

COMMENT

Taking a Critical Look at Second Parent Adoption

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I. INTRODUCTION

This Comment examines the effectiveness of second parent adoption litigation as a strategy for obtaining liberation and legal protection for lesbian families. The examination is limited jurisdictionally to the New York State courts, because the decisions there supply an ample lens through which the benefits and shortcomings of the strategy can be assessed. The New York cases have come full circle: the lower court decisions (mainly in the family or surrogate courts) split on the permissibility of such adoptions, leading to their rejection by two appellate courts. The New York State Court of Appeals, the highest court, ultimately ruled second parent adoption permissible.

Another element of this project is its strategy of placing lesbian women and their families at the center of analysis. The unique difficulties encountered by the lesbian family in attempting to guarantee its protection require ambitious legal strategies and dynamic legislative advocacy. Unfortunately, many legal strategies utilized to achieve legal protection for lesbian families are

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problematic on a number of levels. Viewed in its totality, second parent adoption is one such problematic method.¹

Because this analysis is lesbian focused, methods that serve to privilege particular members of the lesbian community will be rejected as inherently problematic. Second parent adoption privileges lesbian families that emulate a marital, monogamous relationship. The strategy is fundamentally flawed, however, even with regard to those families. The adoptions continue to privilege and vest in the birth mother parental rights which she must then confer to her partner. As a practical matter, second parent adoption has relied, and will continue to rely heavily upon the enlightenment of an individual family court judge. The court determines if the adoption is in the best interest of the child, usually through invasive and stressful investigations. Finally, economic and class privilege continue to be employed as a tool to alleviate potential heterosexist responses in the adversarial process.

While second parent adoption arguably serves its function as a temporary, equitable measure for many lesbian families, it is not a panacea to the overarching problem of privileging certain types of familial relationships. It is time for lesbians to stop trying to fit into a broken and antiquated model. It is time to start building coalitions with other nontraditional families and engaging in legislative advocacy that will eventually lead to true liberation in our chosen families.

II. SECOND PARENT ADOPTION—THE MODEL

A. *Overview of Standard Adoption Statutory Law*

Adoption is a creature of statute.² Most state statutes confer standing to adopt upon either “[a]n adult unmarried person or an adult husband and his adult wife together.”³ The typical barrier for lesbian mothers, who cannot marry,⁴ is the “cut-off provision.” The cut-off

1. I realize the risks involved in engaging in such an “intra-community” critique. Despite those risks, it is essential that legal strategies chosen for equitable short term change be examined in order to evaluate and recognize any and all long term effects.

2. See 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, 522 (1990).

3. E.g., N.Y. DOM. REL. LAW § 110 (McKinney 1998).

4. Some commentators have suggested that granting the right to marry to gay and lesbian couples will provide a solution to the dilemma presented by such a provision. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Legal Inquiry*, 1 LAW & SEXUALITY 9 (1991). The segment of the gay and lesbian community pursuing the right to marry, however, have yet to adequately address the intersections of gender, race and class. Several commentators

provision generally mandates that a “natural parent” relinquishes her parental rights by permitting the adoption.⁵ Most modern statutes waive the cut-off provision, however, if the adopting party is the spouse of the legal parent.⁶ This is known as the “stepparent exception” to the cut-off provision.⁷

B. *Second Parent Adoption*

Second parent adoption was first advocated in the legal literature in the mid 1980s.⁸ Its proponents explained that in structure it would resemble stepparent adoption, with its “add[ition] rather than substit[ution of] one parent for another.”⁹ Even a child conceived through alternative insemination planned and carried out by both mothers is denied the legal protection of a second parent because only the biological mother automatically receives parental rights at birth.¹⁰ Second parent adoption provides children in lesbian families with many protections under the law, including the provision of inheritance rights, financial support during minority, and protection in the event of separation or death.¹¹ Such an adoption grants both mothers “the authority to deal with the child’s schools, doctors and other agencies.”¹² Second parent adoption fully protects the child, and is preferable to other currently available legally recognized arrangements, which typically can only guarantee limited protection.¹³

have therefore questioned the wisdom of pursuing the right to marry. *See, e.g.*, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); *but see* Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95). That analysis, however, is outside the scope of this paper.

5. *See, e.g.*, N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1998).

6. *See, e.g.*, Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child’s Best Interests*, BERKELEY WOMEN’S L.J. 96 (1985-86).

7. *See id.*

8. *See generally* Patt, *supra* note 6, at 96-97; Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986).

9. Zuckerman, *supra* note 8, at 731.

10. *See id.* at 733 n.14 and accompanying text. The term “alternative insemination” will be used throughout. *See* Polikoff, *Two Mothers*, *supra* note 2, at 467 n.24 (observing that “[b]ecause there is nothing artificial about inseminating a woman, alternative insemination aptly describes a process that is merely an alternative to insemination through sexual intercourse”).

11. *See* Zuckerman, *supra* note 8, at 742.

12. *Id.*

13. *See* Patt, *supra* note 6, at 107-110; Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 179 (1995).

C. *The New York State Cases*

One of the earliest cases to grant a second parent adoption in New York was *In re Adoption of Evan*.¹⁴ In *Evan*, a mother¹⁵ petitioned for a second parent adoption of a child born to her partner.¹⁶ The court noted that the women were in a “committed, long-term relationship . . . for the past fourteen years” and conceived a child together through alternative insemination.¹⁷ The court granted the adoption by the petitioning mother after considering the reports of the court-appointed guardian ad litem and two court-appointed licensed social workers, all of whom concluded that the adoption was in the child’s best interest.¹⁸ The court observed that the birth mother was “an Assistant Professor of Pediatrics and an attending physician at a respected teaching hospital,” whereas the petitioning mother “[held] a Ph.D. in developmental psychology and teaches at a highly regarded private school.”¹⁹ Observing that the adoption was in the child’s best interest, the court noted that the adoption would facilitate his receipt of several legal rights: the right to economic support, inheritance rights, as well as improved medical and educational benefits, all from the petitioning mother.²⁰ Additionally, in the event of a separation of his legal mothers, the child would be assured of maintaining contact with both mothers.²¹ Under New York’s standing provision, the petitioning mother met the requirement that she be an “unmarried adult.”²² The court recognized that the only statutory impediment to the adoption was New York’s cut-off provision.²³ In refusing to

14. 583 N.Y.S.2d 997 (Sup. Ct. 1992).

15. Throughout this paper I refer to both parents as “mothers,” and differentiate as needed by referring to the “birth mother” and the “petitioning mother” where appropriate, so as to avoid any privileging of the birth mother.

16. See *Evan*, 583 N.Y.S.2d at 998.

17. *Id.*

18. See *id.* at 1002.

19. *Id.* at 998.

20. See *id.* at 998-99.

21. See *id.* at 999. Under the law of New York, a mother who has not birthed or adopted her child has no rights to maintain visitation. See *id.* (citing *In re Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991) (characterizing mother who failed to adopt or birth her child a “legal stranger” with no standing to petition the court for visitation)).

22. See *id.* New York’s standing requirement permits “[a]n adult unmarried person or an adult husband and his adult wife together [to] adopt another person.” N.Y. DOM. REL. LAW § 110 (McKinney 1998). New York also expressly prohibits discrimination against potential adoptive parents on the basis of sexual orientation. See N.Y. CIV. RIGHTS LAW § 421.6[h](2) (McKinney 1998).

23. See *Evan*, 583 N.Y.S.2d at 1000. New York’s cut-off provision states that “the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child.” N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1998).

construe the terms of the provision literally, the court observed that “where the adoptive and biological parents are in fact co-parents . . . New York law does not require a destructive choice between the two parents.”²⁴

Another lower court decision granting a second parent adoption was *In re Adoption of Caitlin*.²⁵ In *Caitlin*, two separate adoption cases were consolidated and presented to the court. Both petitioning mothers were partners of the birth mothers, and both sets of children were created through planned alternative insemination.²⁶ The court noted approvingly the reports of each court-appointed guardian ad litem and licensed social worker, as well as numerous letters of reference.²⁷ With reference to the first couple, the court observed that the petitioning mother “earned a Master’s Degree in Engineering. She is . . . an Environmental Engineer and provides the primary financial support to the family. . . . The family lives in a large two-story 100-year-old house in excellent repair, in a quiet neighborhood on a tree-lined street.”²⁸ Discussing the second couple, the court noted that the petitioning mother had “a Bachelor of Science degree in laboratory technology The family lives in a . . . suburb in a neat and well-furnished raised ranch. [The petitioning mother] is the primary wage earner.”²⁹ The court interpreted the language of the cut-off provision as directory, rather than mandatory, and concluded that the adoptions were consistent with the “legislative intent” of permitting adoptions to proceed when in the best interest of the child.³⁰ The court recognized “that these cases present family units many in our society believe to be outside the mainstream . . . [t]he reality, however, is that most children today do not live in so-called ‘traditional’ 1950 television situation comedy type families.”³¹

Following the lower court decisions in *Evan* and *Caitlin*, two different appellate courts affirmed denials of second parent adoptions in *In re Jacob*³² and *In re Dana*.³³ In *Jacob*, an unmarried couple, consisting of a birth mother and her male partner petitioned for a joint

24. *Evan*, 583 N.Y.S.2d at 1000.

25. 622 N.Y.S.2d 835 (Fam. Ct. 1994)

26. *See id.* at 836. The court emphasized that “the couples have lived together in committed, long-term relationships for nine and twelve years respectively. Each couple viewed its relationship as permanent, *akin to marriage*.” *Id.* (emphasis added).

27. *See id.* at 837.

28. *Id.*

29. *Id.*

30. *See id.* at 838.

31. *Id.* at 841.

32. 620 N.Y.S.2d 640 (App. Div. 1994), *rev’d*, 636 N.Y.S.2d 716 (1995).

33. 624 N.Y.S.2d 634 (App. Div.), *rev’d sub nom.*, *In re Jacob*, 636 N.Y.S.2d 716 (1995).

adoption, with the consent of the biological father.³⁴ In a terse, three paragraph opinion, the court observed that adoption law is entirely statutory and required strict construction.³⁵ Because “the statute does not permit adoption by two unmarried persons,” the court denied the couple’s appeal.³⁶ The dissent argued that while the object and purpose of the adoption law should be honored, a strict construction of the statutory language was not mandated by either caselaw or public policy.³⁷ The dissent observed that in its prior jurisprudence, the New York State Court of Appeals denied an adult adoption petition by a gay man that was authorized under the literal language of the statute.³⁸ In denying the adoption, the Court of Appeals reasoned that the object and purpose of the adoption law was to foster a parent-child relationship; to grant an adoption to sexual partners would not further that legislative purpose.³⁹ The dissent in *Jacob* argued that when “the relationship of the unmarried couple is the functional equivalent of a husband-wife relationship,” the parties should be treated as married, and the stepparent exception should apply.⁴⁰

In *Dana*, a mother appealed a lower court decision denying her petition for a second parent adoption. The two mothers planned and conceived their child through alternative insemination, and the court-ordered home study favored the adoption.⁴¹ While the court disagreed with the lower court’s determination that the petitioning mother lacked standing to adopt, it affirmed the decision on the grounds that the birth mother could not consent to the adoption while retaining her parental rights.⁴² The court approvingly noted the lower court’s conclusion that application of the cut-off provision would be “ludicrous.”⁴³ “The fact that such an outcome would be ludicrous only compels adherence to the statute in the first place. Clearly the

34. See *In re Jacob*, 636 N.Y.S.2d 716, 717 (1995).

35. See *Jacob*, 620 N.Y.S.2d at 640.

36. *Id.*

37. See *id.* at 640-43 (Green, J., and Balio, J., dissenting).

38. See *id.* at 641 (Green, J., and Balio, J., dissenting) (citing *In re Robert Paul P.*, 481 N.Y.S.2d 652 (1985)).

39. See *id.* (Green, J., and Balio, J., dissenting).

40. *Id.* at 643. (Green, J., and Balio, J., dissenting). The dissent also noted in its arguments that the unmarried couple “lived together in what they describe as a ‘committed, long-term relationship.’” *Id.* at 877 (Green, J., and Balio, J., dissenting).

41. See *In re Dana*, 624 N.Y.S.2d 634, 635 (App. Div.), *rev’d sub nom.*, *In re Jacob*, 636 N.Y.S.2d 716 (1995). The court observed that the petitioning mother and the birth mother were together for thirteen years prior to their decision to have a child together. See *id.*

42. See *id.*

43. See *id.* at 635-36.

intent of the legislature was to deny a single person the right to adopt another's child while the natural parent . . . retains parental rights."⁴⁴ The court rejected the reasoning in *Evan* and *Caitlin* as "examples of impermissible judicial legislation."⁴⁵

The New York State Court of Appeals resolved the split in the lower courts by reversing the appellate decisions in *Jacob* and *Dana* in a consolidated appeal.⁴⁶ Writing for the court, Chief Judge Judith Kaye, a noted feminist jurist, found second parent adoption to be entirely consistent with the adoption statute.⁴⁷ As a preliminary matter, she observed that "[t]o rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them."⁴⁸

Discussing the factual background of the cases, the court observed that in *Jacob*, the petitioning father was "a programmer/analyst with an annual income of \$50,000, while [the mother] was a student."⁴⁹ In *Dana*, the mothers "lived together in . . . a long and close relationship for the past 19 years. [The petitioning mother] works as a special education teacher . . . earning \$38,000 and [the birth mother] . . . has an annual income of \$48,000."⁵⁰

Identifying two "basic themes" relevant to the court's analysis, Judge Kaye began by noting that adoption "is 'solely the creature of . . . statute.'"⁵¹ Because of its genesis, the adoption statute as a whole is to be strictly interpreted.⁵² Strict interpretation, however, is not limited to the statutory language, it also requires strict adherence to legislative purpose.⁵³ The legislative purpose of the adoption law, in the end, is to facilitate decisions that reflect the best interests of the child.⁵⁴ The second theme identified by Judge Kaye was the

44. *Id.* at 636.

45. *Id.*

46. *In re Jacob*, 636 N.Y.S.2d 716 (1995).

47. *See id.* at 717.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 718 (citation omitted).

52. *See id.*

53. *See id.* (citing *In re Robert Paul P.*, 481 N.Y.S.2d 652 (1985) (denying adult adoption to adult lover despite literal compliance with statutory language); *In re Best*, 495 N.Y.S.2d 345 (1986) (denying right to inherit from biological ancestor to an adopted child despite literal language of the statute)).

54. *See id.*

complexity and “not entirely reconcilable patchwork” that comprises New York adoption law.⁵⁵

After reasoning that the appellants met the standing requirement as unmarried adults, the court considered the effect of New York’s cut-off provision.⁵⁶ As a preliminary matter, the cut-off provision was intended to deal with the *effect* of adoption and is not a factor relevant to determining if a particular adoption may take place.⁵⁷ The provision utilizes terms from inheritance and estate law; thus, the court concluded that the legislative concern “was the resolution of property disputes upon the death of an adoptive parent or child.”⁵⁸ Any ambiguity inherent in the cut-off provision required the court to interpret its requirements in the child’s best interest.⁵⁹ The court observed that New York law waives the cut-off provision not only in the case of stepparent adoption, but also in the case of “open adoption.”⁶⁰ In the case of open adoption, “the parties to an agency adoption [may] ‘agree to different terms’ as to the nature of the biological parents’ post-adoptive relationship with the child.”⁶¹ The court concluded that the provision does not militate relinquishment of parental rights if: the birth parent consents to the adoption; the birth parent has agreed to retain parental rights; and the birth parent has agreed to raise the child with the petitioning parent.⁶² Rejecting the dissident’s contention that permitting second parent adoptions would allow “adoptions by ‘any number of people who choose to live together,’” the court asserted that its decision did “*not mandate . . . approval of all second parent adoptions . . . [it] simply permits them to take place when appropriate.*”⁶³

III. ANALYSIS AND CRITIQUE OF THE MODEL

As a preliminary matter, it must be observed that second parent adoption has served as a useful equitable remedy for a small number of lesbian families. It also may provide an avenue of legal recognition for lesbian families who are comprised of children from

55. *Id.* at 719.

56. *See id.* at 720-24.

57. *See id.* at 721. “[T]he section has nothing to do with the standing of an individual to adopt.” *Id.*

58. *Id.*

59. *See id.* at 722.

60. *Id.* at 723. In an open adoption scheme, birth parents and adoptive parents structure their relationship according to their own mutually agreed upon terms.

61. *Id.*

62. *See id.*

63. *Id.* n.4 (emphasis added).

prior relationships.⁶⁴ For example, a lesbian family comprised of two women, one of whom has a child from a former relationship, may be able to obtain a second parent adoption to the extent that they are able to demonstrate to the court that the adoption is in the best interest of the child.⁶⁵ Other commentators have suggested that an adoption analysis that centers on the best interest of the child is generally positive, because it reflects a general societal trend away from viewing children as property.⁶⁶

There are many reasons, however, why second parent adoption should be questioned as a long-term strategy for gaining legal recognition for lesbian families. The legal process is invasive and depends upon the enlightenment of an individual family court. Second parent adoption ultimately privileges one mother over the other because it fails to question the automatic conferral of rights in the birth mother where the decision to have children is a joint decision. It perpetuates a system that confers rights based upon class and economic status, rather than demanding substantive restructuring of the family law. Such restructuring would ultimately benefit all types of lesbian families.

For many lesbian families, beginning a second parent adoption proceeding and “subjecting the family to evaluation according to standards rooted in homophobia and heterosexism” will only serve as a deterrent.⁶⁷ The experience of one mother who successfully petitioned the court for a second parent adoption underscores the stress and discomfort experienced by families probed by the court:

[T]he judge . . . requested a home study . . . [we] wondered why we had to be “studied” as our sons had always been in our house and the court would not change that. Although we were assigned a social worker who was sympathetic and supportive of the idea of lesbians adopting, we had to explain and defend our decision to have children to this stranger in our home. We educated her about the effects of legal discrimination on lesbian families This educational process continued at the court hearing when the judge asked [the birth mother] to explain why our children would not be eligible for my social security benefits unless he approved the adoption The hearing itself was a draining process. An expert witness and the

64. Although all of the cases involving lesbian families discussed involved children conceived through alternative insemination, the reasoning of the court in the case of the cross-sex unmarried couple would be applicable to such lesbian families. *See generally In re Jacob*, 636 N.Y.S.2d 716 (1995) (passim).

65. This assumes that the women have obtained consent for the adoption from the child’s other legal guardian, where applicable.

66. *See, e.g., Polikoff, Two Mothers, supra* note 2.

67. *Id.* at 526.

social worker who had done the home study also testified. As I listened to a child psychologist testify why it was in our sons' best interest for the adoption to proceed, I felt anger that anyone could try to deny the relationship I had to my sons.⁶⁸

As demonstrated in cases like *Evan*,⁶⁹ *Caitlin*,⁷⁰ and *Dana*,⁷¹ mothers who petition for a second parent adoption should expect to receive intense scrutiny under the supervision of the lower level state court. A court-appointed guardian ad litem and one or more licensed social workers will conduct numerous visits and assess whether the adoption is in the best interest of the child. For lesbian families already in existence, many mothers may not consider their lives profoundly affected by the conferral of additional legal status.⁷²

In addition to being intrusive, the decision to confer legal status remains with the court. Despite the positive statutory interpretations in states like New York, lesbian families elsewhere remain dependent upon an individual family court judge's interpretation of state adoption statutes.⁷³ Even in states where the statutory interpretation is complete, as Judge Kaye observed, the decision regarding whether to confer legal status to both mothers is solely within the discretion of the court.⁷⁴ The petitioning mother must affirmatively demonstrate to the court that a grant of legal parenthood is in the best interest of the child. Carmel Sella has noted that second parent adoption is only effective if no judicial bias towards lesbian families exists.⁷⁵ Otherwise, a judge uncomfortable with lesbian families may simply find that one mother is in the best interest of the child, instead of two.⁷⁶

Another obstacle preventing second parent adoption from being an effective strategy for lesbian families is the explicit privileging of the birth mother, even in the case of a jointly planned and conceived

68. Deborah Lashman, *Second Parent Adoption: A Personal Perspective*, 2 DUKE J. GENDER L. & POL'Y 227, 228-29 (1995). Lashman successfully petitioned for a second parent adoption in the Supreme Court of Vermont. See *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

69. 583 N.Y.S.2d 997 (Sur. Ct. 1992).

70. 622 N.Y.S.2d 835 (Fam. Ct. 1994).

71. 624 N.Y.S.2d 634, 635 (App. Div.), *rev'd sub nom.*, *In re Jacob*, 636 N.Y.S.2d 716 (1995).

72. See Polikoff, *Two Mothers*, *supra* note 2, at 526.

73. See Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 545 (1993).

74. See *In re Jacob*, 636 N.Y.S.2d 716, 723 n.4 (1995).

75. See Carmel B. Sella, *When a Mother is a Legal Stranger to her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 159-60 (1991).

76. See *id.* at 160.

alternative insemination.⁷⁷ In order to proceed with a petition for adoption, the petitioning mother must acquire the “consent” of the birth mother. Under traditional analysis, her parental rights are “vested” in the birth mother, regardless of the joint mother’s participation and responsibility for their child.⁷⁸ Requiring the petitioning mother to demonstrate her relationship to the child and to prove that it is in the best interest of the child implicitly recognizes and affirms the notion that she is less of a mother than the birth mother.⁷⁹

Perhaps most troubling about the pursuit of second parent adoption is the implicit requirement that lesbian mothers conform to a societal expectation of what a family “is.” A lesbian family must convince the court that its family structure and dynamic mirror the “standard heterosexual family,” the sole exception being the sex of one of the members of the parental unit. To convince a court to deviate, the lesbian family must demonstrate that: there are only two parents; they are in a committed, monogamous long-term relationship; they are professionals with sufficient income levels; and it will certainly help if their child was conceived by the legal mother through alternative insemination.⁸⁰

In evaluating the efficacy and wisdom of the strategy for lesbian families, Ruthann Robson has argued that second parent adoption continues to perpetuate the “dyadic nature of parenthood.”⁸¹ She noted that while second parent adoption may “advance an emancipatory agenda for lesbians by not perpetuating sexual orientation discrimination,” it remains problematic because the individual lesbian family must convince the court that it is the *exception* to the “heterosexual mandate.”⁸² This mandate requires the

77. See *id.*; see also Ettlbrick, *supra* note 73, at 546-47. Ettlbrick observed that in the case of lesbian families, we must reject the notion of a superior legal right based solely upon a biological connection to the child. See *id.* If both mothers agree to conceive and are full participants in the conception, there should be no legal privilege conferred upon the birth mother. See *id.*

78. See Sella, *supra* note 75, at 143-44.

79. See *id.*

80. Although the court’s reasoning in *Jacob* with regard to the unmarried cross-sex couple purportedly applied to *Dana* as well, one significant factual disparity between the couples aptly demonstrates how the heterosexual mandate operates. In *Jacob*, the couple was together three years, and the child was conceived outside of the petitioning couple’s relationship. See *In re Jacob*, 636 N.Y.S.2d 716 (1995). After extending my analysis to cases outside of the New York courts, I have yet to locate one reported case of an approved second parent adoption involving a lesbian couple together less than seven years.

81. RUTHANN ROBSON, *The Third Sex, Third Parties, and Child Custody*, in *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* 171, 185 (1998).

82. *Id.* at 185-86.

mothers to demonstrate long term commitment and monogamy; there can only be two lesbian mothers, not three.⁸³ If there were three lesbian mothers, the third would have to remain a third party, a legal stranger to her child.⁸⁴ While it has been suggested that the courts' reasoning in second parent adoption cases lends itself to adoption by more than two parents,⁸⁵ given the courts' repeated attention to the monogamous nature of the mothers' relationship, the likelihood of judicial recognition seems doubtful. It appears that courts are unable to conceive of a chosen parenting relationship not necessarily linked to a two person, heterosexual relationship.⁸⁶

Advocates of second parent adoption have yet to tackle another significant drawback. As Robson has observed, second parent adoption may serve only to "reinforce a [dominant] social structure based upon economic stratification."⁸⁷ The heterosexual mandate is again relaxed in the case of economic privilege,⁸⁸ as evidenced from the courts' explicit commentary regarding the couple's professional and economic status.⁸⁹ The New York cases aptly demonstrate the judges' acquiescence when confronted with parties who are educated professionals with significant disposable income and property. Class and economic status will also act as a barrier to lesbian mothers for whom access to legal remedies is limited, given the costliness of extensive litigation.

Most of the lesbian families that have successfully petitioned for a second parent adoption became parents through alternative insemination. A grant of a second parent adoption appears more likely if the child was conceived through alternative insemination. This further reflects courts' relaxation of the heterosexual mandate. In the absence of an identified father, the gender neutral "two parents are better than one" mantra can be recited, safe from the specter of lesbian motherhood in defiance of a patriarchal family model.⁹⁰ If no

83. See *id.* at 186.

84. See *id.* Professor Robson has noted that in many ways, "second parent adoption suffers from many of the same ideological shortcomings as same-sex marriage." *Id.*

85. See generally Elizabeth Rover Bailey, Note, *Three Men and a Baby: Second Parent Adoptions and their Implications*, 38 B.C. L. REV. 569 (1997).

86. Cf. Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African-American Adults Should Be Allowed To Jointly Adopt And Co-Parent African-American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997) (questioning the requirement of marriage when two able adults petition for a joint adoption).

87. ROBSON, *supra* note 81, at 186.

88. See *id.*

89. See *supra* notes 14-31 and accompanying text.

90. Cf. Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996).

male can possibly be divested of parental rights, then the ideology of the heterosexual dyad will have to be content with a “substitute” father, that is, another mother. Recognition of lesbian mothers in this context remains problematic because lesbian mothers are only granted legal recognition in the absence of a father.⁹¹

IV. CONCLUSION

Second parent adoption can only offer lesbian families a short-term remedy. In order to acquire a second parent adoption, lesbians must fashion themselves into a traditional heterosexual dyad, the only permissible exception being that both parents are of the same sex. The mothers must be educated professionals who essentially evoke the memory of a “‘traditional’ 1950 television situation comedy type famil[y].”⁹² The pursuit of second parent adoptions may also cause damage to other families, who refuse or are unable to transform themselves to fit the mold. Utilizing community resources to pursue such a short-sighted and flawed result ignores other disenfranchised communities with whom lesbians should build effective coalitions and pursue more viable long-term change.⁹³

More comprehensive and child-centered adoption laws would benefit all communities. Sella has suggested that an intent based model, a combination of contract law and adoption, would be preferable to the present adoption laws.⁹⁴ An intent-based model of parenthood would render the power imbalance between the birth mother and the other mother irrelevant, because parenthood would no longer be based upon a biological relationship to the child.⁹⁵ Such a model would also eschew marital status as a basis for parenthood.⁹⁶ Second parent adoption as it is presently constituted is a questionable strategy for lesbian mothers seeking liberation for themselves and their families.

91. Hinging reproductive efforts and rights on alternative insemination, a financially prohibitive enterprise for many families, is also problematic. While some lesbian mothers with planned families conceive children through less expensive means such as intercourse with a friend or informal alternative insemination, *see, e.g.*, Polikoff, *Two Mothers*, *supra* note 2, at 466, it is likely that such an insemination would be viewed askance by a provincially minded court.

92. *See In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 841 (Fam. Ct. 1994).

93. *See, e.g.*, Kupenda, *supra* note 86 (proposing a legislative solution).

94. *See Sella, supra* note 75 (*passim*).

95. *See id.*

96. *See id.*