tion may well arise when an adoptive parent or adopted child seeks to enforce the adoption in a non-decreeing state.[5]

Judicial decrees of adoption, as binding legal judgments, appear on their face to require that another state recognize and enforce them as mandated by the Full Faith and Credit Clause of the United States Constitution. However, some state legislatures and state social service agencies have prohibited same-gender couples (or persons who are not exclusively heterosexual) from petitioning the state to adopt a minor child or even to serve as foster parents. Thus, these restrictive states signal the possibility that full faith and credit may not be afforded to a judicial decree which permitted such an adoption elsewhere. In a state unwilling to recognize such adoptions *ab initio*, a refusal to enforce another state's adoption decree will likely be considered valid under the protective folds of a state's "strong public policy," particularly if the state's legislative history regarding these prohibitions is to be given any credence. A state's refusal to provide full faith and credit to a same-gender couple's adoption of an unrelated child raises a powerful question: *Where is this child not my child?*

To answer this question, one must recognize what adoption in Anglo-American jurisprudence has traditionally entailed. Similarly, one needs to understand whether any cultural, social, or legal precedents would allow American jurisprudence to move beyond the constraints of an outdated perception of adoption. An issue that warrants investigation, therefore, is whether these precedents provide persuasive evidence to support the law's extension of adoptive parent-child relationships to single persons or couples who are not exclusively heterosexual. As other forms of valid parent-child adoption may effectively bridge the ideological gap between traditional jurisprudence and the adoptions of children sought by partners or single persons of a same-gender orientation, such alternative practices may provide useful answers to those opposed to providing full faith and credit to a lawful adoption judgment of another state.

II. THE CONFIDENTIAL ADOPTION: CLOSED RECORDS

A. A CLOAK OF SECRECY

For the past century, law practice in the United States has provided confidential adoptions of minor children to persons who meet certain selective criteria.[6] "Confidentiality" in this context denotes se-

5. *See infra* section IV.D. (providing an illustration and discussion).

6. The plural, *parents*, is used throughout this article to signify both the singular and plural unless otherwise specified.

crecy, and for the last one hundred years "confidentiality" in adoptions has been the norm.

To maintain confidentiality, or secrecy, the law has required that all records concerning adoptions be sealed. Such a seal closes off the adopted child and adoptive parents from whatever information may exist about the identity of the birth parents. As well, the seal ensured the birth mother's privacy in an era of stigma and penalty for giving birth outside of marriage. However, it was itself a penalty imposed on the birth mother, because the adoption was "confidential" to her as well. She could not know where the child was placed, for fear that she might act in a way that would disrupt the placement. Concern for this possibility was thought to impinge on the adoptive parents' peace of mind, and so their identities were withheld from the birth parents. Thus, sealing the adoption records permitted no expectation that either the original birth parents' identities or the adoptive parents' identities could be made available to either set of parents.

Equally important, sealing the records guaranteed that the adopted children would not be able to learn about their birth parents. The children might live their lives without knowing that the adoption had ever taken place. The law further assisted in keeping the child from learning of the adoption itself and the birth parents' identities by requiring the state to create a false birth certificate, which consequently provided untrue information to the public by naming the adoptive parents as the birth parents of the child. Such a practice is common still today.

B. Opening Adoption: Setting the Model Free from Secrecy

Interestingly, adoptions before the era of Victorian mores were neither closed nor secret. Confidential adoptions and the secrecy of the unwanted pregnancy of the birth mother, as well as the undesired infertility of the adoptive couple, have given way over the last several decades to the earlier form of open adoptions, in which the birth mother's identity was known by the adoptive parents. Despite progress, return to the previous practice has been slow to develop, coming to fruition only in the last three decades. Thus, after a century, confidential or closed adoptions are increasingly giving way to a variety of open adoptions.

Reasons for the change in adoption practice are twofold. First, stepparent adoption has increased. Second, the adoption of older children whose birth parents' rights have been relinquished or terminated by state action has increased. Moreover, for the past decade, adoption practice has been expanded to include open adoptions by strangers. In this latter form, birth mothers, and occasionally birth fathers, choose

and even become acquainted with the adoptive couples. Birth parents may also stay involved, although at an agreed upon distance, and informed about their birth child's life. Such "openness" comes from recognizing an adopted child's need to know about ancestry, genetic inheritance, health concerns, and the like. Also, open adoptions have thrived in part due to the fact that infertile couples are willing to comply with the wishes of the birth mother and father who entrust their child to the couple.

Social science researchers, mental health practitioners, and those who are involved in the actual process of open adoption emphasize the acknowledgment of the reality of adoption: Two people make an adoption plan and, in so doing, provide their child with a loving home and give the infertile person or couple the experience of parenthood. In support of open adoptions, social science researchers and mental health professionals have challenged the confidentiality premise of Anglo-American adoption law. Social service providers embrace open adoptions after having dealt with confidential adoptions in a very profound way: When a court orders all records to be sealed which contain information that would identify a child's birth parents, the persons (and agency) arranging for the relinquishment and subsequent placement of the child must then maintain their records in confidence. As more of the disadvantages accompanying secret adoptions surface, these agencies are often working to release, with care for the interests of the parties involved, the very information that was previously sealed. Moreover, adoption agencies have not taken lightly the searches of adult adoptees for their birth parents and their heritage. After a century of closed record adoptions, the use of open adoption is increasing for many reasons. To better understand the movement toward open adoptions, several elements of traditional Anglo-American adoption practice may require further explanation.

For social workers in the twentieth century, adoption practice has proven to be an evolving and, at times, contradictory practice regarding the exchange of information. Before the 1950's, standard social work practice mandated full disclosure to the adoptive parents of all information concerning the child to be adopted — except for the information that identified the child's maternal and paternal birth families.[7] By the second half of the century, though, social work practice transformed itself to reflect post-war attitudes, supporting protection of the adoptive parents and the adopted child from the stigmas then attached to infertility and illegitimacy.[8] Fortunately, in the decades

7. *See* MADELYN FREUNDLICH & LISA PETERSON, WRONGFUL ADOPTION: LAW, POLICY AND PROCEDURE 1-5 (Child Welfare League of Am. 1998).

8. FREUNDLICH & PETERSON, *supra* note 7, at 2-3.

that followed, the practice of providing a limited and selective disclosure of information, which was designed to make the child and adoptive parents feel good about themselves and the adoptive process, gave way to a more realistic view of adoption.

By the 1970's, social service providers began to see adults who had been adopted as children and who were searching for information about their lives prior to their adoption.[9] In the 1980's, the federal law known as the Freedom of Information Act ("Act") "conferred further authority on the demands [of adoptive parents, birth parents, and the adopted person] for more information."[10]

This current decade, the 1990's, has been one of achievements in biomedical research, driving advances in the understanding and use of genetic information. For example, these advances have proved useful in the diagnosis and treatment of disease.[11] Thus, the vital need for specific information about health and ethnic and racial background, coupled with the need for specific information identifying one's genetic forebears, could not provide advocates of open adoption with a better legal foundation. Adopted persons have successfully petitioned courts to open sealed records to gain valuable health-related information and, of course, to learn the identity of their birth parents in the process.

A second aspect of this movement toward greater disclosure is the increasing use of "voluntarily open adoptions," in which *both* sets of parents in the adoption share identifying information. The amount and type of shared information, the method by which it is exchanged, and the expectations of all the parents involved vary considerably among open adoption plans. Some birth parents choose to withhold identifying information about themselves while learning full identifying information about the adoptive parents. Sometimes, however, the reverse is true: The birth parents provide complete information about themselves but ask only for the adoptive parents' first names and general geographic location in return. Private social service agencies may mediate the degree of openness in the adoption, or all negotiations may take place in the privacy of one of the parties' homes or a lawyer's office.

What is remarkable about the opening of the adoption process, especially with the inclusion of personal information about the respective parties, is that it has removed many untrue aspects of the adop-

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9. *Id.* at 4.

10. *Id.* at 5 (citing E.S. COLE & K.S. DONLEY, HISTORY, VALUES AND PLACEMENT POLICY ISSUES IN ADOPTION 273-94 (1990)).

11. *See id.* (discussing the biological developments in terms of genetic research and disease control in individuals).

tive family's identity. In open adoptions, children have access to information that is often important to forming one's identity. This information includes national origin, ethnic ancestry, racial history, religious affiliations of his or her birth parents, the quality and style of the birth parents' relationship to each other, the tastes and talents that they may have inherited, and the intellectual, athletic, musical, linguistic, work, and play achievements of the birth parents and their families.

Furthermore, the birth parents and their parents can be a valuable source of information about the health concerns and benefits inherited from the birth families. For example, the birth parents can provide such critical information to the adoptive parents regarding prenatal, developmental, neurological, temperamental, allergy risk, dental, menstrual, and other physical maturational history. The information in turn can be supplied to the child's pediatrician, dentist, and other health providers, all the while informing the adoptive parents. Moreover, such information may reassure the adoptive parents by helping them to understand what may well be normal for their child, whereas they might otherwise misread or misinterpret what they observe in their child.

Openness dissolves social stigmas by allowing society to embrace the differences that each set of parents, both birth and adoptive, brings to the creation of a new family. Openness also provides authenticity to adopted children and furnishes true answers to their questions posed in childhood, adolescence, and adulthood. The consequence, however, of an open adoption is that neither set of parents can indulge in fiction.

The birth parents have claim to the dignity of having chosen an adoption plan for their child that acknowledges the child's need for information about them. In making such a plan, the birth parents are also relieved of the anxiety of not knowing if their child is developing appropriately, is being cared for, is kept safe in the care of others. Similarly, the adoptive parents have agreed to acknowledge and honor the child's origin as the birth child of other parents. Moreover, the adoptive parents have also agreed to provide general or particular information about their child. In doing so, the adoptive parents also may claim the affirming experience of being specifically entrusted with the care of their child. The open adoption also acknowledges the larger combination of relatives, immediate and distant, that the child can draw upon when he or she needs or chooses to do so.

The larger issue in open adoption, of course, is that the parents, their families, their communities of neighbors and friends, even the wider community of child service professionals, are given the opportu-

nity to accept a family combination that is different from what is currently familiar. This aspect — the acceptance of two sets of parents, one in the daily life of the child and one in the background — allows us to question the wisdom of the requirement that a child have only one mother and one father, when the child's circumstances clearly justify the acknowledgment of two mothers and two fathers.

Openness, because it changes the way birth and adoptive parents experience adoption, also changes the way the communities around these parents experience adoption. Under an open adoption system, little room exists for pretense, because two sets of parents *are* acknowledged as belonging to the child. The idea that having two mothers (or two fathers) is an impossibility is overturned and shown to be the product of a particular era with its own misconceptions.

III. THE PARENTAL REPLACEMENT ADOPTION

A. SUBTRACTING A CHILD'S PAST

A second feature of American adoption law is the practice of replacing parents: A mother replaces a mother; a father replaces a father. Evidence of the importance of this replacement feature can be found in the legal practice of changing the adopted child's original birth certificate: the adoptive mother for the birth mother; the adoptive father for the birth father. A child is allowed *one* set of parents only, and the birth certificate serves as presumptive evidence of who the parents are. The altered certificate does not allow the birth parents to retain any identity or even hint of existence. In instances where the relinquishment of a child is not voluntary, but rather the result of state action, that action must include a complete termination of the birth parents' right to the child. In order to replace a child's parents, as required in American adoption historically, the original parents' rights have had to disappear.

In a voluntary placement for adoption, birth parents surrender their rights and so end their relationship with the child. In an involuntary placement for adoption, the state severs the rights of the birth parents, usually in an action called a "termination of parental rights." In such an action, the state must show by clear and convincing evidence that the parents have acted in a way which brings serious harm or significant risk of serious harm to the child and are unwilling and unable to correct the problem. The state must also show by clear and convincing evidence that it is in the child's "best interests" to secure the termination, and thus, free the child for adoption by another set of parents. Interestingly, should the state terminate only a birth father's rights to his child, leaving intact the birth mother's rights, the child cannot be adopted by both a man and a woman. Similarly, if the

state terminates the mother's rights and not the father's, the child again cannot be adopted by a man and a woman. Only the parent, by gender, whose rights have been terminated, may be replaced in an adoption. (The child, though, is not likely to be adopted by a stranger when one of the birth parents retains parental rights.) Thus, the replacement model has a powerful pre-requisite:

> [The] replacement model requires that the original parents' connection to the child be severed *completely* through either a court-ordered termination or a voluntary surrender of parental rights . . . [which] leaves the child temporarily "parentless;" . . . a second set of parents is [then] provided to the child through a court-approved adoption. In this way, the child at no time has two legally recognized fathers, mothers, or families.[12]

Understandably, severance of parental rights may be necessary in a termination case where the state is acting to protect a child from harmful birth parents. However, such a severance is questionable in cases where the birth parents pose no threat of disruption to the adoption, and instead, have participated in the adoption plan.

Severance of parental rights and the replacement of birth parents as a model for adoption of children has been the Anglo norm for many centuries. In fact, replacement-style adoption has been a jurisprudential norm since early Roman times. Such a replacement system of adoption was precisely what motivated men in ancient Rome to seek adoption of an heir. In early Rome, when no male heir was available by birth to receive the father's property and title, adoption provided for the smooth transfer of property through inheritance and longevity of the family name.[13] While the Romans considered severance and replacement of parental ties necessary to accomplish the goal of patrilineal transfer of wealth, one is left wondering what purpose it serves today when specific statutes prescribe the transfer of wealth. The historical justification in Anglo-American jurisprudence for severance and replacement, the ownership theory of parental rights over their children, is also vulnerable upon examination: "No two fathers may possess or have a right to the same child," as a father's rights were

12. Catherine M. Brooks, *The Indian Child Welfare Act: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 664-65 (1994) (emphasis added).

13. *See* Jamilin S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1041-42 (1979) (discussing the Roman use of an adoption system to maintain property and familial bloodlines).

once to the labor and wages of the child.[14] All states today eschew this ownership theory of parenthood.

B. Adding Parents in Adoption: Setting the Model Free from Fiction

Today, the laws pertaining to the rights of parents and children address rights to companionship and family privacy.[15] Additionally, American society has come to see adoption as a benefit to the child, who is given a permanent place in another family.[16] Finally, as discussed above, any severance of the original parental bonds must be justified as in the child's "best interests."[17] American jurisprudence has come a very long way from the days of the property theory of fathers owning their children.

As previously discussed, the child's interest in rights of access to his or her parents is quite high.[18] In moving beyond the replacement model of adoption, those rights of access are acknowledged and honored. Perhaps because of its historical place in Anglo-American jurisprudence, the replacement model has a tenacity that continues to this day, now in the form of objections to same-gender parent couples. How can a child have two mothers? How can a child have two fathers? How does a child integrate such information in his or her healthy development toward adulthood? Won't the child him- or herself have as much difficulty as adult policy-makers and lawmakers have had with the unusual combination of two mothers responsible for supporting and raising a child? Interestingly, the replacement model is not the only lawful mode of adoption within the cultures and nationalities of the United States.

Support for change for the addition — and not replacement — of parents can be found in the historical practices of Native American people who have developed intricate social structures within their cultures. These structures incorporate the "adoption" of children in ways that go beyond the traditional constraints of Anglo-American law. In these complex, aboriginal cultures within the United States, children first thrived, and now at least survive enormous obstacles to their

14. Brooks, 27 Creighton L. Rev. at 664 n.22 (citing *Ex parte* Devine, 398 So. 2d 686, 688-91 (Ala. 1981)). *See* Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487, 489 (1973).

15. Brooks, 27 Creighton L. Rev. at 663 n.11 (citing Santosky v. Kramer, 455 U.S. 745, 764 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

16. *Id.* at 664-65.

17. *Id.*

18. *See Franz*, 707 F.2d at 595 (upholding "the reciprocal rights of parent and child to one another's 'companionship'").

well-being, because such social structures were and are, however diminished, available to them.

Traditional Native American social structures do not tolerate the severance and replacement of birth parents. Many Native American nations of the Great Plains have found such a model an anathema to their long-held beliefs about the spiritual nature of family bonds. The model found in many traditional Native American societies is one of duplicating relationships, not discarding those which developed prior to the relationships the child later experiences. Duplicative relationships describe those multiple attachments a child forms while in the care of more than one set of parents. Often, tribal languages do not have an analog for the Anglo word "adoption."[19] The words "orphan," "illegitimate," and "adoption" do not exist in any of the 252 living Indian languages.[20] Instead, Native American practice is to value the roles played in a child's life by the persons who are entrusted with his or her care, in addition to the child's birth parents. For example, many Native Americans esteem family members by conferring family roles on persons beyond the child-mother-father triad:

> American Indian societies consider grandparents to be valued primary caregivers, aunts and uncles to be actual parents, cousins to be sisters and brothers, and extended family members to be close relatives.[21]

Furthermore, many Native American families and tribal communities find replacement adoption wholly unacceptable:

> In devising a system of child placement and adoption designed to distance the child from his or her biological family, American jurisprudence has created a system of childrearing that is foreign to the American Indian population. . . . Equally unknown to American Indian culture is the characteristic termination of all ties with an original family in order to create a new set of attachments with a separate family. The spiritual bonds between mother and child, father and child, child and family, as acknowledged in native peoples' cultural beliefs, make a severance incomprehensible.[22]

The laws of the various states of the United States which govern adoptions should demonstrate a similar deference to the needs and rights of the child to his or her "close" family members. To do so, though, would require a sea-change in jurisprudential thinking. It would require the law to follow nature, rather than expecting the re-

19. *See* Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. IND. L. REV. 51, 52 n.4, 56 n.21.

20. Guerrero, 7 AM. IND. L. REV. at 52 n.4, 56 n.21.

21. *See* Brooks, 27 CREIGHTON L. REV. at 668 n.44 (citations omitted).

22. *Id.* at 665.

verse as it applies in child-rearing. In acknowledging the roles played by others who are not within the triad of the birth mother and birth father and child, the law would be recognizing no more than what the child him- or herself does in attaching to a beloved, consistent care provider as if to a birth parent. If it were to so recognize the importance of others to the child, the law would be responsive to answer the question most pertinent to the child: "Whether the adoption of a particular child by a particular adult or adult pair is appropriate, given the interests of the child in receiving a permanent placement, stability, and love — and the interests of the adult couple in providing those benefits of adoption to the child."

IV. PROPOSING A MODEL FOR TODAY: EMBRACING ALL FAMILIES

A. Full Faith and Credit for Same Gender Couples' Adoptive Families

As American society makes adoption an entirely acceptable option for forming families, adoptive and birth families can be at ease in the knowledge that they and their children will bear no stigma. As society grows beyond its prejudices about adoption and learns to accept with warmth and good will all manner of heterosexual couples' families by adoption, it may also accept, with similar forbearance, the adoptive families headed by non-heterosexual persons. Surely the idea of adoption no longer distresses the community, as the fallacies and myths that shrouded adoption through the first part of the twentieth century fall away.

What lies ahead now is the acceptance of non-heterosexual persons' desires for family and children. Those families are being formed. Through low- or high-technology methods of medical fertility assistance, lesbian women and gay men are creating children. The question of adoption for them is the adoption of the couples' birth child by the partner who could not participate: The woman's partner's ovum is superfluous to conception; the man's partner's sperm contribution can be ruled out with the now commonplace HLA blood assay. Thus, the partner of the same-gender parent has no direct legal claim upon the child. Even common language bestows no sense of entitlement or responsibility incurred by the parent's same-gender partner. In response, these couples have acquired a new term denoting the parenting relationship between same-gender couples who are raising the biological child of one of the partners; that joint effort is termed "co-parenting."

B. Translating Reality into a Theoretical Construct: "Co-Parenting" by Same-Gender Partners

Co-parenting without adoption brings no automatic legal recognition for the co-parent (the partner of the child's legally recognized parent). The co-parent and child may experience the relationship they share as parenting, and such a relationship may well be identified by Professor Joseph Goldstein, *et al.*, as "psychological parenthood." No legal recognition, however, is accorded to the "unrelated adult" in a child's household, unless and until a court decides that legal recognition of the parental relationship is required by the child's "best interests." Without such a finding, the co-parent's voice cannot make itself be heard in legal decision-making for the child. Co-parenting without legal recognition brings no formal rights to the parenting adult or to the child.

The children conceived in same-gender partnerships, though, attach to both caregivers who provide attention to needs, reduce stressors, and comfort troubles away — as children do in households headed by a man and a woman living together. By the close of the third year, the child's hard work of attachment may well be completed. The child's attachments are as likely to be to both of the women or the men who give care in the non-heterosexual household as they are to the mother and father of the majority population's homes. Therein lies the strongest evidence to support full faith and credit recognition and enforcement of adoption by a same-gender, non-birth parent: The child has attached to that partner as if to a mother or father, and that attachment should be undisturbed — unless reasons exist for the state to intervene as it would in a heterosexual household.

C. Giving Reality to a Theory: The Best Interests Model

Respecting a child's interests in the outcome of legal decrees concerning his or her family and home is a valuable way of explaining the so-called "best interests standard." The standard itself dates from Talfourd's Rule in England and several child custody cases early in the nineteenth century in the United States. A particular set of cases, known as *Addicks I* (1813)[23] and *Addicks II* (1815),[24] addressed the needs of two children, the subjects of a dispute between a divorcing couple. First, the divorce court's concern was the young girls' relationship with their mother, and the court (in a remarkable decision for the times) concluded that custody should remain with the adulterous woman. Upon appeal, the court's concern was again for the girls; only

23. Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813) (*Addicks I*).
24. Commonwealth v. Addicks & Lee, 2 Serg. & Rawle 174 (Pa. 1815) (*Addicks II*).

this time, the court focused on the implications of what the girls might learn from their mother's example if they were allowed to continue in her care. The point of court decisions since that series of cases has been the balancing of parental rights and children's needs, often called "best interests." Lawmakers would be remiss if they were to ignore this basic principle.

D. Acknowledging Reality: An Example to Illustrate the "Best Interests" Model

To understand better the fit between a child's best interests and the decision to recognize the child's attachment figures, let us examine a hypothetical scenario. For example, let us look to one state that has provided an adoption decree to the same-gender partner of a child's birth mother. Perhaps a second state's adoption courts, on the other hand, have not been so sympathetic to persons seeking to adopt their same-gender partner's child. The question presented is what a court in State Two would do when faced with the following problem:

A birth mother and her same-gender partner, who has been granted an adoption of the other's birth child in State One, move to accept an employment offer in State Two. The two mothers express no real interest in engaging in a ceremony of marriage nor in seeking approval of their relationship from either State One or State Two. After arriving in State Two, the birth mother dies. Her birth child, who resides with and has accompanied the couple to State Two, subsequently requires educational, medical, and psychological services, in turn requiring parental consent. Suppose further that an institution providing a service to the child objects to the legality of the surviving, adoptive parent's consent to services. Is the bereaved partner a parent of her adopted child in State Two as she was in State One?

To complicate the picture, let us assume that there is an unhappy grandparent or sibling of the deceased birth parent in the mix. In the "low tech" process of anonymous donor artificial insemination (where no birth father is or can be identified), the deceased's family is the most likely source of conflict. (In the even "lower tech" world of known-donor artificial insemination, another layer of potential challenge unfolds if and when the birth father asserts rights to the child.)[25]

25. Of course, the difficulties faced by the bereaved partner increase exponentially if the partner is male and has either adopted his partner's child, who was conceived in a prior heterosexual relationship, or in the "high tech" world of artificial insemination/*in vitro* fertilization of a surrogate who was impregnated with the eggs of another donor or who donated her own eggs' genetic material.

Unlike issues of marital union that are currently limited to a single state's interpretation of its own constitutional protections, the inter-jurisdictional recognition of non-traditional adoptions is ready to come to an American court. Empirical social science research, a good basis upon which to effect change for children, demonstrates support for allowing adoptions between non-related, albeit mutually committed, adults and children to go forward.[26] Thus, the adoptive parent should prevail if the court limits itself to two questions: (1) Has this adoptive parent acted in a way that is so injurious to this child's well-being that no reasonable efforts by the parent can remedy the harm or risk of harm to the child? If so, then (2) are the child's "best interests" met in ending the relationship between the child and the adoptive parent? These are the questions that must be answered by a court in any termination of parental rights action; they are also the questions which should circumscribe the court's inquiry in State Two.

V. CONCLUSION: "THE SUN SHINING INSIDE US"[27]

Open adoption is increasingly available to birth and adoptive parents. Because of the benefits it provides the children who experience it, it thrives — costing only the generosity and courage of the parents involved. It is supported by the history of duplicative adoption that has been a part of this continent's most sophisticated, family-centered cultures. Allowing children to have permanence and predictability in their relationships and sense of family is also the hallmark of the last decade of this century. With the creation of the Safe Families and Adoption Assistance Act in 1997, child service professionals and the courts have been given the mandate to move children into permanent placements, to give them stability and predictability. Without evidence of serious harm or risk of such harm, the Act and strong psychological evidence cautions that a child's sense of place and attachment should not be disrupted.

Rarely does American jurisprudence have the opportunity to make such a difference in the lives of children by simple good will. Upgrading co-parenting to adoptive parenting can be such an opportunity. Recognizing and enforcing the incidents of adoption by persons who are not exclusively heterosexual provides another. In conclusion, this author relies upon a woman of the Pima Tribe, whose words de-

26. *See* D. Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. OF COUNSELING & DEV. 504 (1986); M. Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. OF ORTHOPSYCHIATRY 545 (1981); R. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. OF PSYCHIATRY, 692 (1978).

27. KOEHLER, *supra* note 1.

scribe a patient acceptance of the evolutionary flow of human interaction:

> Ours was the first to be educated in two cultures, the Pima and the white. Sometimes the values of the two were in conflict, but we were learning to put them together to make a way of life different from anything the early Pimas ever dreamed of.[28]

28. GRETCHEN M. BATAILLE & KATHLEEN MULLEN SANDS, AMERICAN INDIAN WOMEN TELLING THEIR LIVES 84 (1984) (quoting ANNA MAY SHAW, A PIMA PAST (1974)).