

# *Articles*

## **Friends as Co-Parents**

*By JESSICA R. FEINBERG\**

### **Introduction**

CHILD WELFARE EXPERTS WIDELY VIEW adoption as the most effective means of promoting the well-being of children whose biological parents cannot care for them.<sup>1</sup> Accordingly, federal law and the laws of every state recognize the current preference for adoption.<sup>2</sup> Federal and state laws have regulated adoption for over 150 years.<sup>3</sup> Over time these laws have differed regarding required procedures,<sup>4</sup> available legal mechanisms,<sup>5</sup> and necessary or preferred characteris-

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1. Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 411–12 (2006) ("Child development specialists all agree that adoption is the best means of promoting the well-being of most children who cannot be reunited with their parents. . . .").

2. See *id.* at 412.

3. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1972).

4. For example, in response to the difficulty of finding the birth fathers of children relinquished for adoption in order to get their consent to the adoption, several states have created putative father registries which "eliminate the need for adoption notification or consent for a man who failed to take the initiative by registering." D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 1034 (3d ed. 2006).

5. States have recently enacted a number of legal mechanisms of which both the birth and adoptive parents can avail themselves during the adoption process. For example, a number of states allow for voluntary open adoption and some states also authorize judicial approval of open adoption agreements between the birth and adoptive parents. *Id.* at 1095–96.

tics of potential adoptive parents.<sup>6</sup> The “best interests of the child” standard as the primary consideration in determining where to place a child, however, remains a constant.<sup>7</sup> Throughout adoption’s existence as a legal institution, legislatures, courts, and adoption agencies have consistently adhered to the view that only placement in a “traditional” family structure consisting of two legally married, opposite-sex parents who reside in the same household can serve a child’s best interests.<sup>8</sup>

Adoption law’s continued adherence to the view that children should live only in traditional family structures raises a number of concerns. First, the traditional family structure does not reflect the realities of modern society. Instead, it accounts for only a distinct minority of today’s family structures.<sup>9</sup> Acknowledging the changing nature of the family structure, family law now recognizes and protects non-traditional family structures in many other contexts.<sup>10</sup> In some instances, family law even mandates the formation of certain non-traditional family structures.<sup>11</sup> Given this shift away from the traditional family structure in both society and family law, it makes little sense for adoption law to deny non-traditional families the opportunity to form and gain legal protections.

Second, the argument that adoption agencies should place children exclusively in traditional family structures succeeds only if place-

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6. In fact, the laws today remain in a constant state of flux regarding whether gay, lesbian, and unmarried individuals and couples may adopt children. See Wald, *supra* note 1, at 410; see also *infra* notes 58–66 and accompanying text.

7. Note, *Joint Adoption: A Queer Option?*, 15 Vt. L. Rev. 197, 200 (1990) (“[I]n the United States[,] adoption law has focused on the needs and welfare of the child. The ‘best interest of the child’ standard is the critical determinate in adoption law today.”).

8. See Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 31 (1997) (discussing the traditional assumption that a family structure consisting of two married parents constitutes the best alternative for adoptive children); see also JULIE BEREBITSKY, *LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD 1851–1950*, at 3 (2000) (discussing how adoption practice developed into a manner of recreating what many consider the “ideal and only legitimate family”—the biogenetic family consisting of a “heterosexual couple with ‘planned for’ children living in an ‘emotionally’ healthy home”); Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. Rev. 547, 590–91 (1999) (discussing the legal consensus “that parenthood within marriage best protects children”); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 334 (2006) (“Adoption law generally prohibits an unmarried couple from adopting an unrelated child jointly.”).

9. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 246 (2001) (“[T]he traditional marital family has become a statistical minority of family units in our society.”).

10. See *infra* Part I.B (discussing the law’s recognition of non-traditional families).

11. See *infra* Part I.B (discussing the law’s recognition of non-traditional families).

ment in traditional families represents the sole manner through which states can further the desired ends of adoption law. In many instances, however, non-traditional family structures can provide children with the positive results adoption law seeks to obtain—a home that provides the child with love, support, and stability.<sup>12</sup> While legislatures and courts recognize the value of non-traditional family structures in many areas of family law, adoption law largely devalues these non-traditional family structures.<sup>13</sup>

Finally, state insistence on placing children in traditional family structures conflicts with adoption law's primary goal of placing *as many children as possible* in loving, stable, and supportive homes.<sup>14</sup> Adherence to the belief that only traditional family structures can serve a child's best interests greatly contributes<sup>15</sup> to the fact that today over 100,000 children remain wards of the state, waiting for a family to adopt them.<sup>16</sup> Research, as well as common sense, indicates that categorically banning classes of potential parents from adoption eligibility reduces the number of children who will find homes.<sup>17</sup> Consequently, children awaiting adoption face a severe disadvantage. These children are denied placement with non-traditional families who may constitute the only families willing or able to adopt them. At the same time, however, states offer legal recognition and protection outside of the adoption realm to non-traditional families with children.<sup>18</sup>

This Article challenges the view that adoption decision-makers should place children only in traditional family structures. More spe-

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12. See *infra* Part II (discussing the relationship between family structure and the objectives of adoption law).

13. See *infra* Part I.C (discussing adoption law's continued adherence to the traditional family structure).

14. *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (stating that adoption law's primary goal consists of "encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them"); *In re M.M.D.*, 662 A.2d 837, 845, 854 (D.C. 1995) (explaining that many courts have shown a preference for liberal construction of adoption statutes so that the state can place as many children as possible in loving homes).

15. Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 326 (2005) ("In the face of a shortage of adoptive parents, categorical bans actually ensure that some children will never have a family of their own."); see also *infra* notes 113–115 and accompanying text.

16. As of September 30, 2005, 114,000 children remained in state custody awaiting an adoptive family. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT 13, at 5 (2005), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report13.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf) [hereinafter AFCARS REPORT 13].

17. See *infra* notes 111–13 and accompanying text.

18. See generally *infra* Part I.B (discussing the law's recognition of non-traditional families).

cifically, it argues courts, legislatures, and adoption agencies should allow two individuals involved in a close, but non-sexual, friendship to adopt a child together.<sup>19</sup> Permitting two emotionally and financially supportive parents to raise a child can further adoption law's goal of placing children in loving, stable homes. Allowing joint adoptions by close friends almost certainly will also increase the overall number of children placed in homes. Further, single individuals whom the state deems eligible to adopt on their own, but who choose not to because of the great difficulties inherent in raising a child alone, may adopt if allowed to do so jointly with a close friend.<sup>20</sup> While it may seem unfamiliar to some individuals, in many respects the family model advocated here (the "proposed model") is not a new one. In a number of cultures, both within and outside the United States, community members often come together to raise children, with friends of the biological parents assuming a parental role in the child's life.<sup>21</sup>

Part I of this Article discusses the breakdown of the traditional family as the prevailing norm in American culture. Part II explores the goals that adoption agencies, legislatures, and courts attempt to further through the historical insistence on placing children in traditional families. This Part also considers whether states can attain these goals more effectively by discontinuing their strict reliance on the traditional family structure, and instead allowing two individuals involved in a close, but non-sexual, friendship to adopt a child. Part III addresses some of the underlying assumptions of adoption law and

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19. This Article will only analyze the possibility of two close friends adopting and raising a child together. The author does not mean to suggest that two constitutes the optimal number of legally recognized parents for a child. Rather, the analysis here focuses on only one of the potential family structures that have not yet gained recognition in the adoption realm. While a discussion of family structures containing more than two legally recognized co-parents is beyond the scope of this Article, a number of courts and commentators have recently broached the issue. *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007); A. v. B., [2007] 83 O.R.3d 561 (Can.); *see also* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 1 (2008); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007).

20. *See* Angela Mae Kupenda, *Two Parents Are Better than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 LOUISVILLE J. FAM. L. 703, 703–10 (1997).

21. *See, e.g.*, *id.* at 712 (advocating for an adoption model that would allow two African-American adults not involved in a romantic relationship to adopt an African-American child together, and discussing the historical tradition in the African-American community of "[shared parenting] by the extended family and friends"); Woodhouse, *supra* note 15, at 309 (discussing how prehistoric mothers had substantial help in raising their children from relatives and community members).

practice that may be preventing states from implementing, or even considering, the proposed model. Finally, Part IV suggests various methods through which states could provide for joint adoptions by two close friends in a manner that promotes an adoptive child's best interests.

## I. The Status of the Traditional Family

### A. The Decline of Marriage

Unwavering insistence that adoptive families mirror a family structure that now represents a minority in our society makes little sense.<sup>22</sup> Today, a higher proportion of adult Americans remain unmarried than ever before.<sup>23</sup> According to census data, in 2000 only 52% of households in the United States were maintained by married couples.<sup>24</sup> The number of unmarried couples who lived together and shared a close personal relationship reached 5.5 million in 2000, an increase of 2.3 million since 1990.<sup>25</sup> In addition, legally recognized non-traditional relationships have increased as a number of states now legally recognize non-marital relationships between adults, such as domestic partnerships, civil unions, and reciprocal beneficiaries.<sup>26</sup>

### B. The Recognition of Non-Traditional Families

Given the significant increase in non-marital households, it makes sense that today half of all children are born into or raised in non-marital households.<sup>27</sup> The law has generally recognized the shift away from the marital family structure, and most impediments previously faced by non-marital children have been removed.<sup>28</sup> Additionally, not only are traditional families less prevalent than ever before, but courts and legislation now commonly allow, recognize, or demand the formation of non-traditional family arrangements in the various contexts discussed below.

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22. Fineman, *supra* note 9, at 246.

23. David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1364 (2001).

24. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

25. *Id.*

26. Chambers, *supra* note 23, at 1349–51.

27. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J.L. & POL'Y 9, 9 (2007).

28. *Id.* at 10.

## 1. Divorce

When a couple with children divorces, the parents often continue to share physical and legal custody of their children. In fact, as of 2006 thirty-two states and the District of Columbia have statutes that presume some form of joint custody upon divorce.<sup>29</sup> Even when biological parents divorce before the child is born (in which case the child has not already formed a bond with each parent), the presumption of joint custody remains in some states.<sup>30</sup> Similarly, the Uniform Parentage Act presumes paternity with parental obligations and the right to seek custody if a man and the mother of the child "were married to each other and the child is born within 300 days after the marriage is terminated. . . ."<sup>31</sup> Thus, in the divorce context, courts will allow two individuals who reside in separate households, no longer share an intimate, marital relationship, and oftentimes lack even a friendship,<sup>32</sup> to raise a child together as co-parents.<sup>33</sup>

## 2. Step-Parent Arrangements

High divorce rates have made multiple parent arrangements common in today's society.<sup>34</sup> Current laws allow an unmarried adult who enjoys joint custody of a child to marry someone not legally recognized as the child's other parent.<sup>35</sup> Consequently, the child may

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29. S. Con. Res. 121, 109th Cong. (2006).

30. See, e.g., CAL. FAM. CODE § 3080 (West 2004); D.C. CODE § 16-914 (2001).

31. UNIF. PARENTAGE ACT § 204 (amended 2002), 9B U.L.A. 16 (Supp. 2008).

32. See *infra* notes 127–28 and accompanying text for a discussion regarding how the proposed model avoids many of the negative effects on children that can occur in the post-divorce joint custody context.

33. Furthermore, many courts and state statutes focus primarily on the actual parent-child relationship when resolving custody issues in the post-divorce context. These courts only consider a parent's non-traditional characteristics, such as sexual orientation or current relationship status, if the evidence demonstrates that such characteristics are in fact negatively affecting the child. See, e.g., D.C. CODE § 16-914 (2001) ("[T]he court may issue an order that provides for frequent and continuing contact between each parent and the minor child or children and for the sharing of responsibilities of child-rearing and encouraging the love, affection, and contact between the minor child or children and the parents regardless of marital status."); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 (Matthew Bender 2002) (stating that the proposed regulation prohibits decisionmaking based on race, ethnicity, sex, religion, sexual orientation, and extramarital sexual conduct, except in rare circumstances). In the post-divorce context, children may thus find themselves in the custody of a parent who does not fit the definition of the traditional, married, heterosexual parent.

34. Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993).

35. Additionally, the state will only recognize the marriage if both individuals meet the state's other legal requirements for marital eligibility (i.e., each individual is of age and not already married).

split time between the two homes in which each of his or her legal parents lives with his or her spouse. This effectively results in three or more parents raising the child.<sup>36</sup> Although step-parents do not have many legal parental rights (unless one of the legal parent's rights are terminated),<sup>37</sup> they often contribute greatly to rearing the child who resides in their household.<sup>38</sup> Additionally, even though step-parents may not have "parental" rights per se, they do, of course, have the right to run their household in the manner they see fit within the boundaries of the law. General household decisions made by a step-parent will often affect a step-child who spends all or part of his or her time residing in the household. Current law thus allows children to split their time between the two separate households of their legally recognized parents, often with three or more individuals serving as parental figures.<sup>39</sup> This legally recognized family form represents a significant departure from the traditional family structure.

### 3. Single Parents

In the United States, nearly one quarter of children are born to unwed mothers.<sup>40</sup> Thus, a great number of children reside in non-traditional family structures from the time their lives begin.<sup>41</sup> The percentage of single parent households increased from 9% of all households in 1990 to 16% in 2000, and overall, about 26% of children under the age of twenty-one live in homes where one parent remains absent.<sup>42</sup> Additionally, all fifty states allow single individuals to adopt a

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36. Am. Academy of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family*, 111 PEDIATRICS 1541, 1551 (2003), available at <http://pediatrics.aappublications.org/cgi/reprint/111/6/S1/1541.pdf> ("Nearly all children in steppfamilies . . . experience having more than [two] parenting adults.").

37. WEISBERG & APPLETON, *supra* note 4, at 1089 (noting that step-parent adoption requires that only one of the child's birth parents retain parental rights).

38. Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 229 (2002) ("[M]any stepparents do play a significant parenting role in the lives of their stepchildren and most residential stepparents contribute significantly to their economic well-being.").

39. See *supra* note 36 and accompanying text (discussing familial situations in which three or more individuals serve in parental roles).

40. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *LIVING ARRANGEMENTS OF CHILDREN: 2002*, at 1 (2005).

41. See *infra* notes 116–23 and accompanying text for a comparison of the benefits adoptive children would receive from a family structure containing two friends as co-parents as opposed to a single parent family structure.

42. Parents Without Partners, <http://www.parentswithoutpartners.org/support1.htm> (last visited May 1, 2009).

child,<sup>43</sup> and the Uniform Parentage Act provides rights and protections to single individuals who wish to conceive children through donor insemination.<sup>44</sup> Commentators note that the "dramatic increase in the numbers of single-parent families is attributable in part to the increasing economic independence of women and the decreasing stigma attached to nonmarital births."<sup>45</sup>

#### 4. Donor Insemination

In addition to aiding single individuals' ability to conceive children, the advancement of technology in the donor insemination realm facilitates a number of other non-traditional parenting arrangements.<sup>46</sup> When a sperm donor claims advanced agreement with the biological mother regarding his involvement as a co-parent, many courts grant the donor parental rights.<sup>47</sup> This has occurred even where the donor and the biological mother not only remain unmarried, but also remain uninvolved in any type of romantic relationship.<sup>48</sup> In fact, some courts grant parental rights and obligations to sperm donors where the donor simply claims that he and the biological mother are friends or mere acquaintances.<sup>49</sup>

Additionally, because most laws do not condition access to donor insemination on an individual's sexual orientation,<sup>50</sup> a trend has developed in some communities where gay and lesbian couples agree to combine the genetic materials from one member of each couple to

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43. Sara R. David, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 927 (2005) (explaining that while every state allows single individuals to adopt, some states exclude single homosexual individuals from adoption eligibility).

44. UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

45. WEISBERG & APPLETON, *supra* note 4, at 447.

46. See Storrow, *supra* note 8, at 310–11 (discussing the lifting of restrictions governing artificial insemination).

47. See, e.g., *In re R.C.*, 775 P.2d 27 (Colo. 1989) (holding that if an agreement existed between the sperm donor and biological mother, who the sperm donor claimed were friends and the biological mother claimed were acquaintances, then the donor would have parental rights and obligations); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986) (affirming the trial court's judgment by strictly construing the relevant statute and granting parental status to the sperm donor, who had an ongoing friendship with the biological mother, and granting him substantial visitation rights). But see *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (denying paternity rights to a known sperm donor, who was an acquaintance of the biological mother, because the donor failed to produce adequate written evidence of any agreement with the biological mother regarding parental rights).

48. See cases cited *supra* note 47.

49. See cases cited *supra* note 47.

50. John A. Robertson, *Gay and Lesbian Access to Assisted Reproduction Technology*, 55 CASE W. RES. L. REV. 323, 348 (2004).

create a child whom the couples will raise jointly.<sup>51</sup> In addition, “[h]undreds of children, most in San Francisco, New York, and other urban centers, grow up with multiple parents, usually due to arrangements among gay and lesbian couples and their friends of the opposite sex who were involved in the conception and birth.”<sup>52</sup> The couples involved in these arrangements believe their children “benefit from being exposed to a wider range of adult influences.”<sup>53</sup>

## 5. Same-Sex Co-Parents

A number of courts also recognize non-traditional family structures consisting of two same-sex individuals involved in a committed relationship who wish to obtain legal status as co-parents.<sup>54</sup> Same-sex couples, however, remain unable to marry in forty-six states.<sup>55</sup> Thus, although the same-sex co-parents share an intimate relationship that exceeds mere friendship, any family structure that involves same-sex co-parents by definition falls outside of the traditional *marital* family structure. In the adoption realm, legislatures and courts in many jurisdictions provide individuals with the right to adopt their current or former same-sex partner’s biological or adoptive child through “second-parent adoption” procedures.<sup>56</sup> Additionally, a number of courts, adoption agencies, and statutes provide two individuals involved in a committed same-sex relationship with the right to adopt a non-related child jointly.<sup>57</sup> Finally, outside of the adoption context, some courts have taken the significant step of granting parental status to each member of a current or former same-sex couple where one member

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51. R. Alto Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN’S L.J. 231, 251 (2000).

52. *Id.*

53. *Id.*

54. Courts have also granted two individuals of the same sex the right to raise a child together in the context of kinship adoptions. The common scenario involves the biological mother and her mother obtaining joint parental rights to the child. See *Sharon S. v. Superior Court*, 73 P.3d 554, 571 (Cal. 2003) (discussing kinship adoptions in which a “grandparent or other relative became a second legal parent of a child”).

55. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1, A16.

56. *Sharon S.*, 73 P.3d at 575 (George, C.J., concurring in part and dissenting in part) (labeling unremarkable the majority’s holding that California recognizes second parent adoptions because, “[a]t least 20 other jurisdictions have already done so”).

57. See Joanna Grossman, *A New York Court Authorizes A Lesbian Couple’s Joint Adoption of A Child: Part of a Growing Same-Sex Adoption Trend*, FINDLAW, Apr. 19, 2004, <http://writ.news.findlaw.com/grossman/20040419.html> (“Recently, courts, legislatures, and politicians have been grappling with the recent surge in gay marriage advocacy and opposition. But at the same time, those same bodies are quietly recognizing rights for gays and lesbians that have traditionally been reserved for heterosexuals—the right to jointly adopt . . . ”).

of the couple became pregnant with the intention of raising the child with her same-sex partner.<sup>58</sup>

### C. Adoption Law's Continued Adherence to the Traditional Family Structure

Although adoption law recognizes non-traditional family structures in a few limited contexts,<sup>59</sup> for the most part it remains significantly slower to depart from its insistence on the traditional marital family structure than the rest of family law. For example, adoption law and practice continue to differentiate between marital and non-marital potential adoptive parents.<sup>60</sup> Utah's adoption statute prohibits joint or singular adoption by "cohabitating" individuals involved in a sexual relationship "that is not a legally valid and binding marriage."<sup>61</sup> In 2008, Arkansas voters passed a ballot initiative banning adoption by unmarried individuals,<sup>62</sup> and the New Hampshire Supreme Court held that unmarried individuals cannot adopt a child jointly.<sup>63</sup> While some states explicitly declare through legislation or court decision that unmarried couples<sup>64</sup> may adopt a child jointly,<sup>65</sup> "[a]doption law

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58. *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (declaring the biological mother's former lesbian partner a legal parent with support obligations to the children whom the couple had agreed to raise together prior to the biological mother receiving donor insemination); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding that both members of a former lesbian couple were the legal parents of twins born after one of the women donated her ova to the other, where the couple had planned to raise the children in the home they shared).

59. See *supra* notes 56–57 and accompanying text (discussing adoptions involving same-sex couples).

60. Wald, *supra* note 1, at 410.

61. UTAH CODE ANN. § 78-30-1 (2000). The statute bans adoption by any person cohabitating with an individual who is not a legal spouse, and does not distinguish between individuals who cohabit with a same-sex versus an opposite-sex partner. *Id.* The legislative history suggests that the state passed the statute based on legislators' fears that the children of parents who cohabit with another adult to whom the parent is not married have a greater likelihood of suffering abuse. Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*, 5 J. L. & FAM. STUD. 203, 204 (2003).

62. Mary Francis Berry, *Gay But Equal?*, N.Y. TIMES, Jan. 16, 2009, at A29.

63. *In re Jason C.*, 523 A.2d 32 (N.H. 1987); see also Allison Freehling, *The Same, but Different*, DAILY PRESS (Newport News), May 21, 2006, at G2.

64. In jurisdictions where unmarried couples can adopt, courts have discussed only on a few occasions whether the unmarried couples must cohabit in order to qualify for adoption. See *infra* notes 133–38 and accompanying text. The adoption statutes that courts have interpreted to allow for adoption by unmarried individuals do not explicitly address whether the individuals must cohabit in order to adopt. See, e.g., *In re Infant Girl W.*, 845 N.E.2d 229, 243 (Ind. Ct. App. 2006) (construing IND. CODE § 31-19-2-2 (1998)). Possible reasons for why courts rarely address the issue include that unmarried individuals involved in a romantic relationship, but who have not made the decision to cohabit, may not

generally prohibits an unmarried couple from adopting an unrelated child jointly . . . .<sup>66</sup> Additionally, legislation in five states limiting adoptions by homosexual individuals or same-sex couples, who by definition cannot legally marry in those states, further demonstrates adoption law's reluctance to move away from the traditional marital family structure. Finally, no statute or court decision expressly states that two individuals involved in a close, but non-sexual, friendship may adopt a child together. Thus, it is unsurprising that adoptions by unmarried couples currently account for a mere 2% of all adoptions, while adoptions by married couples constitute almost 70% of all adoptions.<sup>67</sup>

Across the country, individuals continue forming family structures that differ markedly from the traditional family structure, finding that other arrangements more effectively serve their familial needs. In fact, the traditional family structure now comprises a distinct minority of all family structures,<sup>68</sup> and the societal move away from the traditional family structure likely will not change anytime soon.<sup>69</sup> Census officials note that "the increasing prevalence of non-traditional family structures reflects powerful societal trends that cannot be easily reversed."<sup>70</sup> Consequently, much of family law recognizes and

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believe that adoption is an option for individuals in their situation, or may not feel ready to undertake an adoption together.

65. See, e.g., *Infant Girl W.*, 845 N.E.2d at 243 (holding that Indiana's adoption statute does not prohibit unmarried couples, regardless of their sexual orientation, from adopting); *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) ("[T]he two adoptions sought—one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother—are fully consistent with the adoption statute."); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002) ("There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents."); *Florida in the Dark on Adoption Rights*, REPUBLICAN (Springfield), Jan. 14, 2005, at A12 (discussing how Florida's adoption statute, while banning adoptions by same-sex couples, allows for adoption by unmarried heterosexual couples); Tim Padgett, *Gay Family Values*, TIME, July 16, 2007 (discussing the law that the Colorado legislature recently passed granting unmarried couples the right to adopt).

66. Storrow, *supra* note 8, at 334; see also Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 168 (1997) ("Most states still allow . . . discrimination on the basis of the age or marital status of potential adoptive parents.").

67. AFCARS REPORT 13, *supra* note 16, at 8.

68. Michael C. Gottlieb, *Troxel v. Granville and its Implications for Families and Practice: A Multidisciplinary Symposium Introduction to the Special Issue*, 41 FAM. CT. REV. 8, 9 (2003).

69. Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J. L. & GENDER 109, 113.

70. *Census Says Traditional Family May Soon Be Exception*, THE TECH (MIT), Aug. 30, 1994, at 3, available at <http://www-tech.mit.edu/V114/N35/briefs2.35w.html>.

protects non-traditional family structures.<sup>71</sup> As former Supreme Court Justice Sandra Day O'Connor acknowledged, “[t]he demographic changes of the past century make it difficult to speak of an average American family.”<sup>72</sup>

Adoption law and practice should grant adoptive families the same freedom to structure their family in ways that differ from the traditional family structure. Additionally, the more than 100,000 children waiting for a family to adopt them should have the right, as children outside of the adoption realm have, to live with families who will provide a loving, stable, and supportive environment, regardless of whether the family falls within the narrow definition of “traditional.”<sup>73</sup> The argument becomes even more compelling, as the following Part discusses, if states can attain the desired ends of adoption law through adoption by non-traditional family structures such as the one advocated in this Article.

## **II. The Relationship Between Family Structure and the Objectives of Adoption Law**

Adoption law strives to place children in family structures that provide stability, love, and emotional and financial support.<sup>74</sup> This Part first argues adoption law can meet these ends as or more effectively by allowing the placement of children in non-traditional family structures consisting of two adults involved in a close, but non-sexual, friendship. It then analyzes the likely alternatives for many children awaiting adoption if states choose not to implement the proposed model.

### **A. Can the Proposed Family Structure Further the Objectives of Adoption Law?**

#### **1. Stability Due to the Co-Parents’ Relationship Status**

One prevalent argument in favor of laws requiring the placement of children in only traditional family structures maintains that this

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71. See *supra* Part I.B (discussing the law’s recognition of non-traditional families).

72. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

73. See *Woodhouse*, *supra* note 15, at 300.

74. See *In re Infant Girl W.*, 845 N.E.2d 229, 236 (Ind. Ct. App. 2006) (explaining that “providing a child with two parents by adoption promotes a stable, supportive and nurturing environment . . . advantages that are clearly in the child’s best interest” and finding that the petitioners “are of sufficient ability to rear the child and to furnish the child with suitable support and education”); see also Suzanne Herman, *The Revised Michigan Adoption Code: The Reemergence of Direct Placement Adoptions and the Role and Duties of the Attorney*, 74 U. DET. MERCY L. REV. 583, 585–86 (1997).

structure provides the most stable environment for a child.<sup>75</sup> The stability that may have once existed in traditional family structures, however, is simply not the reality today.<sup>76</sup> The no-fault divorce laws in place throughout the country provide, along with the simplicity of obtaining a marriage license, continues to contribute to soaring divorce rates.<sup>77</sup> Experts predict half of all American children will experience the break-up of their parents' marriage.<sup>78</sup> Additionally, close to half of children who witness their parents' divorce will experience the subsequent remarriage and re-divorce of one of their parents.<sup>79</sup>

These statistics show that obtaining a marriage license does not automatically render a relationship or family structure more stable. “[L]oosened marriage laws have reduced or eliminated many substantive, and most formal, restrictions on entry into marriage for heterosexuals.”<sup>80</sup> The state remains completely uninvolved in assuring the

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75. See Clark, *supra* note 61, at 209 (describing as the primary factor for most members of the Board of Child and Family in deciding to ban adoption by unmarried adults in Utah the “collective assessment of the practical and legal advantages conferred upon children who live in homes with legally married mothers and fathers[,] . . . including rights of inheritance and rights to health insurance coverage, in addition to survivor benefits and other entitlements provided to legal dependents under the social security system”).

76. Similarly, some courts have implied that adoptions by single parents are permissible because these courts expect that single individuals will eventually marry and form the more stable traditional family unit. In *Lofton v. Secretary of the Department of Children & Family Services*, for example, the Eleventh Circuit stated that “[i]t is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment.” 358 F.3d 804, 822 (11th Cir. 2004). This argument, however, fails to consider the great degree of change and disruption to a child’s life that necessarily ensues when his or her single parent decides to marry or remarry. SARA MCCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 29 (1994) (explaining that when a single parent decides to bring a significant other into the household through marriage or cohabitation, it significantly disrupts many aspects of the child’s life); Am. Academy of Pediatrics, *supra* note 36, at 1551 (“When a parent remarries the child’s life is made more complicated and is again disrupted.”).

77. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 338–42 (2004).

78. Frank Furstenberg et al., *The Life Course of Children of Divorce*, 48 AM. SOC. REV. 656 (1983).

79. MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 76 (1996). Additionally, among the millions of children who will witness their parents’ divorce, one of every ten will also live through three or more marital dissolutions involving one of their parents. *Id.*

80. Martha Albertson Fineman, *Progress and Progression in Family Law*, U. CHI. LEGAL F. 1, 6 (2004); see also Jeremiah A. Ho, *What’s Love Got to do With it? The Corporations Model of Marriage in the Same-Sex Marriage Debate*, 28 WHITTIER L. REV. 1239, 1271 (2007) (“The requirements—other than that the couple is comprised of two opposite-sex persons—to obtain a marriage license are generally sparse, requiring only the names, addresses, parties’ ages, names of parents, and whether any of the parties had previous marriages.”).

compatibility of the two individuals who wish to marry.<sup>81</sup> Consequently, the state lacks knowledge as to whether the marital couple's relationship is more long-standing, has a higher level of intimacy and commitment, or is more stable than a close, non-sexual friendship between two individuals who cannot, or do not wish to, marry.

In fact, studies show that close friendships are often important, stable, intimate, and committed relationships in people's lives.<sup>82</sup> Many women report feeling emotionally closer to their female friends than to their husbands;<sup>83</sup> and research shows that women usually make a deep commitment and devote a great deal of time and intensity to their friends.<sup>84</sup> In denying adoption rights to potential co-parents involved in a non-marital friendship, legislatures, courts, and adoption agencies may have relied on the fact that unmarried couples have higher dissolution rates than married couples.<sup>85</sup> Friendships, however, differ from the romantic relationships studied in determining the probability of "break-ups" for marital and non-marital couples. Many individuals enter into romantic relationships with just one person at a time, often in search of "the one" with whom an individual will exclusively share the rest of his or her life. These relationships arguably involve a greater chance of dissolution than friendships, of which individuals often have many at the same time and do not undertake in a search for "the one."

Furthermore, even if lawmakers considered individuals involved in close friendships to fall within the category of unmarried couples, an anti-adoption argument based on the greater prevalence of break-ups among unmarried couples would remain unpersuasive. Research involving the dissolution rates of unmarried couples fails to consider separately the subset of unmarried couples serious enough to under-

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81. Hamilton, *supra* note 77, at 341.

82. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 n.26 (1980) ("Any view of intimate association focused on associational values must therefore include friendship.").

83. SUSAN MAUSHART, WIFEWORK: WHAT MARRIAGE REALLY MEANS FOR WOMEN 16–17, 167 (2003) (noting that most wives report experiencing greater emotional intimacy with their female friends than their male spouses); STACEY J. OLICKER, BEST FRIENDS AND MARRIAGE: EXCHANGE AMONG WOMEN 112–21 (1989) (discussing how, in the author's studies, women reported feeling closer to their female friends than to their husbands).

84. A number of researchers have studied friendships among women. See generally, e.g., HELEN GOULDNER & MARY SYMONS STRONG, SPEAKING OF FRIENDSHIP: MIDDLE-CLASS WOMEN AND THEIR FRIENDS (1987); ELINOR LENZ & BARBARA MYERHOFF, THE FEMINIZATION OF AMERICA: HOW WOMEN'S VALUES ARE CHANGING OUR PUBLIC AND PRIVATE LIVES (1985); LETTY COTTIN POGRUBIN, *Among Friends: Who We Like, Why We Like Them, and What We do with Them* (1987).

85. See Wald, *supra* note 1, at 414.

take the legal obligation of adopting together.<sup>86</sup> Such a study would likely produce different results, as adoption law requires that a potential adoptive parent have the willingness and ability to take on a great deal of obligations to the child.<sup>87</sup>

## 2. Stability as a Result of Legal Protections and Benefits

Another argument for laws allowing for adoption by only traditional family structures contends that current laws protect and benefit such family structures, and thus these structures offer a greater degree of stability.<sup>88</sup> This argument suffers from circular reasoning. If the stability of the marital family comes from the legal protections and benefits that the law provides,<sup>89</sup> then the better response is to modify the law to provide legal protections to the relationship between the adoptive child and each non-traditional adoptive co-parent. Providing legal recognition to the relationship between a child and each non-traditional adoptive parent will allow children placed in non-traditional families to receive the same benefits and protections they would receive if placed in a traditional family structure. If the family structure dissolves, co-parents would have the same obligations to the child as parents involved in the dissolution of a traditional family structure.<sup>90</sup>

Although the relationship between the co-parents and child carries primary importance, states wishing to add even greater stability to this family structure could offer legal protections to the relationship between the two individuals who choose to become co-parents. In fact, some scholars propose the state should offer recognition and protection to certain types of friendships.<sup>91</sup> Under these models, if co-par-

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86. See *id.* at 414 (explaining that barring all unmarried couples from adoption because of the higher break-up rate of unmarried couples as compared to married couples would not reflect a sound policy decision, as it would prevent adoption even by unmarried couples “in long-term, highly stable relationships”).

87. See *In Re M.M.D.*, 662 A.2d 837, 857–59 (D.C. 1995).

88. See Clark, *supra* note 61, at 209 (discussing how decision-makers relied in part on testimony “to the effect that Utah law conferred substantial benefits upon children of legally married couples” in deciding to pass an adoption law that prohibits adoption by unmarried cohabitating individuals); see also Hamilton, *supra* note 77, at 358–59 (discussing how the traditional marital family receives significantly greater government benefits and protections than the non-traditional family where two unmarried individuals serve as co-parents).

89. See Hamilton, *supra* note 77, at 340.

90. See Kupenda, *supra* note 20, at 717 (suggesting the same result in the context of two African-American individuals who are involved in a non-sexual friendship and who adopt an African-American child together).

91. See, e.g., Chambers, *supra* note 23, at 1348 (advocating the recognition of a legal status for people who have close bonds but do not want to marry each other, and the

ents decide to have their friendship legally recognized by the state, the law protects the relationship such that if one co-parent dies, intestate succession and other inheritance rules apply to the other co-parent in the same manner as if the individuals were legally married.<sup>92</sup> Providing protections and benefits to two unmarried individuals would likely not involve a great amount of change in many places. In response to the reduction in married couples, “10 states and 161 local governments now offer some sort of employee protections and benefits—from basic bereavement rights to full health insurance coverage—to [individuals involved in non-marital relationships].”<sup>93</sup>

Scholars extensively discuss government extension of benefits to non-traditional families in family law literature, with many arguing that providing benefits for married individuals remains an ineffective proxy for the state’s goal of supporting private care for dependents.<sup>94</sup> Instead, these scholars argue that states would have considerably more success in meeting their goals if they provided support for family structures based on whether the families contained children, regardless of the parents’ marital status.<sup>95</sup> Altering the benefit structure to include non-traditional parent-child relationships would not only benefit potential adoptive children and parents, but also would benefit a significant number of children and parents who exist outside of the adoption realm. By giving benefits only to the traditional family structure, the government disadvantages the great number of children who already live in non-traditional family structures.<sup>96</sup> Furthermore, a benefit system that fails to include non-traditional families has detrimental race and class-based effects. The traditional family structure remains significantly more prevalent among middle or upper class white individuals.<sup>97</sup> Thus, unfortunately for non-white children, bene-

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creation of the status “designated friends”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 228–29 (2007) (calling “for explicit state recognition of friendship” as “simultaneous [legal] recognition of friends and family . . . would . . . support individuals’ choices about how to structure their lives”).

92. Chambers, *supra* note 23, at 1352–53.

93. Kelley Beaucar Vlahos, *Singles Seek Financial, Legal Perks Offered Marrieds*, Fox News, Nov. 20, 2003, <http://www.foxnews.com/story/0,2933,103590,0.html>.

94. See, e.g., Hamilton, *supra* note 77, at 307, 314, 356–60.

95. *Id.*; see also Fineman, *supra* note 9, at 245–46.

96. See Hamilton, *supra* note 77, at 358–60; see also *id.* at 359 (“Across the United States, unmarried men and women who live together are almost as likely to be raising children as are married couples. But because they have chosen not to formalize their relationships, they must manage caretaking without many of the benefits accorded marital families.” (footnote omitted)).

97. Moore v. City of E. Cleveland, 431 U.S. 494, 508–11 (1977) (Brennan, J., concurring) (stating that “the ‘nuclear family’ is the pattern so often found in much of white

fit systems that only reward traditional family structures “grossly favor their white counterparts.”<sup>98</sup>

### 3. Stability as a Result of Financial Resources

If the law were to recognize and protect the non-traditional proposed model in the same manner as traditional family structures, children living in the proposed model may end up with even greater economic stability than those living in traditional family structures. In contrast to many traditional families where only one parent contributes financially to the household,<sup>99</sup> the proposed model potentially provides the child with the support of two financially independent individuals.<sup>100</sup> One co-parent’s well-being, as well as the child’s, likely would not depend on the other “bread-winning” parent. Providing adoptive children with two independent, financially solvent parents complements the “strong societal policy [in our country] that favors charging at least two persons with support obligations for each child.”<sup>101</sup>

### 4. Love and Emotional Support

A person’s ability to love and offer emotional support to a child depends on his or her personality traits (such as empathy, sympathy, understanding, and kindness) and has no logical connection to that individual’s marital or relationship status.<sup>102</sup> When two friends jointly adopt a child, the family arguably consists of two individuals who each strongly desire to raise a child together. The structure advocated here

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“suburbia” and does not represent the norm for many lower and working class families or for many racial and ethnic minority groups).

98. C. Quince Hopkins, *The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL’Y 431, 492 (2004).

99. KATHLEEN GERSON & JERRY JACOBS, THE TIME DIVIDE: WORK, FAMILY, AND GENDER EQUALITY 43 (2004) (stating that over forty percent of marital households do not consist of dual income earners).

100. Of course, even under the proposed model there is the possibility that one co-parent would be financially dependent on the other co-parent, or, for other reasons, not financially independent. The proposed model, however, envisions two individuals who each, on their own, would be eligible to adopt a child. See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1298 n.15 (Barkett, J., dissenting from denial of rehearing en banc) (“If an applicant were unemployed and had no immediate job prospects or other present means of financially supporting a child, no placement agency would even consider permitting an adoption . . . .”).

101. Storrow, *supra* note 8, at 321.

102. See *Lofton*, 377 F.3d at 1298 (Barkett, J., dissenting from denial of rehearing en banc) (“[I]t is not marriage that guarantees a stable, caring environment for children[,] but the character of the individual caregiver.”).

lacks any marital or otherwise romantic relationship whereby one partner may agree to the adoption in order to accommodate his or her significant other. However, each relationship and individual is different, and adoption decision-makers should undertake an individual evaluation of each individual adoptive parent's characteristics and abilities. This Article does not suggest that adoption decision-makers give preference to the proposed family model over other family structures. Rather, it simply proposes that adoption agencies not dismiss potential adoptive parents solely based on their marital status or desired family structure.

In sum, the traditional family represents a decreasingly effective proxy to further adoption law's ends. In spite of this, few courts recognize that evaluating individuals on their capacity to care for a child, rather than their family structure, most effectively promotes adoptive children's best interests.<sup>103</sup> Thus, states should reevaluate their current adoption policies and explore the ability of non-traditional family structures, such as the proposed model, to further the goals of adoption law.

## B. Alternatives for Children Awaiting Adoption

Even if legislatures, courts, and adoption agencies continue to adhere to the belief that traditional family structures represent the optimal alternative for adoptive children, the proposed model remains relevant. The number of children awaiting adoption greatly exceeds the number of traditional families willing to adopt.<sup>104</sup> With this reality in mind, adoption decision-makers in favor of the traditional family structure may find the proposed model to constitute the next best alternative for these children.

### 1. Children Who Would Remain Wards of the State

Courts and legislatures alike recognize that a primary goal of adoption law is to prevent as many children as possible from growing up in an institutional setting without the love and support of a family.<sup>105</sup> In fact, even jurisdictions with highly restrictive adoption stat-

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103. Storrow, *supra* note 8, at 341–43; see also *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993) (“When the statute is read as a whole, we see that its general purpose is to clarify and protect the legal rights of the adopted person[,] . . . not to proscribe adoptions by certain combinations of individuals.”).

104. AFCARS REPORT 13, *supra* note 16, at 5.

105. See *supra* notes 1–2, 74, and accompanying text (discussing adoption as the preferred choice for children who will not be raised by their biological parents).

utes such as Utah employ the “least detrimental standard.”<sup>106</sup> Under this standard, courts and adoption agencies allow for adoptions by individuals with disfavored characteristics, where such individuals represent “the only people who can [and are willing to] give the children the . . . foundation for realizing their highest potential.”<sup>107</sup> Thus, even courts in jurisdictions with the most restrictive adoption laws realize providing a child with a home in a loving and supportive non-traditional family represents a better alternative than leaving the child with no home at all.<sup>108</sup>

Implementation of the proposed model would help states ensure that as few children as possible spend their lives in institutional settings. In most states, adoption statutes direct courts and agencies to choose the best placement “among the available homes.”<sup>109</sup> Research and common sense indicate that when there are far more children awaiting adoption than available homes, categorically excluding classes of potential adoptive parents means some children will live in institutional settings for the duration of their childhood.<sup>110</sup> Broadening the pool of prospective adoptive parents to include more categories not only will provide homes to more children overall, but will also offer those individuals making adoption decisions a greater ability to match each child with the adoptive family who can best provide for that particular child.<sup>111</sup>

In addition to providing more homes overall for children awaiting adoption, implementation of the proposed model will likely mean that certain categories of children, whom traditional adoptive families historically have disfavored, will find homes. Adoption literature refers to children over a certain age, of certain racial minorities, or with special physical or emotional needs as “hard-to-place” children, because they have a low likelihood of being adopted.<sup>112</sup> Non-traditional co-

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106. *In re Adoption of W.A.T.*, 808 P.2d 1083, 1087 (Utah 1991) (Stewart, J., concurring).

107. *Id.*

108. See Storror, *supra* note 8, at 347 (discussing instances where courts ruled that “a blanket exclusion” of an entire class of individuals from standing to adopt is simply bad public policy).

109. Wald, *supra* note 1, at 385.

110. See Woodhouse, *supra* note 15, at 326.

111. Woodhouse, *supra* note 15, at 324–25. By way of example, if a gay or lesbian individual had specific expertise in dealing with a child’s medical or behavioral issues, and the state categorically banned that person from adopting because of his or her sexual orientation, the exclusion would deny the child the opportunity for placement with the individual who could best provide for his or her needs. *Id.* at 325–26.

112. See, e.g., William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L.

parents may have a greater willingness to adopt non-traditional or hard-to-place children, as these parents likely do not believe in the existence of only one permissible type of family structure.<sup>113</sup> Studies indicate that gay and lesbian or single parents are more likely than heterosexual married couples to adopt hard-to-place children with special needs.<sup>114</sup> Experts estimate that many of these children would remain without homes if state adoption law rendered non-traditional parents ineligible to adopt.<sup>115</sup> Overall, this Article's proposed model represents a realistic and beneficial alternative for children who would otherwise remain wards of the state.

## 2. Adoption by a Single Parent

In 2005, adoptions by single individuals accounted for over 27% of all adoptions in the United States.<sup>116</sup> It makes little sense to permit single people to adopt individually, yet prohibit or discourage two single people from adopting jointly. Child experts recognize that having two parents, regardless of the co-parents' relationship status, leads to an array of financial and emotional benefits for children.<sup>117</sup> Joint adoption by two close friends can provide the child with significant benefits that a single parent, simply by the inherent nature of single parenthood, cannot provide.

Financial support is indisputably a crucial aspect of caretaking.<sup>118</sup> Studies involving children raised by single parents conclude any detriment to these children generally results from lower income levels and other related financial characteristics of the family structure, rather

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REV. 473, 490 n.64 (1990) ("[T]here is a rapidly growing number of hard-to-place children who will probably spend the rest of their childhood without a permanent home; minority, older and handicapped children are very unlikely to be adopted.").

113. See Wald, *supra* note 1, at 411 ("Reports indicate that the children placed with gay individuals and couples often have special needs and are considered hard to place children . . .").

114. *Id.*; see also E. Gary Spitzko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195, 211-12 & 211 n.53 (2005) (discussing how a high proportion of the children placed with gay individuals are hard to place children who adoption agencies have been unable to place in a traditional family structure).

115. EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES?, at 2, 12-13 (2006), available at [http://www.adoptioninstitute.org/publications/2006\\_Expanding\\_Resources\\_for\\_Children%20\\_March\\_.pdf](http://www.adoptioninstitute.org/publications/2006_Expanding_Resources_for_Children%20_March_.pdf); Wald, *supra* note 1, at 411; Woodhouse, *supra* note 15, at 326; see also Spitzko, *supra* note 114, at 211 n.53.

116. AFCARS REPORT 13, *supra* note 16, at 8.

117. See *Sharon S. v. Superior Court*, 73 P.3d 554, 568 (Cal. 2003).

118. Hamilton, *supra* note 77, at 362.

than from the lack of a second parent.<sup>119</sup> The proposed model allows two individuals who the state classifies as eligible to adopt on their own, but choose to do so jointly, to adopt a child. Thus, this model provides the child with the potential for income and financial support from two parents as opposed to a single parent.

The potential for income from both parents, however, comprises only one of the benefits that children will receive by having two legally recognized parents. Children with two legal parents also gain the significant protection that if one co-parent dies, custody of the child automatically goes to the other parent, and the child does not become a ward of the state.<sup>120</sup> These children also receive legal entitlement to "both parents' employer-and/or government-sponsored health and disability insurance; education, housing, and nutrition assistance; and social security benefits."<sup>121</sup> Additionally, children with two legally recognized parents will benefit from inheritance rights as to each parent.<sup>122</sup> Finally, children will have two individuals to provide them with love and emotional support. As one judge recognized, "[a] child who . . . receives the love and nurture of even a single parent [should] be counted among the blessed . . . [and where] a child has *two* adults dedicated to his welfare . . . [t]here is no reason in law, logic, or social [policy] to obstruct such a favorable situation."<sup>123</sup>

### **III. Why the Proposed Model Has Not Yet Emerged: Adoption Law's Underlying Assumptions**

While it is impossible to conceive of every reason states may have for not implementing, or even seriously considering, the proposed model, the three basic assumptions of adoption law discussed in this Part constitute the strongest and most probable state concerns regarding the proposed model. These three assumptions are that: (1) a healthy two-parent family necessarily consists of co-parents who reside in the same household, (2) the ideal family involves co-parents who share a romantic, sexual relationship, and (3) effective family structures necessarily consist of two parents committed not only to their children, but also to one another.

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119. See *id.* at 360 & nn.210–14; see also Kupenda, *supra* note 20, at 709 ("[M]uch of the problem with single parenting rests with economics.").

120. *In re Infant Girl W.*, 845 N.E.2d 229, 242 n.7 (Ind. Ct. App. 2006).

121. *Id.* (quoting *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003)); see also *In re M.M.D.*, 662 A.2d 837, 858–59 (D.C. 1995) (discussing all of the benefits children receive as a result of having two individuals legally recognized as parents).

122. *In re M.M.D.*, 662 A.2d at 858.

123. *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993).

## A. Co-Residing Co-Parents

Adoption law likely assumes that a healthy two-parent family necessarily consists of co-parents who reside in the same household, a scenario that is less likely to occur with the proposed model.<sup>124</sup> With most states retaining a post-divorce presumption of joint custody, however, a significant number of children already split their time between two households.<sup>125</sup> Research involving children whose parents share physical custody demonstrates that such living arrangements are associated with positive outcomes for children's well-being.<sup>126</sup> Additionally, research shows that even in the post-divorce context a child's well-being does not depend primarily on family structure but instead on other factors such as level of familial conflict, poverty, abuse, neglect, and poor school systems.<sup>127</sup>

Importantly, the family structure advocated here arguably involves a much lessened risk of harm to the child than joint physical custody arrangements in the divorce context. When two close friends adopt, from the very start of the familial relationship the child will know and expect a family structure that may involve spending time in two separate households. Unlike in the divorce context, no major disruption to the child's regular way of life or familial expectations will occur.<sup>128</sup> Finally, the two households likely will function more effec-

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124. The assumption that a family unit contains only those members who reside together remains a pervasive assumption even beyond the context of adoption law. For example, the United States Census Bureau defines family as "group of two people or more . . . related by birth, marriage, or adoption residing together." POPULATION DIV., U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS): DEFINITIONS AND EXPLANATIONS, <http://www.census.gov/population/www/cps/cpsdef.html> (last visited May 1, 2009).

125. See *supra* notes 29–30 and accompanying text (noting the presumption of joint custody in the majority of states).

126. AM. PSYCHOLOGICAL ASS'N, REPORT TO THE U.S. COMMISSION ON CHILD AND FAMILY WELFARE 3 (1995) ("The research reviewed supports the conclusion that joint custody is associated with certain favorable outcomes for children including father involvement, best interest of the child for adjustment outcomes, child support, reduced relitigation costs, and sometimes reduced parental conflict."); Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 91 (2002) ("Children in joint physical or legal custody were better adjusted than children in sole-custody settings[,] . . . [and] no different from those in intact families."); see also E. MAVIS HETHERINGTON & JOSEPHINE D. ARASTEH, IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN 73 (1988).

127. Hamilton, *supra* note 77, at 345.

128. See *Braiman v. Braiman*, 378 N.E.2d 1019, 1021 (N.Y. 1978) (explaining that joint custody can be disruptive and may also increase the pain of divorce for children); *Dodd v. Dodd*, 403 N.Y.S.2d 401, 404 (N.Y. Sup. Ct. 1978) ("Experts in the field have expressed opposition to divided custody on the ground that change and discontinuity threaten the child's emotional well-being."); Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 510–11 (2005); see also *id.* at 511 ("Four

tively as co-parents, as the close friends will not have just experienced a divorce.

Although the traditional family structure involves co-parents who reside in the same household, many cultures do not recognize co-residence as a necessary characteristic of the family unit.<sup>129</sup> Even within the United States, research demonstrates that “the notion of co-residence as a critical symbol or marker of ‘family’ is significantly lower in lower class families than for middle [or upper] class families.”<sup>130</sup> Our laws and census methodologies that presuppose only the traditional family structure exclude a large number of functioning families falling outside the traditional definition of family.<sup>131</sup> This bias largely prevents the recognition that a significant number of non-traditional families function effectively without adhering to the traditional rule of co-residency.<sup>132</sup> Systematic failure to recognize other types of effectively functioning family structures allows the traditional co-residing family structure to keep its privileged status in the adoption realm as the “normal” or “proper” family model.

Despite adoption law’s general exclusion of family structures that lack parental co-residence, a few courts have recognized the legitimacy of these family structures in the adoption context. In *Sharon S. v. Superior Court*,<sup>133</sup> the California Supreme Court rejected the idea that adoption statutes contain an overriding requirement that co-parents reside in the same household.<sup>134</sup> The court instead focused on each potential parent’s ability to effectively raise a child, warning that co-residency requirements would exclude “qualified adoptive parents who might live apart for reasons having no bearing on whether an adoption is in a particular child’s interest.”<sup>135</sup> Likewise, in *Jhordan C. v. Mary K.*,<sup>136</sup> the California Court of Appeal, First District, specifically noted the “uncontradicted expert testimony” that full-time residency between a parent and his or her child does not constitute an absolute

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major causes of stress for children of divorcing parents are (1) the family they have always known will be different; (2) loss of attachment; (3) fear of abandonment; and[ ] (4) hostility between the parents.”).

129. Hopkins, *supra* note 98, at 477.

130. *Id.* at 483.

131. *Id.* at 492–93.

132. *Id.*

133. 73 P.3d 554 (Cal. 2003).

134. *Id.* at 569 n.17.

135. *Id.* at 572; *see also* Jacob v. Shultz-Jacob, 923 A.2d 476, 482 (Pa. Super. Ct. 2007) (awarding shared physical custody of two children to the biological mother, her former lesbian partner, and the sperm donor, all of whom resided in different households).

136. 224 Cal. Rptr. 530 (Ct. App. 1986).

requirement for effective parenthood.<sup>137</sup> The court noted research demonstrating that if the time spent by the child with each parent was of adequate frequency and quality, the parent-child relationship could successfully form.<sup>138</sup>

The assumption that healthy two-parent families cannot consist of co-parents who reside in separate households ignores the reality of a great number of families successfully functioning within the United States. Perhaps if our laws and practices provided greater recognition to such structures, the misplaced fear that families could not function effectively without parental co-residency would cease to exist. Adoption laws should refrain from repeating these mistakes, because the failure to recognize that family structures can function effectively without parental co-residency ultimately hurts children who remain without homes.

### B. Sexually Intimate Co-Parents

Another underlying assumption of adoption law is that the ideal family involves co-parents who share a romantic, sexual relationship.<sup>139</sup> Researchers present no evidence, however, suggesting that a sexual relationship makes two individuals better able to function as co-parents. Even as to traditional married co-parents, states do not require that such individuals engage in sexual relations. In fact, almost 20% of married individuals report that they are in “sexless marriages,”<sup>140</sup> and this number only reflects the number of individuals willing to admit the lack of sex within their marriage. Many marriages thus turn into what most people would define as a close, committed, non-sexual friendship, so that even children raised within the traditional family structure may not have sexually intimate co-parents. Consequently, states should recognize that sexual activity between co-parents has little bearing on their ability to raise a child.

### C. Co-Parents Who Commit to Each Other

Finally, adoption lawmakers may assume that effective family structures necessarily consist of two parents committed not only to

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137. *Id.* at 537 n.9.

138. *Id.*

139. BEREBITSKY, *supra* note 8, at 3 (discussing adoption practice and the assumption of the “ideal and only legitimate family” as “the nuclear, democratic family—the sexually satisfied, playfully compatible heterosexual couple”).

140. Psychologists define “sexless marriages” as marriages in which the individuals have sex with each other less than ten times per year. Laura Berman, *Tired? Low Libido? Find the Real Reasons for Sexless Marriages*, CHI. SUN TIMES, Oct. 30, 2006.

their children, but also to one another. Consequently, with the proposed model, states may fear that one or both of the co-parents will become involved in a romantic relationship, causing problems within the family structure. States should consider the fact that adoption law already provides for adoption by single individuals,<sup>141</sup> who will often, and are even expected to, introduce a significant other into the family structure at some point in the future.<sup>142</sup> Additionally, as identified earlier, our laws and societal norms reflect the reality that half of all married individuals will divorce, and a great number will remarry.<sup>143</sup> Family law already allows for the vast construction of family structures that consist of a child, his or her legal parent(s), and the significant other(s) of the legal parent(s).<sup>144</sup>

The laws governing each parent's obligations and rights in the joint custody context could also govern the arrangement proposed here.<sup>145</sup> Because co-parents will have agreed upon the details of the joint adoption arrangement from the beginning, the addition of a significant other to the life of one of the co-parents will not affect either of the co-parent's obligations or protections. Finally, as discussed in Part IV, co-parents, upon adoption, will agree to a plan designating the specific rights each will have to make decisions regarding the child. The parenting plans may further provide that the addition of a significant other to a co-parent's life will not alter either co-parent's rights or obligations.<sup>146</sup>

#### **IV. Implementation of the Proposed Model**

While each state may implement the proposed model in the manner it deems best, this Part provides a number of guiding principles that states may find useful to consider throughout the implementation process.

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141. Adoptions by single individuals constitute over one-fourth of all adoptions. AF CARS REPORT 13, *supra* note 16, at 8.

142. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004) ("[H]eterosexual singles have a markedly greater probability of eventually establishing a married household.").

143. See *supra* notes 34–38 and accompanying text.

144. See *supra* notes 34–38 and accompanying text.

145. See *infra* notes 160–66 and accompanying text (discussing the implementation of parenting plans in the joint custody context).

146. See *infra* notes 161–66 and accompanying text (discussing the potential requirements of parenting plans).

### A. De-emphasizing Family Structure

States should enact family-related legislation that focuses less on family structure. As a starting point, instead of using marriage as a proxy for providing benefits and protections to families, future legislation should provide direct support to the child-parent relationship regardless of the parents' relationship status.<sup>147</sup> Other countries have successfully implemented programs that provide support and protection for caretaking functions.<sup>148</sup> These programs change the support systems' status quo and take steps to ensure that both caretakers and dependents receive adequate levels of support.<sup>149</sup>

Although eliminating marriage as a proxy for advancing rights and benefits to families represents only one example of a possible change to de-emphasize family form, similar steps could effectively alter society's views regarding the correctness of the continued reliance on the traditional family structure. Further, it would allow significantly more individuals to live in the non-traditional family form that works best for them, without sacrificing governmental support and protections. Overall, recognizing non-traditional families as legitimate and focusing legislation on the child-parent relationship instead of the marital relationship would provide adoption decision-makers with a greater level of comfort in placing children in non-traditional family structures such as the one advocated here.

### B. Changing the Wording of Adoption Laws

Along with changing legislation to de-emphasize the overall focus on family structure, states should also amend their adoption laws to explicitly allow explicitly for adoption by non-traditional parents. Some courts read legislation to allow two non-traditional parents to adopt, even if the statutory language does not expressly address such parents.<sup>150</sup> These courts use tools of statutory construction, such as

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147. Hamilton, *supra* note 77, at 368–69.

148. *Id.* at 369–70.

149. *Id.* at 369.

150. See, e.g., *In re M.M.D.*, 662 A.2d 837, 846–47 (D.C. 1995) (upholding adoption rights for unmarried couples because “[w]ords importing the singular number shall be held to include the plural, and vice versa, except where such construction would be unreasonable”); *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (reading the statute to allow adoptions by unmarried second-parents because such adoptions were consistent with the spirit and policies behind the statute); *In re Adoption of Tammy*, 619 N.E.2d 315, 318 (Mass. 1993) (allowing adoption by an unmarried couple where “[t]here is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants[,]” and noting that “[a]lthough the singular ‘a person’ is used, it is a legislatively mandated rule of statutory construction that ‘[w]ords importing the singular number may extend

reading phrases that grant adoptive rights to an unmarried “individual,” as necessarily including its plural form, unmarried “individuals.”<sup>151</sup> Such courts can then grant adoption rights to two unmarried individuals seeking to adopt a child jointly.<sup>152</sup>

Not all courts, however, demonstrate a willingness to interpret ambiguous statutes in a manner that permits adoption by non-traditional co-parents.<sup>153</sup> Legislatures could send a clearer message to adoption agencies and courts by amending the words of adoption statutes to provide expressly for adoptions by unmarried individuals who wish to adopt jointly, regardless of the parents’ relationship status. Additionally, legislatures could go further and amend the statutes to provide for joint adoption by two individuals involved in a close friendship.

### C. Implementing Nondiscrimination Policies

In addition to amending current adoption statutes to allow explicitly for adoption by certain non-traditional co-parents, state legislatures and adoption agencies could change their laws or governing rules to prohibit discrimination against potential parents based on factors such as relationship status, marital status, sexual orientation, or similar characteristics. Nondiscrimination policies would help prevent adoption caseworkers from discriminating at the various decision-making stages against non-traditional parents who state law classifies as legally eligible to adopt. The implementation of nondiscrimination policies would not involve a huge step in the field, as “[t]oday, family law policy generally is based on the premise that presumptions in favor or against particular categories of people do not serve the interests of children.”<sup>154</sup> As discussed earlier, discrimination in the adoption realm can undermine children’s interests because excluding classes of people as potential adoptive parents means that some chil-

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and be applied to several persons’ unless the resulting construction is ‘inconsistent with the manifest intent of the law-making body’” (internal citation omitted)).

151. See, e.g., *In re M.M.D.*, 662 A.2d at 846–47; *In re Adoption of Tammy*, 619 N.E.2d at 318–19.

152. See, e.g., *In re M.M.D.*, 662 A.2d at 846–47; *In re Jacob*, 660 N.E.2d at 401; *In re Adoption of Tammy*, 619 N.E.2d at 318.

153. Annmarie Timmins, *Adoption Law Is up for Interpretation*, CONCORD MONITOR, Apr. 10, 2006, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20060410/REPOSITORY/604100308> (discussing the split among New Hampshire courts, with some counties reading the adoption law to allow for adoption by unmarried couples, and some reading it to prohibit such adoptions).

154. Wald, *supra* note 1, at 384.

dren will have to live in institutional settings for the duration of their childhood.<sup>155</sup>

Some states have already implemented nondiscrimination policies in the custody realm. In a number of jurisdictions, courts may not consider the race, sex, sexual orientation, marital status, or religion of the parent except upon a showing of direct harm to the child.<sup>156</sup> Even in the adoption realm, for years courts have employed their own non-discrimination policies by reading statutes to allow for adoption by non-traditional parents.<sup>157</sup> Nondiscrimination policies would not inhibit adoption agencies from making case-by-case determinations to identify which potential parents would serve the child's best interests; rather, they would ensure that adoption decision-makers do not bar certain categories of co-parents from consideration solely based on their relationship status. Lastly, states should prohibit discrimination against certain categories of potential co-parents because such discrimination hurts both children and society as a whole. Discrimination based on parents' relationship status "standardize[s] child-rearing arrangements in a way that unnecessarily curtails diversity and cultural pluralism."<sup>158</sup>

#### D. Developing Parenting Plans

Finally, before allowing two individuals involved in a close friendship to adopt, states should require that the co-parents enter into a legally binding "parenting plan."<sup>159</sup> Parenting plans, which a number of states already successfully implement in the custody realm, would explicitly identify each parent's rights and responsibilities with regard to the child.<sup>160</sup> In many states these plans involve a great degree of detail. In Missouri, for example, upon divorce parents must create a

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155. See *supra* notes 111–13 and accompanying text.

156. AM. LAW INST., *supra* note 33, § 2.12 cmt. a (discussing the nondiscrimination provisions in the custody statutes of various states).

157. See *In re M.M.D.*, 662 A.2d at 848 ("[C]ourts over the years have entertained all sorts of adoption petitions to create 'non-standard' families, granting some and denying others in the prospective adoptee's best interests."); see also *In re Jacob*, 660 N.E.2d at 400–01 ("The pattern of amendments since the end of World War II evidences a successive expansion of the categories of persons entitled to adopt regardless of their marital status or sexual orientation.").

158. AM. LAW INST., *supra* note 33, § 2.02 cmt. c.

159. Kupenda, *supra* note 20, at 717 (suggesting that if states allowed two single African-American friends or relatives to jointly adopt an African-American child, "potential co-parents might prefer to prepare in advance of the adoption a co-parenting agreement . . .").

160. Mary Kay Kisthardt, *The AAML Model for a Parenting Plan*, 19 J. AM. ACAD. MATRIMONY LAW 223, 226 (2005) (describing parenting plans as "detailed descriptions of the

parenting plan, which, among other things, requires a “specific written schedule detailing . . . residential time for each child with each party.”<sup>161</sup> The schedule must include major holidays, school holidays, birthdays, transfer arrangements, and telephone access.<sup>162</sup> Additionally, the plan must address how the co-parents will make educational, medical, dental, healthcare, and childcare decisions.<sup>163</sup> Finally, the plan must identify the dispute resolution procedures that the parents will use for “matters on which the parties disagree.”<sup>164</sup>

States should structure required parenting plans as they see fit. The more detail that parenting plans contain, however, the less likely disputes regarding each parent’s responsibilities and rights will arise. Furthermore, a prevalent rule within the custody realm is that, once agreed upon, courts should allow parents to modify the parenting plan only in rare circumstances.<sup>165</sup> States should also implement this rule in the adoption realm, as continued adherence to the parenting plan will help to ensure consistency in the child’s upbringing. Parenting plans make a great deal of sense in contexts such as the one advocated here, in which two independent individuals undertake the joint endeavor of raising a child.<sup>166</sup> With a plan in place from the beginning, co-parents will know and understand their respective parental rights and responsibilities, and will have an agreed upon dispute resolution mechanism in place should any major disagreements occur.

## Conclusion

The 114,000 children presently without homes are those most hurt by states’ continued insistence on placing adoptive children only in traditional family structures. State preferences or requirements regarding the placement of adoptive children into traditional family structures often force children into family structures that simply do not reflect the reality of today’s society or denies children any home at

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manner in which parents intend to continue caring for their children after divorce” and noting that “[s]everal jurisdictions require a parenting plan in all cases”).

161. Mo. ANN. STAT. § 452.310 (West 2003).

162. *Id.*

163. *Id.*

164. *Id.*

165. See, e.g., *Lindman v. Geissler*, 872 N.E.2d 356, 361–62 (Ohio Ct. App. 2007) (holding that neither the former husband’s threat to reduce the amount of time the children spent with the former wife, nor the alleged financial hardship in the former wife’s home sufficiently established the significant change of circumstance that would warrant modifying the shared parenting plan).

166. See generally *Jacobs*, *supra* note 19 (discussing how legally binding advance agreements about the division of parental rights can facilitate multiparty parenting).

all. Recognizing the changing familial realities for today's children, states should reevaluate the historical reliance on the traditional family structure as the only, or most effective, means of attaining the ends of adoption law. This Article has identified a multitude of arguments that suggest adoption law can reach its goal of placing children with loving, supportive, and stable families as or more effectively through placing children in non-traditional adoptive family structures like the one advocated here.

What the family structure provides in substance, and not how it looks in structure, largely determines a child's well-being. Expressly authorizing and encouraging two individuals involved in a close friendship to adopt jointly can provide adoptive children with emotionally and financially supportive, loving, and stable homes. Child welfare experts widely believe that adoption provides for the best interests of children who do not have homes. If states continue to adhere to this belief, then they should work to further children's best interests by allowing two individuals, each fit to raise a child alone but who wish to do so jointly, the opportunity to provide an adoptive child with a family.