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The case for same-sex adoption

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An increasing number of same-sex couples are raising children in Australia. Although there are a number of ways for same-sex couples to become parents — including heterosexual intercourse and assisted conception procedures — adoption is denied to same-sex couples in many Australian jurisdictions. For same-sex couples, adoption (either in the form of non-relative adoption or step-parent/second parent adoption) is a crucial and significant avenue for family formation. Like heterosexual couples, same-sex couples decide to adopt children for numerous reasons including medical infertility, social infertility, and (most importantly) the desire to provide a child with a loving and nurturing environment. For male same-sex couples, who have limited alternatives for achieving parentage, the adoption process presents a particularly attractive pathway to parenting. There is now a large body of research that indicates that same-sex couples parent as well as heterosexual couples.¹ Once it is accepted that same-sex couples are suitable parents, there is no reason to discriminate against them in relation to the way they become parents.

The current law in Australia

In Australia, legislative power is divided between the states and the Commonwealth. Section 51 of the *Australian Constitution* confers on the federal parliament the power to legislate on specific topics. Residual powers that are not expressly or impliedly vested in the Commonwealth remain within the exclusive legislative domain of the states. As a result of this constitutional division of powers, laws relating to the adoption of children fall within the jurisdiction of the state and territory governments, rather than the federal government.

Assisted reproductive technology and legal recognition of the non-birth mother

Western Australia, New South Wales and Victoria have all passed legislation allowing same-sex couples to access donor insemination and legally recognising the non-birth mother. In 2002, WA introduced a package of reforms, which included allowing all women to access clinical donor insemination (irrespective of their marital status) and recognising the consenting non-birth mother as a parent.² Shortly afterwards, the ACT and Northern Territory passed legislation recognising the consenting non-birth mother as a parent.³ NSW recently passed progressive legislation presuming the consenting non-birth mother of a child conceived through assisted conception procedures to be the mother of the child

where parties are living in a de facto relationship.⁴ Following the recommendations of the Victorian Law Reform Commission (VLRC), Victoria has passed a package of reforms allowing all women to access donor insemination.⁵ Further, if two women are living together on a genuine domestic basis the consenting non-biological mother is presumed to be the legal parent of a child conceived during a lesbian relationship.⁶

At the federal level, in 2006, the Human Rights and Equal Opportunity Commission released a report that identified 58 federal Acts that discriminated against same-sex couples.⁷ In November 2008, the Federal Government responded to that report by enacting the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). In accordance with this legislation, where same-sex couples are living in a genuine domestic relationship, s 60H(1) of the *Family Law Act 1975* (Cth) recognises the consenting non-birth parent as a parent of the child born as a result of assisted conception procedures. The section also provides for mutual recognition of parentage between the Commonwealth and the states and territories. Likewise, there is a reciprocal recognition of adoption of children.⁸

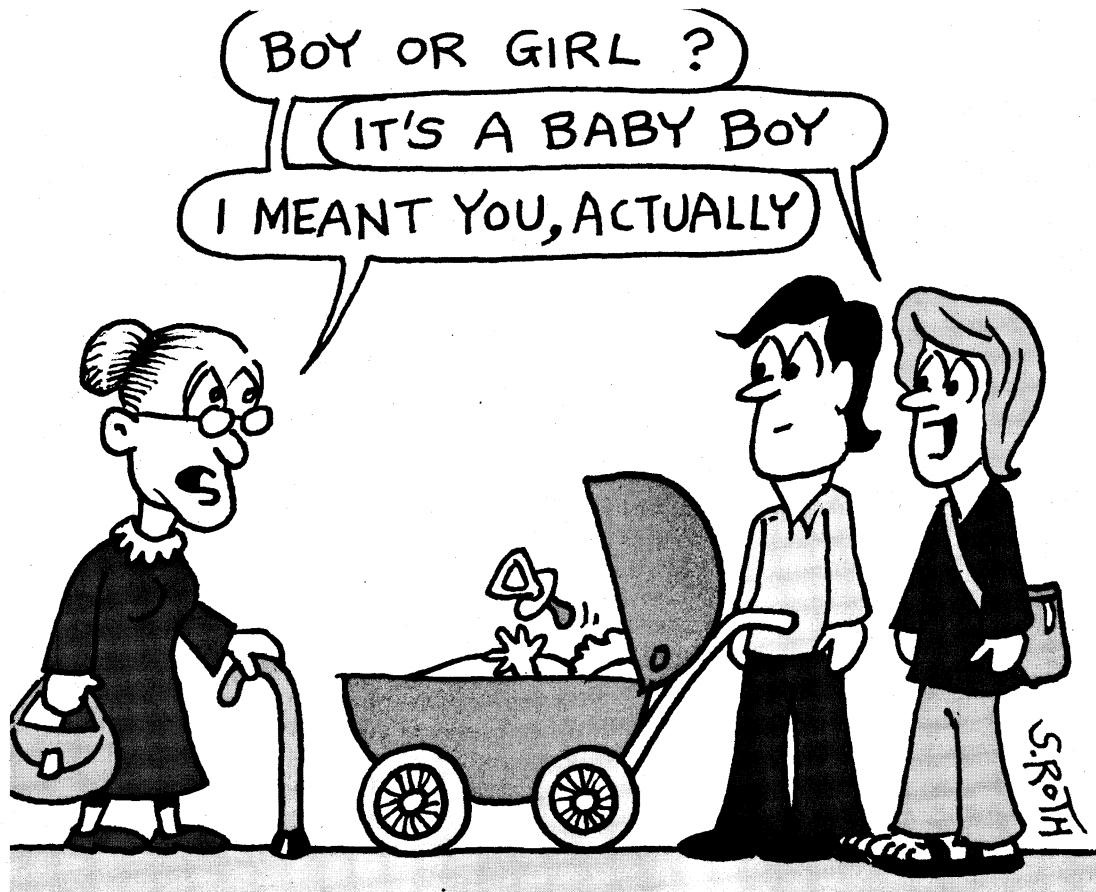
Eligibility for adoption

WA, the ACT and Tasmania have been at the forefront of changes to adoption legislation for same-sex couples: all have amended their legislation to allow same-sex couples to adopt.⁹ While WA and the ACT have simply allowed same-sex couples to adopt children, Tasmania has taken a middle path. Legislation in that state provides that same-sex couples who have registered their relationship may apply to adopt the natural or adoptive child of the other party to that relationship.

All adoption legislation in Australia includes eligibility criteria. This means that a particular person, or category of persons, is included in the adoption process while others are excluded. In the context of non-relative adoption, the legislation provides for individuals to be assessed on their particular characteristics in order to determine whether or not they are suitable candidates. In the remaining jurisdictions, while individual lesbian women are eligible to apply to adopt a child, two women as a couple will not be regarded as the child's legal parents, because eligibility to adopt is limited to heterosexual couples. In some jurisdictions the couples must be married, while in others it is sufficient if they are living together on a genuine domestic basis. Appendix A sets out in detail the up-to-

REFERENCES

1. See Ruth McNair, 'Outcomes for Children Born of ART in a Diverse Range of Families', (Occasional Paper, Victorian Law Reform Commission 2004).
2. The *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) s 26 introduced s 6A into the *Artificial Conception Act 1985* (WA). This section came into force on 21 September 2002.
3. The *Law Reform (Gender, Sexuality And De Facto Relationships) Act 2003* (NT) s 41 inserted s 5DA(1) into the *Status of Children Act 1978* (NT). This section commenced on 17 March 2004. The *Parentage Act 2004* (ACT) repealed the *Artificial Conception Act 1985* (ACT) and came into effect on 22 March 2004. See the *Parentage Act 2004* (ACT) ss 8(1) and 11(4).
4. Schedule 2 of the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) introduces s 14(1A) into the *Status of Children Act 1996* (NSW). It commenced on 19 September 2008. See also the recently proclaimed *Assisted Reproductive Technology Act 2007* (NSW) which regulates access to reproductive technology and will commence operation on 1 January 2010.
5. *Assisted Reproductive Treatment Act 2008* (Vic) s 10.
6. *Assisted Reproductive Treatment Act 2008* (Vic). Section 147 amends Part III of the *Status of Children Act 1974* (Vic) and introduced ss 13 and 14. These amendments will come into operation on 1 January 2010 unless they are proclaimed earlier.
7. HREOC, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits 'Same-Sex: Same Entitlements.' Final Report (2007).
8. *Family Law Act 1975* (Cth) ss 4AA, 60EA, 60H(1) and 60HA. See also s 60HB, which allows for the reciprocal recognition of surrogacy arrangements between the Commonwealth and states and territories.
9. *Adoption Act 1994* (WA) s 39, *Adoption Act 1993* (ACT) s18 and *Adoption Act 1988* (Tas) s 20 (2A).



date eligibility criteria pertaining to adoption legislation in each of the Australian states and territories, and highlights the discriminatory provisions.

Challenging the legislation

In Australia all levels of government have recognised the same-sex family unit in relation to assisted reproduction and, importantly, have made an effort to eradicate discrimination against same-sex couples.¹⁰ This is confirmation that the legislature views the sexuality of parents as being of little consequence to the interests of the children that they raise. The fact that most Australian jurisdictions allow same-sex couples to access fertility treatment is evidence that same-sex couples are considered to be suitable parents.¹¹ Consequently, it is inconsistent for many Australian jurisdictions to continue to exclude same-sex couples from the adoption process. Urgent reform of the adoption legislation in NSW (considered in detail below), Queensland, Victoria, SA and the NT is required.

The legislation relating to same-sex adoption has not been challenged in the courts in Australia. However, in the Federal Court decision of *McBain v The State of Victoria* the issue of same-sex parents came under the judicial microscope in the context of access to reproductive technologies.¹² The Court rejected the Catholic Church's assertion that children have a right to be born into a family consisting of a male and a female parent. Further, the Court decided that the then Victorian legislation prohibiting single women and lesbian couples from accessing clinical reproductive services was inconsistent with the Commonwealth Sex Discrimination Act 1984. A similar result was reached in the case of *Pearce v South Australian Health Commission*.¹³ These cases are limited to access to infertility treatment; to date, sex discrimination legislation has not been used to challenge adoption laws. However, so long as adoption legislation continues to discriminate against same-sex couples, challenging these laws in the courts remains a viable option.

New South Wales: a case study

Looking at the situation in NSW in more detail, s 30 of the *Adoption Act (NSW) 2000* ('the Adoption Act') provides that where parties are in a heterosexual relationship, a step-parent may apply to adopt a biological child of his or her partner. The non-biological parent in a same-sex couple will not be considered a step-parent and thus is not eligible to apply to adopt his or her partner's biological child. Step-parent adoption extinguishes the legal relationship between the child and one of the birth parents, and for this reason is not encouraged by the legislatures on all levels (See Appendix A).¹⁴

In the case of non-relative adoption, which is often of an infant child,

adoption is the process whereby a court irrevocably extinguishes the legal ties between a child and the natural parents or guardians and creates analogous ties between the child and his [or her] adopters.¹⁵

The legal consequences of adoption are thus to deny a biological parent any legal status, rights or responsibilities regarding the child. It is therefore of considerable significance for the relinquishing parents, the adopters and, most importantly, the child.

The Adoption Act stipulates a number of threshold requirements that a couple must meet to be eligible to apply to adopt a child. For the purposes of this article, the most important of these threshold requirements is that only married couples or heterosexual couples living in a de facto relationship may apply to adopt a child.¹⁶ There is also provision for one person to apply to adopt a child.¹⁷ Thus, while each person in a same-sex relationship may make application to adopt a child as an *individual*, they cannot do so as a same-sex couple. This is clearly an illogical outcome; how can sexual orientation of prospective parents be relevant when it is a couple seeking to adopt, but not when the prospective parent is a single person? In our view, the same criteria should be applied in all cases: the

10. In addition to amendments to the Commonwealth and State and Territory legislation set out above see also *Same-sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act (Cth) 2008* and *Same-sex Relationships (Equal Treatment Commonwealth Laws — Superannuation) Act (Cth) 2008* which remove discrimination against same-sex couples from a raft of Commonwealth legislation in relation to superannuation, social security, taxation, veterans affairs and workers compensation.

11. See the *Assisted Reproductive Technology Act 2007 (NSW)* which is yet to be proclaimed.

12. *McBain v The State of Victoria* [2000] 99 FCR 116, 120. See also *AB v Attorney-General for the State of Victoria* (2005) VR 485 which confirmed this decision.

13. (1996) 66 SASR 486.

14. See also *Family Law Act 1975 (Cth)* ss 60G, 60F(4)(a) and 60H. In some overseas jurisdictions such as certain states in the US and provinces in Canada if a child is conceived during the same-sex relationship the non-biological parent may adopt the child without severing the legal relationship with the birth parent. This is referred to as second parent adoption.

15. Stephen Cretney, Judith Masson and Rebecca Bailey Harris, *Principles of Family Law* (7th ed, 2003) 791.

16. *Adoption Act 2000 (NSW)* ss 23, 26 and 28.

17. *Adoption Act 2000 (NSW)* ss 23, 26 and 27.

18. Victorian Law Reform Commission, 'Assisted Reproductive Technology and Adoption: Final Report' (2007) 104.

19. *Adoption Act 2000 (NSW)* ss 27 and 28.

sexual orientation of a prospective parent is irrelevant, regardless of whether he or she is seeking to adopt as an individual or as part of a couple.

Adoption is primarily a service to children and its major purpose 'is to provide a stable family for a child in need, rather than to meet the need or desire of an adult for a child'.¹⁸ In accordance with the Adoption Act, the basic requirement that applies to all prospective persons who wish to make application to adopt a child is that they must be 'of good repute and are fit and proper persons to fulfil the responsibilities of parents'.¹⁹ In the interests of prospective adopted children, eligibility criteria are both necessary and desirable. However, it is not necessary or desirable to arbitrarily discriminate against same-sex couples purely on the basis of their sexuality. The NSW Legislative Council Standing Committee on Law and Justice has recently conducted an Inquiry into Adoption by same-sex couples. The committee concluded that, subject to an exemption in favour of 'faith based' adoption agencies, same-sex couples should be eligible to adopt children.²⁰ These recommendations should be acted on, and the existing eligibility criteria amended, so that only relevant factors are taken into account in determining what is in the best interests of the child, and not the sexual orientation of the prospective parents.

What is in the best interests of the child?

Section 7(a) of the NSW Adoption Act establishes the best interests of the child as the paramount consideration in the adoption process. The increase in the number of same-sex families has given rise to an upsurge in social science and legal research presenting arguments for and against same-sex parenting. The centrality of children's interests has prompted those in favour of lesbian parenting to rely upon empirical research proving that children raised in lesbian-led families are 'no different' to those raised in heterosexual families.²¹

In Australia, a number of law reform commissions have examined the empirical data relating to same-sex couples as parents. As early as 1997, the NSW Law Reform Commission commented that '[t]here is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents'.²² The Victorian and Tasmanian law reform bodies have provided the most extensive responses to the question of whether same-sex parenting is in the interests of the child. In 2003, the Tasmanian Law Reform Institute submitted a report on adoption by same-sex couples which recommended that the *Adoption Act 1988* (Tas) 'be amended to permit a couple to apply for adoption regardless of the gender or marital status of the partners making up the couple'.²³ This conclusion was reached after a painstaking analysis of the data available. While the Institute acknowledged that much of the research was controversial and flawed, it found that it was no less reliable than equivalent research into other areas of child development and psychology. The Institute stated that:

The problem appears to be that anti-gay scholars either have a tendency to view any evidence of difference as evidence of harm or alternatively they employ double standards by attacking the studies, not so much because their research methods are inferior to most studies of family relationships, but because these critics oppose equal family rights for lesbians and gays.²⁴

The Institute concluded that the best interests of children required that same-sex couples be eligible to adopt children, and it criticised arguments about sexual identity on the basis that such arguments reflected prejudices about homosexuality as 'undesirable', 'wrong or a pathological condition'.²⁵

The Victorian Law Reform Commission approached the question of children's interests from a much broader perspective. Its reference included not only adoption, that is assessed on a case-by-case basis, but also eligibility criteria for assisted reproduction and consequential amendments such as recognition of parentage.²⁶ As part of its investigation, the VLRC commissioned Dr Ruth McNair to prepare an occasional paper about children born of assisted reproductive technologies; a good portion of this paper is dedicated directly to the outcomes for children with same-sex parents. Dr McNair carefully summarised, analysed and examined studies on these children from the perspective of the outcomes for the children themselves, their family functioning and the wider social environment. She concluded that 'family functioning (processes) rather than family structure is the critical factor in determining children's outcomes'.²⁷ These conclusions echoed earlier findings that family structure is only important where it is associated with secondary effects, such as poverty.²⁸ The VLRC responded positively to these findings, stating that 'there is sound evidence that children born into families with non-biological parents or same-sex parents do at least as well as other children'.²⁹

The VLRC recommended that the Victorian adoption legislation be amended to allow the courts to make adoption orders in favour of same-sex couples.³⁰ This conclusion was reached after a five-year process during which every aspect relating to the legal recognition of same-sex families, including the eligibility of same-sex couples to adopt children, was investigated. The VLRC emphasised that the interests of the child are the paramount consideration and concluded that as result of same-sex couples being excluded from the adoption process 'a child in need may potentially be deprived of the opportunity to be placed with the most suitable carers'.³¹

It is clear that the same-sex family structure is not in itself a cause of negative outcomes for children and should not in itself determine whether a couple is eligible to adopt children. An academic from the United States, Nancy Polikoff, has summed up the results of the empirical data on this question as follows:

By now there have been more than fifty peer reviewed studies with small samples published. While these studies have often included samples of convenience, many of them utilized control groups. All of them concluded that there is no relationship between the sexual orientation of a parent and the well-being of a child. To summarize, gay and lesbian

20. See NSW Standing Committee on Law and Justice, *Adoption by same-sex couples*, Report No 39, (8 July 2009), Recommendations 1, 2 and 3.

21. Ruth McNair, 'From GP to Political Activist for the New Family' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005) 227.

22. NSW Law Reform Commission, 'Review of the Adoption of Children Act 1965 (NSW)', Report 81 (1997) [6.120].

23. Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) Recommendation 1. See also Recommendation 3(a) which recommended that 'both step-parent and relative adoptions should be available to the same-sex partner of a parent or a relative of a child.'

24. Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) 5.

25. See Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) 6.

26. See Victorian Law Reform Commission *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* Consultation Paper (2003).

27. McNair, above n 1, 2.

28. Elizabeth A Vandewater and Jennifer E Lansford, 'Influences of Family Structure and Parental Conflict on Children's Well-Being' (1998) 47 *Family Relations* 323. See also the New Zealand Law Commission, *New Issues in Legal Parenthood*, Report 88, (2005) [2.10].

29. See VLRC, *Assisted Reproductive Technology & Adoption*, Position Paper One: Access (2005) [2.66].

30. VLRC, above n 18, Recommendation 67.

31. *Ibid* 106.

32. Nancy Polikoff, 'Lesbian and Gay Parenting: The Last Thirty Years' (2005) 66 *Montana Law Review* 51, 55.

33. See for example *Civil Code of Quebec LQ 1991*, c64 art 546 and 578.1, *Adoption Act SNL 1999*, c A-2.1, s 20(1) and *Adoption Act SS 1998* c A-5.2, ss 16(2) and 23(1).

34. See for example *Re K* (1995) 15 RFL (4th) 129 and *Re M* (C.S.) 2001 NSSF 24.

No evidence exists that children raised in same-sex families are disadvantaged. Not all same-sex couples make good parents, just as not all heterosexual couples make good parents.

parents have equal parenting abilities to heterosexuals, and raise children as happy, healthy and well adjusted as children raised by heterosexual parents. The studies show no difference in the rate of psychiatric, emotional or behavioural difficulties and no differences in the quality of peer relationships, self esteem or popularity of children raised by lesbian and gay parents.³²

Same-sex couples adoption: the overseas experience

A number of overseas jurisdictions have extended their adoption legislation to include same-sex couples. In Canada, there is almost uniform recognition of adoption by same-sex parents who live together in a genuine domestic relationship.³³ The Canadian judiciary has promoted this process and been active in extending the laws of adoption to same-sex couples.³⁴ The trend in the US appears to be in favour of permitting same-sex couples to adopt.³⁵ A number of states allow second parent adoption, which enables the partner of the legally recognised parent to adopt the latter's child without the biological parent having to relinquish his or her legal status as a parent.³⁶ In addition, a number of states (including California, New Jersey, Illinois, Connecticut, District of Columbia and Oregon) allow same-sex couples to apply to adopt a child as a couple.³⁷ In fact:

[T]he reported decisions suggest that courts confronted with lesbian and gay families that embody dominant marital norms of monogamy, financial security, mutual care and support, and psychological parenting find adoption to be in the child's best interest despite lack of clear statutory support for such non-marital, two-parent adoptions.³⁸

In the United Kingdom, the *Adoption of Children Act 2002* (UK) c 38 provides that same-sex couples are eligible to adopt children. This has been achieved through changing the definition of couple to 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'.³⁹ In Europe, numerous countries have legislated to allow same-sex couples to adopt including Spain, the Netherlands, Sweden and Belgium.⁴⁰

South Africa provides a particularly interesting example. In an effort to build a society based on equality and tolerance, the post-apartheid South African Constitution has a particularly strong human rights focus, both in terms of civil and political rights and economic, social and cultural rights. In the case of *Du Toit v Minister of Welfare & Population Development and Others*⁴¹ the Constitutional Court held that the existing legislation, which stipulated eligibility criteria

for adoption, discriminated unfairly against people living together in a same-sex life partnership and contravened the 'best interests of the child' principle. As a consequence of this decision, a same-sex couple in South Africa is legally permitted to adopt a child.

Conclusion

The increasing number of same-sex families is a worldwide phenomenon that has prompted many overseas jurisdictions to extend their adoption legislation to include same-sex couples. In contrast, many Australian jurisdictions have adoption legislation that arbitrarily discriminates against same-sex couples. While heterosexual couples are eligible to adopt children if they are 'of good repute and are fit and proper persons to fulfil the responsibilities of parents', same-sex couples are too often ineligible, even if they are 'of good repute and are fit and proper persons to fulfil the responsibilities of parents'. No evidence exists that children raised in same-sex families are disadvantaged. Not all same-sex couples make good parents, just as not all heterosexual couples make good parents. Australia risks falling behind the rest of the common law world in the protection of the rights of gay and lesbian couples, if it fails to quickly reform adoption laws to remove such discriminatory provisions. This legislation must be amended so that same-sex couples are eligible to adopt, subject to the same eligibility criteria as opposite-sex couples. Prospective parents should be evaluated individually and by reference to their ability to parent, rather than their sexual orientation.

Only minor amendments are required to achieve parity between same-sex couples and heterosexual couples and remove discrimination from adoption legislation. In particular, the discriminatory effect can be overcome by defining a 'de facto relationship' as 'the relationship between two persons, irrespective of sex, who live together on a bona fide domestic basis'. Enacting this relatively minor reform would have a major impact in removing one of the last bastions of entrenched legislative discrimination against gays and lesbians.

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35. Compare, e.g. *In re K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. 1995), and *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. App. 2006), and *In re K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004), and *In re M.M.G.C.* 785 N.E.2d 267 (Ind. Ct. App. 2003), and *In re Sharon S.*, 31 Cal. 4th 417, 73 P.3d 554 (Cal. 2003), and *In re R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002), and *In re H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995), and *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995), and *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995), and *In re Tammy*, 619 N.E.2d 315 (Mass. 1993), and *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (all permitting same-sex couple adoption under traditional adoption statutes), with *In re Luke*, 640 N.W. 2d 374 (Neb. 2002), and *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999), and *Matter of Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996), and *In re Angel Lacey M.*, 516 N.W.2d 678 (Wisc. 1994) (all rejecting same-sex partner adoption under traditional adoption statutes).

36. See John Seymour and Sonia Magri, 'ART Surrogacy and Legal Parentage: A Comparative Legislative Review', (Occasional Paper, Victorian Law Reform Commission 2004) 56.

37. Recently, over half a dozen states have extended marital rights, including same-sex parent adoption, to same-sex couples. Cal. Fam. Code § 297.5 (West 2005); Conn. Gen. Stat. §§ 46b-38bb (West Supp. 2007); N.H. Rev. Stat. Ann. ch. 457-A (Supp. 2007); N.J. Stat. Ann. 9:3-37 (West Supp. 2007); Oregon Family Fairness Act, Oregon Laws 2007, ch. 99; Vt. Stat. Ann. tit. 15, § 1204 (2002); See generally Annette R Appell, 'The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption' (2008) 22 *BYU Journal of Public Law* 289, footnote 190.

38. Appell, above n 37, 317 (citations omitted).

39. *Adoption of Children Act 2002* (UK) c 38, s 49(1)(a) and s 144.

40. See Robert Wintemute, 'Same-Sex Marriage: When Will It Reach Utah' (2006) 20 *BYU Journal of Public Law* 527, Appendix A.

41. *Du Toit v Minister of Welfare & Population Development and Others* 2003 (2) SA 198 (CC).

Appendix A

| State | Legislation | Who can adopt? (excluding step-parent) | Definition of couple | When can a step-parent/second parent adopt? |
|-------|---|---|--|--|
| ACT | <i>Adoption Act 1993</i> s 18 | s 18 (1)(b): A couple 'who, whether married or not, have lived together in a domestic partnership for a period of not less than 3 years'. <ul style="list-style-type: none"> • Heterosexual married and de facto couples. • Same-sex couples. • s 18(3): Single person. | 'domestic partnership' is the relationship between two people whether of a different or the same sex, living together as a couple on a genuine domestic basis.' s 169 <i>Legislation Act 2001</i> (ACT). | s 18(2): Only in circumstances where the Court considers it 'not preferable' to make an order for custody or guardianship under the <i>Family Law Act</i> . |
| NSW | <i>Adoption Act 2000</i> ss 23, 26, 27, 28, 30 | ss 26 and 28(4): A couple who have been living together for a continuous period of at least 2 years. <ul style="list-style-type: none"> • s 28(4): Heterosexual married and de facto couples. • s 27: Single person. | s 23(1): 'Couple' means a man and a woman who: (a) Are married; or (b) Have a de facto relationship. 'De facto couple' applies to a man and woman living together on a genuine domestic basis without being married. | s 30(a)-(d): the child is at least 5 years old; the step parent has lived with the child for a continuous period of not less than 2 years; there is consent in accordance with the <i>Adoption Act 2000</i> , and 'clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child'. |
| NT | <i>Adoption of Children Act 1994</i> ss 13, 14, 15 | s 13(1)(a): Man and woman married to each other for not less than two years'. <ul style="list-style-type: none"> • s 13(1) married couple. • s 14(1)(b): Single person under exceptional circumstances. | s 13(1) 'where the man and woman ... are married to each other'. | s 15(3)(a)-(c): guardianship or custody of the child under <i>Family Law Act</i> does not make adequate provision for the welfare and interests of the child; 'exceptional circumstances'; 'better provision'. |
| QLD | <i>Adoption of Children Act 1964</i> s 12(1) | s 12(1) 'husband and wife jointly'. <ul style="list-style-type: none"> • s 12(1) and (2): Husband and wife. • s 12(3)(c): Single person under special circumstances. | s 12(1) 'husband and wife jointly'. | s 12(5): 'Welfare and interests of the child 'better served' than under an order for guardianship and custody under the <i>Family Law Act</i> . |
| SA | <i>Adoption Act 1988</i> ss 10 and 12 | s 12(1): Two persons cohabiting together in a marriage relationship for a continuous period of at least five years (unless special circumstances). <ul style="list-style-type: none"> • Heterosexual married and de facto couples. • s 12(3)(b): Single person in special circumstances. | s 4(1): 'Marriage relationship' means the relationship between two persons cohabiting as husband and wife or de facto husband and wife. | s 10(1)(a): is clearly preferable, in the interests of the child, to any alternative order. s 10(2): The Family Court of Australia has given that person leave to proceed with the application for adoption. |
| TAS | <i>Adoption Act 1988</i> s 20 | s 20(1) two persons who, for a period of not less than 3 years are married or in a registered deed of relationship. <ul style="list-style-type: none"> • s 20(1): Married couple • s 20 (2A): Parties in a 'significant relationship' But only where the partner is the natural or adopted parent of the child or a relative of the child. • s 20(4): One person under exceptional circumstances. | <i>Relationships Act 2003</i> (Tas) s 4: Significant relationships – (1) Is a relationship between two adult persons (a) Who have a relationship as a couple; and (b) Who are not married to one another or related by family | s 20(7)(a)-(c): Court shall not make an adoption order unless: an order for custody or guardianship under the <i>Family Law Act</i> would not make adequate provision to serve the welfare and interests of the child; and serves the welfare and interests of the child; and special circumstances exist. |
| VIC | <i>Adoption Act 1984</i> ss 11-12 | s 11(1)(a) and (c): A man and a woman who are married to each other or living in a de facto relationship for not less than two years. <ul style="list-style-type: none"> • Heterosexual married and de facto couples • s 11(3) Single person under special circumstances. | s 4(1): 'De facto relationship' means the relationship of a man and a woman who are living together as husband and wife on a genuine domestic basis, although not married to each other. | s 11(6)(a)-(d): Conditions to be satisfied. Order under <i>Family Law Act</i> not adequate; exceptional circumstances; better provision for welfare of child and in the case of an order in favour of a de facto spouse neither that spouse nor his or her de facto spouse is married to another person at the time that the order is made. |
| WA | <i>Adoption Act 1994</i> s 39 | s 39(1)(d) and (e) (joint): Married couple or living together in de facto relationship for at least three years. <ul style="list-style-type: none"> • Married couples. • Heterosexual de facto couples. • Same-sex de facto couples. • s 39(1): Single person. | <i>Interpretation Act 1984</i> s 13A(1): 'De facto relationship' as a relationship other than marriage between two people who live together is a 'marriage like' relationship. s 13A(3): 'It does not matter whether the persons are different sexes or the same sex.' | s 68(1)(fa): Child's adoption by step-parent preferable to order under <i>Family Law Act</i> . s 4(1)(b): definition of 'step-parent'. |