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Flesh of My Flesh but Not My Heir: Unintended Disinheritance

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FLESH OF MY FLESH BUT NOT MY HEIR: UNINTENDED DISINHERITANCE

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I. INTRODUCTION

Adoptions by same sex partners are becoming more common, with at least five hundred in California alone.[1] Furthermore, "an estimated 10,000 lesbians and gay men have had or adopted children during the past 10-15 years . . . ."[2] Same sex adoptions may occur if someone who has been acting in a parental capacity adopts his or her partner's legal child.[3] For example, a lesbian may

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* Associate Professor of Law, California Western School of Law; J.D., Stanford Law School, 1987; B.A., Stanford University, 1983. I extend my gratitude to Professor Gilbert A. Holmes for reviewing this article and providing constructive feedback. I am also grateful to organizers of the Third Annual Mid-Atlantic People of Color Legal Scholarship Conference for inviting me to present this paper, to commentators at the Western and Southwestern/Southeastern Law Professors of Color Conference for their suggestions when I presented this paper as a work in progress, and to Dean Smith at California Western School of Law. Research assistants Magnolia Mansourkia and Jacquiline Wagner and librarian Linda Weathers provided extraordinary assistance on short notice, and Sandy Murray and Mary-Ellen Norvell not only provided exceptional secretarial support, but also displayed angelic patience. Of course, any mistakes are my own, as are the views expressed in this comment.

[1] Telephone Interview with Shannon Minter, attorney with the National Center for Lesbian Rights (Jan. 15, 1997). In order to avoid confusion, I will refer to adoptions by either or both of same sex partners with the more inclusive term "same sex adoptions," and will refer to adoptions by non-biological partners of their partners' natural children as "second parent adoptions." For definitional purposes, the term "natural children" refers to either one's biological child or legally adopted child.

[2] HAYDEN CURRY, DENIS CLIFFORD, & ROBIN LEONARD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 3-4 (9th ed. 1996) [hereinafter LEGAL GUIDE].

[3] I am not sure exactly when or where the term "second parent adoption" was coined, but it appears as far back as 1986, in Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986). Zuckerman defines the term "second parent" adoption as an "adoption of a child by her parent's nonmarital partner, without requiring the first parent to give up any rights or responsibilities to the child." *Id.* at 731. For purposes of this article, the singular "child" includes "children," when appropriate, and the plural "children" includes the singular "child," when appropriate.

adopt her partner's biological child.[4] In that case, the parent-child relationship between the biological mother and child should clearly continue, and in many cases, it does.[5] However, even if the parent-child relationship is acknowledged during their lives, it can terminate if one party dies, resulting in the loss of inheritance rights between a biological parent and child, even if they have had a lifetime parent-child relationship. The thrust of this article is that inheritance rights vis-a-vis a legal parent and child should *not* terminate upon a same sex partner's adoption of that child.

This article briefly explains how the laws of intestacy and adoption work together, providing background information on second parent adoptions.[6] It then describes why these laws are inadequate for same sex partners who adopt each others' children. It is impractical to cover statutes throughout the United States, and because I seek legal reform in California, this article focuses on California statutes, with occasional reference to the Uniform Probate Code. However, the problems caused by California's statutes also arise in other states with similar statutes. Therefore, the issues raised in this article, as well

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[4] *See* Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233 (1995) (discusses the mechanics of carrying out a second parent adoption); Zuckerman, *supra* note 3 (discusses benefits of second parent adoptions and urges judges to allow such adoptions when they are in the best interests of the child).

[5] *See, e.g.*, *In re* Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992), *In re* Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993). Note, however, that these have not necessarily been easy victories, and some jurisdictions and courts have refused to allow same sex adoptions. *See* FLA. STAT. ANN. § 63.042(3) (West 1997) ("No person . . . may adopt if that person is a homosexual . . . ."); N.H. REV. STAT. ANN. § 170-B:4 (1995) ("[A]ny individual not a minor and not a homosexual may adopt."). *See also In re* Adoption of Bruce M., No. A-62-93 (D.C. Super. Ct. Fam. Div. Apr. 20, 1994) (denying gay couple's joint petition to adopt); *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994) (denying lesbian couple's joint petition to adopt).

[6] While this article does not focus on whether same sex partners should be able to adopt a child, together with all the rights and responsibilities that emanate from that right, I believe such adoptions should be allowed, as do many other authors who have addressed this topic. *See, e.g.*, Bryant, *supra* note 4; Deborah Lashman, *Second Parent Adoption: A Personal Perspective*, 2 DUKE J. GENDER L. & POL'Y 227 (1995); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91 (1996); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995); 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 (1990); Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009 (1989); Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055 (1995).

as the solutions proposed, are relevant in other states. The article closes with a suggestion for legal reform that is necessary to prevent penalizing same sex families who adopt and denying them equal protection of the laws.

At the outset, I should establish my position on this topic and how I came to it. First (but not necessarily most importantly), I teach Trusts and Estates, and am generally interested in the transfer of property on death. Every year when I teach about inheritance rights between a biological parent and that parent's child who is later adopted,[7] I am bothered by how the legal system penalizes people in same sex relationships or other "families by choice or need."[8] For example, biologic parents who consent to their partners' adoption of their children are rarely allowed continued inheritance rights by, from, or through their "adopted" children, even if their relations with their children have been uninterrupted.[9] Existing law thus does not adequately serve these families by choice or need. Second, I am interested in outsider jurisprudence and my teaching, scholarship, and community activism generally focus on outsider issues—working for greater rights for voices that have historically been silenced.[10] The marginalization of same sex couples in their quest to form families is yet another example of how outsiders are not granted the same rights as those traditionally in power. Through this article, I hope to bring attention to this issue and propose a way for second parents to achieve greater equality not only during life but, as importantly, after death.

II. STATUTORY FRAMEWORK

In order to establish a legal framework, it is important to familiarize the reader with basic intestacy laws. If one dies intestate, that is, without a will, then the decedent's property will descend according to the statutes of descent

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[7] CAL. PROB. CODE § 6451 (West 1997).

[8] I originally used the term "nontraditional families," but now prefer Professor Elvia Arriola's use of the term "families by choice or need." *See* Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 J. FAM. L. 691 (1996-97). "Non-traditional" can be offensive because it references "traditional" as the norm, which by implication causes "non-traditional" to be abnormal.

[9] *See infra* text accompanying note 25. CAL. PROB. CODE § 6451 is representative of legislation concerning adoption and inheritance. It disallows inheritance vis-a-vis biologic parents and children following adoption, unless the adoption was by a stepparent.

[10] *See, e.g.*, Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue* (forthcoming); Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities* 2 HARV. LATINO L. REV. (forthcoming 1998).

and distribution in the state where the decedent is domiciled. In most states, the first in line to take is a spouse, followed by issue, to the exclusion of other relatives.[11] Probate codes commonly define issue as lineal descendants, which typically includes adopted persons.[12]

It is also important to understand the impact of adoption on parent-child relationships and how California's intestacy laws treat adoption. While a parent-child relationship exists for intestacy purposes between a person and that "person's natural parents, regardless of the marital status of the natural parents,"[13] the parent-child relationship also "exists between an adopted person and the person's adopting parent or parents."[14] By implication, one cannot have a parent-child relationship with both biological and adoptive parents.[15]

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[11] JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 80-81 (5th ed. 1995). In California, a surviving spouse takes all of a decedent spouse's community property and quasi-community property, together with a percentage of the decedent spouse's separate property, ranging from one-third to one hundred percent. CAL. PROB. CODE § 6401 (West 1997). Any property that does not go to a spouse descends to issue, parents, issue of parents, grandparents, issue of grandparents, step-children, next of kin, parents-in-law, or siblings-in-law. CAL. PROB. CODE § 6402 (West 1997).

[12] In California, "issue" is defined as "lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent." CAL. PROB. CODE § 50 (West 1997). The relationship of parent and child is later defined as existing "between an adopted person and the person's adopting parent or parents." CAL. PROB. CODE § 6450(b) (West 1997).

[13] CAL. PROB. CODE § 6450(a) (West 1997). *See also* UNIF. PROB. CODE § 2-114(a) (West 1996). For all intents and purposes, these provisions do not confer parental status on anyone other than biological parents. Some exceptions arise under the Uniform Parentage Act. For example, if a child is born to a married woman, the husband is presumed to be the father, even if the biological father is someone else (i.e., she became pregnant as a result of rape, an extramarital affair, or through the sperm of a known or anonymous donor). *See* CAL. FAM. CODE §§ 7600-7730 (West 1997); Michael H. v. Gerald D., 491 U.S. 110 (1989).

[14] CAL. PROB. CODE § 6450(b) (West 1997). *See* UNIF. PROB. CODE § 2-114(b) (West 1996) (The UPC adds a clause which states that "adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent, or (ii) the right of the child . . . to inherit for or through the other natural parent.").

[15] "Under nuclear family-based adoption policy, the law terminates the birth parents' rights before it engrafts parental rights on the adoptive parents." Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1653 (1995).

California's adoption laws are more explicit. Typically, prior to adoption, birth parents sign a consent to adoption.[16] Following adoption, they forfeit all rights and obligations arising out of the parent-child relationship.[17] "The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child."[18] Thus, family law policy suggests that the adopted person should be treated as re-born into the adoptive family. Accordingly, adoption establishes a parent-child relationship between the adopted person and the adoptive parents, and severs ties to the biologic family.[19]

The effect of California's intestacy and adoption laws working together is that an adopted person has inheritance rights vis-a-vis that person's adoptive family, but not through the biologic family.[20] When the adoption involves a true third party or stranger,[21] the severance policy appropriately promotes a fresh start with the new family, removing interference by the biologic family members.[22] In some circumstances, however, it is inappropriate and inequitable to sever ties with biologic family members. Many legislatures and lawmakers have recognized this and created an exception to parental termination for stepparent adoptions.[23] To ensure that

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[16] *See* CAL. FAM. CODE § 8605 (West 1997). While the consent of both biological parents is normally required, there are exceptions. For example, if a birth mother became pregnant through artificial insemination, using the sperm of an anonymous donor, her consent alone is sufficient. *See* CAL. FAM. CODE §§ 8605, 7611 and 7613(b) (West 1997). *See also* CAL. FAM. CODE §§ 8604, 8606 (West 1997).

[17] *See* CAL. FAM. CODE § 8617 (West 1997).

[18] CAL. FAM. CODE § 8617 (West 1997).

[19] *See* UNIF. ADOPTION ACT § 1-105 (1994); Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, 10 (Summer 1982).

[20] CAL. PROB. CODE §§ 6450(b), 6451 (West 1997).

[21] Third party or stranger adoptions involve adoptions by persons unrelated to the adoptee. Interestingly, unlike in the past when many adoptions were by strangers, "[i]n recent years, no more than 25-30% of all adoptions involve infants adopted by unrelated adults." *See* UNIF. ADOPTION ACT, Prefatory Note (West Supp. 1997).

[22] *See, e.g.*, Crumpton v. Mitchell, 281 S.E.2d 1, 4 (N.C. 1981) ("[B]y adoption the child adopted becomes legally a child of its new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents." (quoting Crumpton v. Crumpton, 221 S.E.2d 390, 393 (N.C. Ct. App. 1976), *vacated*, 227 S.E.2d 587 (N.C. 1976))); *In re* Estates of Donnelly, 502 P.2d 1163, 1166 (Wash. 1972) (There is a "broad legislative objective of giving the adopted child a 'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past.").

[23] *See* CAL. FAM. CODE § 9306(b) (West 1997) ("Where an adult is adopted by the spouse of a birth parent, the parental rights and responsibilities of that birth parent are not affected by

a biologic parent in a stepparent adoption is aware of this exception, adoption consent forms from birth parents in California must contain the following language:

> Notice to the parent who gives the child for adoption: If you and your child lived together at any time as parent and child, the adoption of your child by a stepparent does not affect the child's right to inherit your property or the property of other blood relatives.[24]

Likewise, intestacy laws recognize continued legal relationships with certain biologic relatives in stepparent adoptions and some other limited adoptions by natural relatives. These laws provide in part:

> (a) An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person unless both of the following requirements are satisfied:
>
> (1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth.
>
> (2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

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the adoption." Interestingly, this language appears only for adoption of adults but not for adoption of minors.) *See also* CAL. PROB. CODE § 6451 (West 1997), discussed *infra* in detail in the text accompanying notes 25-28. *See also* UNIF. ADOPTION ACT § 4-103 (West 1996); UNIF. PROB. CODE § 2-114 (1990). For discussions of why a stepparent exception is justified, see Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended?*, 77 CORNELL L. REV. 1188 (1992); Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?*, 1988 WIS. L. REV. 321; Barbara C. Quissel, Note, *Adoption–Intestate Succession–The Denial of a Stepparent Adoptee's Right to Inherit from an Intestate Natural Grandparent: In Re* Estate of Holt, 13 N.M. L. REV. 221 (1983).

California also extends inheritance rights in favor of an adopted person from his or her natural relatives if there was a parent-child relationship between that person and the natural parent(s) and the adoption was after the death of the natural parent(s). *See* CAL. PROB. CODE § 6451(a) (West 1997).

[24] CAL. FAM. CODE § 9004 (West 1997). The statutory language does not distinguish between custodial and non-custodial parents, thus further adding to the confusion in this area.

(b) Neither a natural parent nor a relative of a natural parent, except for a wholeblood brother or sister of the adopted person or the issue of that brother or sister, inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and the natural parent that satisfies the requirements of paragraphs (1) and (2) of subdivision (a), unless the adoption is by the spouse or surviving spouse of that parent.[25]

The first prong of subdivision (a) is easy to fulfill in second parent adoptions because the adopted person has typically lived with the natural parent, usually the biological mother, in a parent-child relationship, and continues to live in a parent-child relationship.[26] In states that do not recognize same sex marriages,[27] however, the second prong cannot be met in a second parent adoption because the adoption is not by the spouse of a natural parent.[28] Because both prongs would have to be met in order for a parent-child relationship to be preserved, the relationship between the biologic parent and child would be terminated in second parent adoptions.

To illustrate, let us explore the case of Susan and Helen.[29] Susan conceived a child by artificial insemination, using sperm donated by her partner, Helen's, cousin.[30] Helen sought to legally adopt the child, Tammy.[31]

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[25] CAL. PROB. CODE § 6451(a)-(b) (West 1997).

[26] Note that natural mother can also refer to a legal mother by adoption. Interestingly, it is not unusual for both the biological mother and her same sex partner to live with the child from birth. For a description of a non-biological parent's attempt to adopt the children who she and her partner, Jane, planned, and who Jane conceived and birthed, see Lashman, *supra* note 6.

[27] "At the present time, no state allows marriage between two people of the same sex." Mishra, *supra* note 6, at 95 n.18. For a probing discussion of same sex marriage and the validity of such marriages in other states, see Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033.

[28] Even if a same sex couple is not legally married, they are not precluded from arguing that an adoption by the non-biological parent is analogous to a stepparent adoption, or that an unmarried partner can indeed become a stepparent. *See* LEGAL GUIDE, *supra* note 2, at 3-4. However, under the literal language of California's statute in its present form, a formalistic court could easily discard such an argument.

[29] The names of Susan, Helen, and Tammy come from Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993). However, the hypothetical situations laid out in the text are purely fictive, tied to real people simply to demonstrate how genuine the problems are that are laid out in this comment.

[30] Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993).

[31] *Id.* at 316-17. Although it was clearly important for Helen to adopt Tammy for

Although it took some work,[32] she succeeded.[33] Let us change the facts somewhat. Suppose that Helen succeeded in adopting Tammy and then Susan and Helen moved to California. Shortly thereafter, Tammy's biological mother, Susan, died intestate survived by Tammy and Helen. Is Tammy Susan's heir in California? To answer this question, we must refer to § 6451 of the California Probate Code. Subdivision (a) determines whether a parent-child relationship existed between the adopted person, Tammy, and the natural parent, Susan, for purposes of determining Tammy's inheritance rights.[34] Tammy and her natural parent, Susan, clearly lived together as parent and child, thus fulfilling the first prong of the test. But they cannot meet the second prong because the adoption by Helen, Susan's partner, was not by Susan's spouse (because same sex marriages are not currently recognized in California). Furthermore, the adoption was not after the death of a natural parent—it was prior to Susan's death. While there is no compelling policy reason to deny inheritance rights to Tammy from her natural mother, that is precisely what happens under current California law. Thus, the law neither adequately nor properly addresses Tammy's position in the family. She cannot inherit from Helen, even though Helen is her biologic parent and Tammy and Helen lived together in a parent-child relationship all of Tammy's life. The result is that the law penalizes Tammy because she is part of a family by choice or need.

To make matters worse for this family, because Susan and Helen are not married, Susan's estate cannot descend to Helen, who would otherwise likely use that property to help raise Tammy. The first in line to take under California law is Susan's parent or parents. Assuming one or both of them are still alive and that they had a good relationship with Susan and have a good relationship with Tammy, they could either transfer the property directly or

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emotional reasons, there were significant legal reasons underlying the decision, including reasons related to inheritance.

> Susan indicated that the adoption is important for Tammy in terms of potential inheritance from Helen. Helen and her living issue are the beneficiaries of three irrevocable family trusts. Unless Tammy is adopted, Helen's share of the trusts may pass to others. Although Susan and Helen have established a substantial trust fund for Tammy, it is comparatively small in relation to Tammy's potential inheritance under Helen's family trusts.

Id. at 317.

[32] *Id.* at 315-16.

[33] *Id.* at 321.

[34] CAL. PROB. CODE § 6451(a) (West 1997).

indirectly to Tammy,[35] or use Susan's property to help raise Tammy. But if they disapproved of the relationship, it is unlikely that they would use any of the property to help raise Tammy. From a policy perspective, this is an undesirable result. Under intestacy laws, Tammy would be disinherited and there is the possibility that she would be a ward of the state even though her biological mother who raised her died with property.

Allow me to change the facts ever so slightly. Let us say that Susan is still alive and Tammy grows up to be an entrepreneur in the style of Bill Gates.[36] Helen died a few years ago and she had long been estranged from her family because they disapproved of her lifestyle.[37] Tammy, who is single and childless, then dies intestate in a car accident on the way to a meeting with an estate planning attorney.

To determine who will take Tammy's property, we turn again to § 6451 of the California Probate Code, but this time to subdivision (b), which controls whether a natural parent or relative can inherit from an adopted person. It states that a natural person can take so long as a parent-child relationship is established under subdivision (a) and the adoption is by the spouse of a natural parent.[38] We have already established that a parent-child relationship existed because Susan and Tammy lived together as mother and child. However, Susan's legal spouse did not adopt Tammy (even if Helen is considered a de facto spouse). Thus, it appears that Susan, Tammy's biological mother with whom Tammy had a loving parent-child relationship throughout her life, will not be able to inherit Tammy's estate. Nor will any other biologic relatives inherit through Susan because the adoption also cuts off their rights. Tammy's adoptive mother, Helen, predeceased her, and since Tammy is single and without children, her property will descend to her adoptive grandparents, Helen's parents. They disowned Helen and have never had a relationship with Tammy. They did not participate in raising her and did not have a relationship with her.

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[35] For example, they could make a gift under the Uniform Transfers to Minors Act. CAL. PROB. CODE §§ 3900-3909 (West 1997). They also could fund a trust with Susan's estate, with Tammy named as a beneficiary under the trust.

[36] In 1996, William Henry Gates III, founder of Microsoft, had a net worth estimated at $18.5 billion. Ann Marsh, *Meet the Class of 1996*, FORBES, Oct. 14, 1996, at 108.

[37] Tammy still takes under the family trusts, of course.

[38] CAL. PROB. CODE § 6451(b) (West 1997).

Is it appropriate or logical that Tammy's adoptive grandparents inherit from Tammy to the exclusion of Tammy's biological mother, Susan? I argue it is not and the laws should be reformed to carry out the policies underlying the laws.[39] For example, one of the primary policies underlying trusts and estates' law is to carry out the average decedent's intent.[40] Yet current intestacy laws contravene this policy insofar as they mandate that a same sex decedent in effect disinherits her own child when she allows her partner to adopt that child. Her more likely intent, like any parent, would be to provide for her child on death. It is even more important for laws to preserve inheritance rights in same sex families, because in these families there is no spouse who would otherwise be first in line to inherit property. If the partner could take as a spouse, there are reasonable reassurances that partner would use a portion of the inherited property for the child's benefit. But if there is no spouse and the child cannot inherit, then the policy favoring carrying out the decedent's intent is not furthered.

Another policy underlying trusts and estates law is to provide protection for surviving family members.[41] Yet current laws prevent the implementation of this policy in second parent adoptions because those laws effectively disinherit a biologic mother's surviving children if her partner adopts her children. Accordingly, these laws are not only inadequate, they are contrary to the policies underlying the laws. They therefore require change to respond to the needs of more families. Legislatures have modified laws to create stepparent exceptions for similar reasons, thus causing those laws to reflect the likely desires of modern stepfamilies that do not fit the stereotypical nuclear family pattern. As other non-nuclear family types develop, the law must respond to the needs and desires of those family models, and its "paramount concern should be with the effect of our laws on the reality of children's lives."[42] One court explained:

> It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.

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[39] For a proposal that addresses this legal shortcoming, *see infra* Part IV.

[40] "The primary policy [in framing an intestacy statute] . . . is to carry out the probable intent of the average intestate decedent." DUKEMINIER & JOHANSON, *supra* note 11, at 70.

[41] *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 11, at 473-562 (discussing federal and state laws which protect a surviving spouse and children); *see also* CAL. PROB. CODE §§ 6560-62, 6570-73 (West 1997).

[42] *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

> But it is the courts that are required to define, declare and protect the rights of children raised in these families . . . .[43]

The legal system could provide greater protection for families by choice or need by rewriting stepparent exceptions so inheritance rights extend to any natural parent or relative who continues familial relations with an adopted person, such as in second parent adoptions and adoptions by a child's other relatives.[44]

III. LEGAL OPTIONS AND SHORTCOMINGS

A. Overview of Options

Same sex partners can address the inadequacies and unfairness of current laws through a variety of approaches in order to establish property rights on death vis-a-vis one partner's child. They can simply live as a family without legal recognition of their family unit, but take advantage of legal mechanisms for transferring property on death. For example, they can execute wills, trusts, and other non-probate instruments that give their property to their partners and children. Then they have to hope that the documents will not be challenged later, and that courts will give them effect.[45] Alternatively, they can jointly petition to adopt each other's children, thus assuring a legal relationship during life, which continues on death, between the child and both de facto parents.[46] Finally, through a limited consent adoption, the non-biological parent can adopt her partner's child, and if the court recognizes the biological

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[43] *Id.*

[44] *See* Fuller, *supra* note 23, at 1190.

[45] There are many cases in which biological family members have contested gifts to same sex partners on the grounds that the gifts were procured by fraud, undue influence, duress, or other wrongful behavior. *See, e.g., In re* Estate of Spaulding, 187 P.2d 889 (Cal Ct. App. 1947); *In re* Will of Kaufmann, 247 N.Y.S.2d 664 (App. Div. 1964), *aff'd,* 205 N.E.2d 864 (1965); *In re* Estate of Anonymous, 347 N.Y.S.2d 263 (Sur. Ct. 1973); *Legal Challenges to AIDS Patients' Wills Seen on Rise*, L.A. DAILY J., Aug. 16, 1988, at 1. *See also* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 246 (1981) ("The evidence . . . suggests that the lover-legatee of a homosexual testator faces a more difficult task at probate than does his heterosexual counterpart.") *Id.* Thus, just because one has taken the appropriate steps of designating who will take property on death, does not mean that one's intent will be carried out.

[46] The joint adoption option is discussed *infra* in Part III B.

mother's limited consent to the adoption, then the legal ties between her and her child will not be severed.[47]

There are a number of hurdles same sex partners face when considering joint adoptions or limited consent adoptions. First, these adoptions are costly both in terms of time and money.[48] Thus, many couples will be precluded from pursuing adoptions strictly for financial reasons. Another major shortcoming is that these adoptions are unavailable in states that prohibit gays or lesbians from adopting children outright.[49] Other states do not have statutory prohibitions against these adoptions, but they nonetheless have not allowed them thus far.[50] Trial courts in many states have allowed second parent adoptions,[51] as have at least two appellate courts.[52] Yet other states simply have not addressed this issue.[53] However, there is no statutory precedent for recognizing limited consent adoptions (other than in the

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[47] The limited consent option is discussed *infra* in Part III C.

[48] Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31, 33 (1995). Berner states that "[i]n Alameda County, California, one must pay $1,200 for a social worker's evaluation of the home in addition to legal fees for adoption. An adoption can take from six months to several years and outcomes are not guaranteed." *Id.* at n.12 (citing Telephone Interview with Shannan Wilber, Staff Attorney, Youth Law Center, S.F., Cal. (Jan. 12, 1995)).

[49] *See* FLA. STAT. ANN. § 63.042(3) (West 1995), N.H. REV. STAT. ANN. § 170-B:4 (1994), *supra* note 5, which prohibit adoptions by gay persons. In addition, Oklahoma, South Carolina, and Washington are considering legislation similar to that in Florida and New Hampshire. *See* Mishra, *supra* note 6, at 102.

[50] *In re* Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994) (court denied lesbian's petition to adopt her partner's daughter); *In re* Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996) (court denied two lesbians' petitions to adopt each other's children).

[51] *See In re* Adoption of a Minor Child (C), No. 1-JU-86-73 P/A (Alaska First Jud. Dist. 1987); *In re* Adoption of N.L.D., No. 18086 (Cal. Super. S.F. County, Sept. 28, 1987; *In re* Adoption of a Minor (T) & (M), Nos. A-269-90 & A-270-90 (D.C. Super. Ct. Fam. Div. Aug. 30, 1991); *In re* Petition of E.S. and R.L., No. 90 Coa 1202 (Ill. Cir. Cook County Mar. 14, 1994); *In re* Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); *In re* Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992); *In re* Adoption of M. by S. & A., No. D8503-61930 (Or. Cir. Ct. Sept. 4, 1985); *In re* Adoption of E.O.G. & A.S.G., 14 Fiduc. Repub. 2d 125 (Pa. C.P. York County Apr. 28, 1994); *In re* Adoption of R.C., No. 9088 (Vt. P. Ct. Addison Dist. Dec. 9, 1991); *In re* E.B.G., No. 87-5-00137-5 (Wash. Super. 1989).

[52] *See* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993).

[53] In fact, most states have not addressed this issue. *See* LEGAL GUIDE, *supra* note 2, at 3-4 to 3-5 (listing states that have approved or disapproved same sex adoptions, implying that the remaining thirty-four states have not addressed same sex adoptions).

stepparent adoption situation). Thus, a biological mother has no guarantee that she can allow her partner to adopt her child without her parental rights being terminated.

B. Joint Adoptions

One option for same sex partners to enhance their legal status as a family by choice is for the legal parent (either biological or adoptive) to petition jointly with her partner for the adoption of her child.[54] This eliminates inheritance problems, as well as other problems that may arise if the non-biological partner alone petitions for adoption,[55] because then both partners legally would be adoptive parents of the child. Thus, if the petitioners pursue this approach and successfully complete the adoption, they can then avoid the legal problems that arise when only one parent adopts the child.[56]

Some shortcomings of a joint adoption are that it is artificial, it is frequently more costly for two persons to consummate a joint adoption than for a single person to adopt, and it is somewhat risky for the biological mother because she gives up her "natural parent" status to become an adoptive mother, a psychologically large sacrifice. Furthermore, she then no longer has sole control over the child and if a judge denies the petition, she is then in limbo between her role as a birth parent consenting for her child to be adopted, and her role as a same sex partner attempting to adopt that same child.[57] This can be complicated by the difficulty of withdrawing consent in some cases.[58] For example, in stepparent adoptions, which are somewhat

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[54] *See, e.g., In re* M.M.D., 662 A.2d 837 (D.C. 1995). For a discussion of which states have thus far allowed joint adoptions, *see* LEGAL GUIDE, *supra* note 2, at 3-4 to 3-5. At least one state, Minnesota, requires the biological parent to consent to termination of her parental rights, followed by her jointly petitioning with her partner to adopt her child. *Id.*

[55] The biggest problem that may arise if the adoption petition of the non-biological parent is granted is that the rights and responsibilities of the biological parent can statutorily be terminated. *See supra* text accompanying note 17. This can cause problems if the biologic parent attempts to obtain benefits for her child, take her child out of school for whatever reason, travel internationally with her child, gain custody or visitation if the relationship with her partner terminates, etc.

[56] *See, e.g., In re* M.M.D., 662 A.2d 837 (D.C. 1995).

[57] *See* Teri Sweginnis, *Lesbian Couple Adoption in California: Will Governor Wilson's Directive Change the Status Quo?*, 16 J. JUV. L. 169, 170 (1995).

[58] *See* CAL. FAM. CODE § 9005 (West 1997).

analogous to joint adoptions, it is cumbersome for a birth mother to withdraw consent, which requires a court order.[59]

A final problem under this approach arises in California because of Governor Pete Wilson's directive not to approve adoptions by unmarried persons. In 1994, the California State Department of Social Services (DSS) issued an all-county letter proposing:

> [A] child's best interest is served by providing for his or her health, safety, and emotional well-being through placement in a stable and permanent home. That home may be one in which there are two parents with the support, both emotional and financial, that they can provide regardless of their marital status.[60]

Had the policy underlying this all-county letter remained in effect, it would have been easier for same sex partners to legalize their family relationship through joint adoptions.[61] Instead, shortly after the DSS issued this letter, Governor Wilson announced that the new policy should not be given effect and that, instead, the former policy should be reinstated.[62] The prior policy provided, in essence, that state and licensed private adoption agencies should not approve adoptions by unmarried couples.[63] It is beyond the scope of this comment to critique Governor Wilson's directive, but it sends out a very loud message that unmarried couples are not fit to be parents. It also denigrates the parenting skills of same sex couples, while simultaneously reminding them that they are deprived of equal protection of the laws because they cannot exercise the fundamental right to marry.[64] Furthermore, Governor Wilson's actions convert merely inadequate laws into statutes that penalize families by choice or need.

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[59] *Id.*

[60] CAL. STATE DEP'T OF SOC. SERV. ALL-COUNTY LETTER No. 94-104, *Adoptions by Unmarried Couples/Limited Consent Adoptions,* Dec. 5, 1994.

[61] While this was not as desirable as formalizing the process of converting de facto family status to legal family status through legislative change, it is preferable to a policy of disallowing adoptions by unmarried couples.

[62] Dan Walters, *Wilson Cancels Gay Adoptions*, SACRAMENTO BEE, Mar. 12, 1995, at A3. According to Dan Walters, the Governor's office never published a formal directive prohibiting gay adoptions. Telephone Interview with Dan Walters (Feb. 19, 1997).

[63] CAL. STATE DEP'T OF SOC. SERV. ALL-COUNTY LETTER No. 87-80, *Adoptions by Unmarried Couples/Limited Consent Adoptions,* June 15, 1987.

[64] For a discussion of Governor Wilson's directive, see Sweginnis, *supra* note 57. For a discussion of the same sex marriage debate, see Cox, *supra* note 27.

Some courts have approved joint adoptions,[65] thus presenting same sex partners a viable way to achieve legal family status. While joint petitions are preferable to disallowing same sex parent adoptions, they elevate form over substance in order to arrive at a legally recognized family relationship where a child has two legal, unmarried, adoptive parents. It remains ludicrous for a birth mother to give up a biological claim to her child in order to gain a legal claim through adoption. One way out of this conundrum is to allow same sex marriages.[66] Because, however, same sex marriage is not currently an option and because couples instead may actively choose not to marry, another option is to enact legislation or modify existing law to allow unmarried couples to adopt children. Alternatively, a legal parent's partner should be allowed to adopt the legal parent's children without terminating the legal parent's rights.

C. *Limited Consent Adoptions*

Limited consent adoptions are akin to stepparent adoptions. "In such adoptions, the biological mother's partner petitions on her own to adopt the biological mother's child without terminating the biological mother's parental rights."[67] Thus, while current laws typically require a legal parent to forfeit all parental rights and responsibilities when consenting to an adoption, that is not necessary with a limited consent adoption. As a New York court opined in *Adoption of Evan*,

> [W]here the adoptive and biological parents are in fact co-parents such as the instant case, New York law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the natural and

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[65] *See* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* M.M.D., 662 A.2d 837 (D.C. 1995).

[66] Many authors more directly address this issue. *See, e.g.*, Symposium, *The Family in the 1990s: An Exploration of Lesbian and Gay Rights*, 1 LAW & SEXUALITY 1 (1991); G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541 (1985); Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321 (1991); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1987); Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988). As indicated earlier, however, the same sex marriage debate is not the focus of this article.

[67] *See* Sweginnis, *supra* note 57, at 171. Note that limited consent adoptions are by the legal parent's partner, regardless of whether the legal partner is the biological mother or adoptive mother.

> adoptive parent where compelled by the best interests of the child is the only rational result and well within the equitable power of this court.[68]

I applaud the *Adoption of Evan* result,[69] which other courts have also supported.[70] An inherent problem, however, with limited consent adoptions is that the parties have to rely on a court's equitable powers, rather than statutory authority, to allow a legal parent the right to preserve the parent-child relationship with her child while simultaneously consenting to an adoption. Thus, courts may allow limited consent adoptions if they are willing to exercise this discretion, which is far from certain.[71] Limited consent second parent adoptions also require courts to liberally construe statutes drafted at a time when lawmakers probably did not contemplate this situation.[72] While most lawmakers probably did not consider same sex adoptions when drafting adoption intestacy statutes, and it is hard to understand why any court would terminate a biologic parent-child relationship in connection with a second parent adoption, most statutes permit this anomalous result. Although limited consent adoptions might provide a viable option for establishing the same types of inheritance rights that traditional families have, they are too ad hoc and too risky for real families by choice or need who are subject to the whim of a court's discretion.[73]

An additional problem with limited consent adoptions is that there is no reassurance that once a child is adopted, the parent-child relationship between the adopted child and the biologic parent will continue after death. This could result in the loss of all inheritance rights between the biological parent and child.[74]

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[68] 583 N.Y.S.2d 997, 1000 (1992).

[69] *Id.*

[70] *See, e.g., In re* Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. App. Div. 1995).

[71] *See* Berner, *supra* note 48, at 33.

[72] *But see* FLA. STAT. ANN. § 63.042(3); N.H. REV. STAT. ANN. § 170-B:4 (1994).

[73] It certainly was risky for the family to pursue a limited consent adoption in *In re* Dana, 624 N.Y.S.2d 634 (App. Div. 1995) (court denied limited consent adoption to non-biological parent because biological parent refused to forfeit her parental rights and the court enforced the consent requirement). On appeal, however, the court held that New York's relevant statutory law "does not invariably require termination [of parental rights] in the situation where the biological parent, having consented to the adoption, has agreed to retain parental rights and to raise the child together with the second parent." *In re* Jacob, 660 N.E.2d 397, 404 (N.Y. 1995).

[74] Of course, the child has inheritance rights vis-a-vis the adoptive parent, but not through the biological parent.

No court above a trial court has squarely addressed the parental rights termination issue in California, but courts elsewhere have.[75] Courts that have granted second parent adoptions without terminating the lifetime parent-child relationship between the biologic parent and child have typically had to read an exception into the relevant adoption statute, similar to the stepparent exception. This has required assessing "the purpose of specific termination provisions by balancing the purpose of adoption statutes and, where necessary, exercising discretion to effectuate an adoption."[76] Even in these cases, courts have had to carve out exceptions to the rule. Sometimes they have clarified in an adoption decree, a published opinion, or more likely, an unpublished opinion, that the biologic parent's rights have not been terminated. But what weight does that decree or unpublished opinion have when a biologic mother dies intestate and a hostile biologic family contests the distribution of the decedent's estate to the child?[77] Will her child be able to inherit from her? Probate statutes are very clear that on adoption, the parent-child relationship ceases between the natural parents and the child unless the adoption was after the death of one or both of the parents, or by the spouse of a natural parent.[78] Furthermore, some courts, including California's, traditionally interpret the probate code formalistically,[79] and hence could well be reluctant to read in exceptions to parental termination for intestacy purposes.

Rather than leave it for a court to literally apply a statute, thus denying inheritance rights to and from biologic family members, legislators should ensure inheritance rights by changing adoption and intestacy statutes. Professor Martha Minow has noted that "unless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology: merely statements of the kinds of human arrangements the

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[75] *In re* Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

[76] *See* Mishra, *supra* note 6, at 105.

[77] It is not uncommon for families of gays or lesbians to be hostile toward their "aberrant" children. *See Legal Challenges to AIDS Patients' Wills Seen on Rise*, L.A. DAILY J., Aug. 16, 1988, at 1.

[78] *See* CAL. PROB. CODE § 6451 (West 1997).

[79] Estate of Mangeri, 55 Cal. App. 3d 76 (4th Dist. 1976) (court invalidated a will because the signature requirement was not fulfilled where decedent made a mark over his typewritten name); Estate of Hart, 165 Cal. App. 3d 392 (4th Dist. 1984) (court prohibited collateral attack on out-of-state adoption decree, thus possibly terminating adopted child's right to inherit from natural father).

lawmakers do and do not endorse."[80] Maybe the law is irrelevant so long as people conduct and construct themselves as a family and all family members are healthy and happy. If one has been involved in planning for the birth of a child, has participated in the birthing process, has raised a child, has watched with agony as a partner succumbs to a fatal illness, and then is served with papers giving notice that the child's biologic, maternal grandparents are using funds they inherited from the partner's estate to seek custody of the child, the law is not irrelevant.[81] Presto—the child is gone. It is not only heartbreaking, but more importantly, it is not in the best interest of the child. Studies consistently show that the most important indicator of whether children will grow up to be productive members of society is whether those children have committed and caring adults in their lives.[82] If children have that opportunity, but the law takes away from them one loving and committed adult, then it does a tremendous disservice to society and may cause permanent harm to these children.

IV. A PROPOSAL FOR CHANGE

The same policy reasons for preserving inheritance rights vis-a-vis natural family members in stepparent adoptions exist in second parent adoptions or joint adoptions by unmarried couples.[83] As one court explained:

> [a]lthough the precise circumstances of these adoptions may not have been contemplated during the initial drafting of the statute . . . [t]he intent of the legislature was to protect the security of the family units by defining the legal

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[80] Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 271 (1991).

[81] My husband Terry and I will never be in that position because we are the biologic parents of a toddler, Jeremiah. I can only imagine the pain felt by a devoted parent who loves a child from depths that cannot adequately be explained to a non-parent, when that parent is told she is not a legal parent to the child, her parent-child relationship does not legally exist, and she therefore has no rights.

[82] JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 9, 11, 151-72 (1992) ("Each child contains the potential to be many different children, and caring adults can help to determine which of those children will come to life.") *Id.* at 9; THE INVULNERABLE CHILD 16-18, 84-105 (E. James Anthony & Bertram J. Cohler eds., 1987); Friedrich Lösel & Thomas Bliesener, *Resilience in Adolescence: A Study on the Generalizability of Protective Factors, in* HEALTH HAZARDS IN ADOLESCENCE 299-320 (Klaus Hurrelmann et al. eds., 1990); EMMY E. WERNER & RUTH S. SMITH, VULNERABLE, BUT INVINCIBLE: A LONGITUDINAL STUDY OF RESILIENT CHILDREN AND YOUTH 103-105 (1982).

[83] *See* Fuller, *supra* note 23, at 1214-15.

> rights and responsibilities of children who find themselves in circumstances that do not include two biological parents.[84]

Furthermore, in second parent or joint adoptions, there are continuous, uninterrupted relationships between the biologic mother who has never ceased acting as the child's natural mother and the child.[85] There is no reason to require the legality of this relationship to cease upon the child's adoption by the mother's partner.

While most jurisdictions provide various statutory tests for determining whether an adopted person may inherit from blood relatives and vice versa, they typically do not otherwise provide any mechanism for altering inheritance rights.[86] Nonetheless, some adoption decrees have provided that a second parent adoption does not sever the legal relationship between the adopted person and that person's natural parent.[87] While some commentators believe that these types of decrees are sufficient to preserve inheritance rights between the adopted person and that person's biologic mother,[88] I am not convinced that all courts would agree. There is a stronger argument that inheritance rights would be preserved if a decree specifically stated that rights to custody and inheritance would be maintained. Even these specific decrees might not override a statutory scheme of descent and distribution if the jurisdiction's intestacy statutes specify which inheritance rights exist between

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[84] *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993). While this case addressed whether a biological mother's parental rights had to be terminated during life if her child was adopted by someone other than her spouse, the court's reasons for preserving the parent-child relationship beyond stepparent adoptions applies equally well to extending that relationship beyond death. "Despite the narrow wording of the step-parent exception, we cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner." *Id.*

[85] In many cases, there are also uninterrupted relationships between the natural relatives through the biologic mother and the child.

[86] Some states, however, allow adoption decrees to specify the degree and extent of inheritance rights among affected parties. *See* ALASKA STAT. § 25.23.130 (Michie 1995) ("A final decree of adoption . . . terminate[s] all legal relationships between the adopted person and the natural parents and other relatives of the adopted person . . . unless the decree of adoption specifically provides for continuation of inheritance rights . . . ."); ME. REV. STAT. ANN. tit. 18A, § 2-109(1) (West 1990) ("an adopted child will also inherit from the natural parents and their respective kin if the adoption decree so provides . . . .").

[87] *See supra* note 70. *See also* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 160-61.

[88] *See* Brashier, *supra* note 87, at 161-62.

and among parties in the event of adoption, and they do not statutorily allow the discretion to include provisions in an adoption decree to this effect.[89] In cases where an adoption decree generally preserves a legal relationship between the adopted person and the biological mother but does not specify inheritance rights,[90] the argument that such rights exist becomes weaker. The argument is weaker still in decrees where there is no mention of whether a legal relationship continues with the biological mother.

Ensuring that the legal relationship between an adopted person and the custodial biologic parent continues following adoption, including upon death, requires legislative change. Any proposed legislation should modify adoption laws to preserve the parent-child relationship between a biologic parent and an adopted person, when a biologic parent's partner adopts the child.[91] This formalizes an existing familial relationship, obviates the need to pursue joint adoptions, and eliminates the risks of limited consent adoptions.

In addition, any proposed legislation should modify inheritance laws that currently allow parental rights to be continued following adoption only if the adoption is by the spouse of a natural parent. Thus, the proposed adoption legislation by itself does not necessarily override statutes of descent and distribution. California's intestacy laws could be revised to read as follows:

> (a) An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person unless both of the following requirements are satisfied:

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[89] For an example of a statute allowing this type of discretion, see ALASKA STAT. § 25.23.130, *supra* note 86.

[90] The National Center for Lesbian Rights has model forms of adoption decrees that preserve a legal relationship between the original legal parent and the adoptive child. The forms include the following language:

> IT IS FURTHER ORDERED that the parental rights of ___, the child's natural parent, are not affected by this adoption, and she shall continue to have all the rights and be subject to all of the duties of a legal or natural parent to the child.

Forms provided by Shannon Minter, attorney with the National Center for Lesbian Rights (on file with author).

[91] For example, the legislation could state in part:

> (a) An adoption by a stepparent or second parent does not affect:
>
> (1) the relationship between the adoptee and the adoptee's parent who is the adoptive parent's spouse or partner.
>
> (2) the rights to inheritance between the adoptee and the adoptive parent's spouse or partner.

> (1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child.
>
> (2) The adoption was by the spouse *or partner of* either of the natural parents or after the death of either of the natural parents.
>
> (b) Neither a natural parent nor a relative of a natural parent . . . inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and the natural parent that satisfies the requirements of paragraphs (1) and (2) of subdivision (a), unless the adoption is by the spouse *or partner*, or surviving spouse *or surviving partner* of that parent.[92]

These legislative changes should be enacted for a number of reasons. First, they give family status to families by choice or need, thus offering these families the legitimacy of legal status, together with the perquisites that come with legal status.[93] Second, they are in the best interest of the child—the keystone of adoption law.[94] For example, the child could then receive benefits through both parents, would have the psychological and emotional comfort of knowing that he or she has two legal parents, and would have support and visitation rights from both parents in the event the partners/parents separate.[95] Third, even though there are no prerequisites on the length of time that a relationship must exist between an adopting partner and the legal parent for second parent adoption approval, the cost and time to pursue legal adoption

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[92] The original text is from the California Probate Code (CAL. PROB. CODE § 6451(a)-(b) (West Supp. 1997)). I have indicated changes through italics.

[93] For example, the child would then have inheritance rights from both the adoptive and biological parents, and vice versa.

[94] For a discussion of how the "best interest of the child" standard evolved, *see* Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994); Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 177 (1983) (The "best interests" formula was established as "a hallmark of American adoption."); *See also* Holmes, *supra* note 15 (discussing how best interest of child can be achieved by shifting from an adult-centered approach based on a nuclear family to a child-centered approach based on an extended family).

[95] *See* Zuckerman, *supra* note 3, at 741-45, for a general discussion of the benefits of second parent adoptions to both the child and the parents.

serve as built-in mechanisms that would provide protection against hasty adoption.[96]

V. CONCLUSION

Inheritance rights are probably far removed from the minds of same sex partners when one seeks to adopt the child of the other. They are probably more concerned with immediate hurdles, such as how to convince a state agency to grant the adoption. This hurdle would disappear if adoption laws were modified to allow unmarried couples to adopt and to allow second parent adoptions. Furthermore, if a same sex adoption is granted, then the couple should not have to worry about whether legal rights between the biologic parent and child extend through death.[97] The legislation proposed here protects biologic parents from the risk of losing inheritance rights from, by, or through their children, upon their partners' adoption of their children. In addition, enacting this type of legislation allows same sex couples to receive many of the legal benefits that nuclear families currently receive.

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[96] *See supra* note 48, for an example of the time and expense required to complete an adoption.

[97] As, for example, in limited consent adoptions. One scholar noted:

> adoption without termination of parental rights should be available if all existing parents consent. Courts and legislatures should permit such adoptions without considering the number or gender of the resulting parents. This change in the law would provide parents with an indisputable method of establishing parental rights.

Polikoff, *supra* note 6, at 524 (footnotes omitted).