

1-1-2001

Can We Have a Happy Family: Adoption by Same Sex Parents in Massachusetts

Amy Joy Galatis
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

6 Suffolk J. Trial & App. Advoc. 7 (2001)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

CAN WE HAVE A “HAPPY” FAMILY? ADOPTION BY SAME-SEX PARENTS IN MASSACHUSETTS

I. INTRODUCTION

In 1993, Vermont and Massachusetts were the first and second states respectively in the United States to allow adoptions by same-sex parents.¹ In 1999, Massachusetts was the second state, after Vermont, to grant a same-sex parent visitation rights without biological, adoption, or other legal ties.² As a pioneer state in expanding rights for same-sex parents, Massachusetts has a heavy responsibility in continuing to develop the law in this area.³ With the combined effect of social prejudice, judicial ignorance, and antiquated laws, the need for reform in this area is more pressing than ever.⁴

The purpose of this note is to examine the current state of the law as it pertains to same-sex adoption, and to advocate for the extension of rights and security for these families. Section II sets out a comprehensive history of this genre of adoption law in Massachusetts from the 1980s to the present. Section III provides an analysis of this history and discusses the flaws and gaps in the law as it has developed. Section IV articulates the problems faced by same-sex couples and parents in society and in the courtroom, and proposes that the legalization of same-sex marriage would curb these problems. Finally, Section V provides safeguards for same-sex

¹ See E.J. Graff, *When Heather's Mommies Share Custody*, BOSTON GLOBE, September 12, 1999, at E5; see also *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993); *In re B.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (1993).

² See Graff, *supra* note 1, at E1, E5 (discussing *E.N.O. v. L.L.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999)).

³ See *id.* (commenting on state of law in Massachusetts for same-sex parents).

⁴ See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and their Children*, 71 IND. L.J. 623 (1996) (citing social views regarding homosexuals reflects in implementation of laws).

couples contemplating various court proceedings. Section VI concludes that to insure stable futures for these families, both societal and legal approaches to the issue must change.

II. HISTORY OF SAME-SEX PARENTING IN MASSACHUSETTS

In Massachusetts, adoption is solely a creature of statute.⁵ Under Massachusetts law, any “person of full age” is eligible to adopt another as long as the adoptee is younger and the parties do not share certain degrees of familial kinship.⁶ Despite the inclusive nature of the statute, the adoption of children by same-sex parents in Massachusetts became possible only recently, and first required significant breakthroughs in other areas of family law.⁷ In 1980, the Massachusetts Supreme Judicial Court (“SJC”) specifically held that homosexuality was not, by itself, a basis for denying a natural parent custody of his or her children.⁸ Three years later, the SJC made a similar ruling in a custody dispute between two natural parents.⁹

⁵ See generally MASS. GEN. LAWS ch. 210 (1999) (defining rules and processes of adoption). See also *Adoption of Tammy*, 416 Mass. 205, 210, 619 N.E.2d 315 (1993) (citing *Davis v. McGraw*, 206 Mass. 294, 297, 92 N.E. 332 (1910)).

⁶ See MASS. GEN. LAWS ch. 210, §1 (1999) (defining process and requirements of adoption).

⁷ See *infra* notes 8-13 and accompanying text (discussing history of right of homosexual parents); *Adoption of Tammy*, 416 Mass. at 205, 619 N.E.2d at 315 (ruling non-biological “legal stranger” could have rights over homosexual partner’s children); *Bezio v. Patenaude*, 381 Mass. 564, 410 N.E.2d 1207 (1980) (ruling parent’s homosexuality on its own was not enough to deprive a parent of her children); *Doe v. Doe*, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983) (ruling parent’s homosexuality did not make her unfit to retain custody of her children).

⁸ See *Bezio*, 381 Mass. at 579, 410 N.E.2d at 1216. In *Bezio*, the plaintiff natural mother gave a former friend (defendant) permanent guardianship and intermittent custody of her two children due to the mother’s medical and emotional problems. *Id.* at 564-65, 410 N.E.2d at 1208-09. The mother had liberal visitation with the children. *Id.* at 566, 410 N.E.2d at 1209. However, the mother later refused to return the children after a visit, was arrested for kidnapping, and was denied custody of her children after the court discovered she was living in a lesbian relationship with another woman. *Id.* at 567-69, 410 N.E.2d at 1215-16. The court reversed the trial judge’s decision, stating there was no evidence that the mother’s sexual preference rendered her an unfit parent. *Id.* at 578, 410 N.E.2d at 1215. The court further ruled that parents could not be deprived of custody “simply because their households fail to meet the ideals approved by the community ... or simply because the parents embrace ideologies or pursue life-styles at odds with the average.” *Id.* at 579, 410 N.E.2d at 1216.

⁹ See *Doe v. Doe*, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983). In *Doe*, the former husband sued for a modification of a child custody order, which gave both parents joint custody, on the grounds that his ex-wife was romantically involved with and living with

This momentum suffered a serious setback in 1985 when Governor Michael Dukakis issued an administrative order virtually forbidding homosexual men and lesbians from becoming foster parents.¹⁰ Two weeks later, the state legislature passed a bill that cited homosexuals as a threat to children.¹¹ This policy stayed in effect until the spring of 1990, when a state-appointed commission recommended to the Governor that homosexual parents do not have an adverse effect on their children solely due to their homosexuality.¹² However, under the Code of Massachusetts Regulations, the Department of Social Services is still required to ask about sexual orientation on the prospective foster or adoptive parent's application.¹³

A breakthrough came in 1993 with the SJC's ruling in *Adoption of Tammy*¹⁴ that same-sex couples had the right to legally adopt children.¹⁵ The Court came to this ruling by determining after careful analysis that there was no statutory prohibition precluding this type of adoption, and

another woman. *Id.* at 503, 452 N.E.2d at 296. The court affirmed the original divorce decree, deciding that there was no indication that the ex-wife's living situation adversely affected the child, and that a parent's unconventional lifestyle was not, on its own, sufficient to deprive them of custody. *Id.* at 503-04.

¹⁰ See Patti Doten, *They Want a Chance to Care: Gay Couple Still Hurts from Decision that Took Their Foster Children*, BOSTON GLOBE, September 27, 1990, at 85; Jane Meredith Adams, *Gay Parents Determined to Combat Stereotypes*, Mass. Foster Care Policy, BOSTON GLOBE, March 1, 1987, at 29. Governor Dukakis, using the Department of Social Services ("DSS"), removed two young brothers from a gay couple acting as foster parents. *Id.* The removal took place after an acquaintance of the couple voiced their concerns to the *Boston Globe*. *Id.* Two weeks later, Dukakis implemented a policy which required DSS to discover the sexual orientation of applicants to try to place children in heterosexual families. *Id.* A discrimination suit brought by the couple against the governor and members of his staff was settled out of court in the spring of 1990. *Id.* at 85. Despite his actions, "the governor doesn't [sic] want to be homophobic and doesn't think of himself that way." Adams, *supra* at 29.

¹¹ See Adams, *supra* note 10, at 29. The final vote was 122-28. *Id.*

¹² See *id.* The new policy made parenting experience the key factor in choosing foster parents. See Doten *supra* note 10, at 85; see also Mary L. Bonauto, *Advising Non-Traditional Families: A General Introduction*, 40-OCT B. B.J. 10, 13 (1996) (stating DSS does not discriminate against homosexuals in certifying foster parents).

¹³ See 110 C.M.R. § 7.103 (1999) (detailing what information is asked for in applications to become foster parents). The Regulations do not require DSS to ask for the applicant's marital status. *Id.*

¹⁴ 416 Mass. 205, 619 N.E.2d 315 (1993).

¹⁵ See *id.* at 214, 619 N.E.2d at 320. In this case, a lesbian couple petitioned the court to jointly adopt one of the women's biological child. *Id.* at 206, 619 N.E.2d at 316. The child was raised by, supported by, and lived with the couple since her birth and saw both women as her parents. *Id.* at 207, 619 N.E.2d at 316.

further found that it was in the child's best interest to be adopted by the couple at issue.¹⁶ In a companion case, the SJC ruled that the Probate and Family Court had jurisdiction to consider various kinds of adoption petitions, as long as the ultimate force of the decree was in the best interests of the child involved.¹⁷ Since these rulings, several of the Commonwealth's cities and towns have passed ordinances allowing unmarried couples to register their "domestic partnership" for purposes such as hospital visitation and obtaining school records.¹⁸ Some private Massachusetts employers have also begun offering health plans that include an employee's unmarried partner.¹⁹

In the late 1990s, the SJC began to debate more specific issues of same-sex parenting such as the use of home-study waivers and *de facto* parents.²⁰ In *Adoption of Galen*,²¹ the Court decided only one of the petitioners had to meet the requirements of Massachusetts General Law chapter 210, §2A to grant a waiver of the home-study, and also, a homosexual relationship could not, on its own, be a bar to adopting a child.²² In *E.N.O.*

¹⁶ See MASS. GEN. LAWS ch. 210, § 1 (1999) (citing age and other restrictions on adoptions for married couples, blood relatives, etc.). Also key to the Court's ruling was that the couple lived in a long-term, monogamous relationship, that they were both very financially stable, and that both had a strong commitment to starting a family and raising children. *Tammy*, 416 Mass. at 206-07, 619 N.E.2d at 315-16. The court also noted the numerous affidavits from friends, relatives, colleagues, mental health and medical professionals, teachers, and clergy, which indicated that the adoption was in the best interests of the child. *Id.* at 208. DSS, the guardian ad litem, and an attorney appointed to represent the child's interests all recommended the adoption. *Id.* at 209.

¹⁷ See *Adoption of Susan*, 416 Mass. 1003, 619 N.E.2d 323 (1993) (emphasizing best interests of child in adoption cases).

¹⁸ See Bonauto, *supra* note 12, at 11; Adrian Walker, *City Council OK's Gay-Couples Act*, BOSTON GLOBE, December 16, 1993, at 38 (announcing new domestic partnership ordinance). This includes the cities and towns of Northampton, Springfield, Brookline, Cambridge, and Boston. Jennifer A. Levi, *Boston's Family Protection Ordinance*, 4 W.B.A. L.J. 10 (2000). The registered parties may also be liable for the other's debt. Bonauto, *supra* note 12, at 11. The application usually entails a sworn statement indicating the parties' ages, relation, shared residence, intent to remain together, and financial and emotional interdependence. *Id.*

¹⁹ See Bonauto, *supra* note 12, at 11.

²⁰ See *E.N.O. v. L.L.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999), *cert. denied*, 120 S.Ct. 500 (1999) (granting temporary visitation rights to *de facto* parent); *Adoption of Galen*, 425 Mass. 201, 680 N.E.2d 70 (1997) (prohibiting sexual orientation as reason for denying motion to waive home-study).

²¹ 425 Mass. 201, 680 N.E.2d 70 (1997).

²² See *id.* at 203, 205, 680 N.E.2d at 73; MASS.GEN.LAWS c. 210, §§ 2A, 5A (1999) (allowing waiver of home-study requirement in certain circumstances). The couple wished to jointly adopt one woman's biological child. *Galen*, 425 Mass. at 202, 680 N.E.2d at 72.

v. *L.L.M.*,²³ the Court gave a non-biological parent in a lesbian relationship parental and visitation rights on the grounds that it was in the best interest of the child to continue his relationship with his other mother.²⁴ The SJC adopted and used the principle of *de facto* parents which allows a “legal stranger” who has no biological ties to a child to gain visitation and custody rights when that person has functioned as a member of that child’s family, so long as that relationship is in the best interests of the child under the circumstances.²⁵

The petitioners were living together in a long-term romantic relationship, and had planned to have a family together. *Id.* Although the couple produced numerous supporting affidavits from family, friends, colleagues, and medical professionals, the trial judge denied their motion to waive the DSS home-study. *Id.* at 202-03, 680 N.E.2d at 70-71. The court took note that a home-study could be a significant delay in issuing an otherwise sound adoption decree. *Id.* at 206, 680 N.E.2d at 73. The court determined that the trial judge had not given significant reasoning for her decision. *Id.* Therefore, because one of the petitioners satisfied § 2A, the trial judge had to either grant the order or state specific reasons why the petitioners were not suitable parents for the child. *Id.* at 205-07, 680 N.E.2d at 72-3.

²³429 Mass. 824, 711 N.E.2d 886 (1999), *cert. denied*, 120 S.Ct. 500 (1999). The parties shared a serious monogamous relationship for thirteen years, during which they executed numerous legal documents evidencing their intent to be life partners, and to bind them as such. *Id.* This included a co-parenting agreement that was executed twice: before and after the birth of the child. *Id.* Among other things, the agreement stated that the plaintiff (the non-biological parent) should retain parental status even if the parties separated. *Id.* They planned together to have children, which included taking courses in parenting, making joint medical decisions, choosing a name for the child, and jointly caring for their son. *Id.* at 825. The parties separated when the child was three years old after the plaintiff had inquired about adoption proceedings. *Id.* The plaintiff was then denied all access to her son. *Id.* The plaintiff then filed a complaint seeking to adopt the child and receive joint custody and visitation rights. *Id.* The trial judge granted her temporary visitation rights until the matter could be decided by the SJC. *Id.* at 827.

²⁴See *E.N.O. v. L.L.M.*, 429 Mass. 824, 832, 711 N.E.2d 886 (1999), *cert. denied*, 120 S.Ct. 500 (1999). The court based its decision, in part, on the guardian ad litem’s report which stated the plaintiff was an active parent and was involved in the child’s upbringing equally with the defendant. *Id.* at 827. The court also took the co-parenting agreement very seriously, which by its terms described what the parties thought was in the child’s best interests. *E.N.O.*, 429 Mass. at 831, 711 N.E.2d at 892. See *Wilcox v. Trautz*, 427 Mass. 326, 334 n.7, 693 N.E.2d 141, 148 (1998) (cohabiting couple can contract regarding rights of their children if terms reflect child’s best interests). The court also noted that the parties lived together after the child’s birth, the defendant consented to and encouraged the plaintiff to be a parent to their son, and declared the plaintiff to be the boy’s parent in all public settings. *Id.* The court ruled that the plaintiff, in all respects, functioned as the child’s *de facto* parent. *E.N.O.*, 429 Mass. at 831, 711 N.E.2d at 892.

²⁵*Id.* at 829, 711 N.E.2d at 891. The court further described the *de facto* parent’s role as:

“resid[ing] with the child, and with the consent or encouragement of the legal parent, perform[ing] a share of caretaking functions at least as great

III. ANALYSIS OF LEGAL HISTORY

Even before its landmark decision in *Tammy*, the SJC noted that a homosexual lifestyle was not, by itself, enough to deprive parents of their children.²⁶ However, because of policy dictated by the state legislature and executive branch, children were still being deprived of their loving and able parents because of their parents' homosexuality.²⁷ Also, since marriages between same-sex couples were (and continue not to be) recognized or legally possible in Massachusetts, a large number of benefits were denied to the children of same-sex couples.²⁸

With this in mind, the Court in *Tammy* insightfully noted that childrens' best interests are forfeited by not giving same-sex and opposite-sex parents the same rights.²⁹ Children adopted by same sex parents were thus given the same rights as any other adopted or biological children.³⁰ In addition, the *Tammy* court allowed the child to have support and visitation rights from both her parents in the event of separation or death.³¹ But

as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide."

Id. The court was careful to note that a babysitter, nanny, or other caretaker is not a *de facto* parent because those kinds of relationships begin as a result of financial considerations. *Id.* at 829, n.6, 711 N.E.2d at 891.

²⁶ See *Bezio v. Patenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207 (1980) (stating courts may not use homosexuality as reason to deprive parents of their children).

²⁷ See *Shapiro*, *supra* at note 4, at 636 (describing negative effects of current law on same-sex parents and their children).

²⁸ See *Graff*, *supra* note 1, at E5 (remarking on large amount of rights denied to parents and children not legally related); Julia Frost Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG.L. REV. 1055, 1072-74 (1995) (discussing how parents not legally related to their children often lose important rights); see also *infra* notes 52-55 and accompanying text (advocating same-sex marriage would solidify rights of non-biological parents).

²⁹ See *Tammy*, 416 Mass. at 214-15, 619 N.E.2d at 320 (stating same-sex parents lose rights solely because of on lack of legal status).

³⁰ See MASS. GEN. LAWS ch. 210, § 7; *Tammy*, 416 Mass. at 214, 619 N.E.2d at 320 (stating decision would give rights automatically given to children of opposite-sex parents); *Graff*, *supra* note 1, at E5 (discussing new security of children of same-sex parents). These include the rights of intestacy, to be covered by the parents' health insurance, social security benefits and the right to press wrongful death claims should one parent die, and parental authorization for medical treatment. *Tammy*, 416 Mass. at 214, 619 N.E.2d at 320; *Graff*, *supra* note 1, at E5.

³¹ See *Tammy*, 416 Mass. at 215, 619 N.E.2d at 320; *Susan*, 416 Mass. at 1003, 619 N.E.2d at 324 (reiterating *Tammy* decision); *Bonauto*, *supra* note 12, at 13 (discussing options of same-sex parents in light of *Tammy*).

while *Tammy* was a breakthrough for same-sex parents in Massachusetts and nation-wide, the decision did not go far enough in extending same-sex couples' rights.³² For instance, if a couple separated without jointly adopting their children, the non-biological parent had no rights whatsoever vis-à-vis their children; they were considered "legal strangers."³³ If the biological parent died, and that person's family wanted custody of the child, the non-biological parent still was considered a third party.³⁴

The Court's decision in *Galen* also reflected significant progress in the procedural arena by allowing the Court to routinely grant motions to waive the requirements of a home-study.³⁵ The Court is also authorized to grant motions to waive notice to the biological father where the biological mother was artificially inseminated by an anonymous donor.³⁶ However, it is more difficult for same-sex couples to obtain these waivers than it is for opposite-sex couples.³⁷

³² See Irene Sege, *When Mom and Mom split*, BOSTON GLOBE, November 23, 1999, at C1, 4 (describing shortfalls of *Tammy* decision); J. Shoshanna Ehrlich, *Co-Parent Visitation: Acknowledging the Reality of Two Mother Families*, 4 W.B.A. L.J. 1 (2000) (explaining decision does not state whether *de facto* parents have all rights of legal parent).

³³ See Sege, *supra* note 32, at C1 (citing examples of situations where non-biological parents would lose all contact with their children). The non-biological parent had no right to petition the court for visitation, custody, or any other access to the child. *Id.* Their relationship with the child after the separation depended completely on the whim of the biological parent. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464, 471 (1990). Also, a large number of same-sex parents never take the formal step in adopting their children. See William Mason Emmett, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433, 434 n. 3 (1997).

³⁴ See Polikoff, *supra* note 33, at 531 (citing examples of when non-biological parents lost primary standing to file for custody); *Tammy*, 416 Mass. at 215 n. 8, 619 N.E.2d at 320 (explaining without adoption, family members of either biological parent could contest custody). Polikoff points out that this legal limbo and the possible loss of the surviving parent "cruelly" adds to the loss already suffered by the child. *Id.* She also notes that a father in the same position would not be deprived of custody. Polikoff, *supra* at 532.

³⁵ See generally Adoption of *Galen*, 425 Mass. 201, 680 N.E.2d 70 (1997); see also Bonauto, *supra* note 12, at 13 (citing statistics on granting of motions to waive home study requirement); Susan L. Crockin, *Beyond Tammy: Co-Parent Adoptions in Massachusetts*, 38-OCT B. B.J. 7 (1994) (citing increased ease in same-sex parent adoptions since *Galen*). This is done with the aid of supporting affidavits and letters from family, friends, and medical personnel. Bonauto, *supra* at 18.

³⁶ See Bonauto, *supra* note 12, at 18 (citing statistics in the waiving of the home-study requirement); Crockin, *supra* note 36, at 19 (citing increased ease in same-sex parent adoptions since *Galen*).

³⁷ See *Galen*, 425 Mass. at 206, 680 N.E.2d at 73 (pointing out increased difficulty in adoption for same-sex couples); Crockin, *supra* note 36, at 19 (discussing need for numer-

With the ruling in *E.N.O. v. L.L.M.*, the SJC finally recognized rights of same-sex parents that had been given to opposite-sex parents twenty seven years before.³⁸ Under this ruling, any same-sex parent that can show a *de facto* parent relationship with their child can be granted temporary visitation rights.³⁹ However, the decision makes no provision for joint custody or adoption of the child, and is therefore very limited in scope.⁴⁰ The case also fails to give definitive answers as to whether the child and the biological mother are entitled to child support.⁴¹

IV. FACING SYSTEM DISADVANTAGES

Research has indicated that some harbor the perception that lesbians and gay men are solely sexual people, with no other significant character traits; indeed, many courts and judges consider a prospective parent's sexuality as a major factor in adoption proceedings.⁴² A homosexual or lesbian person's or couple's relationship and private life thus become points of special judicial concern that is not normally focused on opposite sex couples.⁴³ The very existence of this uncommon attention, while

ous affidavits from third-parties). When a petitioner normally moves for home-study waivers, DSS will check its own records for the petitioners' or child's involvement with the department, and if there is no prior involvement, the department will not object to the motion. *Id.* In most cases the court will then grant it. *Id.*

³⁸ See *E.N.O.*, 429 Mass. at 832, 711 N.E.2d at 893 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972) (giving natural fathers right to custody of their children without being married to mother or adopting children)).

³⁹ See *E.N.O.*, 429 Mass. at 830-31, 711 N.E.2d at 891-92. This case followed similar case law in Colorado, Wisconsin, New Mexico, Illinois, and New Hampshire. See *Graff*, *supra* note 1, at E5 (listing and explaining similar decisions by other state courts).

⁴⁰ See *Sege*, *supra* note 32, at C4 (analyzing *Tammy* decision). While stating that the non-biological parent originally filed for adoption, joint custody, and visitation, the court in *E.N.O.* only dealt with the visitation issue. See *E.N.O.*, 429 Mass. at 825 n.1, 826, 711 N.E.2d at 888 (explaining these other issues were pending in Probate Court and not presently before S.J.C.).

⁴¹ See *E.N.O.*, 429 Mass. at 824 n.1, 826, 711 N.E.2d at 888.

⁴² See *Shapiro*, *supra* note 4, at 624 (describing how public bias against same-sex parents appears in court proceedings); Felicia E. Lucious, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 S.U. L. REV. 171, 179 (1994) (discussing prejudice against homosexuals in courtroom in adoption proceedings); Emmett, *supra* note 39, at 439 n. 25 (discussing how judges take sexual orientation of parties into consideration when ruling).

⁴³ See *Shapiro*, *supra* note 4, at 624 (commenting on lengthy adoption proceedings and written opinions as compared to opposite sex couples); see also *Tammy*, 416 Mass. at 206-09, 619 N.E.2d at 317 (devoting three pages for discussion of parties history, relationship and support of numerous third parties); *Galen*, 425 Mass. at 202-03, 680 N.E.2d at

meant to work for the best interests of the child, actually puts the child's well-being in danger.⁴⁴

Statistics show the general public shares the view that same-sex parents are harmful to children.⁴⁵ This stigma of "unnaturalness" is the impetus for a myriad of laws and actions against homosexuals, which are ultimately detrimental to their children.⁴⁶ In all areas this anxiety is unfounded.⁴⁷ An overwhelming majority of studies conducted in this area conclude that worries about same-sex parenting are groundless, and that children of same-sex parents are just like children of opposite sex parents.⁴⁸ Any laws promulgated to this effect are, therefore, unjustified

71-2 (devoting two pages); *E.N.O.*, 429 Mass. at 824-26, 711 N.E.2d at 888-89 (devoting three pages). See generally Emmett, *supra* note 39, at 439 (maintaining current policies marginalize same-sex relationships and puts them through more judicial scrutiny than opposite-sex couples).

⁴⁴ See Shapiro, *supra* note 4, at 648 (advocating "added emphasis" suggests that family is abnormal); Polikoff, *supra* note 33, at 565 (suggesting judges' and public's behavior affects children's development).

⁴⁵ See Shapiro, *supra* note 4, at 648 (citing public fear and dislike of families with same-sex parents); Pat Wingert and Barbara Kantrowitz, *Gay Today: The Family*, NEWSWEEK, March 20, 2000 at 50-51 (stating in *Newsweek* poll only 39% of general public favored adoption by non-biological same-sex parent).

⁴⁶ See Davies, *supra* note 28, at 1058 (listing and describing laws against same-sex parenting and adoption).

⁴⁷ See Shapiro, *supra* note 4, at 650 (citing extensive list of 22 studies); Graff, *supra* note 1, at E5 (discussing results of studies on effects same-sex parents have on their children); Polikoff, *supra* note 39, at 461-67 (stating studies reveal no adverse effect on children); Elizabeth Trainor, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5th 591, § 4 (1998) (asserting sexual orientation of parents has no negative consequences to children); Adams, *supra* note 10, at 29 (stating public fears of homosexuals being parents is unfounded); Judy Mann, *From California, a Proposal on Gay Marriage*, WASHINGTON POST, December 22, 1999, at C16 (discussing clinical research that rebuts public concern with same-sex parents).

⁴⁸ See Shapiro, *supra* note 4, at 648 (addressing studies that rebut general public's fear of negative effects on children); Graff, *supra* note 1, at E5 (discussing results of studies on effects same-sex parents have on their children); Polikoff, *supra* note 33, at 461-67 (stating studies reveal no adverse effect on children); Trainor, *supra* note 47, at § 4 (asserting sexual orientation of parents has no negative consequences to children); *Bezio*, 381 Mass. at 578, 410 N.E.2d at 1215 (stating homosexuality of parents is not detrimental to children); Adams, *supra* note 10, at 29 (stating public fears of homosexuals being parents is unfounded); Mann, *supra* note 47, at C16 (discussing clinical research that rebuts public concern with same-sex parents). Some of these fears about children of same-sex parents include the following: gender role confusion, a stronger likelihood to become gay or lesbian, a stronger likelihood of being stigmatized, harassed and ostracized because of their parents, and an inability to think or act in a moral manner. See Shapiro, *supra* note 4, at 646 (summarizing baseless fears about same-sex parenting).

and misdirected.⁴⁹

Of the greatest significance is the controversy over same-sex marriage.⁵⁰ At present, only Vermont expressly allows same-sex couples to marry.⁵¹ However, there is continuing debate in Massachusetts, and nation-wide, over whether same-sex couples should have this right.⁵² By

⁴⁹ See Shapiro, *supra* note 4, at 648 (discussing prejudicial and baseless nature of current law).

⁵⁰ See *infra* notes 51-54 and accompanying text (advocating for passing of laws to allow same-sex couples to marry).

⁵¹ See Jeffrey Good, *Gays Ponder Breadth of a Vt. 'Civil Union'*, BOSTON GLOBE, April 27, 2000, at A1, 31 (announcing Vermont state bill allowing same-sex couples to enter into "civil unions" beginning July 1, 2000); *Vt. Gov Signs Civil Union Bill into Law*, BOSTON HERALD, April 27, 2000, p. 26 (outlining history allowing same-sex couples to marry from *Baker* to signing of "civil union" law). The Vermont law allows same-sex couples to enter into civil unions, which entitle them to all of the rights and responsibilities of civil marriage, including parental rights, shared property rights, joined health insurance, the right to make medical decisions for each other, and intestacy rights. Good, *supra* at A31. In addition, any legal dissolution of civil unions would require court orders akin to divorce decrees for opposite sex couples. *Id.* Recently, the Vermont Supreme Court ruled in *Baker v. State*, that under the Vermont Constitution, it was illegal to deprive same-sex couples the same rights and benefits given to opposite-sex couples by only allowing opposite-sex couples to marry. 170 Vt. 194, 744 A.2d 864 (1999). While the Court did not mandate the right to marriage for same-sex couples, it did order the state legislature to either allow such marriages or to create a "domestic partnership" system that would give same-sex couples all of the same rights given to married couples. *Id.* Because the decision was based on state constitutional law, it cannot be appealed to the United States Supreme Court. *Id.* at 868; Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* at A1, 28 (describing reasoning in decision); Rosin, *supra* at A1 (discussing basis of Court's decision). The Supreme Court of Hawaii had attempted to remedy this issue in *Baehr v. Lewin*. 74 Haw. 530, 852 P.2d 44 (1993). However, after a decision striking down the current system based on equal protection theory, the state legislature and the voters passed a constitutional amendment making the decision moot. *Baehr v. Miike*, 92 Haw. 634, 994 P.2d 566 (1999). Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1052 n. 91 (1994). Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* at A1; Rosin, *supra* at A14. On remand, *Baehr v. Miike*, the Hawaii Supreme Court recognized the newly ratified amendment and stated that the equal protection claims made by the plaintiffs in the previous case were made meritless by the amendment's passage. *Id.* at 639-42, 994 P.2d at . However, after the first *Baehr* decision, the United States Congress passed the "Defense of Marriage Act." Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* at A1 (discussing actions of state and federal lawmakers after *Baehr* decision); Rosin, *supra* at A14 (discussing effect of Defense of Marriage Act on *Baehr*); Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419. This act defined marriage as only existing between one man and one woman and allowed all states and territories to refuse recognition of marriages made between same-sex couples legitimized in other states. *Id.* at §§ 2, 3. Thirty states subsequently passed similar laws. Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* at A1; Rosin, *supra* at A14.

⁵² See Michael Crowley, *Gay Rights Bill Would Face Battle in Mass.*, BOSTON

allowing same-sex couples to marry, we would be giving their children the security, legitimacy, and acceptance that their opposite sex counterparts enjoy.⁵³ However, all attempts to pass domestic partnership laws in Massachusetts have failed, and current Governor Paul Cellucci has repeatedly voiced his opposition to same-sex marriage.⁵⁴

V. WHAT THIS MEANS FOR THESE FAMILIES

While the law is progressing towards increasing the rights of families with same-sex parents, it is progressing too slowly.⁵⁵ Provisions specifically stating the rights of same-sex parents, such as non-adoptive cus-

GLOBE, December 23, 1999, at B1, 8 (discussing state of law for same-sex marriage in light of recent Vermont decision). Michael Crowley, *Vt. court gives gay couples a victory*, BOSTON GLOBE, December 21, 1999, at A1, 28 (announcing *Baker* decision and discussing its impact on Massachusetts and nation); Hanna Rosin, *Same-Sex Couples Win Rights In Vermont*, WASHINGTON POST, December 21, 1999, at A1, 14 (reviewing *Baker* decision); Will Lester, *Rights for Gay Couples: Poll Shows Divide*, BOSTON GLOBE, June 1, 2000, p. A17 (citing Associated Press poll describing near fifty-fifty split in opinions of various gay rights). Because the Vermont and Massachusetts constitutions have similar provisions, and in light of the SJC's recent movement towards equalization of rights for same-sex couples, it is very possible for a Massachusetts court to use *Baker v. State* as precedent to work towards same-sex marriage in Massachusetts. Crowley, *supra* at B8 (pointing out similarities between Vermont and Massachusetts state constitutions). Massachusetts Attorney General Tom Reilly favors the new Vermont decision. *Id.* Should a similar case ever reach the SJC, Reilly may be called upon to evaluate and give arguments on Massachusetts law in this regard. *Id.* at B1.

⁵³ See Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* note 53, at A1 (arguing same-sex marriage would solidify families); Mann, *supra* note 47, at C16 (suggesting civil union laws would give legitimacy to families with same-sex parents); Cox, *supra* note 51, at 1033 (stating denial of marriage to same-sex couples promotes feelings of inferiority and second-class citizenship). See generally *Baker v. State*, 170 Vt. 194, 74 A.2d 864 (1999) (discussing benefits of same-sex marriage to parties as well as their families). Rights of legitimacy would be similar to those given to children who are adopted under present Massachusetts law but without the added expense, time, and effort of an adoption proceeding. *Id.* The right to marry would also give a more solid foundation to the parent-child relationship. Mann, *supra* at C16; Emmett, *supra* note 33, at 436 (advocating marriage of same-sex couples to strengthen families).

⁵⁴ See Crowley, *Gay Rights Bill Would Face Battle in Mass.*, *supra* note 51, at B8 (describing views of Massachusetts politicians and officials on same-sex marriage); Crowley, *Vt. Court Gives Gay Couples a Victory*, *supra* note 51, at A1 (stating reactions of Massachusetts officials, including Governor Cellucci, on *Baker* decision). However, all efforts to outlaw same-sex marriage or enforce laws prohibiting Massachusetts courts from honoring out-of-state same-sex marriages have also failed. *Id.*

⁵⁵ See Graff, *supra* note 1, at E5 (indicating substantial obstacles are still in the way of same-sex families); Davies, *supra* note 32, at 1056 (suggesting further development is needed to equalize same-sex and opposite-sex parents).

today, paternity/maternity, child removal, subsequent adoptions by new partners, the effects of domestic abuse, and effects of separation are still missing.⁵⁶ These rights and obligations must be made to mirror those of opposite sex parents in every respect, or else more damage will be done to these families.⁵⁷

Until this happens, there are things that same-sex parents can do to try to protect themselves and their families.⁵⁸ First, all efforts should be made to commit the nature and intentions of the couple's relationship to writing.⁵⁹ This may include financial and property obligations, as well as the intent to raise children together.⁶⁰ Not only does written documentation prove to a court a couple's intentions of being forever bound, but it also protects both parties in the event of a separation or death of the other partner.⁶¹ In adoption or other legal proceedings, either or both partners should do their utmost to procure affidavits and live witnesses to testify to important facts about the family, particularly about the adoption's effect on the children.⁶²

Mediation is a rarely suggested but generally helpful option for separating couples.⁶³ However, some criticisms are that mediation agreements pertaining to custody and visitation are not enforceable in the courts, and the mediation system does nothing to change the current discriminatory system.⁶⁴

⁵⁶ See Sege, *supra* note 32, at C4 (discussion of rights still not available in context of *E.N.O.* decision).

⁵⁷ See generally Polikoff, *supra* note 33 (advocating change in laws will improve lives of same-sex parents and their children); Shapiro, *supra* note 4 (alleging legal equality will strengthen families with same-sex parents); Davies, *supra* note 28 (arguing imbalances laws are detriment to children of same-sex parents).

⁵⁸ See generally Bonauto, *supra* note 12 (suggesting ways same-sex couples can legally solidify their relationship).

⁵⁹ See *id.* at 10 (discusses how executing agreements and other legal documents can protect parties).

⁶⁰ See *id.* See also *supra* notes 27-28.

⁶¹ See *id.* at 10.

⁶² See Sonia Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5th, § 2(b) (1995) (discussing cases where third-party opinions, professional and personal, had significant impact on court decision); Trainor, *supra* note 47, at § 2(b) (citing cases nationally where supplemental affidavits and evidence was important in ruling); see also *supra* notes 16, 43 (listing and describing numerous affidavits and testimony by third parties).

⁶³ See generally Emmett, *supra* note 33 (advocating use of mediation to maintain parties' privacy, control and respect).

⁶⁴ See *id.* at 445, 447-48 (admitting mediation does little to improve legal situation of

VI. WHAT WE SHOULD STRIVE FOR

In addition to changes in the laws, changes in the *implementation* of these laws are also critical.⁶⁵ The use of sexual orientation as a factor in proceedings involving children must cease.⁶⁶ As long as sexual orientation is considered a factor, it will also be considered a liability for that party.⁶⁷ A parent's sexual orientation also shifts the focus from the best interests of the child to the parent.⁶⁸ The rights of parents are of concern here, as well as the best interests of the children. Without extending rights to meet those of opposite-sex parents, these families run the risk of losing important rights concerning their children.⁶⁹

same-sex parents); Polikoff, *supra* note 33, at 499 n. 207 (suggesting mediation as alternative to court proceedings).

⁶⁵ See Emmett, *supra* note 33, at 439 (stating judicial prejudice against same-sex parents affects how they will rule); Lucious, *supra* note 43, at 193 (alleging without legal standards judges are ruling based on personal belief, not law); Shapiro, *supra* note 4, at 627 (stating judges use arbitrary standards because courts have no rules for dealing with same-sex parents).

⁶⁶ See Davies, *supra* note 28, at 1056 (advocating prejudice against homosexuals in courtroom reduces chances of unbiased proceedings). *But see* Lucious, *supra* note 42, at 191 (alleging parent's homosexuality should be taken into consideration in court proceedings).

⁶⁷ See Emmett, *supra* note 33, at 439 (arguing present system reinforces feelings of inferiority in same-sex parents and concern in court); Lucious, *supra* note 42, at 195; Shapiro, *supra* at note 4, at 630, 633 n.59 (arguing same-sex parent is automatically and always disadvantaged because of sexual orientation).

⁶⁸ See Lucious, *supra* note 42, at 194-95 (arguing attention to petitioners' homosexuality reroutes focus from child's best interest to petitioner's parental fitness).

⁶⁹ See Polikoff, *supra* note 3, at 468, n. 28 (1990) (citing Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Promise of the Nuclear Family has Failed*, 70 VA. L.REV. 879, 884-85 (1984)). Rights of parents that may be affected include custody, religious upbringing, education, social comfort and company, discipline, medical treatment, naming the child, a right to the child's earnings and services, residence, the right to gather information about the child, the right to include and exclude any information from others, and the right to put the child in the temporary or permanent custody of another person. *Id.* While all credit and support should be given to those who try to further the law in this area, families should be cautious. *Id.* Significantly, most couples that have challenged the laws in this area have been economically advantaged. *Id.* Also, nearly all decisions can be overturned by state legislatures and are therefore quite vulnerable. *Id.* It would be unwise to count on the legal system to adequately resolve all "first-impression" contentious issues quite yet. See Emmett, *supra* note 39, at 439 n. 32 (noting overturn of *Baehr* in Hawaii, and enactment of "Defense of Marriage" statutes).

VII. CONCLUSION

The debate over the rights and restrictions of same-sex parents has raged over the past twenty-five years. Especially in Massachusetts, a forefront state in second parent adoptions, tensions run high. To insure that children's best interests are served, courts must do more than simply recognize these families through adoption; they need to make them feel welcome and secure by making the process as simple and non-critical as it is for opposite-sex adopters. To do its part, Massachusetts should continue following liberal decisions of other forefront states or take the initiative in extending adoption and parental rights. Although the Commonwealth has made great progress, the task is far from being finished.

*Amy Joy Galatis*⁷⁰

⁷⁰ This note is dedicated to those who have the courage to challenge unjust laws.