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MARITAL PREFERENCES IN ADOPTION LAW: A 50 STATE REVIEW

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EXECUTIVE SUMMARY

While all 50 states assert that adoption is governed by the “best interests of the child,” legal preferences for married couples in adoption are rare. More states explicitly ban “discrimination” based on marital status than contain even mild preferences for marriage. Five states (Alabama, Kentucky, Maryland, New Jersey, New York) make it illegal to prefer married couples in placement decisions. Only one state (Utah) codifies a clear preference for married couples in adoptions. Recommendation: State legislatures should codify appropriate preferences for married couples (where available) in adoption law.

ADOPTION IN AMERICA

Adoption is a significant family form in the United States. According to Census 2000, about 2.5 percent of children under 18 (or 1.6 million children) are living with adopted parents. Seventy-eight percent (1.24 million) of these adopted children are living with two married adoptive parents and 22 percent (348,000) are living with a single parent, including 3.6 percent (58,000) who live with a single parent and an unmarried cohabiting partner.¹

THE BEST INTERESTS OF THE CHILD

Adoption was created in America as a legal structure explicitly in order to meet the needs of children, not the desires or interests of adults or of other social institutions. Professor Ruth-Arlene Howe of Boston University notes that while ‘Roman law was

based upon the needs and rights of the adoptive parents; . . . American law, from the beginning, protected the welfare of adopted children.’²

In all 50 states, the “best interest of the child” standard in some form governs adoption law. For example, the Pennsylvania adoption statute provides, “[T]he court shall decide [an adoption’s] desirability on the basis of the physical, mental and emotional needs and welfare of the child.”³ The Texas statute is very straightforward: “If the court finds that the requirements for adoption have been met and the adoption is in the best interest of the child, the court shall grant the adoption.”⁴ The Washington adoption statute opens with a legislative finding: “The legislature finds that the purpose of adoption is to provide stable homes for children. . . . The guiding principle must be determining what is in the best interest of the child.”⁵

MARITAL PREFERENCES IN STATE LAW

In a systematic review of adoption law in all 50 states, we could find just one state, Utah that codifies a clear preference for marriage in adoption law.

Utah’s provisions were originally part of its Board of Child and Family Services regulations, banning adoption by unmarried couples and giving “priority for adoptive placements to families in which both a man and a woman are legally married under the laws of this state . . .”⁶ In 2000, the regulation was codified as part of a statutory provision which also includes a finding concerning the best interests of children, stating, “The

Legislature specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."⁷

Until recently, Florida had a similar clear preference for marriage in state regulations,⁸ but in 2003 the marriage preference was replaced by weaker language listing "marital status" as one of the factors considered in placement but immediately adding: "The department and its designees will accept applications to adopt from married couples and from single adults. Couples married less than two years must be given particularly careful evaluation."⁹

Meanwhile five states (Alabama, Kentucky, Maryland, New Jersey, and New York) explicitly ban marital status discrimination in adoption law, making it illegal for government agencies to place newborns with a married couple over a single individual or (in theory) an unmarried couple.¹⁰ There are thus more states that explicitly forbid social workers from preferring married couples than there are states that explicitly urge or permit them to do so.¹¹

REFORMING ADOPTION LAW

Adoption as a legal structure dates from the mid-19th century.¹² Professor Howe writes that "adoption laws were designed to imitate nature."¹³ That is, "[T]raditionally, adopters were married couples, except perhaps for a single-parent adoption by a surviving step-parent or surviving grand-parent, or by another relative following the death of one or both parents."¹⁴ However, preference for married couples (where available) was not typically codified in state adoption laws. Social mores at the time strongly preferred married families to other kinds, and explicit codification may not have seemed necessary.

Today (as then) social workers in private and public agencies have considerable discretion in placement decisions. But social work as a profession has placed increasing

emphasis on the value of diversity, defining preferences for marriage as a form of discrimination against single people. The code of ethics of the National Association of Social Workers states: "Social workers should obtain education about and seek to understand the nature of social diversity and oppression with respect to . . . sex, sexual orientation, age, [and] marital status . . ."¹⁵ A 1996 study of attitudes of 300 clinical social workers (drawn from a random sample of clinicians registered with the National Association of Social Workers) found strong support among social workers for individuals' right to adopt, regardless of marital status and orientation, and a tendency to reject the traditional idea that married couples are better for children than other family forms.¹⁶

Social scientists have not directly compared child well-being in single-parent versus married couple (or unmarried couple) adoptions. However, a large amount of social science evidence strongly suggests that, of all the family structures well-studied, children do best when raised by married mothers and fathers.¹⁷

Of course, in any individual instance, a married home may not be possible, or may not be in the best interest of a particular child. An orphaned older child is likely better off being adopted by her single aunt, than the most married pair of complete strangers. A loving single parent is better for a child than to be bounced around in the foster care system.

At the same time, the number of married couples pursuing foreign adoptions at great cost suggests that real or perceived barriers in domestic adoptions may be preventing some of the most vulnerable children in the government's care from receiving the benefits of a loving mother and father.¹⁸ Some of our most vulnerable children pay the price when adult ideological and political agendas trump the best interests of the child.

State legislators or others seeking model legislation for adoption law reform please contact: joshua@imapp.org.

Endnotes

¹ Rose M. Kreider, *Adopted Children and Stepchildren: 2000*, Census 2000 Special Reports, U.S. Census Bureau (August 2003). These numbers do not include the separate census category of “stepchildren” also listed (but not defined) on the census form. Roughly 5.2 percent (4.4 million) of all children were described as stepchildren, of which 88 percent (2.9 million) lived with a married couple and 12 percent (388,000) living with single parents (including 9.3 percent (307,000) living with a single parent and a cohabiting partner). The proportion of the latter who are with same-sex cohabiting couples is not known. Roughly 89% of all cohabiting couples are opposite-sex couples. Tavia Simmons and Martin O’Connell, *Married Couple and Unmarried Partner Households: 2000*, Table 4, at 9, U.S. Census Bureau (February 2003).

² Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L. Q. 173, 175 (1983) (citing Henry H. Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 BUFFALO L. REV. 1 (1973)).

³ 23 Pa.Cons. Stat. § 2724.

⁴ Tex. Fam. Code Ann. § 162.016

⁵ Wash. Rev. Code § 26.33.010; *see also* Fla. Stat. Ann. § 63.022; Idaho Code § 16-1506; Mont. Code Ann. § 42-1-102; N.J. Stat. Ann. § 9:3-37; Okla. Stat. tit. 10, § 7501-1.2; Tenn. Code Ann. § 36-1-101; Utah Code Ann. § 78-30-1.5.

⁶ Utah Admin. R. 512-41-5(J)(1).

⁷ Utah Code Ann. § 78-30-9.

⁸ Florida Admin. Code Ann. R. 65C-16.005 (version current through July 1, 2003) (“Families in which there is a mother and father are considered important for the well-rounded growth and development of a child. The department will give primary consideration to the applications of couples who have been married a sufficient length of time to establish stability. Couples married less than two years must be given particularly careful evaluation. Unmarried couples living together in a sexually cohabitating relationship will not be considered by the department of adoptive parents. The department will accept the application of single persons seeking to adopt a child. Single parent placements will be considered when a suitable two-parent home is unavailable and the alternative for the child is extended foster home care, when there is an already existing relationship which is meaningful and healthful for the child or when the particular needs of a specific child can best be met by a single parent.”)

⁹ Florida Admin. Code Ann. R. 65C-16.005 (2004).

¹⁰ Alabama Code §26-10A-5; 922 Ky. Admin. Regs. 1:030; Md. Code §5-309; N.J. Admin Code 10:21C-2.6; 18 N.Y. Comp. Code R. & Regs. §421.16.

¹¹ Some states do privilege married couples over unmarried couples when it comes to adoption. Courts in five states have held that the adoption statutes do not permit joint adoption by unmarried same-sex or opposite-sex couples (Colorado, Louisiana, Nebraska, Ohio, Wisconsin); Mississippi state law explicitly bans adoptions only by same-sex couples. Ten states and the District of Columbia permit second-parent adoptions, either as a result of legislative action (California, Connecticut, and Vermont) or more commonly by judicial interpretation (Delaware, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Washington, D.C.). Florida is the only state to explicitly ban adoption by homosexuals.

¹² Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L. Q. 173, 175-76 (1983).

¹³ *Id.* at 178.

¹⁴ *Id.* at 182.

¹⁵ National Association of Social Workers, *Code of Ethics* § 1.05(c) (“Cultural Competence and Social Diversity”), available at <http://www.socialworkers.org/pubs/code/code.asp>.

¹⁶ Sarah M. Holbrook, 1996. “Social Workers’ Attitudes Toward Participants’ Rights in Adoption and New Reproductive Technologies,” *Health and Social Work* 21(4) (November): 257ff.

¹⁷ For a review of this evidence, see Maggie Gallagher and Joshua Baker, 2004. “Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being,” *iMAPP Policy Brief* (February 27) (Washington D.C.: Institute for Marriage and Public Policy).

¹⁸ *See, e.g.*, Jamie Dean, *Can Heather Have Two Mommies in Charlotte?*, The Charlotte World, Jan. 6, 2004.