Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri

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INTRODUCTION

In today's world, the concept of family is being redefined. The traditional family, consisting of a father, a mother, and a few children living happily together in one home, is no longer the norm. Divorce is at an all-time high, with nearly one of every two marriages ending in divorce.[1] Fragmented families are left to build new lives and to perhaps establish relationships that bring together a patchwork of people.

As one of the driving forces behind the redefinition of family, same-sex couples continue to fight for equal treatment in areas such as marriage and child rearing. In fact, new reproductive technologies and adoption possibilities have increased the options of same-sex couples who wish to raise children. This, in turn, increases the urgency for courts and legislatures to create laws and policies that provide guidance on these issues.

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1. Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States* (Ctr. for Disease Control, Nat'l Ctr. for Health Statistics, Advance Data No. 323, 2001), *available at* http://www.cdc.gov/nchs/data/ad/ad323.pdf. This report found that forty-three percent of first marriages end in separation or divorce within fifteen years. *Id.* at 6. In 2002, the Census Bureau projected that nearly half of recent first marriages would end in divorce. ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 1 (2002), *available at* http://www.census.gov/prod/2002pubs/p70-80.pdf. This report shows increased percentages of people divorcing during the last half of the twentieth century. *Id.* at 19.

Just as traditional family relationships can dissolve, same-sex couples can end their partnerships. However, after the separation, the stakes are higher for same-sex couples when there are children involved and the non-legal parent seeks custody or visitation rights. Although some states permit legal adoption by a second parent,[2] many states are ill-prepared to deal with custody and visitation conflicts between same-sex couples.[3] In fact, some states prohibit homosexual parents from having custody or visitation rights, and refuse to recognize that the concept of family is changing and that the traditional family is being redefined.[4] Instead, these states make decisions and pass legislation based on false stereotypes and homophobia.[5]

Judges, legislators, and social scientists alike are constantly faced with the question of how to deal with today's nontraditional families and their dissolutions. Fortunately, flexible state statutes, new legislative opportunities and equitable doctrines may ease the difficult task of deciding when to allow third parties to assume the rights of legal parents. Missouri has failed to take advantage of these legal vehicles, and has therefore left homosexual parents and their

2. *See infra* note 46.

3. *See infra* notes 53–55.

4. *See infra* note 57.

5. Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, FAM. ADVOC., Summer 1997, at 21. Kendell highlighted four myths about children of gay or lesbian parents: (1) "Children of lesbian or gay parents will be subjected to substantial harassment;" (2) "Children raised by lesbian or gay parents will not develop appropriate gender identity;" (3) "Children of lesbian or gay parents will grow up gay;" and (4) "Children of lesbian or gay parents have poor self-esteem." *Id*. at 21–24. Kendell concludes that there is no basis for any of these myths. *See id*. at 21–26. With respect to the first myth, studies indicate that peer pressure is not a significant problem. *See, e.g.*, Mary E. Hotvedt & Jane Barclay Mandel, *Children of Lesbian Mothers*, *in* HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 275, 282 (William Paul et al. eds., 1982). Studies also indicate that the sexual orientation of a child's parent is not determinative of that child's sexual orientation. *See, e.g.*, Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3 (1996); Julie Schwartz Gottman, *Children of Gay and Lesbian Parents*, *in* HOMOSEXUALITY AND FAMILY RELATIONS 177, 189 (Frederick W. Bozett & Marvin B. Sussman eds., 1990). In addition, Judith Stacey and Timothy Biblarz found that rather than struggling with gender identity or having poor self-esteem, "children of same-sex parents develop in less gender-stereotypical ways," and "their experiences give them greater sensitivity, empathy for social diversity, and capacity to express feeling." Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001).

children to face even greater difficulties and heartbreak following the dissolution of a relationship.

Part I of this Note discusses the current law regarding family, children and homosexuals at the Supreme Court level and among various states. Part II examines empirical data regarding the fitness of homosexual parents and the effect such parents have on children. Part III discusses second-parent adoption and the equitable parent doctrine, and identifies those states currently employing such devices to resolve custody disputes. Part IV offers an analysis of the law of Missouri as compared to that of other states. Part V proposes statutory reform by the Missouri legislature to allow second-parent adoptions, and, in the interim, an effort by the courts to extend rights and responsibilities to legitimate second-parents by employing broad statutory interpretation or by applying principles of equity and fairness.

I. THE LAW REGARDING FAMILIES, CHILDREN AND HOMOSEXUALS

Courts and legislators have struggled with how to approach same-sex couples, their desire to be parents and the consequences if they terminate the relationship. Many courts recognize changing family dynamics and the disappearance of the "traditional family," and have discovered or created ways to provide rights to members of nontraditional families.[6]

The Supreme Court has offered some guidance to the states by protecting family relationships and employing a liberal interpretation of the word "family."[7] Protection of family relationships began with *Meyer v. Nebraska*[8] and *Pierce v. Society of Sisters*,[9] in which the Court placed the parent-child relationship within the Fourteenth Amendment's realm of privacy.[10] This limited the states' ability to interfere with parents' decisions regarding child rearing and education.[11]

6. *See infra* notes 11, 19–22.
7. *See infra* notes 8–16.
8. 262 U.S. 390 (1923).
9. 268 U.S. 510 (1925).
10. *Id.* at 533–34; *Meyer*, 262 U.S. at 399.
11. Although not declared as such by *Meyer* or *Pierce*, the right to bring up one's child as

Subsequently, *Prince v. Massachusetts*[12] suggested that the family is not beyond state regulation, and that a parent's fundamental right to control a child's upbringing can be limited by the state's interest as *parens patriae* to protect the child's well-being or to keep the child from being harmed.[13] However, the Court again acknowledged the importance of protecting families from governmental intrusion in *Wisconsin v. Yoder*,[14] in which it recognized parental authority in child rearing.[15] As a result of these cases, it is clear that the Supreme Court protects a parent's right to guide the upbringing of his or her child, provided the decision does not place the child in harm's way.[16]

In addition to giving deferring to parental decisions in a familial relationship, the Court has refused to adopt a narrow definition of family that would limit constitutional protection of those within the traditional family realm. For example, in *Moore v. City of East Cleveland*,[17] the Court disallowed a single family zoning ordinance that excluded a family consisting of a grandmother, her son, his child and another grandchild.[18] The Court recognized the need to adopt a broad definition of family to "protect[] the sanctity of the family."[19]

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one sees fit is recognized as a fundamental right. *See* Santosky v. Kramer, 455 U.S. 745, 758 (1982) (holding that the rights of the natural parents in the care, custody and management of their children is a fundamental right and cannot be severed using the "fair preponderance of the evidence" standard); Wisconsin v. Yoder, 406 U.S. 205 (1972) (acknowledging the fundamental right of parents to guide the religious upbringing of their children). The legacy of *Meyer* and *Pierce* is the promotion of pluralism and the idea that families cannot be standardized. These ideas were echoed by the dissent in *Michael H. v. Gerald D.*:

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.

Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

12. 321 U.S. 158 (1944).
13. *Id*. at 166.
14. *Yoder*, 406 U.S. 205.
15. *Id*. at 233–34.
16. *See id*.
17. 431 U.S. 494 (1977).
18. *Id*. at 506.
19. *Id*. at 503. Justice Powell explained: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted

The Court expanded the definition of family further in *Smith v. Organization of Foster Families for Equality and Reform*[20] by acknowledging that family is not limited to blood, marriage, or adoption.[21] Despite this expanded definition of family, the Court refused to grant constitutional protection to a foster family, holding that the family contracted with the state and therefore knew that the rights and responsibilities of foster parenting did not include constitutional protection.[22]

In 2000, the Court further restricted the statutory rights of third parties in *Troxel v. Granville*.[23] In *Troxel*, the Court struck down Washington's grandparent visitation statute, thereby strengthening the rights of parents to determine with whom a child associates and narrowing the statutory authority of third parties in child custody and visitation disputes.[24] The Court has yet to hear a case regarding the equitable parent doctrine[25] as applied to third parties.

Just as the Court has acknowledged the importance of family and parental rights, it has also exhibited an even greater determination to protect the rights of children. In *Plyler v. Doe*,[26] the Court upheld a child's right to education and refused to punish children for the

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in this Nation's history and tradition. . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Id*. at 503–04.

20. 431 U.S. 816 (1977).

21. *Id*. at 843–44.

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.

Id. at 844 (citations omitted).

22. *Id*. at 845–46.

23. 530 U.S. 57 (2000). The court acknowledged that "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Id*. at 63. However, the Court struck down Washington's visitation statute on the grounds that it was unconstitutional as applied because the order for grandparent visitation unjustifiably interfered with the natural mother's due process right to make decisions concerning the "care, custody, and control" of her children. *Id*. at 72.

24. *Id*.

25. *See infra* note 59.

26. 457 U.S. 202 (1982).

mistakes of their parents, who were illegal immigrants.[27] The Massachusetts Supreme Court reiterated this principle when it acknowledged that it is unfair to punish children of same-sex couples, who do not have a choice as to their parentage.[28]

The Supreme Court signaled its changing attitude toward homosexual relationships when it expressly overruled *Bowers v. Hardwick*[29] in *Lawrence v. Texas*.[30] However, rather than concentrating on the issue of homosexuality, the Court recognized the right of all individuals, regardless of sexual preference, to engage in sexual relations within the privacy of their own homes.[31] In *Goodridge v. Department of Public Health*,[32] the Massachusetts Supreme Judicial Court went even further in its protection of

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27. *Id*. at 220. The *Plyler* Court observed:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants . . . . Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."

Id. at 219–20 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

28. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003). "It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation." *Id*.

29. 478 U.S. 186 (1986) (finding that Georgia's sodomy statute does not violate the fundamental rights of homosexuals, thereby criminalizing homosexual sex). The majority, construing the right and tradition in question narrowly, determined that the asserted right was the right to engage in homosexual conduct, and found that there was no specific tradition protecting the right to practice homosexual sodomy. *Id*. at 190–94. The dissent, following the lead of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and its broad construction of the rights and traditions at stake, found the right in question to be the right to sexual liberty for all, not just for homosexuals. *Id*. at 199 (Blackmun, J., dissenting).

30. 539 U.S. 558 (2003).

31. *Id*. at 574. "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*.

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Id. at 578.

32. *Goodridge*, 798 N.E.2d at 963–64.

homosexual couples by recognizing the impermissible burdens that discriminatory marriage laws place on homosexual couples and their children, and by spurring the legislature to legalize gay marriage.[33] In fact, several states have recognized the rights of homosexuals by legalizing gay marriage or by providing for civil unions or domestic partnerships.[34]

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33. *Id*. at 969. The court found the hardships on gay parents as a result of being denied the right to marry particularly important in its decision. "[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws." *Id*. at 963. "[S]ame-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction." *Id*.

34. In 1997, the Hawaii legislature passed the Reciprocal Beneficiaries Act, which provides certain rights and privileges to reciprocal beneficiaries that are generally the exclusive province of spouses and dependents. 1997 Haw. Sess. Laws 383. The law defines reciprocal beneficiaries as, *inter alia*, two adults who are legally prohibited from marrying one another under state law, and extends to them many benefits that were previously limited to spouses. *Id.*

In 2003, the highest Massachusetts court, in *Goodridge v. Department of Public Health*, ruled that same-sex couples have the right to marry under the state's Constitution. 798 N.E.2d 941. "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." *Id*. at 948. In 1999, Vermont enacted legislation providing for civil unions between same-sex partners. VT. STAT. ANN. tit. 15, §§ 1201–07 (2002). The statute requires:

> For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: (1) not be a party to another civil union or marriage, (2) Be of the same sex and therefore excluded from the marriage laws of this state.

Id. § 1202.

In 2003, California, Maine and New Jersey enacted laws allowing same-sex partnerships. California's legislation allows domestic same-sex couples to register as domestic partners. CAL. FAM. CODE § 297 (West 2004). Maine also passed a domestic partnership law. ME. REV. STAT. ANN. tit. 22, § 2710 (2004). The New Jersey Family Equity Act, better known as the Domestic Partnership Act (DPA), took effect on July 11, 2004. N.J. STAT. ANN. § 26:8A (West 1996 & Supp. 2005). The DPA entitles domestic partners to many of the rights enjoyed by spouses. "Domestic partner" is now a protected status for purposes of non-discrimination policies. *Id*. Other benefits conferred include visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions on behalf of an incapacitated partner; an exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse; and, for plans sponsored by the State of New Jersey, health and pension benefits similar to those provided to spouses. *Id*. In addition, domestic partners may now claim joint status for state tax purposes pursuant to the DPA. *Id*. However, there is no equivalent of alimony or division of marital assets for domestic partners. *Id*. Domestic partners are also not included in intestate succession schemes. *Id*.

II. EMPIRICAL EVIDENCE REGARDING THE FITNESS OF HOMOSEXUAL PARENTS

Despite this seemingly broad construction of family, parental rights, and the rights of children, homosexual parents have historically faced harsh treatment.[35] Although some courts have assumed that gay men and lesbians are mentally ill for purposes of denying custody and visitation, the psychiatric, psychological, and social work professions no longer consider homosexuality to be a mental disorder.[36] Empirical studies show "that parental sexual orientation per se has no measurable effect on the quality of parent-child relationship or on children's mental health or social adjustment," and suggest that "there is no evidentiary basis for

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35. *See supra* note 5. Courts and legislatures have called into question a homosexual parent's fitness in deciding custody disputes and making public policy decisions. However, the assumptions that lesbians are less maternal than heterosexual women and that homosexual partners devote less time to building and maintaining parent-child bonds have no empirical support. *See, e.g.*, Sally L. Kweskin & Alicia S. Cook, *Heterosexual and Homosexual Mothers' Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children*, 8 SEX ROLES 967 (1982); Terrie A. Lyons, *Lesbian Mothers' Custody Fears*, WOMEN & THERAPY, Summer/Fall 1983, at 231; Judith A. Miller et al., *The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research*, J. HOMOSEXUALITY, Fall 1981, at 49; Mildred D. Pagelow, *Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions*, 5 J. HOMOSEXUALITY 189 (1980).

In addition to harsh treatment from official sources, homosexuals have also faced public scrutiny. On November 2, 2004, voters in eleven states approved constitutional amendments limiting marriage to one man and one woman. Those states include Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah and Oregon. *11 States Ban Same-Sex Marriage*, CBS NEWS, Nov. 2, 2004, http://www.cbsnews.com/stories/2004/09/30/politics/main646662.shtml.

36. In 1973, the American Psychiatric Association removed "homosexuality" from its list of mental disorders, commenting that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Position Statement, Am. Psychiatric Assoc., Homosexuality (Dec. 1992), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/199216.pdf. In 1975, the American Psychological Association took the same position and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation. *See* AM. PSYCHOLOGICAL ASS'N, RESOLUTIONS RELATED TO LESBIAN, GAY AND BISEXUAL ISSUES, DSM-III AND HOMOSEXUALITY (1997), *available at* http://www.apa.org/pi/reslgbc.html. The National Association of Social Workers has taken a similar stance. *See* Nat'l Ass'n of Soc. Workers, Lesbian, Gay and Bisexual Issues, http://www.naswdc.org/resources/abstracts/abstracts/lesbian.asp (last visited June 1, 2006).

considering parental sexual orientation in decisions about children's 'best interest.'"[37]

Although it has been difficult to obtain legal recognition of their status as couples and their rights as parents, many homosexual couples raise children successfully.[38] In fact, none of the primary

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37. Stacey & Biblarz, *supra* note 5, at 176.

> Given historic societal prejudices against homosexuality, it is not surprising that many family court judges are concerned about whether children of lesbian and gay parents suffer higher levels of emotional and psychological harm than other children. The many studies of 'children's self esteem and psychological well-being' based on research tests children directly, as well as those that rely on parents' accounts or teacher evaluations, all find no significant differences between children of lesbian mothers and children of heterosexual single or married mothers in anxiety, depression, self-esteem, and other measures of social and psychological adjustment. There are even a few studies that suggest higher levels of self-esteem and emotional maturity among children being raised by lesbian mothers. Children being raised by gay or lesbian parents are no different than other children with respect to cognitive functioning. Studies that purport to measure levels of parental 'investment' in their children report levels at least as 'high' and sometimes higher for lesbian and gay parents than for heterosexual parents.

Id. at 171.

38. "Between eight and fourteen million children are being raised in homes headed by a lesbian or gay parent." Kendell, *supra* note 5, at 21.

> [In 1998, a]pproximately 160,000 [same-sex] couples reported that they had children aged 15 or younger living with them. Because it is difficult to get an estimate of the number of single gay or lesbian adults raising minor children, the actual number of minor children living with a gay or lesbian parent, with or without a partner, is likely to be considerably larger. . . .

Joan Heifetz Hollinger, *Sexual Orientation as a Factor in Adoptive Placements and Overview of Second-Parent Adoptions*, *in* 2004 CHILDREN'S LAW MANUAL, at 357, 359 (Nat'l Assoc. of Counsel for Children, 2004).

Many child welfare and adoption advocacy organizations (for example, the Child Welfare League of America and the North American Council on Adoptable Children), as well as national professional service and research associations with expertise in child development and family dynamics, support the effort to enable homosexual individuals and same-sex couples to become parents with full legal rights. *See, e.g.*, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339–40 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339. The American Academy of Pediatrics' Committee on Psychosocial Aspects of Child and Family Health observed:

> Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are

concerns of skeptics can be proven by empirical research.[39] Children of homosexuals develop patterns of behavior, both socially and sexually, much like those of other children.[40] Michael Wald, Professor of Law at Stanford University, found that "[t]he vast majority of children in all the studies functioned well intellectually, did not engage in self-destructive behavior or in behaviors harmful to the community . . . [and got] along as well with their parents and peers as children raised in heterosexual families."[41]

III. SECOND-PARENT ADOPTION AND THE EQUITABLE PARENT DOCTRINE

A. Second-Parent Adoption

To avoid the issue of third parties as parents and the custody and visitation problems that arise when a same-sex relationship terminates, a growing number of states allow second-parent adoption.[42] Second-parent adoption protects "children in same-sex

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heterosexual. When 2 [two] adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.

Id.

39. *See supra* notes 35–38. The three main concerns over homosexuals raising children are that the child's sexual identity development will be impaired, the child's personal development skills will be impaired, and the child will have difficulty creating and maintaining social relationships. *See* Kendell, *supra* note 5.

40. Hollinger, *supra* note 38. "Social science research has shown that children raised by lesbian and gay parents are just as healthy and well adjusted as those raised by heterosexual parents in comparable socio-economic circumstances." *Id.* at 357.

41. Michael S. Wald, *Same-Sex Couples: Marriage, Families, and Children* 12 (Stanford Pub. Law & Legal Theory, Working Paper No. 6, 1999).

42. Currently, second-parent adoption has been approved by appellate court decisions in the following jurisdictions: California, the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont.

For the decision in California, see *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003). "[A]doption statutes [should] be liberally construed with a view to effect their objects and to promote justice. Such a construction should be given as will sustain, rather than defeat, the object they have in view." *Id.* at 560 (citation omitted). "[T]he Legislature did not intend . . . to bar an adoption when the parties clearly intended to waive the operation of that statute and agreed to preserve the birth parent's rights and responsibilities." *Id.*

For the decision in the District of Columbia, see *In re M.M.D.*, 662 A.2d 837 (D.C. 1995).

For the Illinois decision, see *In re Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

For the Indiana decision, see *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003).

> The appellate court held that, because the adoption statutes did not explicitly prohibit adoptions by unmarried couples nor explicitly require that an existing adoptive parent relinquish all parental rights when consenting to a second-parent adoption by his or her partner, the courts could rely on "Indiana's common law" to permit a second-parent to adopt a child without divesting the rights of the first adoptive parent so long as the trial court finds that the proposed adoption is in the best interest of the child.

Hollinger, *supra* note 38, at 360 n.18; *see also In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1258 (Ind. Ct. App. 2004) ("It is clear that the divesting statute, designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoption by second parents.").

For the decision of Massachusetts, see *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993) ("While the Legislature may not have envisioned adoption by same-sex partners, there is no indication that it attempted to define all possible categories of persons leading to adoptions in the best interests of children. Rather than limit the potential categories of persons entitled to adopt . . . , the Legislature used general language to define who may adopt and who may be adopted."). The Massachusetts court described the benefit of a second-parent adoption:

> Adoption will not result in any tangible change in Tammy's daily life; it will, however, serve to provide her with a significant legal relationship which may be important in her future. At the most practical level, adoption will entitle Tammy to inherit from Helen's family trusts and from Helen and her family under the law of intestate succession . . ., to receive support from Helen, who will be legally obligated to provide such support . . ., to be eligible for coverage under Helen's health insurance policies, and to be eligible for social security benefits in the event of Helen's disability or death. . . .
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> Of equal, if not greater significance, adoption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate, or Susan predeceases Helen. As the case law and commentary on the subject illustrate, when the functional parents of children born in circumstances similar to Tammy separate or one dies, the children often remain in legal limbo for years while their future is disputed in the courts. In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests. Adoption serves to establish legal rights and responsibilities so that, in the event that problems arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child within the recognized framework of the law.

Id. at 320–21 (citations omitted).

For the New Jersey decision, see *In re Adoption of Two Children*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

For the decision of New York, see *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995). "[T]he adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." *Id*. at 399; *see also In re* Adoption of Carolyn B., 774 N.Y.S.2d 227 (N.Y. App. Div. 2004) (allowing two unmarried adults to adopt jointly, rather than sequentially).

For Pennsylvania's decision, see *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).

For the decision in Vermont, see *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993) ("When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. 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.").

parent families by giving the child the legal security of having two legal parents."[43] It "also protects the rights of the co-parents, by ensuring that the co-parent will continue to have a legally recognized parental relationship to the child if the couple separates or if the biological parent (or original adoptive parent) dies or becomes incapacitated."[44]

To provide these benefits to same-sex couples and their children, some courts have chosen to read existing adoption statutes broadly to allow for second-parent adoption.[45] Other courts, such as Missouri, instead restrict adoption by applying a very narrow reading of the current statutory language. To avoid the need for judges to massage the language of outdated statutes to obtain the desired result, some states expressly authorize second-parent adoptions.[46]

The toughest barrier that courts have had to overcome in recognizing second-parent adoptions via existing adoption statutes is the cut-off provision, which requires termination of birth parents' rights prior to adoption proceedings.[47] Courts have used a variety of interpretive strategies to circumvent these provisions. Some courts hold that reading the adoption laws so as to require termination of the

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43. Hollinger, *supra* note 38, at 358.

44. *Id*. at 359.

45. *See supra* note 42. Trial courts in Alabama, Alaska, Delaware, Georgia, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas and Washington have granted second-parent adoptions. Hollinger, *supra* note 38, at 363.

46. Currently, second-parent adoption is available by statute in California, Connecticut and Vermont. *See* CAL. FAM. CODE § 9000(f) (West 2004) (allowing only for registered domestic partners); CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2004) (superceding *In re* Adoption of Baby Z, 724 A.2d 1035 (Conn. 1999)); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) (codifying *Adoption of B.L.V.B.*, 628 A.2d 1271). These statutes are based on the Uniform Adoption Act, which recognizes the right of anyone to attempt to adopt in order to create a parent-child relationship. UNIF. ADOPTION ACT § 1-102 (1994).

47. The New York adoption statute provides an example of a typical provision, commonly referred to as a cut-off provision, terminating the rights of a natural parent. It provides that "[a]fter the making of an order of adoption the natural parents of the adoptive child . . . shall have no rights over such adoptive child." N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1999); *see also* MASS. GEN. LAWS ANN. ch. 210, § 6 (West 1999) ("[A]ll rights, duties and other legal consequences of the natural relation of child and parent shall . . . terminate between the child so adopted and his natural parents and kindred."); WIS. STAT. ANN. § 48.92(2) (West 1997) ("After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.").

rights of a parent who intends to raise the child in conjunction with the adoptive parent violates the rule proscribing "absurd results" when interpreting statutes.[48] Other courts point to the legislative mandate of liberal interpretation of statutory language as "directory" rather than "mandatory" to ignore the termination of parental rights provision.[49]

Following similar reasoning as those courts that use adoption statutes as guides rather than as strict rules, the Illinois Court of Appeals recently refused to apply the state's cut-off provision because the adoption statute instructed liberal construction by the courts and mandated the use of the best interests of the child standard.[50] As an alternate interpretive tool, two courts have found that the cut-off provisions were never intended to apply when a legal parent participated in the adoption.[51] Finally, some courts have recognized the similarities between lesbian co-parents and step-parents, and have held that provisions waiving the requirements for step-parents should apply to co-parents as well.[52]

Unfortunately, appellate courts have denied second-parent adoptions in a few states.[53] In addition, some states have passed

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48. *See In re* M.M.D., 662 A.2d 837, 845 (D.C. 1995) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. . . . [T]he canon does not require distortion or nullification of the evident meaning and purpose of the legislation.") (citing United States v. Brown, 333 U.S. 18, 25–26 (1948)); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) ("When the statute is read as a whole, we see that its general purpose is to clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals. . . . The legislature recognized that it would be against common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child, albeit in a family unit with a partner who is biologically unrelated to the child."); *In re* Jacob, 660 N.E.2d 397, 402–06 (N.Y. 1995); Adoption of B.L.V.B., 628 A.2d 1271, 1272–74 (Vt. 1993).

49. *In re* Angel Lace M., 516 N.W.2d 678, 691–92 (Wis. 1994) (Heffernan, C.J., dissenting).

50. *In re* K.M., 653 N.E.2d 888, 892–95 (Ill. App. Ct. 1995).

51. *M.M.D.*, 662 A.2d at 860–62; Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) ("The Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition.").

52. *See M.M.D.*, 662 A.2d at 860–61; *Jacob*, 660 N.E.2d at 405 (stating that the cut-off provision was "designed as a shield to protect new adoptive families [and] was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents").

53. Courts in Colorado, Nebraska, Ohio, and Wisconsin have held that a parent who consents to the adoption of his or her child mandatorily terminates his or her parental rights and duties. *See In re* Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996); *In re* Adoption of

statutory prohibitions against adoptions by homosexual individuals and couples.[54] At least one state has gone even further by enacting a statute refusing to recognize adoptions granted to same-sex couples in other states.[55] The reluctance of courts, combined with the threat of legislation expressly prohibiting homosexual adoption, is the most serious problem facing efforts to recognize the validity of same-sex co-parents. Without the legal protection of adoption, non-legal parents and their children face serious disadvantages and possible health risks.[56]

B. The Equitable Parent Doctrine

Without second-parent adoption, courts are forced to determine the custody and visitation rights of same-sex couples by invoking (or not invoking) their equitable authority. Some courts refuse to recognize the parental rights of a homosexual partner and insist on treating the partner as a stranger.[57] This gives the legal parent the

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Luke, 640 N.W.2d 374 (Neb. 2002); *In re* Adoption of Jane Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998); *Angel Lace*, 516 N.W.2d 678.

54. *See* FLA. STAT. § 63.042(3) (2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); UTAH CODE ANN. § 78-30-1(3)(b) (2002) (prohibiting "a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state" from adopting).

55. OKLA. STAT. tit. 10, § 7502-1.4(A) (1998 & Supp. 2005). In May 2004, the Oklahoma legislature amended the adoption statute to read:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

Id.

However, other courts have explicitly confirmed recognition of second-parent adoptions approved in other states. *See* Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002) ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.").

56. There are serious consequences of failing to recognize the rights of co-parents. The child may be ineligible for health insurance, life insurance or disability benefits through the co-parent's employer, and, without a will, are unable to inherit from the co-parent. The co-parent is also unable to consent to emergency medical procedures or to obtain school records.

57. *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990); Kazmierazak v.

absolute right to deny the ex-partner custody or visitation with the child.

However, a growing number of courts have recognized that a partner is not a stranger, and that a legal tie is all that separates a child and the partner from a legal parent-child relationship.[58] These courts recognize the equitable parent doctrine[59] and award visitation or custody to non-legal parents based on their involvement in the child's life, rather than strictly on legal or biological ties.[60] The doctrine of equitable parenthood was established in *Atkinson v.*

Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (holding that lesbian former partner had no right to custody of child); Liston v. Pyles, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997) (holding that applicable statutes granted no legal parenting rights to partner). Other courts have recognized a former partner as more than a mere third party. *See* Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000).

58. *See infra* note 60.

59. JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996).

> Whether a person becomes the psychological parent of a child is based on day-to-day interaction, companionship, and shared experiences. This can be done by an adoptive parent, or by any other caring person—but never by a physically or psychologically absent person, whatever the person's biological or legal relationship to the child may be.

Id. at 12–13.

> Unlike adults, children have no psychological conception of blood-tie relationships until quite late in their development . . . What matters to them is the pattern of day-to-day interchanges with the adults who take care of them and who, on the strength of such interactions, become the parent figures to whom they are attached.

Id. at 9.

> An 'equitable parent' is an individual who provides for the physical, emotional, and social needs of a child and demonstrates that (1) he had physical custody of the child for an extended period, (2) his motive in seeking parental status is his genuine care and concern for the child, and (3) his relationship with the child began with the consent of the child's legal parent.

In re T.L, No. 953-2340, 1996 WL 393521, at *2 (Mo. Cir. May 7, 1996); *see also* Alison D. v. Virginia M., 572 N.E.2d 27, 32 (N.Y. 1991); *In re* Allen, 626 P.2d 16, 21 (Wash. Ct. App. 1981).

60. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (granting mother's former partner visitation based on equitable parent doctrine); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); *In re* Parentage of L.B., 89 P.3d 271 (Wash. Ct. App. 2004); *In re* H.S.H-K., 533 N.W.2d 419 (Wis. 1995).

Atkinson,[61] in which the court granted rights to the mother's husband based on his relationship with the child, not on his relationship with the mother.[62]

One hesitation in recognizing the equitable parent doctrine is that it may open the door to allowing anyone to claim a relationship with a child and seek visitation. This would, in turn, undermine the idea of family and strip biological and legal parents of their rights to guide the upbringing of their children.[63] However, by adopting a specific, detailed definition of an equitable parent, courts can differentiate between a total stranger and a legal stranger.

Courts traditionally employ a four-part test to determine whether an individual should be recognized under the equitable parent doctrine.[64] The four factors include: consent from the biological or legally adoptive parent, living with the child, performing parental functions, and the existence of a parent-child bond.[65] These four factors illustrate the necessity of intent when forming a bond with a

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61. 408 N.W.2d 516 (Mich. Ct. App. 1987); *see also* Nancy D. 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, 483 (1990).

62. *Atkinson*, 408 N.W.2d at 519. The court adopted a three-prong test to determine whether a father qualifies as an equitable parent. *Id.* A person qualifies as an equitable parent if:

> (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Id.

63. *See* Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 394 (1994).

64. *H.S.H-K.*, 533 N.W.2d at 421.

65. *Id.* The court's statement of these factors is as follows:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id.

non-biological child. Intent has been a crucial factor in a number of decisions involving separation and custody and visitation.[66]

The relevancy of a homosexual relationship in custody and visitation disputes has traditionally been determined using one of three different methods.[67] Some courts adopt the per se rule, in which proof of a parent's homosexuality disqualifies the parent from custody without any consideration of the best interest of the child or the fitness of the other parent.[68] Other courts apply a presumption of harm rule based solely on the fact that a parent is involved in a homosexual relationship, and place the burden on the homosexual parent to prove the absence of harm.[69] Most courts, however, apply the nexus test,[70] which is influenced by the Uniform Marriage and Divorce Act.[71] This test requires that a connection, or nexus, between a homosexual parent's conduct and negative impact on the child must be established before homosexual conduct is given relevance.[72]

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66. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that when all else is equal, the court must look at the intent of the parties to determine motherhood); Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976) (finding that the applicable remedy is to carry out the reasonable expectations of the parties); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

67. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 824, 824–27 n.3 (2d ed. 2002).

68. *See* Roe v. Roe, 324 S.E.2d 691 (Va. 1985). The per se rule does not require a showing of harm to the child. *Id*. at 692.

69. *See* Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987).

70. Stephen B. Pershing, *"Entreat Me Not to Leave Thee":* Bottoms v. Bottoms *and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 308 (1994).

71. UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1970). This section states:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id. In addition to the UMDA, the American Law Institute's *Principles of the Law of Family Dissolution* does not allow a court to consider a parent's sexual orientation or extramarital sexual conduct except when that conduct causes harm to the child. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12(1)(d), (e) (2002) (discussing sexual orientation and extramarital sexual conduct, respectively).

72. *See, e.g.*, A.C. v. C.B., 829 P.2d 660, 664-65 (N.M. Ct. App. 1992).

States have taken many different approaches in applying the equitable parent doctrine.[73] Colorado's appellate court has denied second-parent adoptions,[74] but recognizes the equitable parent doctrine as a basis for granting joint custody to same-sex partners.[75] For example, *In re E.L.M.C.* held that a former partner had standing as a psychological parent to petition for equal parenting time, and that the compelling state interest of preventing emotional harm to the child justified interference with the adoptive mother's due process right to make decisions concerning her child's care.[76] New Jersey also recognizes the equitable parent doctrine.[77] For example, in *V.C. v. M.J.B*, the New Jersey Supreme Court recognized the importance of a third party's psychological bond to a child and awarded visitation based on the equitable parent doctrine.[78]

In 1999, the Massachusetts Supreme Court awarded visitation to a parent's ex-partner and declared that a biological or legal parent's rights do not allow the parent to deny visitation to (and effectively end a child's relationship with) a former partner when the parties signed and adhered to a co-parenting agreement.[79] California does not

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> [T]he issue before the court is not the nature of the parent's sexual activities, if any, but whether and how those activities affect the child, if in fact they do. This is a factual issue that must be considered and resolved on specific evidence concerning the effect, if any, of the activity on the children; it cannot be resolved as a matter of law based on the perceived morality or immorality of the parent's conduct.

Id.

73. *See infra* notes 74–80.

74. *In re* Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996).

75. *In re* E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004).

76. *Id*. at 561. "[W]e . . . conclude that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." *Id*.

77. V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

78. *Id*. at 555.

> At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.

Id. at 550.

79. E.N.O. v. L.M.M., 711 N.E.2d 886, 892–93 (Mass. 1999). A "cohabitating couple can contract regarding the rights of their children so long as the judge determines that the terms reflect the child's best interests." *Id*. at 892 (citing Wilcox v. Trautz, 693 N.E.2d 141, 147 (Mass. 1998)).

recognize the equitable parent doctrine because the legislature enacted a statute explicitly allowing second-parent adoptions for registered domestic partners, thereby negating the need for the doctrine.[80]

IV. ANALYSIS OF THE TREATMENT OF HOMOSEXUAL PARENTS REGARDING CUSTODY ISSUES IN MISSOURI

Despite the national trend of according rights to homosexual parents, Missouri has a long history of harsh treatment of gay and lesbian parents in custody and visitation disputes.[81] Missouri courts apply a much higher level of scrutiny to the behavior of homosexuals than to that of heterosexuals.[82] Traditionally, Missouri has applied the best interests standard[83] and the presumption of harm rule. However,

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80. CAL. FAM. CODE § 9000(f) (West 2004). "For the purposes of this chapter, stepparent adoption includes adoption by a domestic partner." *Id*.

81. *See* Delong v. Delong, No. WD 52726, 1998 WL 15536, at *6 (Mo. Ct. App. Jan. 20, 1998); T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989); J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (upholding severe visitation restrictions despite weak evidentiary basis that father and homosexual lover held hands and kissed in front of the child); G.A. v. D.A., 745 S.W.2d 726, 727 (Mo. Ct. App. 1987) (holding that evidence indicating that mother was a lesbian "tipped the scales," and awarding custody to the father); S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987) (modifying custody order upon receipt of evidence of mother's homosexual relationship); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 870–72 (Mo. Ct. App. 1982) (limiting visitation of gay father by not allowing overnight visits, attendance at gay activist social gatherings, or attendance at church with a large homosexual congregation); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982) (awarding custody to unemotional, transient father, and limiting visitation of lesbian mother despite child's wishes to get away from father); N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980).

82. Lisa A. Brunner, *Circumventing the "Best Interests of the Child" Standard: Child Custody Law in Missouri as Applied to Homosexual Parents*, 55 J. MO. B. 200, 203 (1999). Rather than focusing solely on the sexual behavior of heterosexual parents, the court based its decision on a variety a factors, and looked for a showing of an adverse effect on the children. *Id.* at 202. In some cases, courts award custody to adulterous spouses or to persons in unmarried, cohabitating relationships by looking beyond their sexual conduct and evaluating their behavior based on the best interests of the child. *See* Morrison v. Morrison, 676 S.W.2d 279 (Mo. Ct. App. 1984) (granting mother custody despite her cohabitation with man to whom she was not married); *see also* Indermuehle v. Babbitt, 771 S.W.2d 873 (Mo. Ct. App. 1989).

83. MO. REV. STAT. § 452.375.2 (1997). This section provides:

> In determining the best interests of the child, the court shall consider all relevant factors including the wishes of the child as to his custody; the interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests; the child's adjustment to his home, school, and community; the mental and physical health of all individuals involved,

some courts' application of the best interests standard does not seem to be any different from the per se approach.[84] This perception is reinforced by the fact that between 1980 and 1989, Missouri appellate courts decided seven cases involving homosexual conduct and child custody and visitation; in each case, the court upheld the trial court's award of custody to the heterosexual parent and restricted or denied visitation to the homosexual partner.[85]

Missouri courts have also refused to use available methods to circumvent the restrictive language of the state's current adoption statute. The Missouri legislature has exacerbated the situation by failing to amend its current adoption statute to explicitly allow second-parent adoptions. However, the legislature has taken positive steps in this direction by showing friendliness toward third-party custody and visitation in child custody battles,[86] and by adopting the best interests of the child standard to protect children in custody disputes.[87] Missouri has also adopted a public policy in favor of the welfare of the child in custody determinations.[88]

> including any history of abuse of any individuals involved . . .; the needs of the child for a continuing relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child; the intention of either parent to relocate his residence outside the state; and which parent is more likely to allow the child frequent and meaningful contact with the other parent.

Id.

84. *G.A. v. D.A.*, 745 S.W.2d 726. The court did not examine the father's home environment and ignored the mother's statement under oath that she would discourage her child from engaging in a homosexual relationship. *Id*. at 729 (Lowenstein, J., dissenting).

85. *See supra* note 81.

86. MO. REV. STAT. § 452.375.5 (1997).

> Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider . . . [t]hird-party custody or visitation . . . custody . . . may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child.

Id.

87. *Supra* note 83.

88. Section 452.375.4 of the Missouri statutes states:

> The general assembly finds and declares that it is public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of a child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children.

A few recent Missouri cases illustrate a movement toward recognizing the rights of gay and lesbian parents and their partners.[89] For example, in 1998, the Missouri Supreme Court declared that a homosexual parent is not *ipso facto* unfit for custody.[90] In 2003, a trial court judge awarded visitation to a non-biological father based on fairness and the welfare of the child.[91]

The most promising Missouri case regarding non-parents' rights in a same-sex relationship is *In re T.L.*[92] In *T.L.*, a Missouri circuit court recognized the equitable parent doctrine.[93] Although the decision does not constitute binding precedent for other custody and visitation cases, it provides an example of how a court can circumvent previous negative court decisions and legislation to produce a fair result for homosexual parents and their children.

In arriving at its decision, the *T.L.* court recognized the problems presented by "[s]ocial fragmentation and the myriad configurations of the modern family."[94] "Courts must recognize that custody and visitation disputes no longer occur only between heterosexual couples," and these issues must be resolved "in a way which minimizes the detriment a child suffers."[95] Further, "[c]ourts must be ever cognizant of the child's need for stability in his life and continuity in his personal relationships."[96] To manage the changing family dynamic, the *T.L.* court recommended the adoption of a "more

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MO. REV. STAT. § 452.375.4 (1997).

89. *See* J.A.D. v. F.J.D. III, 978 S.W.2d 336 (Mo. 1998); *In re* T.L., No. 953-2340, 1996 WL 393521 (Mo. Cir. May 7, 1996).

90. *J.A.D.*, 978 S.W.2d at 339.

91. *See* Kelly Kress, *Man Wasn't Father But Is Awarded Visitation: Biological Dad Was in Prison for Homicide*, MO. LAW. WKLY., Feb. 17, 2003 (discussing *Gain. v. Gain*, MLW No. 32646 (Mo. Co. Cir. Ct., Feb. 4, 2003)).

> It is clear to the court that under the unique facts of this case the welfare of the child requires that Husband be awarded third party custody rights . . . . The person would be hurt most severely by cutting off any relationship between [the girl] and Husband is [the girl]. It's just not fair to [the girl] to have to suffer this additional grief.

Id.

92. *T.L.*, 1996 WL 393521, at *1.

93. *Id.* at *2.

94. *Id.*

95. *Id.*

96. *Id.*

flexible 'functional approach'"[97] in which a family is defined by "determining whether a relationship shares the essential characteristics of a traditionally accepted relationship, such as economic cooperation, participation in domestic responsibilities, and affection between the parties."[98]

In adopting the equitable parent doctrine, however, the *T.L.* court did not simply overrule a biological or legal parent's right to custody in favor of the child's best interest. The court balanced parental custodial rights and the right to choose with whom a child associates against the "state's interest as *parens patriae* in the child's welfare."[99] In doing so, the court adopted the actual detriment to the child test,[100] a middle ground between the best interests of the child and the parental unfitness test.[101] As part of the balance, the court stressed the serious problem of public scrutiny and private biases,[102] and

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97. *Id*. The court opposed the "traditional, stricter 'formal approach' for defining family" because it "defines family according to the traditional nuclear model and, therefore, recognizes only individuals related to each other by blood, adoption, or marriage." *Id.*

98. *Id*. The term family should be defined in the context of modern relationships. *Id*. It is a "continuing relationship of love and care, and an assumption of responsibility for some other person." *Id*. (quoting *In re* Adult Anonymous II, 452 N.Y.S.2d 198, 201 (N.Y. App. Div. 1982)).

99. *Id*. at *3.

100. *In re* Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981).

> [T]o give custody to a nonparent there must be more than the 'best interests of the child' involved, but less than a showing of unfitness. In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the state's interest in the child's welfare. There must be a showing of actual detriment to the child, something greater than the comparative and balancing analysis of the 'best interests of the child' test.

Id.

101. *T.L.*, 1996 WL 393521, at *3. "The 'best interests' test does not adequately protect a biological parent's primary right to custody and the 'parental unfitness' test does not sufficiently protect a minor child's welfare . . . ." *Id*.

102. *Id*.

> Discrimination toward individuals who do not conform with mainstream society is a serious problem [that cannot be ignored.] . . . Courts can no longer directly or indirectly give private biases effect; *i.e.*, the Court may not deprive A.L. of custody of or visitation with the minor child simply because she pursues a life-style at odds with the norm.

Id. at *3; *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that "[t]he Constitution cannot control such [racial] prejudices but neither can it tolerate them"). *Contra* G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (noting that homosexuality "can never be kept private enough to be a neutral factor in the development of a child's values and character");

suggested that although a parent's sexual orientation "is not a permissible basis for the denial of custody or visitation," it should be considered in determining the needs of the child.[103]

In applying the functional approach and the actual detriment to the child test, the *T.L.* court found that "A.L. [(the homosexual partner)] and the minor child have formed a family unit, and . . . disruption of that stability and continuity by elimination of contact between A.L. and the minor child will result in actual detriment to the minor child."[104] Based on this finding and despite the lack of statutory authority, the court exercised its equitable authority by applying the equitable parent doctrine, thereby awarding visitation rights to A.L.[105]

V. PROPOSAL FOR IMPROVEMENTS IN MISSOURI LAW

The issue of homosexual parenting is not a matter of condoning homosexual behavior; it is a human rights issue involving children who do not deserve to be harmed because of a moral disagreement as to their parents' choices. In fact, research indicates that it is more traumatic for a child to lose a parental figure, such as when courts do not recognize same-sex relationships, than it is to be raised by a homosexual parent.[106] Unfortunately, homosexual parents, particularly in Missouri, are often treated differently despite evidence of their ability to successfully raise children.[107] To avoid this, Missouri courts and legislators should follow the analysis set forth by

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S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) ("We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen."); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (noting that exposure to embarrassment is not simply a product of who a child lives with, but rather a product of the identity of the child's parents).

103. *T.L.*, 1996 WL 393521, at *4. "Homosexuality in and of itself should not be a bar to custody or to reasonable rights of visitation, which must be determined with reference to the needs of the child rather than the sexual preferences of the parent." *Id.*; *see also* A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. App. 1992).

104. *T.L.*, 1996 WL 393521, at *4.

105. *Id.* at *5. During periods of physical custody, both women were restricted from having any unrelated person over the age of twelve spend the night. *Id.* at *7.

106. *See supra* notes 35, 37–41.

107. *See supra* note 82.

In re T.L.[108] to recognize a functional parent-child relationship intentionally created by a legally recognized parent.

The Supreme Court has paved the way for the recognition of rights and responsibilities of members of nontraditional families.[109] The Court has recognized the existence of the nontraditional family, advocated for a broad interpretation of the term family, protected the rights of both parents and children, and recognized the privacy rights of homosexuals.[110] In addition to the guidance provided by the Supreme Court, legislators and courts across the country have expanded the rights of homosexuals as couples and as parents,[111] and researchers have shown that homosexuals can be successful parents.[112]

There is little argument against deference to the decisions of fit parents as to their children's upbringing. However, courts should expand their definitions of parent to include a psychological parent, so as to avoid punishing children for the choices of their parents. When a homosexual couple legally barred from marriage or adoption agrees, nonetheless, to raise a child together, that child should not have to lose the love and support of one parent if the couple later decides to end their relationship. At the same time, the rights and responsibilities of parenthood should not be given without careful analysis of the relationship between the putative parent and the child, as demonstrated in *In re T.L.*[113] A third party stranger should not overrule a biological parent's rights without a sufficient parent-like relationship to the child.

The ideal solution to this issue is statutory reform. Although Missouri judges can circumvent the state's current legislation to grant

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108. For a discussion of the court's analysis, see *supra* notes 93–103.
109. *See supra* notes 7–31.
110. *Id.*
111. *See supra* notes 33–34, 42, 45–46, 58.
112. *See supra* note 38.
113. *In re* T.L., No. 953-2340, 1996 WL 393521, at *2 (Mo. Cir. May 7, 1996).

> A.L. has proven by clear and convincing evidence that (1) she and the minor child mutually acknowledge a relationship as parent and child, (2) Y.R. cooperated in the development of the parent-child relationship, (3) she desires to have the rights afforded to a parent, and (4) she is willing to take on the responsibility of supporting the minor child.

Id.

rights and responsibilities to homosexual parents, the legislature should take a hard look at its current adoption statute and revise the wording to provide an alternative to the cut-off provision,[114] or to explicitly allow second-parent adoption. This would decrease the burden on the court system by avoiding the uncertainty of applying equitable remedies, and would align the Missouri adoption statute with the state's interest in protecting the child[115] and with the nation's interest in promoting pluralism.[116]

Unfortunately, the Missouri legislature has been slow to recognize the rights of homosexuals, and Missouri citizens have illustrated their animus towards gays by passing a ban on gay marriage.[117] As individuals who witness the effects of the current legislation and policies on homosexual parents, Missouri judges should not wait for the legislature to reform its statutes to broaden the definition of parenthood and adoption eligibility. Lack of legislation is not an excuse to avoid the issue. In fact, Missouri courts face the controversy of non-traditional familial and parenting arrangements on a regular basis. However, most courts have recognized the rights of third parties in cases in which heterosexual parents are involved, but

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114. Missouri's cut-off provision is similar to that of other states. *See supra* note 34. Section 453.090.1 of the Missouri statutes states:

> When a child is adopted in accordance with the provisions of this chapter, all legal relationships and all rights and duties between such child and his natural parents (other than a natural parent who joins in the petition for adoption as provided in section 453.010) shall cease and determine. Such child shall thereafter be deemed and held to be for every purpose the child of his parent or parents by adoption, as fully as though born to him or them in lawful wedlock.

MO. REV. STAT. § 453.090.1 (1997).

115. *See supra* notes 83 and 88.

116. *See supra* note 11.

117. MO. CONST. art. I, § 33 (amended 2004). "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman." *Id.*; *see also* MO. REV. STAT. § 451.022 (2004).

> 1. It is the public policy of this state to recognize marriage only between a man and a woman. 2. Any purported marriage not between a man and a woman is invalid. 3. No recorder shall issue a marriage license, except to a man and a woman. 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.

Id.

have not applied an equal standard to cases involving homosexual parents.[118]

Despite facing these same obstacles, many other state courts have found ways to award rights and responsibilities to homosexual parents, and Missouri should do the same. Many courts construe their current adoption statutes to include second-parent adoptions,[119] in which the legal or biological parent does not have to give up his or her rights and responsibilities. Others find the situation of a homosexual parent similar to that of a step-parent, and apply the step-parent exception.[120] Other courts ignore the statutory language and rely instead on principles of equity and fairness by applying the equitable parent doctrine to award rights and responsibilities to ex-partners who meet established criteria.[121]

The judge in *In re T.L.* faced the challenge of homosexual parents' rights head on, employed the equitable parent doctrine, and set an example for Missouri judges and legislators alike. Missouri courts should adopt the functional test set forth by *In re T.L.*, and should balance the rights of the legal parent against the best interests of the child to determine the outcome of these difficult cases. The key is to respect parental autonomy, but to limit it when the child is at risk of having a parental figure cast out of his or her life.

The analysis in *In re T.L*, Missouri's public policy in favor of the welfare of the child in custody determinations, and the increasing recognition of the rights of homosexuals throughout the United States provide hope that Missouri will continue to improve its treatment of gays and lesbians in custody and visitation conflicts. However, homosexual parents in Missouri should not rely on this hope. To guard against the absence of statutory or equitable remedies, same-sex couples should plan ahead by drafting agreements regarding parental responsibilities, including their intention to continue co-parenting in the event the relationship ends. Couples who have entered into such agreements must then honor them; the alternative—taking their chances in court—currently carries unacceptable risks.

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118. *See supra* notes 82–85.
119. *See supra* notes 48–51.
120. *Supra* note 52.
121. *See supra* note 60.

CONCLUSION

Homosexual couples who plan families together and later terminate their relationship should not face stricter standards simply because they are in the vanguard of an era in which family structure is changing and tradition is being redefined. A child's well-being and the opportunity to be raised in a loving, stable environment, in Missouri and in all other states, should be the most important factor in determining custody and visitation. A person who is lacking only a legal or biological tie to be recognized as a parent should have an opportunity to gain custody or visitation rights regardless of his or her sexual orientation. If Missouri will not allow gay marriage or second-parent adoption, it should recognize the equitable parent doctrine to protect its children.