Protecting Children and the Custodial Rights of Co-Habitants

by
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I. INTRODUCTION

Throughout the United States the definition of "the family" is continually evolving. In the past, "the family" was defined using an archetype of a husband, wife, and 2.3 children.[1] Today one sees a kaleidoscope of various familial arrangements, many similar to the traditional family, but increasingly common are families that exist without the legal safeguards enjoyed by traditional families. Consider the following example:

Roger and William had been involved in a serious monogamous relationship for the past seven years and had resided together for the past six years. Prior to their relationship, Roger adopted his ten-year old daughter, Ellen. Since moving in with Roger, William has been every bit the father figure to Ellen; he picks her up from school, is the coach of her soccer team, attends parent teacher conferences, and has taken her to her doctor's appointments. Unfortunately, Roger and William have grown apart and William has moved out of the residence. Since moving out of the residence, Roger has denied William all contact with Ellen. William is no longer able to retrieve medical information from the doctor's office and has been removed from the school contact list.

Regrettably, the above scenario is not out of the ordinary. It is not unusual in today's society that relationships end and families are split apart.[2] All too common is the situation where one

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1 *See*, Susan J. Becker, *Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law,* 48 CLEV. ST. L. REV. 101, 130 (2000).

2 *See* Percent of New Marriages Which End in Divorce, in Selected Countries (2002), Divorce Mag., at http://www.divorcemag.com/statistics/statsWorld.shtml (providing a chart listing the divorce rate in the United States as 45.8 percent).

parent does everything possible to obtain primary custody of the child or alienate the other parent.[3] Throw into the mix the fact that one party to the relationship has no legal rights to the child it is easy to see how lives can be torn apart quickly; frequently lost in the dissolution of the adult relationship are the effects on the child.

This article will address the various ways in which non-married cohabitants can protect themselves, as well as the children, should such a situation arise. For all practical purposes, the circumstances addressed in this article would most likely be encountered when a same-sex couple's relationship ends. However, there would be very little difference in the circumstances of a heterosexual couple under a similar fact pattern. The paradigm set of facts would be: (1) that the couple has resided together for a significant period of time; (2) a parental relationship has been established between the child and the individual with no parental rights; (3) the parties have ended the relationship; (4) there is not a traditional second legal parent; and (5) the parent without parental rights has been alienated from the child.

This article will focus on four different methods by which the noncustodial parent can prevent a curtailment of parental rights or at the very least can attempt to maintain his relationship with the child. Three of the safeguards are proactive in nature and should be accomplished as soon as a couple decides to forge a family. The fourth legal process, third-party visitation petitions, is reactive and can only be accomplished after the parties have split.

In section II we discuss the first legal process that the noncustodial parent could consider in some states: second-parent adoption. Such an adoption is analogous to a step-parent adoption and would afford the noncustodial parent all of the rights of a legal parent. Unfortunately, second-parent adoptions are only available in a few states[4] and mentioning this subject in conversa-

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[3] Joan Biskupic, *Same-sex Couples are Redefining Family Law in USA*, USA TODAY, Feb. 17, 2003, at 1A.

[4] California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, Maine, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington are just a few of the states that allow second-parent adoption; however, check with an adoption specialist in your jurisdiction. Second parent adoption may also be available in selected counties in other states.

tion typically garners one of two responses: either an inquisitive look with one's head cocked to the side, similar to the RCA Victor dog, or the statement "not another gay thing." However, second-parent adoption is much more than a "gay thing" and deserves more attention than simple disregard because it is unfamiliar to most people except for those whose lives are affected. Second-parent adoptions are on the forefront of a change in family law and of what states should consider when determining the rights of children and their parents in a modern society.

In the following section, we will consider the legal process of co-guardianships. Although co-guardianships provide many safeguards with respect to custodial rights, they do not afford all of the protections of an adoption. We will discuss the benefits and disadvantages of co-guardianships. Although not prevalent, co-guardianships may provide the most protection available when second-parent adoptions are not an option.

Then in section IV, we will consider the impact cohabitation agreements may have on future custody disputes. If in the example used above Roger and William entered into a cohabitation agreement, acknowledging that the parties will maintain joint legal and physical custody of Ellen, this agreement might be useful during a medical emergency if it contained language granting William permission to make medical decisions; but would this agreement be enforceable and withstand judicial scrutiny in a custody hearing once the relationship ended?

Finally, we will also consider third party visitation provisions, which a number of states have adopted in one form or another. Although third party visitation petitions have undergone increased scrutiny recently, as a last resort, an order for visitation may be the only way that William could maintain a relationship with Ellen over Roger's objections.

Throughout this article we will address Nevada law, simply because it is where we practice. Although a number of state statutes mirror Nevada's law, it is imperative that you research your local statutes and case law before trying to implement some of the ideas promoted in this article.

See, e.g., Human Rights Campaign, Second Parent Adoption, http://www.hrc.org/issues/2385.htm (last visited June 3, 2008). Since adoptions in all jurisdictions are sealed, and very few appealed, the courts in your jurisdiction may grant second parent adoptions.

II. SECOND PARENT ADOPTIONS

A. *The History of Adoption and Definitions*

When considering a topic as broad and complex as adoption, it is important to establish a common foundation. This section will briefly discuss the history of adoption and then define a few terms and concepts incorporated throughout the other sections of the article. These concepts are: the best interest of the child, family, co-parent adoption, and second parent adoption.

1. *History of Adoption*

The concept of adoption is ancient; references to adoption can be found in the Bible as well as in the Greek, Roman, Egyptian, and Babylonian cultures.[5] The primary purpose of these early adoptions was to preserve continuity within the adopter's family by preventing extinction; these adoptions were not to serve the best interest of the child.[6] In addition, these adoptions had "a deeply religious significance,"[7] calling for the adoptive child's "admission into a new worship as well as into a new family."[8] The focus, once again, was on the adoptive family's religious beliefs without regard to the faith, wishes, or interest of the child.[9]

English common law did not include the concept of adoption.[10] The "feeling that an outsider could not be brought into the family to inherit to the prejudice of the expected heirs undoubtedly extended throughout all the classes which owned property in the English realm."[11] Like the adoption laws of ancient Rome, the laws of England focused on the blood lineage rather than the best interest of the child.

Focusing on the best interest of the child is an American concept. Although adoptions occurred informally in the United

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5 Rita Meiser & Marcie Velen, The History of Adoption, http://www.destinyink.com/research/history.html.

6 Leo Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743-45 (1955).

7 *Id.* at 743.

8 *Id.*

9 *Id.* at 745.

10 *Id.* at 746.

11 Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 449 (1971).

States prior to any statutory legislation, the process was not legally recognized until the first adoption statute was enacted by the Massachusetts legislature in 1851.[12] The "statute required judicial approval, consent of the child's parent or guardian, and a finding that the prospective adoptive family was of sufficient ability to raise the child."[13] American adoption statutes continue to consider these foundational requirements essential to every valid adoption.[14]

Many states followed Massachusetts and passed their own adoption statutes, using the Massachusetts statute as a model.[15] "The purpose of the American adoption statutes passed in the middle of the nineteenth century," unlike that of Rome and England, "was to provide for the welfare of dependant children"[16] by "securing to adopted children a proper share in the estate of adopting parents who should die intestate."[17]

Nevada passed its first adoption statute in 1885.[18] The wording of the statute closely resembled the wording of the Massachusetts statute and placed an emphasis on the "best interest of the child."[19] Since 1885, Nevada has revised and amended its adoption statutes on a number of occasions resulting in the current statute.[20] Although amended and revised, the adoption statute's primary focus, the best interest of the child, and its pertinent parts have remained relatively unchanged.

2. *Best Interest of the Child*

Since their inception in the late nineteenth century, American adoption laws have been enacted with the best interest of the child as the focal point. However, in the one hundred plus years of American adoption jurisprudence, a standard to determine what those interests are has not been universally accepted. The difficulty in developing this standard lies with differing social

12 Meiser & Velen, *supra* note 5.
13 Presser, *supra* note 11, at 465.
14 Sharon S. v. Super. Ct., 73 P.3d 554, 562 (Cal. 2003).
15 Presser, *supra* note 11, at 466.
16 *Id.* at 453.
17 *Id.* at 465 (*quoting* WHITMORE, THE LAW OF ADOPTION iii-iv (1876)).
18 GEN. STAT. OF THE STATE OF NEV. § 601 (1885).
19 *See generally* GEN. STAT. OF THE STATE OF NEV. §§ 601-606 (1885).
20 NEV. REV. STAT. § 127 (2008).

norms of the states and the various state courts' interpretation of adoption statutes. Additionally, many courts assess each set of facts on a case-by-case basis before making a best interest of the child determination.[21] Although there are customary factors that courts consider, an all-inclusive catalog does not exist. Factors that courts typically weigh are "the level of care and attention a child receives from the adult, the amount of time the parent spends with the child, the adult's [financial and emotional] stability, the home environment, and the adult's prior criminal history."[22] Additionally, courts will consider the benefits the child will gain by the adoption.

The financial benefits of permitting the adoption include the child's receiving "Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of [that] parent, the right to inherit under rules of intestacy, ...eligibility for coverage under both parents' health insurance policies."[23]

Moreover, the emotional stability and permanency that come with being an integrated part of a family unit must be considered. Finally, there are benefits the child gains from the adoptive parent's ability to legally make parental decisions with respect to education and emergency health care.

Ascertaining the "best interest of the child" when severing the parent-child relationship is of such importance that it requires a judicial determination.[24] Although a "best interest of the child" standard is not defined in Nevada's adoption statutes, other chapters in the statutes, those concerned with visitation, custody, and parental rights, do identify appropriate considerations. Nevada Revised Statute section 128.108 specifies what factors courts should consider when making determinations on

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21 *See* Sharon S., 73 P.3d 554 (Cal. 2003); In re M.M.D. & B.H.M., 662 A.2d 837, 859 (D.C. 1995).

22 Jodi L. Bell, Note, *Prohibiting Adoption by Same-Sex Couples: Is It in the "Best Interest of the Child?,"* 49 DRAKE L. REV. 345, 358 (2001).

23 Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1029 (1999) (*quoting* Matter of Jacob, 660 N.E.2d 397, 399 (N.Y. 1995)).

24 NEV. REV. STAT. § 128.005(2)(a) (2008).

adoption petitions for children who have been placed in foster homes.[25]

When considering visitation rights, the Nevada Revised Statutes require the courts to consider,

> (a) The love, affection and other emotional ties existing between the party seeking visitation and the child. (b) The capacity and disposition of the party seeking visitation to: (1) Give the child love, affection and guidance and serve as a role model to the child; (2) Cooperate in providing the child with food, clothing and other material needs during visitation; and (3) Cooperate in providing the child with health care or alternative care recognized and permitted under the laws of this state in lieu of health care. (c) The prior relationship between the child and the party seeking visitation, including, without limitation, whether the child resided with the party seeking visitation and whether the child was included in holidays and family gatherings with the party seeking visitation. (d) The moral fitness of the party seeking visitation. (e) The mental and physical health of the party seeking visitation. (f) The reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference. (g) The willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents of the child as well as with other

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25 NEV. REV. STAT. § 128.108 states in part;

> the court shall consider whether the child has become integrated into the foster family to the extent that his familial identity is with that family, and whether the foster family is able and willing permanently to treat the child as a member of the family. The court shall consider, without limitation: 1. The love, affection and other emotional ties existing between the child and the parents, and the child's ties with the foster family. 2. The capacity and disposition of the child's parents from whom the child was removed as compared with that of the foster family to give the child love, affection and guidance and to continue the education of the child. 3. The capacity and disposition of the parents from whom the child was removed as compared with that of the foster family to provide the child with food, clothing and medical care and to meet other physical, mental and emotional needs of the child. 4. The length of time the child has lived in a stable, satisfactory foster home and the desirability of his continuing to live in that environment. 5. The permanence as a family unit of the foster family. 6. The moral fitness, physical and mental health of the parents from whom the child was removed as compared with that of the foster family. 7. The experiences of the child in the home, school and community, both when with the parents from whom he was removed and when with the foster family. 8. Any other factor considered by the court to be relevant to a particular placement of the child.

> relatives of the child. (h) The medical and other needs of the child related to health as affected by the visitation. (i) The support provided by the party seeking visitation, including, without limitation, whether the party has contributed to the financial support of the child. (j) Any other factor arising solely from the facts and circumstances of the particular dispute that specifically pertains to the need for granting a right to visitation pursuant to subsection 1 or 2 against the wishes of a parent of the child.[26]

The "best interest of the child" lists are not all-inclusive. Additionally, all of these factors, as well as any other factors the court considers relevant, should be considered from the "child-centered perspective,"[27] rather than from a perspective that merely considers the prospective parents' relationship. These benefits are not trivial matters and should be considered on a case-by-case basis.

3. *Family*

Nevada, like all states, has a high regard for the establishment and preservation of the family.[28] However, "family" is not defined in either the adoption statutes[29] or parental rights statutes.[30] *Black's Law Dictionary* states that the definition of the word "family" "depends on the field of law in which [the] word is used."[31] However, regardless of the field of law, the term "family" has taken on an entirely new paradigm in the past decade.[32] "Family" is as much defined by function as it is by biological ties.[33]

"While families of the past may have seemed simple formations repeated with uniformity. . . .[w]e cannot continue to pretend that there is one formula or correct pattern that should

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26 NEV. REV. STAT. §§ 125.480, 125C.050(6)(West 2005).

27 *See,* Barbara Bennett Woodhouse, *Children's Rights in Gay and Lesbian Families: A Child-centered Perspective, in* CHILD, FAMILY, AND STATE 273 (Stephen Macedo & Iris Marion Young, eds. 2003).

28 NEV. REV. STAT. § 128.005 (2008).

29 NEV. REV. STAT. § 127 (2008).

30 NEV. REV. STAT. § 128 (2008).

31 BLACK'S LAW DICTIONARY 620 (7th ed. 1999).

32 Thom Reilly, *Gay and Lesbian Adoptions: A Theoretical Examination of Policy Making and Organizational Decision Making*, 23 J. SOC. & SOC. WELFARE 99, 99-100 (Dec. 1996).

33 Woodhouse, *supra* note 27, at 290.

constitute a family."[34] In today's society, mothers, fathers, sisters, brothers, grandparents, aunts, uncles, and life partners are all members of a domestic circle commonly referred to as a "family,"[35] each having their own places and obligations within the circle and when interacting outside of the circle on behalf of the whole.

Additionally, with respect to the children who reside within the circle, it is the child, an integral part of the familial circle, who should be the focal point of all adoption proceedings.[36] This is particularly true when familial or de facto parent relationships have already been established. Although legal recognition of this existing child-parent relationship may change the legal definition of a "family," non-recognition of this established family would be harmful and not in the child's best interest.

B. *Co-Parent and Second-Parent Adoptions*

Much has been written on the subject of second-parent and co-parent adoption over the past decade; so much so that the terms have become somewhat interchangeable. However, a distinction must be made when determining which statutes influence the court's final decree. For the purposes of this article, co-parent and second-parent adoptions will be defined as follows: Co-parent adoption is an adoption model used when two unmarried people attempt to adopt a child who has no blood relation to either prospective adoptive parent and has not already been adopted by one of the adoptive parents.[37] In other words, neither person has any previously established parental rights with regard to the child to be adopted.

The second-parent adoption model occurs when one individual already has established parental rights with the child to be

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34 Susan J. Becker, *Symposium: Re-Orienting Law and Sexuality,* 48 CLEV. ST. L. REV. 101, 129 (2000), *citing In the Matter of the* Adoption of a Child by J.M.G., 632 A.2d 550, 554-55 (N.J. 1993).

35 Annette R. Appell, *Lesbian and Gay Adoption*, 4 ADOPTION Q. 75, 75-76 (Spring 2001); *see also* Strasser, *supra* note 23, at 1029 ("traditional models of the nuclear family have come . . . to be replaced by various configurations of parents, stepparents, adoptive parents and grandparents," *quoting* Michaud v. Wawruck, 551 A.2d 738, 742 (Conn. 1988)).

36 Reilly, *supra* note 32.

37 Appell, *supra* note 35, at 75-76.

adopted, either by blood or by a previous adoption.[38] A second person, not married to the first, then files for adoption without the first parent relinquishing any parental rights to raise the child. Second-parent adoptions are similar to stepparent adoptions, when the adoptive parent is married to the person who has parental rights.[39]

In both co-parent and second-parent adoptions, the adoption is sought with the mutual consent of both adults involved in the process. For the purposes of this paper, unless a distinction between the two must be made, the term second-parent adoption will be used when referring to both co-parent and second-parent adoptions.

1. *The Nevada Revised Statutes*

The Nevada adoption statutes are similar to the adoption statutes in other states, identifying who may adopt and the procedures to facilitate adoption procedures, and thus provide a useful model. The following statutes are significant when considering whether second-parent adoptions are viable in Nevada. Nevada Revised Statute section 127.030 identifies who may adopt:

> Any adult person or any two persons married to each other may petition the district court of any county in this state for leave to adopt a child. The petition by a person having a husband or wife shall not be granted unless the husband or wife consents thereto and joins therein.[40]

Nevada Revised Statute section 127.040 identifies when consent or relinquishment is required.

> Except as provided in NRS 127.090, written consent to the specific adoption proposed by the petition or for relinquishment to an agency authorized to accept relinquishments acknowledged by the person or persons consenting, is required from: (a) Both parents if both are living; (b) One parent if the other is dead; or (c) The guardian of the person of a child appointed by a court of competent jurisdiction.[41]

Another key provision of the Nevada Revised Statutes is section 127.160, which addresses the "rights and duties of the

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38 *Id.*

39 *Id.*

40 NEV. REV. STAT. § 127.030 (2008).

41 NEV. REV. STAT. § 127.040 (2008).

adopted child and adoptive parents."[42] This provision states in part:

> Upon the entry of an order of adoption, the child shall become the legal child of the persons adopting him, and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child. . . .After a decree of adoption is entered, the natural parents of an adopted child shall be relieved of all parental responsibilities for such child, and they shall not exercise or have any rights over such adopted child or his property.[43]

Finally, Nevada, like all other states, makes an exception to its relinquishment of parental rights provision when the adoption is sought by a step-parent: "[n]otwithstanding any other provisions to the contrary in this section, the adoption of a child by his stepparent shall not in any way change the status of the relationship between the child and his natural parent who is the spouse of the petitioning stepparent."[44]

2. *Comparison of Nevada Statutes With Those of Other States*

The majority of states have adoption laws with wording very similar to Nevada's adoption laws. They allow for any person to adopt or any two married persons to adopt.[45] With only a few notable exceptions, most states have allowed gay men and lesbians, as individuals, to adopt children.[46] Florida, Arizona, Utah, Mississippi, and Arkansas[47] are the exceptions.

Florida is the only state in the nation that explicitly forbids adoption by a homosexual,[48] and therefore, assuming the adop-

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42 NEV. REV. STAT. § 127.160 (2008).

43 *Id.*

44 *Id.*

45 *See generally*, ALA. CODE § 26-10A-5 (1990), ALASKA STAT. § 25-23-020 (2007), ARIZ. REV. STAT. § 8-103 (West 2002), ARK. CODE ANN. § 9-9-204 (Rep. 2002 and Supp. 2007); *see also* STEVEN M. TANNENBAUM, ADOPTION BY LESBIAN AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES (Lambda Legal Defense Fund Publication 1996) (providing a chart).

46 TANNENBAUM, *supra* note 45, at 3.

47 On Novemeber 13, 2008, Arkansas election results confirmed an act providing that an individual who is cohabiting outside of a valid marriage may not adopt, pursuant to Arkansas Constitutional Amendment § 7-9-107.

48 FLA. STAT. ANN. § 63.042 (West 2003) ("Who may be adopted; who may adopt . . . (3) No person eligible to adopt under this statute may adopt if that person is a homosexual."); Recently the 16th Judicial Circuit Court (a

tive parents are homosexual, does not permit second-parent adoptions. The Eleventh Circuit recently upheld this statute in the face of an equal protection constitutional challenge.[49]

Arizona's adoption laws are also similar to those of Nevada. "Any adult resident of this state, whether married, unmarried or legally separated is eligible to qualify to adopt children. A husband and wife may jointly adopt children."[50] However, the Arizona courts use Arizona sodomy laws[51] to prevent an adoption by a bisexual male because he may commit a crime (sodomy) in the future based on his sexual orientation. In *Appeal in Pima County Juvenile Action B-10489,* [52] the court cited *Bowers v. Hardwick,*[53] the U.S. Supreme Court case that upheld a Georgia statute criminalizing homosexual sodomy, as justification for the decision to deny an adoption. However, *Bowers* was recently overruled in *Lawrence v. Texas*,[54] which may cause Arizona's court to reinterpret the state's adoption laws without using sexual orientation as a disqualifier.

Utah and Mississippi's adoption statutes allow homosexuals to adopt as individuals but explicitly condemn second-parent adoptions. Utah's adoption laws are also very similar to Nevada's. They allow for a single person and adults legally married

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Court of general jurisdiction) has held that this statute was unconstitutional (*see* In re Adoption of Doe, Fla. Cir. Ct., No. DP-K99-161). As of the date of this publication, this decision has not been addressed by the Florida Appellate Courts.

49 Lofton v. Sec'y of the Dept. of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004).

50 ARIZ. REV. STAT. § 8-103.

51 ARIZ. REV. STAT. § 13-1411 ("A person who knowingly and without force commits an infamous crime against nature with an adult is guilty of a class 3 misdemeanor."); ARIZ. REV. STAT. § 13-1412 ("A person who knowingly and without force commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons, is guilty of a class 3 misdemeanor.").

52 727 P.2d 830, 835 (Ariz. Ct. App. 1986) ("It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that prescribed model, in effect approving that standard, inimical to the natural family, as head of a state-created family.").

53 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

54 539 U.S. 558 (2003).

to adopt.[55] The Utah adoption statutes do not bar homosexuals from adopting but they do explicitly exclude applicants who are "cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3), 'cohabiting' means residing with another person and being involved in a sexual relationship with that person."[56] Although homosexuals are not singled out, this prohibition would exclude all homosexuals who are in a relationship from the adoption process; thus, second-parent adoptions would also be excluded.

Mississippi's adoption laws are also similar to Nevada's. However, in 2000, the Mississippi legislature amended the state's adoption statutes to explicitly prevent second-parent adoptions;[57] the statute states, "Adoption by couples of [the] same gender is prohibited."[58]

On the other hand, a handful of states have explicitly provided for second-parent adoptions within their statutes. The three states that expressly allow for second-parent adoptions in their statutes are Connecticut, Vermont and California. Connecticut recently changed its adoption statute, which now reads in part,

> [s]ubject to the approval of the Court of Probate as provided in section 45a-727, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.[59]

In 1995, Vermont also changed its adoption laws to explicitly allow second-parent adoptions. Previous to this change, Vermont's adoption law was similar not only to the law in Nevada but also the adoption laws of many other states. However, after Vermont's Supreme Court decision, in *Adoptions of B.L.V.B. and E.L.V.B*,[60] the legislature changed the statute. The Vermont statute now reads in part,

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55 UTAH CODE ANN. § 78B-6-117 (2008).

56 UTAH CODE ANN. § 78B-6-103(9) (2008).

57 MISS. CODE ANN. § 93-17-3 (2008).

58 *Id.*

59 CONN. GEN. STAT. ANN. § 45a-724(3) (2008).

60 628 A.2d 1271, 1273 (Vt. 1993) *citing* VT. STAT. ANN. 15 § 431 (repealed) (1995) ("A person or husband and wife together, of age and sound

> (a) Subject to this title, any person may adopt or be adopted by another person for the purpose of creating the relationship of parent and child between them. (b) If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.[61]

In 1999, California passed similar legislation to allow second-parent adoptions. Once individuals have registered as domestic partners, they are eligible to adopt children. "A domestic partner . . . desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides."[62] However, in California couples must first identify themselves as domestic partners to take advantage of this new adoption provision.[63] Couples unable to meet the re-

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mind, may adopt any other person as his or their heir with or without change of name of the person adopted. A married man or a married woman shall not adopt a person or be adopted without the consent of the other spouse. The petition for adoption and the final adoption decree shall be executed by the other spouse as provided in this chapter.").

61 VT. STAT. ANN. 15A, § 1-102 (2002).

62 CAL. FAM. CODE § 9000(b) (West 2003).

63 CAL. FAM. CODE § 297 (West 2003) ("Domestic partners and partnership; establishment. (a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring. (b) A domestic partnership shall be established in California when all of the following requirements are met: (1) Both persons have a common residence. (2) Both persons agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership. (3) Neither person is married or a member of another domestic partnership. (4) The two persons are not related by blood in a way that would prevent them from being married to each other in this state. (5) Both persons are at least 18 years of age. (6) Either of the following: (A) Both persons are members of the same sex. (B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62. (7) Both persons are capable of consenting to the domestic partnership. (8) Neither person has previously filed a Declaration of Domestic Partnership with the Secretary of State pursuant to this division that has not been terminated under Section 299. (9) Both file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division.").

quirements to register as domestic partners cannot use the new statutes.[64] Registering as domestic partners requires the parties to affirm "that couples share an 'intimate and committed relationship,' in a document that is subject to public disclosure."[65] This requirement bars members of the military in committed homosexual relationships from state recognition as domestic partners.[66] Instead, these couples and other similarly situated couples must rely on the precedent set by California's Supreme Court in *Sharon S. v. Superior Court.*[67]

In *Sharon S.,* the California Supreme Court interpreted the adoption statute liberally to further, rather than defeat, an adoption petition.[68] The court granted the second-parent adoption decree based on California's independent adoption laws,[69] which are similar to Nevada's specific adoption provisions. The court further recognized that "the basic purpose of an adoption is the welfare, protection and betterment of the child, and adoption courts ultimately must rule on that basis."[70]

Because the Nevada statutes are silent with respect to second-parent adoptions, and as the Nevada Supreme Court has not yet addressed the issue, the question of the feasibility of second-parent adoptions in Nevada remains uncertain. Although the regulations in Nevada forbid second-parent adoptions, there are a few cases in which district judges have granted such adoptions.[71] The Nevada Supreme Court, when given the opportunity to address this issue for the first time, may consider precedent set in other states but will have to rely on rules of statutory construction and interpretation.

The Nevada Revised Statutes do not explicitly address the concept of second-parent adoptions. The statutes can be interpreted to either prohibit second-parent adoptions or to allow for second-parent adoptions by implication or literal interpretation.

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64 Brief of Amici Curiae, Children of Lesbians and Gays Everywhere et al. at 14, Sharon S. v. Super. Ct., 93 Cal. App. 4th 218 (2001) (No. A46053).

65 *Id.* at 14, n.7.

66 *Id.*

67 73 P.3d 554 (Cal. 2003).

68 *Id.* at 560.

69 *Id.* at 569.

70 *Id.* at 568 (internal quotation marks omitted).

71 This office has been successful in finalizing several second parent adoptions.

This section will investigate the various ways in which the statutes may be interpreted to accommodate the issuance of second-parent adoption decrees. Because the Nevada courts have not had the opportunity to provide specific guidance with respect to second-parent adoptions, the investigation will include examples of the rulings of other states courts.

III. EXTENSION OF THE STEPPARENT EXCEPTION

In some states where the legislature has not passed second-parent adoption statutes, courts have granted second-parent adoptions.[72] The exact number of such adoptions is hard to determine because of the confidential nature of adoption proceedings,[73] but some cases have become a matter of public record where lower court rulings have been appealed. Of these cases, the courts are split regarding the correct interpretation of adoption statutes. Ironically, courts with decisions on both sides of the controversy generally use the same bases to justify their rulings: statutory construction and the termination of parental rights provisions.

"Termination of parental rights is an exercise of awesome power."[74] All states recognize that the parent-child relationship is a fundamental right protected by the United States Constitution and "statutes that infringe upon this interest are thus subject to strict scrutiny and must be narrowly tailored to serve a compelling interest."[75]

Delaware courts, when considering second-parent adoptions, stated, "when a child is adopted by a stepparent 'his, or her relationship to his birth parent who is married to the stepparent shall in no way be altered by reason of adoption.'"[76] The Delaware court then recognized the similarities between a stepparent and second-parent, stating, "under appropriate facts a person

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72 TANNENBAUM, *supra* note 45, at 8-12.

73 *Id.* at 8.

74 In the Matter of the Parental Rights as to J.L.N. v. Nevada, 55 P.3d 955, 958 (Nev. 2002).

75 *Id.* (internal quotations marks omitted).

76 In the Interest of Hart, 806 A.2d 1179, 1186 (Del. 2001), *citing* DEL. CODE ANN. tit. 13, § 919(b) (1999).

who may not have any legal duty to a child might maintain such a strong parental relationship with the child similar to that of a natural parent that he/she should be considered a '*de facto* parent.'"[77] The court went on to list some of the characteristics of a de facto parent or stepparent as an individual with the support and consent of the parent, who has assumed the obligations of parenthood, has acted as a parent for some time, has helped shape the child's daily routine, and has fulfilled the child's need to be loved, valued, and appreciated.[78] Using *de facto* parent analysis, the Delaware court concluded that allowing a petitioner to adopt his or her partner's children would not violate the intent of the stepparent exception and that upon issuance of an adoption decree to a second parent, the parental rights of the natural parent would not be affected.[79]

The Vermont courts also interpreted the stepparent exception of the Vermont adoption statutes to include second-parents.[80] In *Adoption of B.L.V.B.*,[81] the Vermont court agreed with the petitioners that under the circumstances not allowing the stepparent exception to apply "would reach an absurd result . . . and that such a result is inconsistent with the best interest of children and the public policy of [Vermont]."[82] When interpreting the statute, the court considered the purpose of the statute, which was to promote the welfare of children.[83] The court stated that "[w]e must look 'not only at the letter of the statute but also its reason and spirit.'"[84] The court then theorized that it was doubtful that adoption by same-sex couples was even contemplated by the legislature when the statute was enacted. The court stated, "it cannot be said that [second-parent adoptions were] either specifically prohibited or specifically allowed by the statute."[85] The court also concluded that the spirit of the statute was "to clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by

77 *Hart*, 806 A.2d at 1186.
78 *Id.* at 1187.
79 *Id.* at 1186.
80 Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).
81 *Id.* at 1272. The applicant was the natural mother's same-sex partner.
82 *Id.* at 1273.
83 *Id.*
84 *Id.*, *quoting* In re S.B.L., 553 A.2d 1078, 1083 (Vt. 1988).
85 *Adoption of B.L.V.B.,* 628 A.2d at 1274.

certain combinations of individuals."[86] The Vermont court granted the adoption decree and Vermont's legislature has since followed suit by changing Vermont's adoption statutes to specifically provide for second-parent adoptions.[87]

Massachusetts also addressed the issue of parental rights with respect to the stepparent exception when the appellate court overturned a lower court's denial of an adoption petition filed jointly by a same-sex couple.[88] Similar to Nevada's and Delaware's stepparent exceptions, Massachusetts's stepparent exception provides for a natural parent to maintain parental rights while granting parental rights to the stepparent.[89] The statute does not expressly address second-parent adoptions.[90] Although no specific provision allows a natural parent to maintain parental rights in a second-parent adoption, the Massachusetts court reasoned that "the Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition."[91] Continuing, the court stated that the provisions in section 6 of the Massachusetts adoption statutes were "to protect the security of the child's newly-created family unit by eliminating involvement with the child's natural parents,"[92] and not to terminate the parental rights of a parent who is a party to the adoption.[93]

Massachusetts, Vermont, and Delaware courts are not the only appellate courts that have interpreted state statutes to allow for second-parent adoptions; they are joined by Illinois,[94] New

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86 *Id.*

87 *See* VT. STAT. ANN. 15A § 1-102 (West 2002).

88 Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (The adoption petition was filed jointly by two unmarried women, even though one of the petitioners was the biological mother of the child and already had parental rights with respect to the adoptive child).

89 MASS. GEN. LAWS ANN. ch. 210, § 6 (West 1998).

90 *Id.*

91 *Adoption of Tammy,* 619 N.E.2d at 321.

92 *Id.*

93 *Id.*

94 In the Matter of the Petition of C.M.A., 715 N.E.2d 674 (Ill. 1999).

Jersey,[95] New York,[96] Pennsylvania,[97]and the District of Columbia.[98]

However, using reasoning opposite of that used by appellate courts that have approved second-parent adoptions, at least four states' appellate courts have denied second-parent adoption petitions. In *In re Adoption of Luke*,[99] the Nebraska court affirmed the ruling of a lower court, denying the adoption petition of a same-sex companion of the child's birth mother. The court looked at the plain language of the statute and stated, "[t]he matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed."[100] Nebraska's adoption laws are similar to those of other states.[101] The court's unwillingness to "extend the rights of adoption beyond the plain terms of the statutes"[102] agreed with the State's contention "that [a] stepparent adoption is the only explicit adoption scenario outlined in the Nebraska adoption statutes," and therefore, second-parent adoptions, where the natural parent maintains parental rights, are not permitted.[103]

The Colorado Court of Appeals ruled similarly in *In the Matter of the Adoption of T.K.J. and K.A.K.,* affirming the decision of the district court denying a petition by a same-sex couple to adopt each other's child.[104] The court stated that although the Colorado adoption statutes should be given a liberal construction based on the best interest of the child, a "liberal construction does not permit a court to rewrite the statute."[105] The Colorado

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95 In the Matter of the Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. 1995).

96 In the Matter of Jacob, 636 N.Y.S.2d 716 (N.Y. 1995).

97 *In re* Adoption of R.B.F. & R.C.F., 803 A.2d 1195 (Pa. 2002).

98 *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995).

99 *In re* Adoption of Luke v. Nebraska, 640 N.W.2d 374 (Neb. 2002).

100 *Id. citing In re* Adoption of Hemmer, 619 N.W.2d 848 (Neb. 2000)*; In re* Adoption of Kassandra, 540 N.W.2d 554 (Neb. 1995).

101 NEB. REV. STAT. § 43-101 (1999).

102 *In re Adoption of Luke*, 640 N.W.2d at 378, *quoting In re* Petition of Riche, 53 N.W.2d 753, 755 (Neb. 1952); *also cited in In re* Adoption of Hemmer, 619 N.W.2d 848, 851 (Neb. 2000).

103 *In re Adoption of Luke*, 640 N.W.2d at 379.

104 In the Matter of the Adoption of T.K.J., 931 P.2d 488 (Colo. 1996).

105 *Id.* at 492.

legislature has since amended its adoption statutes to specifically allow second parent adoption.[106]

In *In the Interest of Angel Lace M. v. Terry M.,* the Wisconsin Supreme Court affirmed a lower court's ruling that a child was not eligible for adoption because the birth mother failed to relinquish her parental rights when consenting to her same-sex partner's adoption petition.[107] The adoption petition was denied based on a strict literal reading of the Wisconsin adoption provisions, similar to the Nevada provisions, mandating the relinquishment of parental rights by the natural parent(s) except in the case of a step-parent adoption.[108] Since the legislature specifically addressed an exception for stepparents, the court concluded "the legislature did not intend to exempt other adoptions, including those by non-marital partners."[109] The court made this decision despite the fact that the adoption was in the best interest of the child,[110] completely ignoring the legislative purpose of the statute, which was to interpret the statute liberally to ensure that "the best interest of the child shall always be the paramount consideration."[111]

The Court of Appeals of Ohio also used a strict literal analysis of the Ohio adoption statutes to deny a second-parent adoption in *In re Adoption of Jane Doe*.[112] The court stated that it was "not within the constitutional scope of judicial power to change the face and effect of the plain meaning of" the statute.[113]

A second parent adoption would provide William and Ellen the most protection. William would have parental rights identical to those of Roger. William would have standing to seek custody, visitation, and child support; he would also be responsible to pay child support should custody be awarded to Roger. In

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106 C.R.S.A. 19-5-207 (2007).

107 In the Interest of Angel Lace M. v. Terry M., 516 N.W.2d 678 (Wis. 1994).

108 *Id.* at 681-683; *see also* WIS. STAT. ANN. §§ 48-81(1), 48.835(3)(b), 48.92(2) (West 1997).

109 *In the Interest of Angel Lace M*., 516 N.W.2d at 684.

110 *Id.* at 680-681 (Wis. 1994)(the adoption agency, The Community Adoption Center, and circuit court both determined that the adoption would be in the best interest of the child.).

111 WIS. STAT. ANN. § 48.01(1) (West 1997).

112 *In re* Adoption of Jane Doe, 719 N.E.2d 1071, 1072 (Ohio 1998).

113 *Id.* at 1073.

addition, Ellen would have the security that comes from being William's legal child in the event of his death, since she would be eligible for social security benefits and have rights to inheritance. Unfortunately, courts throughout the country are split on interpreting the various state adoption laws. Since only a few states explicitly allow second-parent adoption, this may not be an option for William.

IV. OTHER FORMS OF LEGAL PROTECTION FOR SECOND PARENTS

A. *Co-Guardianships*

In the initial hypothetical, William may have been able to maintain his relationship with Ellen had he and Roger entered into a co-guardianship. An alternative that is rarely contemplated when adoption is not an option is the creation of a co-guardianship with the legal parent (Roger) and *loco parentis* (William) identified as co-guardians to the minor ward (Ellen). In Nevada, "a proposed ward, a government agency, a nonprofit corporation or any interested person may petition the court for the appointment of a guardian."[114] With the consent of the legal parent(s) (Roger), such guardianships do not require notice and in some cases are granted summarily. Once granted, Nevada Revised Statutes section 159.079 defines the general functions of the guardian. It states,

> 1. Except as otherwise ordered by the court, a guardian of the person has the care, custody and control of the person of the ward, and has the authority and, subject to subsection 2, shall perform the duties necessary for the proper care, maintenance, education and support of the ward, including the following:
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> (a) Supplying the ward with food, clothing, shelter and all incidental necessaries.
>
> (b) Authorizing medical, surgical, dental, psychiatric, psychological, hygienic or other remedial care and treatment for the ward.
>
> (c) Seeing that the ward is properly trained and educated and that the ward has the opportunity to learn a trade, occupation or profession.
>
> 2. In the performance of the duties enumerated in subsection 1 by a guardian of the person, due regard must be given to the extent of the

114 NEV. REV. STAT. § 159.044 (West 2005).

> estate of the ward. A guardian of the person is not required to incur expenses on behalf of the ward except to the extent that the estate of the ward is sufficient to reimburse the guardian.
>
> 3. This section does not relieve a parent or other person of any duty required by law to provide for the care, support and maintenance of any dependent.[115]

Co-guardians have all of the responsibilities of a legal parent. In the case at hand, by creating the co-guardianship, Roger has relinquished some of his parental rights in that he has given his consent to allow William to legally act as a parent. Essentially, Roger and William have created a situation in which a court has recognized William's *loco parentis* status. This status is not only important in providing for the ward, it may be instrumental in protecting the legally recognized relationship between William and Ellen.

In our example, Roger and William decided to dissolve their relationship; however, the co-guardianship would remain in place unless a court is petitioned to dissolve the guardianship. In the petition to dissolve the guardianship, the petitioner would have to state the reason for removing the guardian and show cause for the removal.[116] The petition must also be filed in good faith and in furtherance of the ward's best interests.[117] In other words, not only would Roger have to petition the court to terminate the guardianship, he would have to prove to the court that it was in the child's best interest to dissolve William's status as *loco parentis.*

Like most states, Nevada provides for a parental preference when considering the placement of minors.[118] However, this statute specifically addresses the appointment of a guardian, not the termination of a guardianship. Many courts may find difficulty in not terminating the co-guardianship in favor of the "legal parent." However, with the recognition of new family paradigms, courts may begin to deviate from such a hard stance. For example, in the past, the Nevada Supreme Court focused on a

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115 NEV. REV. STAT. § 159.079 (West 2005).

116 NEV. REV. STAT. § 159.1853 (2) (West 2005).

117 NEV. REV. STAT. § 159.1853 (4) (West 2005).

118 NEV. REV. STAT. § 159.061 (West 2005) (stating that the parents of a minor, or either parent, if qualified and suitable, are preferred over all others for appointment as guardian as a minor).

parental preference.[119] The Nevada Supreme Court has recently departed from this strict interpretation and has changed the focus of the court to the "best interest of the child."

In *Hudson v. Jones*,[120] the court held that in proceedings that seek a modification in custody, the court must apply the standards in *Murphy v. Murphy*.[121] In *Murphy,* one prong of the test focused on the circumstances of the parents. However, the Nevada Supreme Court recently modified the *Murphy* standard in *Ellis v. Carcucci*.[122] Now the court must focus on changes that materially affect the child, thus focusing on the child more than the parent.

The Nevada Supreme Court's migration to focus on the best interest of the child was reaffirmed in its most recent decision regarding placement of a child. The court held that when considering the custody of a child, the best interest of the child remains the overarching standard to be used by the district court in making placement decisions, even those involving the familial preference.[123]

In the example used throughout this article, it is likely that unless Roger was able to prove that it was in the best interest of Ellen to dissolve the co-guardianship, the co-guardianship would remain in place and the court could make an initial custody determination similar to those determinations made during dissolution of a marriage when children are involved.

Co-guardianships also protect the *loco parentis*-child relationship in the unfortunate event that the legal parent dies. Because the guardianship was created with the consent of the legal parent, it is unlikely a court would make findings to terminate William's continued guardianship of Ellen. Therefore, Ellen would remain with William, in her home.

Although co-guardianships seem to be the answer when adoption is not an option, one must realize that there are limitations to co-guardianships. The co-guardianship does not provide

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119 *See* Locklin v. Duka, 929 P.2d 930 (Nev. 1996); Litz v. Bennum, 888 P.2d 438 (Nev. 1995).

120 138 P.3d 429 (Nev. 2006).

121 447 P.2d 664 (Nev. 1968).

122 161 P.3d 239 (Nev. 2007).

123 Clark County Dist. Attorney. v. Eighth Judicial Dist. Court, 123 Nev. Adv. Rep. 36 (2007).

any intestate rights to William's estate; he would have to produce a will or create a trust to provide for Ellen. The co-guardianship would also not provide Social Security benefits to Ellen should William die or become disabled.

B. *Cohabitation Agreements*

Cohabitation agreements, like prenuptial agreements, are designed to protect the signatories' rights and to mitigate the need for future litigation should the relationship dissolve. The only real difference between a cohabitation agreement and prenuptial agreement is that a cohabitation agreement would go into effect on the date signed, unless stated otherwise, while a prenuptial agreement would not be effective until the parties actually married. In addition, cohabitation agreements would be an option for same-sex couples who were not able to marry because of a particular state law or constitutional amendment that would prevent their marriage.

However, while signatories have a right to contract,[124] cohabitation agreements may only protect the parties to the agreement with respect to property distribution and other issues not involving parental rights.[125] Like prenuptial agreements, any provision in a cohabitation agreement that pertains to children would only be considered by the courts to the extent that the agreement would express the intent of the parties at the time that they entered into the agreement. In all likelihood, courts would conduct a "best interests" analysis when determining the custodial time share of parties who entered into a cohabitation agreement but have since dissolved their relationship. Of course, if the parties to the case were heterosexual and the legal parents of the children in question, then every court in the nation would make a custody determination.

However, should one party to the agreement not be a legal parent but a *de facto* parent, the court may determine that the non-legal parent lacks standing to petition for custody. In such a situation, the existence of a cohabitation agreement that identifies the intent of the parties to co-parent the children in a certain

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124 Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

125 Cohabitation agreements may satisfy a state's or company's requirements to extend medical benefits to domestic partners.

manner may mean the difference between the court hearing the case and a dismissal.

C. *Third-Party Visitation Rights*

Many states have provisions commonly referred to as grandparent visitation or third-party visitation. These provisions are usually implemented when an individual (i.e., grandparent or ex-significant other) has been denied contact with a child with whom they have developed a relationship. The United States Supreme Court, in *Troxel v. Granville*,[126] held that the application of the state grandparent visitation statute violated the mother's rights. In doing so, the Court found that the mother would have to be found unfit to deviate from her desires regarding visitation.[127]

A number of articles have been written about the constitutional rights of parents and the impact *Troxel* has had on grandparent or third party visitation statutes[128] and states have reacted differently to the "unfitness" criteria. The Nevada statutes allow for third party visitation "if the child has resided with a person with whom he has established a meaningful relationship." The district court can grant that party a reasonable right to visit during the child's minority.[129] The Nevada Supreme Court has yet to address whether this provision complies with the standard set in *Troxel*. However, various courts around the country have scrutinized their statutes according to the *Troxel* decision with differing results; some states have re-written their statutes.[130]

Depending on the state, and the judge assigned to the case, success with such a petition would appear to be a long shot unless one could truly prove that the legal parent is unfit. In addition, third party visitation rights would only provide reasonable visitation rights, relegating the petitioner to someone similar to a non-

126 Troxel v. Granville, 530 U.S. 57 (2000).

127 *Id.*

128 *See generally* Michael K. Goldberg, *Over the River and Through the Woods- Again: The New Illinois Grandparent Visitation Act*, 29 S. ILL. U. L.J. 403 (2005); Brooke N. Silverthorn, Comment, *When Parental Rights and Children's Best Interests Collide: An Examination of Troxel v. Granville as it Relates to Gay and Lesbian Families*, 19 GA. ST. U. L. REV. 893 (2003).

129 NEV. REV. STAT. § 125C.050 (2005).

130 *See* Goldberg, *supra* note 128.

custodial parent but with fewer rights. Petitioning the court for third party visitation should be used only as a last resort to maintain a relationship with children when the legal parent has denied contact.

V. CONCLUSION

When individuals decide to cohabit and raise children, serious consideration must be given to the possibility that, for whatever reason, the relationship will not last for the entire span of the minority of the children. This is particularly true when one of the parties to the relationship does not have parental rights with respect to the children. To provide the best protection for both the parent without parental rights and for the children, a second parent adoption should be considered. This will ensure that the "second parent" will have all of the same legal and custodial rights of the "first parent." It will also provide the most safeguards for the children; providing intestate rights, insurance and health benefits, Social Security benefits, rights of survivorship, and all of the other rights that the children would otherwise have if adopted by the second parent.

If the state where the couple resides is not a state that recognizes second parent adoptions, then a co-guardianship would provide one with the most protection. Although co-guardianships do not provide the same benefits that a second parent adoption would provide, they would require court action to dissolve the legal rights of the party without parental rights.

Providing the most uncertainty would be cohabitation agreements and reliance on third party visitation rights. Cohabitation agreements that refer to future custodial rights will, in all likelihood, only be considered with respect to the intent of the parties. The court would have to make a "best interests" analysis, which would only be available if the state allows one without parental rights to petition for third party visitation. Unfortunately, third party visitation rights are speculative at best and provide only limited contact between the party without parental rights and the children.