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COMPETITION

Parents in Illinois Are Parents in Oklahoma
Too: An Argument for Mandatory Interstate
Recognition of Same-Sex Adoptions

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I. INTRODUCTION

In recent years, an enormous national debate has focused on the question of whether gay and lesbian couples should have the legal right to marry and thus access the myriad benefits that the legal status of marriage grants to heterosexual couples.¹ While the gay marriage debate focuses on legal relationships between two adults, the American public has paid less attention to other members of same-sex-parent families: children born to, or adopted by, gay individuals or same-sex couples.² Supporters of the parenting rights of homosexual adults point to statements from a wide array of professional experts in medicine, psychology, and law, which indicate that “a parent’s sexual orientation has nothing to do with his or her ability to be a good parent.”³ On the other side of the debate, opponents of gay and lesbian parenting articulate “fears that children raised in lesbian or gay households will suffer gender role confusion, will themselves become lesbian or gay . . . or will not be morally fit because the household in which they are raised is moreally [sic] suspect.”⁴

The conflict between these two opposing camps has played out in the lives of thousands of parents and their children. One particularly dramatic example is the case of Steven Lofton and his three HIV-positive foster children, whom he raised from infancy.⁵ Even while noting that his

1. “[T]here is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states[.] . . .” *Lewis v. Harris*, 908 A.2d 196, 209 (N.J. 2006). The *Lewis* court held that while same-sex couples did not have a fundamental right to marriage, New Jersey’s constitution “guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples.” *Id.* at 223. Various other courts and state legislatures have now authorized same-sex marriages. For a current summary of state marriage laws, see Human Rights Campaign, Marriage & Relationship Recognition, <http://www.hrc.org/issues/marriage.asp> (last visited Sept. 7, 2009).

2. There was, however, an immense amount of media coverage surrounding the pregnancy of Vice President Richard Cheney’s lesbian daughter, Mary Cheney. See, e.g., William Saletan, *Mary with Children*, WASH. POST., Dec. 24, 2006, at B2 (“Moralists are denouncing . . . Mary . . . for disclosing that she and her lesbian partner will raise the baby together.”). When Ms. Cheney’s son was born, the White House released an official photograph of the Vice President and Second Lady with their grandson, but the photograph did not include Ms. Cheney or her partner. See Posting of Sarah Wheaton to The Caucus: The Politics and Government Blog of The Times, <http://thecaucus.blogs.nytimes.com/2007/05/23/its-a-boy-for-mary-cheney/> (May 23, 2007, 18:24 EST).

3. Human Rights Campaign, Professional Organizations on GLBT Parenting, <http://www.hrc.org/issues/parenting/professional-opinion.asp> (last visited Sept. 7, 2009).

4. Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 646 (1996).

5. Mr. Lofton’s family has received significant media attention. See, e.g., Dana Canedy, *Groups Fight Florida’s Ban on Gay Adoptions*, N.Y. TIMES, Mar. 15, 2002, at A12; Robert Scheer,

“efforts in caring for these children have been exemplary,”⁶ a federal appellate court upheld a Florida statute prohibiting Mr. Lofton from legally adopting the children because he was openly gay.⁷ The court saw no irony in the fact that the Florida Department of Children and Family Services praised Mr. Lofton as a model foster parent even while the state asserted that he was fundamentally unfit to become an adoptive parent; the court stated that “to the extent that foster care and guardianship placements with homosexuals are the handiwork of Florida’s executive branch, they are irrelevant to the question of the *legislative* rationale for Florida’s adoption scheme.”⁸ Florida remains the only state that specifically prohibits adoption by an individual homosexual adult,⁹ but prospective homosexual parents in other states may face practical obstacles to adoption.¹⁰

The legal rights of homosexual couples who wish jointly to adopt and raise a child are substantially less certain. There are two common ways that two adults may come to share parental rights over a child who is not biologically related to both parents. In a dual-petition or two-parent adoption, the biological parents of the child either voluntarily relinquish their parental rights or have them terminated by a court due to child abuse, neglect, or other proof that the biological parents are unfit to raise the child.¹¹ This leaves the child with no legal parent, enabling a homosexual couple to create a new legal parentage relationship through

Editorial, *Kids Get Left in the Lurch When the ‘Values’ Cops Arrive*, L.A. TIMES, Mar. 19, 2002, at Metro 13.

6. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 807 (11th Cir. 2004). One scholarly analysis of the case concluded that the State of Florida is “jeopardizing the well-being of children who it concedes are currently receiving wonderful care from loving parents in order to send a message that homosexuality is incompatible with permanent parenting.” Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 379, 389 (2007).

7. *Lofton*, 358 F.3d at 827.

8. *Id.* at 824. At least one state, Texas, has considered passing a statute that would bar homosexual individuals from serving as foster parents. See Elizabeth L. Maurer, Comment, *Errors That Won’t Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals from Foster Parent Eligibility*, 5 APPALACHIAN L.J. 171 (2006).

9. Information derived from the Human Rights Campaign database on state adoption laws, http://www.hrc.org/issues/parenting/adoptions/adoption_laws.asp (last visited Sept. 7, 2009), and the Florida Adoption Law, <http://www.hrc.org/issues/parenting/adoptions/856.htm> (last visited Oct. 13, 2009).

10. Homosexual individuals may, however, have difficulty finding an adoption agency that is willing to work with them. Additionally, gay and lesbian individuals are barred from adopting from certain foreign countries. For an excellent and engaging first-person account of an adoption by a gay couple detailing many of the obstacles faced by homosexual individuals and couples as they navigate the adoption process, see DAN SAVAGE, *THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT* (Plume 2000) (1999).

11. Shapiro, *supra* note 4, at 630.

the finalization of an adoption decree pursuant to the laws of the relevant state.

Alternatively, in cases where a biological parent wishes to retain parental rights to the child and allow another adult to assume similar rights, state courts have come to recognize and allow “stepparent adoptions.”¹² Stepparent adoptions create a legal relationship between the stepparent and the child that generally would not exist in the absence of a legal adoption, as a stepparent is not required, simply by virtue of marrying a biological parent, to support or maintain a relationship with the stepchild after dissolution of the marriage.¹³ Additionally, some jurisdictions that do not allow same-sex marriage do allow second-parent adoptions by gay or lesbian parents without requiring that the biological parent terminate his or her parental rights.¹⁴ Once a court of competent jurisdiction enters a finalized adoption decree, an adoptive parent has all parental rights under applicable state law that a biological parent would have.¹⁵

Thus, a lesbian or gay individual may legally adopt his or her partner’s biological child, and homosexual couples may adopt a child to whom neither partner is biologically related. As of this writing, ten states and the District of Columbia explicitly, either by statute or judicial decision, allow two adults of the same sex to petition jointly to adopt a child unrelated to either of them.¹⁶ Twenty-six additional states have laws allowing joint petitions by married couples, which the courts of some states, even those that do not recognize same-sex marriages, have construed as permitting same-sex joint adoption petitions.¹⁷ In thirty-six states and the District of Columbia, therefore, a lesbian or gay couple

12. *Id.* at 630 n.37.

13. Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 41 (1984).

14. This is the case, for instance, in California (*Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003)), Illinois (*Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995)), and Indiana (*In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004)).

15. *See, e.g.*, UNIF. ADOPTION ACT § 1-104 (1994), 9 U.L.A. 23 (1999) (“After a decree of adoption becomes final, each adoptive parent and the adoptee have the legal relationship of parent and child and have all the rights and duties of that relationship.”); UNIF. PARENTAGE ACT § 1 (1973), 9B U.L.A. 387 (2001) (“[A] ‘parent and child relationship’ means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.”).

16. California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Oregon, Vermont, and the District of Columbia. Information derived from the Human Rights Campaign database on state adoption laws, *supra* note 9.

17. *See id.*

may be able to adopt a child who is biologically related to neither of the parents.¹⁸ Nine states and the District of Columbia allow lesbian and gay adults to petition to adopt a child either biologically related to or adopted by a same-sex partner, and sixteen states have allowed such petitions in parts of their jurisdictions.¹⁹ Thus, in twenty-five states and the District of Columbia, same-sex second-parent adoptions may be finalized.²⁰

It is unclear, however, to what extent states that do not allow homosexual parents to adopt jointly are required to recognize such an adoption finalized in another state. This is a significant concern, because “there are now more than 160,000 families with two gay parents and roughly a quarter of a million children spread across some 96 percent of U.S. counties.”²¹ This Article argues that interstate recognition of finalized same-sex adoptions should be mandatory for three key legal and policy reasons: the constitutional right to parenthood, the constitutional requirement that states offer full faith and credit to the final judicial decrees of other states as reflected in national policies governing custody determinations, and the interest of children in the certainty of parental identification and rights.

This Article proceeds in six Parts. Following this Introduction, Part II analyzes the constitutional dimensions of the right to parent by surveying case law of the Supreme Court of the United States that has rooted the parent-child relationship in the Due Process Clauses of the Fifth and Fourteenth Amendments. Part III argues that interstate recognition of adoption decrees issued to same-sex couples is mandated by the Constitution’s Full Faith and Credit Clause, notwithstanding any potential ramifications of the federal Defense of Marriage Act. Part IV continues the discussion of the Full Faith and Credit Clause as it applies to parenting rights by examining two key statutes that recognize a federal interest in the settled determination of parental rights granted by an individual state. Part V analyzes two landmark legal battles in the same-sex adoption arena and uses them as a lens through which to view the effects of nonrecognition on families and children. Part VI offers concluding thoughts.

18. *See id.*

19. *See id.*

20. *See id.*

21. Dan Gilgoff, *The Rise of the Gay Family*, U.S. NEWS & WORLD REP., May 24, 2004, at 40.

II. CONSTITUTIONAL DIMENSIONS OF THE RIGHT TO PARENT

In spite of significant opposition, thousands of homosexual individuals and couples have created parental relationships with biological and adopted children. Family relationships have long implicated individual rights of constitutional dimension: “[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”²² The Supreme Court has recognized that the existence of a parent-child relationship, whether or not that relationship is rooted in biological ties, is entitled to some protection under the Due Process Clause of the Fifth and Fourteenth Amendments.²³ The Court has also noted the importance of stable legal understandings of parentage to both parents and children by noting that during judicial review of potentially unconstitutional parental rights terminations, the parent “suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.”²⁴ Finally, the Court has afforded procedural due process protections to the termination of existing parental relationships, explaining that “persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.”²⁵

Although the Supreme Court in these various precedents was concerned primarily with the ties between biological parents and their children, the Court’s arguments also ring true when one considers the importance of the established tie between adoptive parents and their children. An adoptive parent who has established a stable, legal relationship with his or her child deserves the same protections as are due

22. *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (citations omitted) (holding that a city ordinance allowing only members of nuclear families to share residences was not rationally related to legitimate state interests in light of the constitutional protections afforded to existing familial relationships between a grandmother and her two grandchildren).

23. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (holding that an unmarried father who had not had a significant personal relationship with his child was not entitled to greater procedural protections than those already provided by the State of New York, but explaining that “[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood” by developing a parental relationship with the child, “his interest in personal contact with his child acquires substantial protection under the Due Process Clause” (internal citations omitted)).

24. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972). In *Stanley*, the Illinois Supreme Court held that Illinois could not treat an unmarried biological father differently under its laws governing child custody presumptions than it treats biological fathers who were married to their children’s mothers at the time their children were born. *Id.* at 658.

25. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that a biological parent’s parental rights could only be terminated on a showing of clear and convincing evidence supporting the state’s grounds for termination).

to a biological parent.²⁶ In spite of constitutional arguments that seemingly mandate the protection of parental relationships created by homosexual adoptive parents, advocates who are concerned about the moral or psychological ramifications of homosexual parenting have worked to pass legislation that would disrupt established family relationships.²⁷

The potential implications of such nonrecognition become clear if one imagines a scenario in which same-sex couples may need to exert their parental rights in a state that does not recognize those rights. Consider the following hypothetical situation: Adam has a biological child, Beth, while legally married to Beth's mother. After the death of Beth's mother, Adam enters into a homosexual relationship with Charlie, who after several years seeks to adopt Beth. Because Adam and Charlie live in a state that allows second-parent adoptions, such as Illinois, Charlie would be granted a final adoption decree recognizing him as Beth's legal parent. Bringing their adoption decree and exercising their constitutionally protected right to travel throughout the United States, Charlie, Adam, and Beth travel south for a scenic tour and enter Oklahoma.²⁸ One night, a drunk driver strikes their car, killing Adam instantly and severely injuring Beth. Paramedics at the scene realize that Charlie is not Beth's biological father because she addresses him by name and he is of another race. Charlie produces his Illinois adoption decree, but Oklahoma state agencies are not allowed to recognize the legal status of that decree. Because Oklahoma law mandates that Charlie's legal relationship to Beth not be acknowledged, Charlie, who has a long-standing relationship of comfort and care with Beth, is denied access to her in the ambulance and emergency room. Moreover, because Charlie is not allowed to make medical decisions for Beth, hospital

26. For an excellent scholarly analysis on this point, arguing that a child's right to be adopted is at least as fundamental as the right to marry although neither depends on the existence of genetic ties between the individuals involved, see Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 *CAR. U.L. REV.* 297, 307-21 (2005).

27. In Oklahoma, as discussed at length *infra* Part IV.A, state legislators mandated in 2004 that state agencies were not permitted to recognize dual-parent same-sex adoptions finalized in other states. 10 *OKLA. STAT. ANN.* tit. 10, § 7502-1.4 (2007).

28. While not expressly guaranteed by the Constitution, the right to travel freely among the several states has long been recognized by the Supreme Court as a fundamental right. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 500 (1999) ("The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.").

officials are required to contact Beth's biological grandparents, with whom she has no close relationship.

All of these rights of access and control over healthcare are normal incidents of a legally recognized parental relationship. It seems unlikely that even the most adamant opponents of homosexual parenting would be comfortable with this result and with the image of a child tragically deprived of both of her parents on a single night. While this is certainly a dramatic scenario, it is not an unimaginable one, and even the faint possibility of such an occurrence makes clear the need for interstate recognition of the rights of homosexual adoptive parents.

III. INTERSTATE RECOGNITION OF ADOPTION DECREES ISSUED TO SAME-SEX COUPLES: THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."²⁹ Adoption proceedings are judicial in nature; adoption decrees are final judicial decrees; the final declaration of adoption is entered into the public record.³⁰ On what grounds do some argue that states may choose not to recognize same-sex two-parent adoptions finalized in other states?

A. *A Public Policy Exemption to the Full Faith and Credit Clause*

The so-called public policy exemption to the Full Faith and Credit Clause purportedly allows states to refuse to recognize judicial acts of other states "that would violate the forum state's internal policies."³¹ This exemption has historically applied in the family law contexts of marriage and divorce. Though the legal forms and effects of marriage licenses, divorce decrees, and adoption decrees are far from identical, the logic behind an exemption covering all three is that the area of family law is one that is so traditionally reserved to the individual states as to merit deference to state policies even in light of the Full Faith and Credit Clause, perhaps pursuant to the Tenth Amendment.³²

29. U.S. CONST. art. 4, § 1.

30. E.H. Schopler, Annotation, *Applicability of Res Judicata to Decrees or Judgments in Adoption Proceedings*, 52 A.L.R. 2d 406 (2008).

31. Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 752 (2003).

32. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Although the Supreme Court generally holds that there is no such exemption,³³ treatment of family law cases under the Full Faith and Credit Clause has not been entirely consistent, and has certainly left room for argument. For many years, courts held that states could choose not to recognize out-of-state marriages contracted by a state's own residents.³⁴ This exception, however, has lain largely dormant for decades "because the major moral divisions among the states over marriage that occasioned it have largely disappeared. The public policy exception has historically been invoked primarily in three contexts: polygamy, incest, and miscegenation."³⁵ Between the invalidation of antimiscegenation statutes by the Supreme Court in 1967³⁶ and the rise of the gay rights movement, few advocated for a rejuvenation of the public policy exemption to marriage recognition. The Defense of Marriage Act, however, may represent an implicit codification of this once-discredited doctrine, which potentially could have severe ramifications for the rights of gay parents and gay couples.³⁷

Even while acknowledging the "conventional wisdom . . . that state adoption decrees are generally treated like any other ordinary judgment under the Full Faith and Credit Clause," one scholar argues that adoption decrees are not entitled to recognition under these historical exemptions to interstate judgment recognition.³⁸ Professor Lynn Wardle asserts that there is a broad exemption for judgments concerning children, although he concedes that "[a]doption decrees are undeniably more stable and final than custody decrees," which due to their changeable nature are generally not deemed to merit full faith and credit in its constitutional

33. See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908) (holding that Mississippi could not refuse to recognize a final judgment issued by a Missouri court because it violated Mississippi public policy); *Mills v. Duryee*, 11 U.S. 481, 485 (1813) (holding that the Act of Congress that effectuated the Full Faith and Credit Clause has the effect of declaring "a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision").

34. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

35. Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 110 (1996).

36. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a Virginia statute banning interracial marriage was not justified because it was based upon unconstitutional racial discrimination).

37. See *infra* Part III.B.

38. Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561, 574 (2005).

sense.³⁹ Professor Wardle also argues that “the Full Faith and Credit Clause does not require enforcement of sister-state judgments that proscribe future behavior.”⁴⁰

The United States Court of Appeals for the Tenth Circuit, however, disagreed with the state of Oklahoma’s use of the argument in defense of its antiadoption statute and explained that states may control the incidents of legal adoption at their discretion, but that this degree of control does not allow states to refuse to recognize the legal status of adoption entirely.⁴¹ Professor Wardle’s argument ultimately boils down not to a legal argument, but to a social policy one: “Responsible public policy may appropriately define and enforce limits on adult lifestyle preferences when they jeopardize the best interests of children.”⁴² With no evidence offered for either of the two extremely questionable assumptions contained therein—that homosexuality is a lifestyle preference and that it jeopardizes the interests of children adopted by homosexual parents—Professor Wardle fails to counter effectively the conventional wisdom favoring interstate recognition of same-sex adoptions.

B. Does the Defense of Marriage Act Create a Broad Exception to Full Faith and Credit?

In 1996, Congress enacted the federal Defense of Marriage Act (DOMA), which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁴³

DOMA allows states to decline to recognize any “right or claim arising from” same-sex marriages or relationships.⁴⁴ It is generally understood that “the intent of Congress at the time of the Act’s passage was to prevent same-sex couples from traveling to Hawaii, marrying, and then returning to their home states and demanding that the domicile

39. *Id.* at 585-86.

40. *Id.* at 590 (internal citations omitted).

41. *Finstuen v. Crutcher*, 496 F.3d 1139, 1153-54 (10th Cir. 2007).

42. Wardle, *supra* note 38, at 616.

43. 28 U.S.C. § 1738C (2006).

44. *Id.*

recognize their same-sex marriage.”⁴⁵ There is considerable debate over “whether the Act is meant to apply only to same-sex marriages that are celebrated contrary to the law of the domicile at the time of the marriage or to other marriages as well,”⁴⁶ but either interpretation could have wide-ranging implications for same-sex adoptive parents. For those states that allow same-sex second-parent adoption as an incident of their domestic partnership arrangements (such as New Jersey), or as a result of a formal homosexual marriage scheme (Massachusetts), DOMA could allow the invalidation of their finalized stepparent or second-parent adoption decrees. As scholars have noted, “[a]lthough DOMA does not expressly address adoption, it is possible that some politicians and judges will construe DOMA as a mandate against any rights conferred upon families with same-sex parents.”⁴⁷

Nevertheless, it appears that “even if DOMA is given a very broad interpretation, DOMA does not permit states to ignore the judgments issued in other state courts where the rights thereby recognized do not arise from the legal recognition of a same-sex relationship.”⁴⁸ Thus, unless an adoption is finalized in a state that allows same-sex couples to adopt only as a result of their marriage or civil union, and not through any other second-parent or joint-petition process, that adoption should not fall within DOMA’s exception to the Full Faith and Credit Clause. Since second-parent adoptions have the effect of creating a legal relationship between adoptive parent and child, not of creating such a tie between adoptive and original parent, such decrees should not trigger DOMA’s exclusionary provisions. Therefore, same-sex parenting couples would be wise to “protect themselves and their children by having their parental rights established in a way that does not require the existence of a marriage-like relationship.”⁴⁹ This is consistent with the advocacy position taken by Lambda Legal, an organization working for the rights of lesbians and gays, which emphasizes the importance of “victories that secure the legal ties between parents and children [and]

45. Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 301-02 (2001) (internal citations omitted). At the time DOMA was passed, Hawaii appeared likely to begin recognizing same-sex marriage pursuant to *Baehr v. Lemin*, 852 P.2d 44 (Haw. 1993).

46. Strasser, *supra* note 45, at 304.

47. Lisa S. Chen, Comment, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171, 199 (2005).

48. Strasser, *supra* note 45, at 320.

49. *Id.* at 323.

have a profound impact on the emotional and economic stability of LGBT and HIV-affected families.”⁵⁰

IV. FULL FAITH AND CREDIT AND INCREASING FEDERAL CONTROL OVER PARENTAL RIGHTS

State law, rather than federal law, traditionally governs the determination of legal rights and responsibilities in the family law arena.⁵¹ The Supreme Court has noted the importance of “solicitude for state interests, particularly in the field of family and family-property arrangements,”⁵² and, logically, the area of adoption law should be no exception to this presumption of default state control. The Court also has noted that “specific congressional action” implicating “clear and substantial interests of the National Government” will override state control, even in the family law arena.⁵³ Congress and the states have recognized a federal interest in closing off relitigation of family law disputes through two important statutory schemes: the Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Even commentators who strongly favor allowing states to reject final adoption decrees granted to homosexual parents by other states recognize that the PKPA “could arguably be read to mandate such recognition.”⁵⁴

The Full Faith and Credit Clause,⁵⁵ requiring that states give effect to final judgments entered by the courts of other states, is effectuated through a general implementing statute⁵⁶ and a number of subject-specific statutes, many of which apply to domestic relations cases. One such statute is the PKPA,⁵⁷ enacted in 1980 “to prevent the abominable practice of ‘child-snatching’ by one of the two parents involved in a marital break-up.”⁵⁸ Prior to the enactment of the PKPA, courts often held that custody decrees, which are always subject to modification in accordance with the best interests of the child, were not entitled to full

50. Lambda Legal, Adoption and Parenting, <http://www.lambdalegal.org/issues/adoption-parenting/> (last visited Sept. 7, 2009).

51. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) (holding that in the absence of a federal statute to the contrary, a Texas law that rendered married women unable to enter into legal binding contracts governed the case at issue).

52. *Id.*

53. *Id.*

54. Wardle, *supra* note 38, at 571.

55. See *supra* Part III.

56. 28 U.S.C. § 1738 (2006).

57. *Id.* § 1738A.

58. Ralph V. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U.L. REV. 803, 845 (2003).

faith and credit “because federal courts may only enforce final state decrees that are no longer subject to modification, and the general rule is that such decrees are not subject to full faith and credit.”⁵⁹ The PKPA was “enacted to prevent jurisdictional conflict and competition over child custody, and, in particular, to deter parents from abducting children for the purpose of obtaining custody awards.”⁶⁰ To achieve that end, the statute provides that no state can modify, except in certain enumerated circumstances, “any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.”⁶¹ The statute sets forth certain requirements for a binding custody determination, and then provides that once a State has exercised jurisdiction over a given custody dispute,⁶² its jurisdiction continues as long as “such State remains the residence of the child or of any contestant.”⁶³

Adoption decrees are similar to custody decrees in that they reflect legal determinations of which adults have the right to exercise parental control over a particular child.⁶⁴ If states were allowed to ignore binding adoption decrees issued to same-sex couples in other states, they would also have the option to ignore custody decrees awarded to same-sex adoptive parents, in contravention of the clear federal intent expressed in the PKPA. This action would be legally and practically problematic because the PKPA is considered a federal attempt “to provide all American citizens with uniformity for their expectations regarding the most basic of state-encouraged institutions”; that is, it ensures that parents are able to rely upon the recognition of their parental rights throughout the United States.⁶⁵ If Congress decides that the children of heterosexual couples are disadvantaged by continuous relitigation over their custodial status, it is only logical that children of homosexual couples are entitled to the same settled expectancy regarding their adoptive status.

59. McDougald v. Jensen, 596 F. Supp. 680, 685 (N.D. Fla. 1984) (internal citations omitted).

60. Peterson v. Peterson, 464 A.2d 202, 204 (Me. 1983).

61. 28 U.S.C. § 1738A(a).

62. *Id.* § 1738A(c).

63. *Id.* § 1738A(j).

64. Whitten, *supra* note 58, at 846-47.

65. Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 589 (1994).

In addition to the PKPA, forty-six states and the District of Columbia have adopted the UCCJEA,⁶⁶ which replaces an older model code, the Uniform Child Custody Jurisdiction Act, and ensures consistency between the Act and the PKPA.⁶⁷ The UCCJEA clarifies a number of issues that arose with reference to the old Act by enacting a clearer preference for home-state jurisdiction over child custody disputes, amending emergency jurisdiction procedures in light of newly enacted domestic violence laws, clarifying the circumstances under which a court can be deemed to have relinquished jurisdiction over a particular custody dispute, and eliminating “best interests” of the child as a standard for determining jurisdiction.⁶⁸ Some scholars have noted that the resident-jurisdiction provision may be detrimental to same-sex partners: “[I]f the biological or adoptive parent wanted to prevent his or her same-sex partner from having rights to the child, he or she could move with the child to a state against same-sex unions, remain there for six consecutive months . . . and then file a custody or visitation action.”⁶⁹

As a general rule, however, the UCCJEA and the PKPA should support the legal rights of gay parents once they are established in a particular state. While the UCCJEA by its own terms does not explicitly cover adoption-related matters,⁷⁰ it nevertheless has potential applications for same-sex adoptive parents. As in the case of the PKPA, the UCCJEA reflects a clear policy decision on the part of the states that have adopted it to weigh the interests of children more heavily than their own jurisdictional claims. It is important to note that the interest-of-the-child standard reflected in the PKPA and the UCCJEA is not the traditional “best interest of the child” standard sometimes used in custody determinations, but rather it refers to the interest of the child in having clearly defined parental relationships and in avoiding continual relitigation of his or her adoption or custody status.⁷¹ Opponents of homosexual adoption often argue that this type of adoption is not in the best interest of the child under the traditional standard, implicating

66. Uniform Law Comm’rs, A Few Facts About the Uniform Child Custody Jurisdiction & Enforcement Act, *available at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Sept. 7, 2009).

67. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 657 (1999) [hereinafter UCCJEA], *available at* <http://www.law.upenn.edu/bll/archives/ulc/finact99/1990s/UCCJEA97.pdf>.

68. *Id.* at 4.

69. Leah C. Battaglioli, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U.L. REV. 1235, 1261 (2005).

70. UCCJEA, *supra* note 67, at 3-4.

71. *Id.* at 4.

concerns of morality and general fitness for parenting, but such considerations are not the focus of the PKPA or of the UCCJEA. At no point in either the PPKA or the UCCJEA are the parents who may exercise rights under the codes defined to be only heterosexual or biological parents. Ensuring that homosexual parents have the rights, and their children have the protections, secured by these statutes requires that states respect and enforce finalized adoption decrees entered in other states.

V. *FINSTUEN V. CRUTCHER* AND *MILLER-JENKINS V. MILLER-JENKINS*:
TWO LANDMARKS IN THE SEARCH FOR INTERSTATE RECOGNITION
OF GAY AND LESBIAN PARENTAL RIGHTS

In addition to the compelling legal and constitutional arguments mandating interstate recognition of finalized adoptions of gay and lesbian couples, there are weighty moral and public interest arguments that require such recognition as well. This Part analyzes two sets of cases in which parents have challenged states' failure to recognize their parental status, and in so doing highlights the reality that the question of same-sex adoption rights is not an abstract one, but one which plays out in the lives of parents and children in all too real and often painful ways.

A. *Oklahoma's Legislative Decision To Deny Recognition to Finalized Gay and Lesbian Adoptions, and the Tenth Circuit's Response*

Like most states, Oklahoma has a broad statutory code that governs the procedures, requirements, and legal ramifications of adoptions. In 2004, Oklahoma legislators amended the code to limit the otherwise broad language providing for recognition of adoptions finalized in other jurisdictions, and to create a very specific exception: "[T]his state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."⁷²

The Oklahoma law, mandating that state agencies refuse to recognize same-sex adoptions finalized in other states, must be distinguished from other state laws that bar such adoptions from ever coming into legal existence.⁷³ The most significant court decision regarding a ban on adoption by a homosexual parent was decided by the United States Court of Appeals for the Eleventh Circuit in 2004, which

72. 10 OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (2004).

73. *Id.*

upheld Florida's ban on such adoptions.⁷⁴ Oklahoma does not have such a blanket statutory prohibition, but Oklahoma courts have yet to consider whether a same-sex partner can petition to adopt his or her partner's biological or adopted child(ren).⁷⁵ Instead, the impetus behind the new Oklahoma law was an opinion issued by the State Attorney General that would have required Oklahoma officials to recognize same-sex adoptions of Oklahoma-born children adopted by gay or lesbian couples in other jurisdictions, with the practical effect that Oklahoma would have been required to reissue children's birth certificates and to list the same-sex adoptive parents as the parents on the reissued certificates.⁷⁶ To describe the motivation behind the law in another way, its primary sponsor explained in a press release that it was intended to "protect children from being targeted for adoption by gay couples."⁷⁷

1. *Finstuen v. Crutcher*: The Tenth Circuit Invalidates the Adoption Amendment

Not long after the passage of the Oklahoma law, the Lambda Legal Defense and Education Fund brought a lawsuit on behalf of a number of families who feared the negative repercussions that could result from the state's refusal to recognize their adoption decrees.⁷⁸ The plaintiffs sought a declaratory judgment that the new Oklahoma law was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment and because it hampered their constitutionally protected right to interstate travel.⁷⁹ Additionally, the suit alleged that the adoption law amendment violated the Full Faith and Credit Clause of the United States Constitution,⁸⁰ and it presented a variety of arguments related to the standing of the various parents involved.⁸¹

The Seattle fathers whose request for an amended birth certificate had sparked the original State Attorney General ruling were the parents

74. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004). See generally *supra* notes 5-7 and accompanying text.

75. Human Rights Campaign, *Oklahoma Adoption Law*, <http://www.hrc.org/issues/parenting/adoptions/1370.htm> (last visited Sept. 7, 2009). However, the state court of appeals has held that the Oklahoma adoption statute denies all unmarried couples the right to adopt a child, which would likely be construed as barring a second-parent adoption by a same-sex partner. *In re Adoption of M.C.D.*, 42 P.3d 873 (Okla. Civ. App. 2001).

76. See T. Shawn Taylor, *Ties That Unwind: Legal Cases and Some State Laws Threaten To Undo Lesbian Couples' Adoptions, Parental Arrangements*, CHI. TRIB., Nov. 17, 2004, at C1.

77. *Finstuen v. Crutcher*, 496 F.3d 1139, 1148 n.6 (10th Cir. 2007) (citation omitted).

78. Taylor, *supra* note 76.

79. *Finstuen v. Edmondson*, 497 F. Supp. 1295, 1300 (W.D. Okla. Aug. 4, 2005).

80. U.S. CONST. art. 4, § 1.

81. *Crutcher*, 496 F.3d at 1142-43.

of an Oklahoma-born child whom they brought to Oklahoma “from time to time” pursuant to an open adoption agreement.⁸² Because their claimed injury—deterrence from continuing those visits for fear of losing their parental rights—was deemed to be too speculative, the fathers were found not to have standing to challenge the law by both the district⁸³ and circuit⁸⁴ courts. The Oklahoma Department of Health had issued a revised birth certificate for their daughter prior to the passage of the adoption amendment, and the circuit court concluded that because any threat to the parents’ legal right to their child was merely “hypothetical” and not the result of “actual or impending contact with Oklahoma authorities that could jeopardize” their parental rights, there was no injury-in-fact.⁸⁵

The circuit court also denied standing to challenge the Oklahoma law to a lesbian couple, Anne Magro and Heather Finstuen, who resided in Oklahoma with their two daughters, Ms. Magro’s biological children, whom Ms. Finstuen adopted under New Jersey law.⁸⁶ The circuit court found that because Ms. Finstuen was not attempting to “enforce any particular right before Oklahoma authorities,” but rather arguing a generalized threat to her continued security as the legal parent of her adopted daughters, she had not stated a sufficient injury to confer standing.⁸⁷

One set of plaintiff parents, however, was found to have standing by the district court: Lucy and Jennifer Doel, who each individually adopted their Oklahoma-born child pursuant to the laws of their home state of California.⁸⁸ Oklahoma then denied the Doels a revised birth certificate for their child.⁸⁹ The standing of the Doel parents was recognized by the circuit court because the refusal to issue a revised birth certificate was said to constitute an “injury-in-fact,” and additionally because the Doels presented a concrete instance in which one of the plaintiffs had “initially faced a barrier to being with [her] child in a medical emergency.”⁹⁰ After finding that the Doels stated an actual

82. *Id.* at 1142 (internal quotations omitted).

83. *Finstuen*, 497 F. Supp. 2d at 1200.

84. *Crutcher*, 496 F.3d at 1143.

85. *Id.* at 1144.

86. *Id.* at 1142-43.

87. *Id.* at 1145.

88. *Id.*

89. *Id.*

90. *Id.* Gay and lesbian parents are not generally arguing a fear that their children will be taken away once they cross into states where their adoptions are not recognized. Rather, they are concerned that their rights to their children will be limited in the case of medical emergency,

injury, the court concluded that they met the requirements of causation⁹¹ and redressability⁹² sufficient to confer standing to challenge the Oklahoma law.

The court then considered an argument raised by the State for the first time on appeal, which was that the amendment was intended only to bar recognition of joint-petition homosexual adoptions and not homosexual second-parent adoptions.⁹³ The circuit court did not accept this argument, noting that “[t]he public policy codified by the adoption amendment was plainly meant to prevent recognition of adoptions by same-sex couples” without qualification as to the precise legal mechanism through which the adoption was finalized.⁹⁴ The court then noted that the State’s argument that the amendment did not apply to the Doels could render their case moot, but that the concession about the amendment’s applicability made at oral argument did not bind any of the state executive or judicial agencies in such a way that would prevent the State from construing it to the detriment of same-sex second-parent adopters in the future.⁹⁵

The circuit court’s careful standing analysis raises a number of important points that advocates for same-sex parents should keep in mind in future cases. While, as a matter of policy, it seems wise to allow parents to challenge laws that prospectively undermine their key parental rights, courts may deny such challenges on standing grounds. Therefore, it will be important in future litigation to ensure that plaintiffs have suffered a concrete injury, even if minor, that can be traced to a state’s denial of their parental rights. Additionally, when challenging statutes that could be construed as applying only to joint-petition but not to second-parent adoptions, advocates will be wise to consider the many procedural landmines that could result in a solid case suffering dismissal on grounds of mootness or otherwise. While the *Finstuen v. Crutcher* case is helpful as a procedural guide, its true value for advocates comes

death of the biological parent, or another pressing need to assert parental control of the child. Consider once more the hypothetical situation presented in Part II of this Article.

91. “[T]he record before us strongly suggests that the amendment was the reason for the denial.” *Id.* at 1146.

92. “[A] judgment invalidating the adoption amendment and ordering a new birth certificate will make it ‘likely, not merely speculative, that a favorable judgment will redress the plaintiff’s injury.’” *Id.* at 1147 (internal citations omitted).

93. *Id.* at 1147-48. More states explicitly or implicitly allow joint-petition adoptions than second-parent adoptions, so this explanation would not have saved the law from a full-faith-and-credit challenge, but would have sufficed to deny standing to the Doels. See *supra* notes 17-20 and accompanying text.

94. *Crutcher*, 496 F.3d at 1148.

95. *Id.* at 1149-51.

in the context of its Full Faith and Credit Clause analysis, to which we now turn.

2. Full Faith and Credit Clause as Considered in *Finstuen v. Crutcher*

In *Finstuen*, the State of Oklahoma argued that a final adoption represents much more than simply a decree recognizing family status; rather, it argued “that the recognition of adoptive status in Oklahoma would extend the gamut of rights and responsibilities to the parents and child of the adoption order, including the right of a child to inherit from his parents, and therefore would constitute an impermissible, extra-territorial application of California law in Oklahoma.”⁹⁶ The circuit court dismissed the State’s reasoning, noting that while Oklahoma was obligated to recognize the final adoption decree from California, it maintained the power to “apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment.”⁹⁷ That is, “[w]hatever rights may be afforded to the Doels based on their status as parent and child, those rights flow from an application of Oklahoma law, not California law.”⁹⁸ Additionally, Oklahoma presented an argument related to the unenforceability of a final California adoption decree against an Oklahoma state agency which had not been party to the California proceeding but, as the circuit court noted, “[t]he absurdity of the argument is obvious.”⁹⁹ The circuit court held, therefore, that final adoption decrees are “entitled to recognition by all other states under the Full Faith and Credit Clause,” and struck down the Oklahoma amendment as unconstitutional without reaching the plaintiffs’ due process or equal protection claims.¹⁰⁰

B. *Application of the PKPA and the UCCJEA: Miller-Jenkins*

The effects of the PKPA and UCCJEA upon the parental rights of a same-sex parent became clear in a 2006 Vermont case.¹⁰¹ Lisa and Janet Miller-Jenkins resided together in Virginia from the late 1990s until

96. *Id.* at 1153.

97. *Id.*

98. *Id.* at 1154.

99. *Id.* at 1155.

100. *Id.* at 1156.

101. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006). For additional commentary on the case, see Bonnie E. Dye, Note, *Miller-Jenkins v. Miller-Jenkins: Expanding Parental Rights for Lesbian Couples*, 16 TUL. J.L. & SEXUALITY 169 (2007).

2002.¹⁰² They visited Vermont, where they entered into a civil union, in 2000.¹⁰³ In 2002, Lisa gave birth to a child named Isabella, referred to as IMJ in court documents.¹⁰⁴ Janet did not formally adopt Isabella at any point.¹⁰⁵ The family then moved to Vermont where they lived from August 2002 until the fall of 2003, at which time the parents separated and Lisa returned to Virginia with Isabella.¹⁰⁶

At the direction of the Vermont family court that oversaw the dissolution of the couple's civil union, Janet was awarded certain visitation rights in a temporary order on parental rights.¹⁰⁷ Lisa then filed a petition in the Virginia courts seeking to establish herself as Isabella's sole legal parent,¹⁰⁸ sparking precisely the kind of interstate custodial dispute that the PKPA and the UCCJEA are designed to prevent. The end result was that Lisa was found in contempt of the Vermont courts for failing to abide by the preliminary declaration of rights, and that the Vermont court ruled that it was not obligated to give full faith or credit to the Virginia judgment voiding Janet's parental rights.¹⁰⁹ On appeal, the Vermont Supreme Court held that the family court of Vermont had exercised valid and continuous jurisdiction over the parties to the dispute, that none of the exceptions within the PKPA were at issue, and that, therefore, "the PKPA applies to this case and does not command the Vermont court to give full faith and credit to the parentage decision of the Virginia court that was issued in violation of the PKPA."¹¹⁰ The Court also dismissed Lisa's DOMA argument, remarking that "in no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state"¹¹¹ even where, as in this case, the challenged parental status hinged upon Vermont's civil union status, which Virginia was entitled to refuse to recognize under DOMA. Subsequent to the Vermont Supreme Court's ruling, the Virginia Court of Appeals held that the PKPA did, in fact, govern the case, and that Lisa

102. The following summary of facts is drawn from *Miller-Jenkins*, 912 A.2d at 956. Further information was drawn from a lengthy and sympathetic 2007 article about the parents and the case. April Witt, *About Isabella*, WASH. POST, Feb. 4, 2007, at W14.

103. *Miller-Jenkins*, 912 A.2d at 956.

104. Witt, *supra* note 102.

105. *Miller-Jenkins*, 912 A.2d at 956.

106. *Id.*

107. *Id.* Although she had not adopted Isabella, Janet was found to have parental rights because of the civil union which had existed at the time of Isabella's birth, and because Lisa had listed Isabella as a "child of the civil union" on court documents. See Witt, *supra* note 102, at W29.

108. *Miller-Jenkins*, 912 A.2d at 956.

109. *Id.* at 957.

110. *Id.* at 961.

111. *Id.* at 962.

was required to abide by the Vermont custody agreement.¹¹² Lisa appealed to the Virginia Supreme Court, which heard oral arguments in the case on April 17, 2008,¹¹³ and ultimately affirmed the appellate decision in Janet's favor.¹¹⁴

The sad story of Lisa, Janet, and Isabella draws together many of the threads of this Article. Although Janet did not formally adopt Isabella, she nevertheless had an established parental relationship with her. The lengthy legal battle illustrates the clear importance of the relationship for Janet, and has almost certainly caused considerable upset and dislocation for Isabella. All parties involved have a constitutional, moral, and practical right to a clear determination of their legal statuses, a determination that could easily have been made had the courts of Virginia recognized, from the onset, the parental rights of a homosexual parent. Other states should look to the *Miller-Jenkins* story as a cautionary tale when considering whether it might be in the best interests of a child to deny full effect to a final adoption decree held by a same-sex parent, particularly in light of the constitutional requirements of the Full Faith and Credit Clause and the federal policy against continual relitigation of custody disputes embodied in the PKPA.

VI. CONCLUSION

The decision of whether or not to require states to recognize same-sex adoption decrees issued by other states is one that could affect millions of parents and children. While such recognition appears constitutionally mandated, it is even more than that—it is necessary to give effect to key federal statutes that govern resolution of custody disputes, and necessary to give life to a standard in family law prioritizing stability and the long-term interests of an adopted child. While there may be an exemption to the requirements of the Full Faith and Credit Clause for marital relationships governed by DOMA (itself an arguably unconstitutional law),¹¹⁵ there is no such exemption for public policies founded in discrimination and irrational government action. As is starkly clear in the hypothetical case of Adam, Beth, and Charlie; the Florida case in which Mr. Lofton, a long-term foster parent, was denied

112. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006).

113. Frank Green, *Women Spar over Visits to Daughter*, RICHMOND TIMES-DISPATCH, Apr. 18, 2008, at A1.

114. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008).

115. *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (holding that the federal government's refusal, on DOMA grounds, to grant benefits to same-sex spouses of federal employees was unconstitutionally discriminatory on the basis of sex).

the right to adopt the children he had raised; and the cases of the Doel and Miller-Jenkins families, discrimination against homosexual parents can destabilize families and harm children. Regardless of whether they allow same-sex couples to adopt within their own jurisdictions, states must give full effect to such adoptions when they are recognized by other states in the union.