

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF FAMILY LAW
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
NATIONAL LESBIAN AND GAY LAW ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

Resolved, that the American Bar Association supports the enactment of laws and
implementation of public policy that provide that sexual orientation shall not be a bar to
adoption when the adoption is determined to be in the best interest of the child.

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I. INTRODUCTION

There are many children in the United States, including large numbers of foster children, who need stable permanent homes with good parents. Despite this growing need, many prospective gay or lesbian parents have been denied the opportunity to adopt solely because of their sexual orientation. The American Bar Association has a longstanding interest in laws and policies that promote the increased permanent placement of children in stable homes with good parents. The Association also has long been a leader in efforts to eradicate bigotry and prejudice against, among other groups, gay and lesbian Americans.¹

In 1995, the Association responded to policy developments regarding non-discrimination on the basis of sexual orientation in the context of family law by adopting a policy supporting legislative measures that would ensure that child custody or visitation is not denied or restricted on the basis of sexual orientation. The policy resolution now being proposed would extend these non-discrimination principles to the area of adoption by supporting the enactment of laws and implementation of policies that provide that sexual orientation shall not be a bar to adoption where the adoption is determined to be in the best interest of the child. Given the recent enactment of federal legal reforms regarding adoption,² the proposed resolution would help

¹In February 1989, the House of Delegates adopted a policy urging federal, state, and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation. The ABA also has adopted policies urging the repeal of laws that criminalize private non-commercial sexual conduct between consenting adults (1973); condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the perpetrators of such crimes (1987); amending the Association's Constitution to recognize the National Lesbian and Gay Law Association as an affiliated organization with a seat in the House of Delegates (1992); adopting canon 3B(5) of the Model Code of Judicial Conduct, which requires that "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation" (1990); urging affirmative steps to increase the diversity of the House of Delegates and requiring a study of bias in the federal judicial system, including bias based upon sexual orientation (1990); and opposing efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who discriminate on the basis of sexual orientation (1992).

²President Clinton signed the Adoption and Safe Families Act into law on Nov. 19, 1997. The new law (P.L. 105-89) is intended to promote adoption or other permanent arrangements for foster children who are unable to return home, and to make general improvements in the nation's child welfare system. The legislation responds to concerns that children are remaining in foster care unnecessarily long, that their adoption rate is low, and that additional safeguards are needed to ensure their safety.

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provide important guidance to courts, legislatures, legal practitioners, and others who will be drafting, reviewing, or implementing states' laws in this area.

II. CHILDREN OF LESBIAN AND GAY PARENT FAMILIES

A. Children of Lesbian and Gay Parent Families Face Numerous Barriers in Preserving and Protecting Their Family Relationships.

Many children are being raised in lesbian and gay parent families in which both partners have parented the child since the child's infancy or birth and have undertaken all the obligations and responsibilities of equal parenthood.³ For the great majority of these families, second parent or joint adoptions are the **only** legal avenue through which both parents can establish a legal parental relationship with the couple's child. In jurisdictions where these forms of adoption are not available, lesbian and gay parents attempt to protect their relationship with their children through a variety of privately executed documents, such as wills, guardianship agreements, and authorizations to consent to emergency medical treatments. While lesbian and gay parents willingly assume these obligations, these documents do not create a legally recognized parental relationship, and they are vastly inferior to the security and protection of legal recognition through adoption. For example, in the absence of a legally protected parental relationship, a child has no right of financial support or inheritance from the second parent, cannot receive Social Security benefits or state workers compensation benefits if the second parent dies or becomes incapacitated, and in most instances cannot receive health insurance or other insurance benefits from the second parent's employer. The second parent may not be eligible for leave to care for a seriously ill child under the Family and Medical Leave Act. In the event of an emergency in which the legal parent is unavailable, the second parent may be unable to consent to medical treatment for the child, or even to visit the child in a hospital emergency room.

³ See, e.g., "ABA Annual Meeting Provides Forum for Family Law Experts," 13 *Fam. L. Rep.* (BNA) 1512, 1513 (Aug. 25, 1987) (estimating that 6 million children have a lesbian or gay parent or parents); Seligman, "Variations on a Theme," *Newsweek*, Special Ed., Winter/Spring 1990, at 39; Susan Chira, "Gay and Lesbian Parents Grow More Visible," *New York Times*, Sept. 30, 1993, at A1; Adams, "Gay Couples Begin a Baby Boom," *Boston Globe*, Feb. 6, 1989, at 2. See also Gold et al., "Children of Lesbian and Gay Parents," 15(9) *Pediatrics in Review* 354 (1994) (noting that "fewer than one third of families in the United States . . . live in a traditional pattern of a working father, homemaking mother, and one or more children").

If the parents separate, adoption also is critical to protect the child's right to financial support and to maintain a relationship with the second parent. Courts in family law situations generally attempt to ensure ongoing contact between a child and both of his or her parents, even when the family unit is no longer intact, in recognition of the fact that ongoing contact with the parents is almost invariably in the best interest of the children because "children generally will sustain serious emotional harm when deprived of emotional benefits flowing from a true parent-child relationship." *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 422 (Cal. Ct. App. 1983). In the absence of a legally defined parent-child relationship, however, children of lesbian and gay parents are routinely deprived of this right. See *Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995) (court has "no inherent authority to award visitation" to a lesbian co-parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (lesbian partner has no standing to seek visitation with child she raised with lesbian mother); *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (Cal. Ct. App. 1991) (same); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991) (lesbian co-parent was not entitled to visitation, even if visitation would be in the child's best interests).

Similarly, if the legal parent dies or becomes incapacitated, the child may become a ward of the state or be placed in foster care or with relatives of the legal parent with whom the child has no bond. Even the nomination of the second parent as the child's guardian in the legal parent's will is merely that -- a nomination. There is no requirement that courts approve the guardianship nomination. Moreover, there is always a risk that relatives of the legal parent can and will challenge such a guardianship nomination.⁴ Even if the surviving partner ultimately prevails, the nomination can trigger expensive and time-consuming litigation and the concomitant trauma and injury to the child during the intervening period of uncertainty.⁵

The recent case of Victoria Lane demonstrates the critical difference that second parent adoptions can and do make in protecting children in lesbian and gay parent families. Victoria Lane was granted a second parent adoption of Laura Solomon's biological child, Tessa; and Laura Solomon was granted a second parent adoption of Victoria's biological child, Maya, by a

⁴ See, e.g., *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (denying custody to lesbian co-parent following death of biological mother, despite power of attorney and will designating the co-parent as the child's legal guardian).

⁵ See, e.g., *In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 Fla. Cir. Ct. May 30, 1989) (following the death of the biological mother, the non-biological mother had to petition to invalidate the child's adoption by the biological mother's parents, who had first denied the non-biological mother visitation and then adopted the child without her knowledge or consent); and *In re Hatzopoulous*, Fam. Law Rep. (BNA) 2075 (Colo. Juv. Ct. 1977) (following the biological mother's death, the non-biological mother had to go through a protracted court battle to regain custody of her child after child was initially placed with the biological mother's aunt and uncle).

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District of Columbia trial court. *Matter of Petition of L.S.*, 119 *Daily Wash. L. Rep.* 2249 (D.C. Super. Ct. Aug. 30, 1991). Two years later, Victoria Lane was killed in an automobile accident. Due to the second parent adoption, there was no need for Laura, the surviving parent, to undergo any court action to protect her relationship with her deceased partner's child. Both children were eligible for social security survivor benefits, and both were permitted to file an action for wrongful death. If a second parent adoption had not been in place, both children's financial stability would have been seriously impaired, and Maya might well have undergone the additional trauma of being legally separated from her surviving parent. See Deb Price, "Girl Would Be Orphan If They'd Lost the Battle," *Minneapolis Star-Tribune*, Jan. 5, 1994, at 4E.

C. Sexual Orientation Is Not Relevant to Parental Ability.

Social science research also confirms what experience and common sense already has demonstrated, namely, that a person's sexual orientation has no bearing on a person's capacity to be a good parent. In fact, studies have found "a remarkable absence of distinguishing features between the lifestyles, child-rearing practices, and general demographic data" of lesbian and gay parents and those who are not gay.⁶ The American Psychological Association (APA) reports that "not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth." APA, *Lesbian and Gay Parenting: A Resource for Psychologists* 8 (1995). See also Golombok & Fisher, "Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families," 32(1) *Developmental Psychology* 3, 9 (1996) ("there is no evidence . . . to suggest that parents have a determining influence on the sexual orientation of their children"); and Gold et al., "Children of Gay or Lesbian Parents," *supra*, at 357 ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual households."). In all respects, lesbians and gay men have proven to be just as committed to the parental role and just as capable of being good parents as their heterosexual counterparts. Charlotte Patterson, "Lesbian and Gay Parenthood," in M.H. Bornstein, ed., *Handbook of Parenting* 255 (1996).

Given this overwhelming evidence, numerous professional organizations have condemned discrimination against lesbian and gay parents. In 1976, the APA affirmed that "[t]he sex, gender identity [transgenders], or sexual orientation of natural, or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases." APA, "Minutes of the Annual Meeting of the Council of Representatives," 32 *Am. Psychologist* 408, 432 (1977). The National Association of Social Workers (NASW) long

⁶ Beverly Hoeffler, "Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families," 51 *Am. J. of Orthopsychiatry* 536 (1981).

has affirmed that gay men and lesbians are capable parents.⁷ The NASW policy statement on lesbian and gay issues deplores the fact that lesbians and gay men have been denied custody of children and the right to provide foster and adoptive care. NASW, "Lesbian and Gay Issues," in *Social Work Speaks: NASW Policy Statements* 93 (1988). The policy holds that NASW shall work for the adoption of policies and legislation to end all forms of discrimination on the basis of sexual orientation. *Id.* at 162. The code of Ethics adopted by the NASW Delegate Assembly further states that "the social worker should not practice, condone, facilitate or collaborate with any form of discrimination on the basis of . . . sexual orientation." *Id.* at 161.

III. CHILD CUSTODY CASES INVOLVING LESBIAN AND GAY PARENTS

To put adoption in context, it is helpful to review judicial decisions regarding child custody cases involving a lesbian or gay parent. Like adoption placements, child custody decisions are supposed to be based on a case-by-case determination of the "best interests" of each individual child, not on *per se* rules or categorical presumptions. Until quite recently, however, courts ruling on custody disputes involving a lesbian or gay parent routinely departed from this evidence-based standard in favor of a *per se* rule against awarding custody to a lesbian or gay parent.

Sadly, these decisions tended to accept at face value, and without empirical support, a host of invidious stereotypes and irrational fears. Some courts, for example, expressed the fear that children of lesbian or gay parents will be subjected to harassment or ostracism by their peers.⁸ Other courts, ignoring the overwhelming evidence to the contrary, have expressed a

⁷ In 1986, when Massachusetts instituted a policy that effectively prohibited the state from licensing lesbians and gay men as foster parents, NASW joined a lawsuit challenging the policy. *See Babets v. Secretary of Human Servs.*, 526 N.E.2d 1261 (Mass. 1988).

⁸ *See, e.g., Jacobson v. Jacobson*, 314 N.W.2d 78, 80-81 (N.D. 1981) (citing concern that children might "suffer from the slings and arrows of a disapproving society"); *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (citing fear that child might be "exposed to ridicule and teasing by other children"); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1995) (citing fear that "social condemnation . . . will inevitably afflict [the child's] relationships with her peers and with the community at large"). Notably, empirical research has found no evidence that children in lesbian and gay parent families are any more likely to be teased or harassed than any other children for some other reason. *See* Gregory M. Herek, "Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research," 1 *Law & Sexuality* 133, 160 (1991).

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concern that the child will grow up to be lesbian or gay,⁹ or that the child's moral well-being will be jeopardized,¹⁰ Still others have refused to accept the overwhelming scientific evidence debunking the myth that lesbians and gay men are more likely to molest children.¹¹ See generally David K. Flaks, "Gay and Lesbian Families: Judicial Assumptions, Scientific Facts," 3 *Wm. & Mary Bill Rts. J.* 345 (1994).

More recently, however, the great majority of state courts that have considered the impact of a parent's sexual orientation in a contested custody case have rejected stereotypical assumptions in favor of the same evidence-based standard used to evaluate the custodial fitness of a heterosexual parent. Widely referred to as the "nexus test," this standard requires evidence of a clear connection, or nexus, between a parent's actions and harm to the child before the parent's sexual orientation (or any other factor) assumes any relevance in the custody determination. States in which appellate courts have adopted this nondiscriminatory standard in cases involving a lesbian or gay parent include: Alaska, California, Florida, Iowa, Maryland, Massachusetts, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South

⁹ See, e.g., *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 871-72 (Mo. Ct. App. 1982); *Dailey*, 635 S.W.2d at 394.

¹⁰ See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (removing custody from gay father because "father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law"); *Chaffin v. Frye*, 119 Cal. Rptr. 22, 26 (Cal. Ct. App. 1975); *Hall v. Hall*, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *Kallas v. Kallas*, 614 P.2d 641, 643 (Utah 1980). See also Golombok & Fisher, *supra*. ("there is no evidence . . . to suggest that parents have a determining influence on the sexual orientation of their children"); and Gold et al., *supra*. ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual households.").

¹¹ *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995); *J.L.P.(H.)*, 643 S.W.2d at 869; *Newsome v. Newsome*, 256 S.E.2d 849, 851 (N.C. Ct. App. 1979). For research on sexual orientation and child sexual abuse, see Carole Jenny et al., "Are Children at Risk for Sexual Abuse by Homosexuals?" 94 *Pediatrics* 41, 44 (1994) (finding that a child is one hundred times more likely to be sexually assaulted by the heterosexual partner of a relative than by a gay adult); and Human Development Service, "National Study of the Incidence and Severity of Child Abuse and Neglect" 27-29 (1982) (a 1978 survey of clinical psychologists and child psychiatrists found that "in over 300 years of accumulated practice, . . . [there was] not one incident reported of molestation by a lesbian mother or a gay father").

Dakota, Vermont, Washington, West Virginia, and Wisconsin.¹² However, twelve states (Alabama, Arkansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Utah, Virginia, and Wyoming) continue to apply either an explicit or a *de facto per se* rule against lesbian and gay parents.¹³ The remaining states have no reported appellate decisions on the issue.

The nexus approach requires a factual finding of harm to the child before sexual orientation may be used to deny or restrict custody or visitation. Courts must base their custody determination on the evidentiary record and must point to specific evidence that the child has been harmed by the parent's sexual orientation. In *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985),

¹² See *J.B.F. v. J.M.F.*, 1997 Ala. Civ. App. Lexis 731 (Ala. Civ. App. Sept. 12, 1997); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *In re: Marriage of Birdsall*, 197 Cal.App.3d 1024, 243 Cal.Rptr. 287 (Cal. Ct. App. 4 Dist. 1988); *In re the Marriage of Wiarda*, 505 N.W.2d 506 (Iowa Ct. App. 1993); *North v. North*, 648 A.2d 1025 (Md. Ct. Spec. App. 1994); *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *DeLong v. DeLong*, WD 52726 (Mo. Ct. App. West. Div. Jan. 20, 1998); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *A.C. v. C.B.*, 829 P.2d 660 (N.M. App. 1992); *State ex rel. Human Serv. Dept. in the Matter of Jacinta M.*, 764 P.2d 1327 (N.M. App. 1988); *Anonymous v. Anonymous*, 120 A.D.2d 983 (N.Y. App. Div. 4 Dept. 1986); *Guinan v. Guinan*, 120 A.D.2d 963 (N.Y. App. Div. 3 Dept. 1984); *Large v. Large*, 1993 WL 498127 (Ohio Ct. App. 10 Dist.)[unpublished]; *Conkel v. Conkel*, 31 509 N.E.2d 983 (Ohio Ct. App. 1987); *Fox v. Fox*, 904 P.2d 66 (Okla. 1995); *Matter of Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994); *In the Matter of Michael Lee Parsons*, 914 S.W.2d 889 (Tenn. Ct. App. 1995); *Nickerson v. Nickerson*, 605 A.2d 1331 (Vt. 1992); *Medeiros v. Medeiros*, 8 Fam. L. Rep. (BNA) 2372 (Vt. Super. 1982); *Matter of Marriage of Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986); *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978); *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987); *Rowsey v. Rowsey*, 329 S.E.2d 57 (W. Va. 1985); and *Dinges v. Montgomery*, 514 N.W.2d 723 (Wis. Ct. App. 1993). In addition, the District of Columbia has a statute that mandates that custody shall be determined without reference to sexual identity. D.C. Code Sect. 16-922 (a) (5) (1990 Repl.).

¹³ See *Larson v. Larson*, 902 S.W.2d 254 (Ark Ct. App. 1995); *S.v.S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980), cert. denied, 451 U.S. 911 (1981); *Lundin v. Lundin*, 563 So.2d 1273 (La. Ct. App. 1990); *Irish v. Irish*, 300 N.W.2d 739 (Mich. Ct. App. 1980); *Hall v. Hall*, 291 N.W.2d 143 (Mich. Ct. App. 1980); *White v. Thompson*, 569 So.2d 1181 (Miss. 1990); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979); *Roberts v. Roberts*, 212 S.E.2d 410 (N.C. Ct. App. 1975); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995).

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for example, the Alaska Supreme Court explained that “the scope of judicial inquiry is limited to facts directly affecting the child’s well-being.” *Id.* at 878. Reversing a trial court removing custody from a lesbian mother, the court held that “[i]n marked contrast to the wealth of evidence that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely . . . It is impermissible to rely on any real or imagined social stigma attaching to Mother’s status as a lesbian.” *Id.* at 879 (citing *Palmore v. Sidoti*, 466 U.S. 429 [1984]. See also *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (“The state may not deprive parents of custody of their children simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average”).

In August 1995, this Association acknowledged and endorsed these legal developments by adopting a policy supporting the enactment of legislation and implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

IV. LESBIANS AND GAY MEN AS ADOPTIVE PARENTS: AN OVERVIEW OF CURRENT LAW

As in the related area of child custody, the growing visibility of lesbian and gay parent families has contributed to a dramatic decrease in anti-gay discrimination on the part of adoption agencies and courts. Despite much progress, however, significant obstacles to equal treatment remain, including efforts to pass new state laws that categorically would prohibit lesbians and gay men from being eligible to adopt.¹⁴

The following is a brief description of the different types of adoption that are available to lesbian and gay parents and a brief overview of current law.

¹⁴ In 1995-96, for example, bills that would prohibit adoption by lesbians and gay men were introduced in Oklahoma, South Carolina, and Washington. See Okla. H.R. Res. 1045, 45th Leg., 2d Sess. (introduced Feb. 5, 1996); S.C. H.R. 3470, 1995-96 Statewide Sess. (introduced Feb. 2, 1995); Wash. H.R. 1171, 54th Leg., 1996 Sess. (introduced Jan. 13, 1995). Missouri considered a bill that would have created a “rebuttable presumption” that “homosexual, bisexual, transsexual and transvestite parents” are unfit to be awarded custody of minor children. Mo. H.B. 1637, 88th Gen. Assembly, 2d Sess. (introduced Mar. 27, 1996). And Maine considered a bill that would have permitted adoption agencies to “consider” the sexual orientation of prospective parents when making placements. Me. S.B. 531, 117th Leg., 1st Sess. (introduced May 2, 1995). In August 1998, the U.S. House of Representatives agreed to an amendment to H.R. 4380, the District of Columbia Appropriations bill for fiscal year 1999, that would have barred joint adoption by unmarried partners; however, the amendment was deleted in conference.

A. Individual Adoptions.

Every state permits unmarried individuals to adopt. Individual adoptions (also sometimes called “stranger” adoptions) are adoptions in which a single (i.e., unmarried) person adopts a child who has been placed for adoption by his or her biological parent or parents, who have agreed to give up all of their parental rights. Individual adoptions may take place through: (1) a state child welfare or public adoption agency; (2) a private, state-authorized adoption agency; or (3) consensual arrangements between private parties, including everything from the adoption of the child of a relative, acquaintance, or friend to the adoption of an orphan situated abroad and brought into the United States. Like all adoptions, individual adoptions must be reviewed and approved by a court and almost always include a home investigation by the state’s child welfare agency.

Currently, Florida and New Hampshire are the only two states that categorically prohibit lesbians and gay men from becoming adoptive parents.¹⁵ Fla. Stat. ch. 63.042(3) (West 1985 & Supp. 1995) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); N.H. Rev. Stat. Ann. section 170-B:4 (1994) (“Any individual not a minor and not a homosexual may adopt.”). The New Hampshire statute applies to foster parenting as well. In Florida, however, the law prohibits adoption only; single lesbians and gay men are eligible to be foster parents.¹⁶ The Florida Supreme Court upheld the constitutionality of Florida’s ban on gay adoption in 1995, pending a remand on the equal protection claim.¹⁷ In New Hampshire, the New Hampshire House of Representatives sought and received the supreme court’s approval of the prohibition on lesbian and gay adoption and foster parenting before it was adopted in 1987.¹⁸

In all other states, lesbians and gay men are at least theoretically eligible to adopt. The “best interest of the child” is the primary criterion for approving an adoption, although there is considerable flexibility in the factors that may be taken into account in evaluating an adoptive

¹⁵ Massachusetts sought to prohibit lesbians and gay men from becoming foster parents by regulation, but the policy was dropped in 1990 in settlement of a lawsuit. For a detailed description of this controversy, see Wendell Ricketts, “Lesbians and Gay Men as Foster Parents” 67-87 (National Child Welfare Resource Center 1991).

¹⁶ See *Matthews v. Weinberg*, 645 So.2d 487 (Fla. Ct. App. 1994).

¹⁷ *Cox v. Florida Dept. of Health & Rehabilitative Servs.*, 656 So.2d 902, 903 (Fla. 1995) (petition subsequently withdrawn). Despite this ruling, some Florida judges have continued to permit individual adoptions by lesbians and gay men, even after the passage of the anti-gay adoption statute in 1991. No case has been brought to test the validity of lesbian and gay parent adoptions permitted since the enactment of the legislation.

¹⁸ See *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987).

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parent's suitability. In practice, judicial reaction to openly lesbian and gay adoptive parents ranges from supportive acceptance to overt hostility. In *In re Adoption of Evan*, 583 N.Y.S.2d 997 (N.Y. Sup. Ct. 1992), for example, the judge held that "an open lesbian relationship is not a reason to deny adoption" because "a child's best interest is not predicated on or controlled by parental sexual orientation."¹⁹ In *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990), the Ohio Supreme Court approved the adoption of a disabled child by a gay man, holding that "nonmarital sexual conduct" (including "homosexual activity") must be shown to have a direct adverse impact on the child before it can be a basis for denying an adoption petition. At the opposite end of the spectrum, the Arizona Court of Appeals upheld the denial of an adoption petition brought by a bisexual man, on the ground that "he testified that it was possible that he at some future time would have some type of homosexual relationship with another man." *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830 (Ariz. Ct. App. 1986).

B. Second Parent Adoptions.

Second parent adoption is a legal term of art used to describe an adoption in which a lesbian, gay man, or unmarried heterosexual person adopts his or her partner's child as a means of ensuring that both parents have a legally recognized parental relationship to the child. The concept of second parent adoption was originated by the National Center for Lesbian Rights (formerly the Lesbian Rights Project) in the mid 1980s, when the first such adoptions were granted in San Francisco.²⁰ Since that time, a number of high-profile and high-level cases in other states have begun to establish second-parent adoption as a formal legal protection for same-sex parent families.

Most state adoption statutes provide that a biological parent who consents to the adoption of a child must give up or "cut off" his or her own parental rights unless the adopting party is the parent's legal spouse and thus a stepparent to the child.²¹ Given that no state currently permits same-sex couples to marry, the key legal question for courts ruling on second parent adoptions has been whether to forego an overly literal and rigid interpretation of state adoption statutes in

¹⁹ New York administrative regulations also prohibit the denial of an adoption solely on the basis of the applicant's marital status or sexual orientation. *N.Y. Comp. Codes R. & Regs. tit. 18, Section 421.16[h][2]* (1996).

²⁰ See, e.g., *In re Adoption Petition of N.* Case No. 18086, (Cal. Super. Ct., San Francisco County, filed Mar. 11, 1986).

²¹ In practice, this "stepparent exception" has virtually subsumed the general cut-off rule, as stepparent adoption has become the most common form of adoption in America. See Elizabeth Zuckerman, "Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother," 19 *U.C. Davis L. Rev.* 729, 737-39 (1986).

order to advance the statutes' underlying purpose of promoting the child's best interests. See, e.g., *In re Adoption of B.L.V.B.*, 628 A.2d at 1276 (“[O]ur paramount concern should be with the effect of our laws on the reality of children’ lives. . . . [the non-biological mother] has acted as a parent of [the children] from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children’s best interests and therefore with the public policy of this state”); and *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (“Where the mother’s same-sex partner has, with the mother’s consent, participation and cooperation, assumed a full parental role in the life of the mother’s child, and where the child is consequently bonded to the partner in a loving, functional parental relationship, the stepparent provision of NJSA 9:3-50 should not be narrowly interpreted so as to defeat an adoption that is clearly in the child’s best interests”).

To date, state supreme courts in Vermont, Massachusetts, and New York have expressly permitted lesbians and gay men to adopt their partners’ children.²² Intermediate appellate courts have permitted second parent adoptions in Connecticut, the District of Columbia, Illinois, and New Jersey.²³ Many other states, including Alabama, Alaska, California, Indiana, Iowa, Maryland, Michigan, Minnesota, Nevada, New Mexico, Ohio, Oregon, Pennsylvania (conflicting decisions), Rhode Island, Texas, and Washington, have approved second parent adoption petitions at lower court levels.²⁴ The National Conference of Commissioners on Uniform State Laws also has endorsed the concept of second parent adoption in the Uniform Adoption Act. See Unif. Adoption Act 4-102, 9 U.L.A. 1, 67 (West Supp. 1994) (stating that a “*de facto* stepparent” or “second parent” has standing to adopt a “minor stepchild” with the consent of the child’s custodial parent, and citing with approval the Vermont and New York decisions permitting second parent adoptions). See also Susan Chira, “Law Proposed to End Adoption Horror Stories,” *New York Times*, Aug. 27, 1994, at A9.

²² See *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); and *In re Jacob*, *In re Dana*, 660 N.E.2d 397 (N.Y. 1995).

²³ See *In re Baby Z*, No. 105695, 1996 Conn. Super. LEXIS 1091 (Apr. 24, 1996); *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re M.M.D.*, 662 A.2d 837 (D.C. Ct. App. 1995); *Petition of K.M.*, 653 N.E.2d 888 (Ill. Ct. App. 1st Dist. 2d Div. 1995).

²⁴ See, e.g., *Adoption of Minor Child*, No. 1JU-86-73 P/A (Alaska Super. Ct. 1st Jud. Dist. Feb. 6, 1987); *In re Adoption of N.L.D.*, No. 18086 (Cal. Super. Ct. San Francisco County Sept. 4, 1987); *In re Adoption of Hentgen-Moore*, No. 91C01-9405-AD-009 (Ind. Cir. Ct. White County Mar. 24, 1995); *In re Adoption of M.M.S.A.*, No. D8503-61930 (Or. Cir. Ct. Multnomah County Sept. 4, 1985); *In re Adoptions of E.O.G. & A.S.G.*, 14 Fiduc. Rep. 2d 125, Nos. 7518, 7519 (Pa. Ct. C.P. York County Dec. 22, 1993); *Interest of E.B.G.*, No. 87-5-00137-5 (Wash. Super. Ct. Thurston County Mar. 29, 1989).

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Only two states have expressly resisted the trend of decisions elsewhere. *See In Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (Wisconsin's adoption statute does not permit a lesbian co-parent to adopt her partner's biological child without terminating the biological mother's parental rights)²⁵; and *In re Adoption of T.K.J. and K.A.K.*, ___P.2d___, 1996 Colo. App. LEXIS 176, rehearing denied (Colo. Ct. App. Aug. 1, 1996) (a biological mother cannot consent to her partner's adoption of the couple's child without giving up her own parental rights).²⁶ In California, Governor Pete Wilson failed in his attempt to block second-parent adoptions administratively in 1996 by proposing a regulation that would require public adoption agencies to oppose any "proposed adoption resulting in a child's having two parents who are not legally married to each other." Jane Gross, "Gays, Single, Also Targets of Adoption Rule," *Los Angeles Times*, Sept. 8, 1996, at A3.

C. Joint Adoptions.

Joint adoption refers to an adoption in which both partners in a couple simultaneously adopt a child who, at least in the usual case, has no biological or pre-existing adoptive relationship to either party. Joint adoption is especially important for gay male couples, for whom adopting a child is often the only viable route to becoming parents. Until very recently, joint adoptions have been restricted to married couples, with the exception of a steady stream of cases granted by lower courts in the San Francisco/Bay Area from the mid 1980s to the present.²⁷

On Dec. 21, 1997, however, New Jersey became the focus of national media attention when it announced a formal statewide policy permitting lesbian, gay, and other unmarried couples to jointly adopt.²⁸ New Jersey adopted the policy in a consent agreement reached in a class action suit brought by the American Civil Liberties Union on behalf of more than 200 lesbian and gay couples, including Jon Holden and Michael Galluccio, the named plaintiffs in the

²⁵ Notably, the Wisconsin Supreme Court has also ruled that a non-biological lesbian parent who has co-parented a child since birth has standing to seek visitation with the child, even in the absence of any legally defined parental status. *See In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

²⁶ Second parent adoptions are also, of course, prohibited in Florida and New Hampshire statutes, which categorically exclude lesbians and gay men from any form of adoption.

²⁷ *See, e.g., In re A. and R. Adopting Parents* (Cal. Super. Ct. Alameda County, Apr. 8, 1986) Case No. 17350; *In re N. and D. Adopting Parents* (Cal. Super. Ct., San Francisco County Feb. 24, 1986) Case No. 17945.

²⁸ *See, e.g.,* Laura Parker, "Boy Adopted by Gays Beats Odds: Child Survives Being Born with HIV, Cocaine Habit -- and Is Thriving with New Parents," *The Detroit News*, Dec. 21, 1997, at A27.

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suit, who sought to adopt the two-year-old foster child who had been living with them since he was three months old. Under the terms of the agreement, the New Jersey Division of Youth and Family Services must apply the same standards to all prospective adoptive parents, without regard to marital status or sexual orientation. As a result of this decision, New Jersey has been widely hailed as "the first state in the nation to allow gay, lesbian and unmarried heterosexual couples to adopt children on an equal basis with married couples." John Goldman, "N.J. Settlement OKs Adoption by Gay Couples," *Los Angeles Times*, Dec. 18, 1997, at A1.

V. CONCLUSION

Every child deserves a permanent home and all the love and care that good parents can provide. Each child is entitled to the emotional and financial security that follows from legal recognition of his or her family relationships. For all of these reasons, courts should evaluate prospective adoptive parents on the basis of their individual character and ability to parent, not on their sexual orientation, and courts should grant second parent and joint adoptions when they are determined to be in a child's best interest.

Respectfully submitted,

Walter H. White, Jr., Chair
Section of Individual Rights and Responsibilities

Maurice Jay Kutner, Chair
Section of Family Law

February 1999

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GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities
Section of Family Law

Submitted By: Walter H. White, Jr., Chair, Section of Individual Rights and
Responsibilities

Maurice Jay Kutner, Chair, Section of Family Law

1. Summary of Recommendations.

The recommendation supports the enactment of legislation and the implementation of public policy providing that adoption shall not be denied on the basis of sexual orientation when it is determined that the adoption is in the child's best interest.

2. Approval by Submitting Entities.

The Section of Individual Rights and Responsibilities Council approved sponsorship of the recommendation at its spring meeting on Apr. 17, 1998. The Section of Family Law Council approved co-sponsorship of the recommendation at its summer meeting on July 31, 1998. The Steering Committee on the Unmet Legal Needs of Children approved co-sponsorship of the recommendation at its meeting on Nov. 7, 1998. The National Lesbian and Gay Law Association Executive Committee approved co-sponsorship of the recommendation at its weekly meeting on Nov. 8, 1998.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This recommendation has not been submitted previously to the House of Delegates or the Board of Governors. However, numerous other recommendations regarding nondiscrimination on the basis of sexual orientation in other contexts, including child custody and visitation regarding sexual orientation, have been approved by the House of Delegates.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Existing Association policies regarding nondiscrimination on the basis of sexual orientation would be strengthened by this recommendation. In February 1989, the House of Delegates overwhelmingly adopted a policy urging the enactment by federal, state, and local governments of legislation prohibiting discrimination on the basis of sexual orientation. The ABA also has adopted policy urging the repeal of all laws that criminalize private non-commercial sexual conduct between consenting adults (1973); a policy condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the perpetrators of such crimes (1987); an amendment to the Association's Constitution recognizing the National Lesbian and Gay Law Association as an affiliated organization with a seat in the House of Delegates (1992);

canon 3B(5) of the Model Code of Judicial Conduct, which requires that "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . .sexual orientation. . ." (1990); a resolution urging affirmative steps to increase the diversity of the House of Delegates, including diversity based upon sexual orientation (1991); a resolution opposing efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who discriminate on the basis of sexual orientation (1992); and a resolution supporting the enactment of legislation and public policy providing that child custody and visitation rights not be denied or restricted on the basis of sexual orientation where in the best interests of the child (1995).

5. What urgency exists which requires action at this meeting of the House?

As a result of the enactment of the Federal Adoption and Safe Families Act of 1997, states currently are revisiting their adoption laws and modifying them.

6. Status of Legislation. (If applicable.)

See #5.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest. (If applicable.)

There are no conflicts of interest known at this time.

9. Referrals.

Following its submission for House of Delegates consideration in February 1999, this Report with Recommendation will be distributed to other ABA entities and affiliates that might have an interest in the subject matter.

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10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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12. Contact Person Regarding Amendments to this Recommendation.

No known amendments at this time.