

Sweet Child O' Mine: Adult Adoption & Same-Sex Marriage in the Post-Obergefell Era

Robert Keefe

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Sweet Child O' Mine: Adult Adoption & Same-Sex Marriage in the Post-Obergefell Era

Erratum

1477

SWEET CHILD O' MINE: ADULT ADOPTION & SAME-SEX MARRIAGE IN THE POST-OBERGEFELL ERA

*Robert Keefe**

Abstract

Gay and lesbian partners used adult adoption to create family relationships and to ensure inheritance and property rights in the decades before the Supreme Court's decision in *Obergefell v. Hodges* legalized same-sex marriage nationwide. Same-sex partners who chose adult adoption as an alternative to marriage before the *Obergefell* decision must now dissolve the adoption in order to exercise their constitutional right to marry due to state incest laws prohibiting marriages between parents and their adopted children. It is difficult, however, to dissolve an adoption, and anecdotal evidence indicates that some judges have refused to dissolve adoptions between same-sex partners. This Note argues that state legislatures should create "conversion statutes"—much like those that were used in many states to dissolve civil unions once same-sex couples could legally marry—to quickly enable adoptive same-sex couples to dissolve their adoptions and to exercise their fundamental right to marry.

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* J.D. candidate 2018, University of Florida Levin College of Law; B.A. 2013, Johns Hopkins University. This Note is dedicated to my fiancée, Bailee Hanle. I would also like to thank Professor Lee-ford Tritt for suggesting this topic and for his invaluable support and guidance while writing this Note.

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INTRODUCTION

Gay and lesbian¹ partners used adult adoption to create family relationships and to ensure inheritance and property rights from the early 1980s until the Supreme Court ruled that same-sex marriage was a constitutionally protected fundamental right in *Obergefell v. Hodges*.² The practice of adult adoption is not unique to homosexual partners. Heterosexual adults adopt other adults to formalize parent–child relationships or make a spouse an heir to an inheritance, among other goals.³ However, gay and lesbian individuals who adopted their romantic partners in the pre-*Obergefell* era now face a problem straight couples do not: unless homosexual partners are able to dissolve their adoptive relationship, they will be prohibited from exercising their constitutional right to marry because of state prohibitions on marriage between parents and their children.⁴

The Court’s ruling in *Obergefell* set off a wave of celebration and marriages between same-sex partners.⁵ The *Obergefell* decision followed a “rapid shift in legal and societal acceptance of same-sex marriage” in the preceding decade.⁶ In fact, it was not until 1999 that the highest court of any state held that the state constitution required that same-sex couples be granted all the rights and benefits of marriage, and not until 2003 that

1. This Note uses the terms homosexual, gay, and gay and lesbian interchangeably to describe same-sex couples.

2. 135 S. Ct. 2584, 2604–05 (2015); see generally Peter N. Fowler, Comment, *Adult Adoption: A “New” Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667 (1984); Thomas Adolph Pavano, *Gay and Lesbian Rights: Adults Adopting Adults*, 2 CONN. PROB. L.J. 251 (1987); Diane Herbst, *Gay Pennsylvania Man Who Adopted His Partner Now Wants Permission to Marry: ‘We Just Wanted Some Legitimacy,’* PEOPLE (Nov. 4, 2015), <http://people.com/celebrity/gay-pennsylvania-man-who-adopted-partner-now-wants-permission-to-marry/> (profiling a gay couple who adopted in 2012).

3. See, e.g., *Minary v. Citizens Fidelity Bank & Tr. Co.*, 419 S.W.2d 340, 341 (Ky. 1967) (involving a husband who adopted his wife in order to make her an heir to his father’s estate).

4. See Herbst, *supra* note 2.

5. See Ileana Najarro, *Hundreds Gather at New York’s City Hall to Witness Mayor Perform Marriage*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/live/supreme-court-rulings/hundreds-gather-at-city-hall-to-witness-mayor-perform-marriage>; Bill Vlasic, *In Michigan, Gay Couples Marry in Mass Ceremony*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/live/supreme-court-rulings/in-michigan-gay-couples-marry-in-mass-ceremony/>.

6. Jess Braven, *Supreme Court Rules Gay Marriage Is a Nationwide Right*, WALL ST. J. (June 26, 2015), <http://www.wsj.com/articles/supreme-court-rules-in-favor-of-same-sex-marriage-1435180972>.

a state declared that same-sex couples were entitled to enter into a civil marriage.⁷ The Court's decision, reversing course after decades of legal precedent, was characterized by President Barack Obama as a "thunderbolt" of justice in what is often a slow, incremental process of social change.⁸ *Obergefell* ended "the patchwork system" of state laws and ended "the uncertainty hundreds of thousands of same-sex couples face[d]" from not knowing whether their marriages would be recognized as legitimate if they moved to a different state.⁹

The uncertainty, however, has not been put to rest for same-sex partners who resorted to adult adoption as an alternative to marriage. In the wake of the Court's decision, the risk taken by same-sex couples who adopted has come sharply into focus: absent fraud or undue influence, adoption cannot be annulled.¹⁰ Thus, gay and lesbian couples who resorted to adult adoption to preserve inheritance and other family rights in lieu of marriage in the pre-*Obergefell* era became "stranded in a kind of limbo" or even subject to prosecution under state criminal incest statutes.¹¹ The question of whether same-sex partners who previously used adult adoption for its legal benefits can now exercise their constitutional right to marry currently rests in the hands of judges in the state court systems, who have the power to vacate adoptions.¹²

7. See generally *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999). Further illustrating how unlikely the prospect of same-sex marriage being legalized nationwide was in the decades leading up to the *Obergefell* decision, from 1998 to 2012, over half of the states passed constitutional amendments prohibiting same-sex marriage. See Carla Uriona et al., *Infographic: A Turning Point for Gay Marriage?*, STATELINE (May 4, 2012), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/05/04/infographic-a-turning-point-for-gay-marriage>.

8. President Barack Obama, Remarks by the President on the Supreme Court Decision on Marriage Equality (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality>.

9. *Id.*

10. 2 AM. JUR. 2D. *Adoption* § 154 (2016); Gwendolyn L. Snodgrass, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 83 (1997-1998); Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 358 (1993) ("[A]dult adoption is an inadequate marriage alternative because of its irrevocability."); Lisa R. Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 692 (1990) ("The greatest disadvantage of adult adoption is its irrevocable nature.").

11. Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES MAG. (Oct. 19, 2015), <http://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html>; see Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 32 HAMLIN L. REV. 95, 121 (2009) (listing states that include the adopted parent-child relationship within the statutory definition of incest).

12. Green, *supra* note 11.

This Note examines the utilization of adult adoption by gay and lesbian couples as a method to give their relationships some legal status. Part I discusses the historic advantages of adult adoption as an alternative to marriage for same-sex couples. Part II discusses the current dilemma faced by same-sex couples that adopted in the decades before the *Obergefell* decision, now that same-sex marriage is legal nationwide. This Note concludes that state legislatures should facilitate the unwinding of these couples' adoptions by removing judicial discretion in the voiding of the adoption. Gay and lesbian partners who were forced to turn to adult adoption as an alternative to marriage should not be restricted from exercising their recently recognized constitutional right to marry by an individual judge's discretion, nor should these couples remain subject to criminal prosecution. The Supreme Court's ruling that same-sex couples have the constitutional right to marry requires a legislative solution that prevents individual judges from obstructing the unwinding of an adoptive relationship between same-sex partners.

I. ADULT ADOPTION AS AN ESTATE-PLANNING TOOL FOR SAME-SEX COUPLES

Before discussing the problems facing gay and lesbian couples that turned to adult adoption in the pre-*Obergefell* era, it is necessary to examine the historical foundation of adoption and adult adoption.

A. *Historical Development of Adoption and Adult Adoption*

Adoption is a device for establishing a legal relationship of a parent and child between persons not already so related by law.¹³ The practice has ancient roots: adoption was practiced among the ancient peoples of Greece, Rome, Egypt, and Babylonia.¹⁴ The primary purpose of adoption was inheritance rights.¹⁵ For example, Roman emperors adopted sons to be their successors.¹⁶ Adoption was codified in Rome under Justinian and subsequently incorporated into the laws of Roman civil law countries such as France and Spain.¹⁷

Although continental Europe continued to practice adoption in accordance with the Roman tradition in the centuries following the

13. *Adoption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744–48 (1956); Russell E. Utter, Jr., *The Benefits and Pitfalls of Adult Adoption in Estate Planning and Its Likely Future in Missouri*, 80 UMKC L. REV. 255, 256 (2011).

15. Huard, *supra* note 14, at 745.

16. Edward A. Hoyt & Michael Sherman, *Adoption and the Law in Vermont, 1804-1863: An Introductory Essay*, 64 VT. HIST. 159, 161 (1996) (citing NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY: A STUDY IN THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME* 54–56 (Doubleday Anchors ed., 1956)).

17. Utter, Jr., *supra* note 14, at 256.

collapse of the Roman Empire,¹⁸ adoption was never recognized as a natural right in the English common law.¹⁹ Because it was not part of the common law, formal acceptance and regulation of adoption in the United States has been exclusively by statutory enactments.²⁰ Consequently, the right to adopt in the United States exists only when expressly authorized by statute.²¹ The first two general adoption statutes were enacted in the mid-nineteenth century.²² The rationales for the adoption of children during this period were the same as those in ancient Greece and Rome in that they were focused on ensuring inheritance rights for the adopted child.²³ Though exclusively statutory, American adoption laws may vary greatly from jurisdiction to jurisdiction.²⁴

Adult adoption is the adoption of one adult by another.²⁵ Like minor adoption, adult adoption has long been a recognized practice in Western cultures.²⁶ It gained statutory recognition in the United States during the same period as traditional adoption and has been used to create legally recognized parent–child relationships between consenting adults.²⁷ Perhaps surprisingly, the adoption of adults was “not uncommon” in the

18. Hoyt & Sherman, *supra* note 16, at 161.

19. *Id.* Adoption had no legal status in England until 1926. Daniel Grey, *Review of a Child for Keeps: The History of Adoption in England, 1918–45*, REVIEWS IN HISTORY (Sept. 2009), <http://www.history.ac.uk/reviews/review/806>. Until that year, child adoption in England “was an informal and generally secretive procedure which gave the adoptive parents no rights whatsoever.” *Id.*

20. Utter, Jr., *supra* note 14, at 256; *see also* S. Megan Testerman, Note, *A World Wide Web of Unwanted Children: The Practice, the Problem, and the Solution to Private Re-Homing*, 67 FLA. L. REV. 2103, 2108–09 (2015) (discussing the historical development of adoption law in the United States).

21. Walter Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566, 568 (1969). There has been much debate on whether adoption should be considered a fundamental right. For an interesting examination of this debate, based in part on a case arising from a constitutional challenge to the state of Florida’s then-existing prohibition on gay adults adopting children, *see* Jenni Hetzel-Gaynor, Note, *What About the Children? The Fight for Homosexual Adoption After Lawrence and Lofton*, 51 WAYNE L. REV. 1271 (2005).

22. Fowler, *supra* note 2, at 672 n.20.

23. *See* Hoyt & Sherman, *supra* note 16, at 162–65.

24. Utter, Jr., *supra* note 14, at 256 (citing Brynne E. McCabe, Note, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L.J. 300, 302 (2009)). Similarly, there is much variation across the states as to the inheritance rights of the adopted child. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 94–95 (9th ed. 2013).

25. Fowler, *supra* note 2, at 667.

26. *Id.* The Romans extended the concept of adoption to adults by means of “adrogation,” which applied only to the adoption of independent, *sui juris* adult males. *Id.* at 668 n.6.

27. Vermont became the first state to expressly authorize adult adoption in 1853, two years after Massachusetts passed the first adoption statute enacted by any American State. *See* Hoyt & Sherman, *supra* note 16, at 161, 166. *But see* Huard, *supra* note 14, at 748 (stating that the earliest adoption statute was in Mississippi in 1846).

United States in the middle of the nineteenth century.²⁸ The modern practice of adult adoption is similarly not an uncommon phenomenon.²⁹ Adult adoptions have long “served as a legal mechanism for achieving economic, political, and social objectives rather than the stereotype parent-child relationship.”³⁰ Today, all states permit adults to adopt other adults,³¹ and most intestacy statutes draw no distinction between the adoption of a minor and the adoption of an adult.³²

Similar to minor adoption, adult adoption may be implemented to formalize a family unit.³³ This is often the case in situations where foster and stepchildren who were raised by the adoptive parent and developed a parent-child bond have not yet legally formalized that relationship by the time the child reaches the age of eighteen.³⁴ After reaching the age of majority, a foster or stepchild may also desire to carry on the family name or give recognition to his foster or stepparent.³⁵ In addition, adult adoption is used to circumvent various laws and regulations or to ensure the extension of benefits to the adoptee.³⁶

Primarily, however, adult adoption between heterosexual individuals is prompted by inheritance objectives.³⁷ In this way, the motivations behind adult adoption by heterosexual individuals in the modern era are

28. Hoyt & Sherman, *supra* note 16, at 166.

29. Sarah Ratliff, *Adult Adoption: Intestate Succession and Class Gifts Under the Uniform Probate Code*, 105 NW. U. L. REV. 1777, 1778 n.3 (2011) (“Unfortunately no data are available regarding the number of adult adoption petitions in each state. However, adult adoption has been acknowledged as enjoying ‘widespread recognition within our legal system,’ and ‘not an uncommon occurrence.’”); Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 749 (1984). One estimate from the 1980s by “knowledgeable practitioners” put the number of successful adult adoption petitions in California at around two to three hundred per year. See Fowler, *supra* note 2, at 702.

30. *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200 (App. Div. 1982).

31. See, e.g., CAL. FAM. CODE § 9300 (West 2016) (“An adult may be adopted by another adult, including a stepparent, as provided in this part.”); MINN. STAT. § 259.241 (2016) (“Any adult person may be adopted, regardless of the adult person’s residence.”); see also Mandi Rae Urban, *Part Nine: Foster Care and Adoption: The History of Adult Adoption in California*, 11 J. CONTEMP. LEGAL ISSUES 612, 612 n.3 (1999) (describing certain limitations imposed on adult adoptions in various states).

32. DUKEMINIER & SITKOFF, *supra* note 24, at 96.

33. Fowler, *supra* note 2, at 686–88.

34. See *St. Louis Union Tr. Co. v. Hill*, 76 S.W.2d 685, 686, 698 (Mo. 1934) (upholding the adoption of Hill’s two stepchildren, ages twenty-two and twenty-eight).

35. See *In re Adoption of Miller*, 227 So. 2d 73, 74 (Fla. Dist. Ct. App. 1969) (noting that the adoptee wanted to be legally recognized as the adoptors’ son because he felt the adoptors were his only real family, he had used their surname since high school, and they felt a mutual affection as members of a family unit).

36. Ratliff, *supra* note 29, at 1780.

37. Fowler, *supra* note 2, at 679 (“Courts have acknowledged that the primary purpose of adult adoption is to make the adoptee the adoptor’s heir.”); Ratliff, *supra* note 29, at 1780.

similar to those behind child adoption in past centuries.³⁸ And, as with early cases involving the inheritance rights of adopted children and the “stranger-to-the-adoption” rule,³⁹ courts have struggled with the issue of whether an adopted adult should be the heir to a class gift by someone other than the adopting parent.⁴⁰ The practice often makes headlines when the ultra-wealthy use adult adoption as a tool to divert assets to a romantic partner who would not otherwise be entitled to them.⁴¹

B. Advantages of Adult Adoption as an Alternative to Marriage for Same-Sex Couples

Same-sex couples faced an “uphill battle” in estate planning in the pre-*Obergefell* era.⁴² Many same-sex couples resorted to contract-based

38. See *supra* note 23 and accompanying text.

39. In older cases, courts held that terms like “children,” “issue,” or “heirs” connoted a blood relationship, and concluded that an adopted child was not entitled to share in a gift in a will or trust to the “heirs” of the adoptive parent. See *DUKEMINIER & SITKOFF, supra* note 24, at 97–98. These cases gave rise to the “stranger-to-the-adoption” rule, which meant that the adopted child was presumptively barred if the donor was not the adoptive parent. *Id.* at 98. This presumption could be overcome by evidence that the donor intended to include persons adopted by others. *Id.* As adoption became more common and socially acceptable, courts carved exceptions to the stranger-to-the-adoption rule, and in most states today, an adopted child is presumptively included as an heir to his or her adoptive parent. *Id.*

40. Compare *In re Trust Created by Nixon*, 763 N.W.2d 404, 410–11 (Neb. 2009) (holding that an adult adoptee is included in a class gift made by someone other than the adoptive parent), with *Otto v. Gore*, 45 A.3d 120, 136–37 (Del. 2012) (holding opposite). The use of an adoption to create a child to come within a class gift is in effect using adoption as a power of appointment. See Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg Into a Round Hole*, 43 *CREIGHTON L. REV.* 815, 842–43 (2010). A power of appointment enables the holder of the power to designate who will take the property subject to the power. *DUKEMINIER & SITKOFF, supra* note 24, at 101.

41. For example, millionaire John Goodman adopted his girlfriend in order to shield assets from a civil suit filed by the parents of a man he killed while driving drunk. See Terry L. Turnipseed, *A Florida Millionaire Adopted His 42-Year-Old Girlfriend. Isn't That Incest?*, *SLATE* (Feb. 7, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/02/should_a_florida_millionaire_be_prosecuted_for_incest_because_he_adopted_his_girlfriend_.html. While not the primary motivation for one homosexual couple, the issue of a same-sex partner adopting someone into an inheritance has, in at least one instance, sparked litigation. See Pam Belluck & Allison Leigh Cowan, *Partner Adopted by an Heiress Stakes Her Claim*, *N.Y. TIMES* (Mar. 19, 2007), <http://www.nytimes.com/2007/03/19/us/19adopt.html>. In that case, an heiress to the IBM fortune adopted her lesbian partner, thus qualifying her as an heir to the to her grandfather's estate. *Id.* The couple separated less than a year after the adoption, but the partner legally remained the heiress's adopted child. *Id.* Over a decade later, the partner resurfaced to stake her claim to the inheritance as the granddaughter of the IBM founder. *Id.* The case led to a protracted court fight that ended in a settlement that was never disclosed. See Turnipseed, *supra*; see also *infra* notes 109–16 and accompanying text.

42. Madeleine N. Foltz, Note, *Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-At-Law Status for Domestic Partners*, 40 *U. BALT. L. REV.* 495, 541 (2010–2011). For an

methods of achieving the financial-planning advantages of marriage, including wills, insurance policies, trusts, healthcare proxies, partnership agreements, and durable powers of attorney.⁴³ However, “none of these contract-based methods achieved the most meaningful outcome of marriage: the creation of a bona fide family relationship.”⁴⁴

While these contract-based legal strategies benefited same-sex couples in ways that “parallel[ed] the legal benefits of marriage, none offer[ed] the benefit of a legal family bond and none carry[d] inalienable inheritance and estate rights.”⁴⁵ Furthermore, these contract-based techniques were subject to challenges by blood relatives that often prevailed because of anti-gay biases.⁴⁶ For these reasons, homosexual couples turned to adult adoption with increasing frequency.⁴⁷

Adult adoption provided three significant benefits that were otherwise unattainable to same-sex couples.⁴⁸ First, adult adoption was the only mechanism that created a “bona fide” and legally recognizable family relationship in states where gay marriage was illegal.⁴⁹ Allowing same-sex couples to formally and legally express their commitment to one another through the creation of a “family unit” was one of the “strongest motives” for adult adoption.⁵⁰ This focus on the creation of a formal legal expression of the close emotional bond shared by same-sex partners contrasts with the primary motive of heterosexual couples that adopted in order to channel assets to individuals otherwise excluded from an inheritance.⁵¹

Second, adult adoption created inheritance rights in the adoptee.⁵² In contrast to instances of heterosexual individuals that adopted another adult in order to bring that person into a class of beneficiaries,⁵³ the

interesting analysis of the history of adult adoption and guidance to courts in this area, see Wendel, *supra* note 40, at 836–54.

43. Snodgrass, *supra* note 10, at 75–76.

44. *Id.* at 76.

45. *Id.* at 79.

46. Foltz, *supra* note 42, at 498 n.23; Snodgrass, *supra* note 10, at 76.

47. Foltz, *supra* note 42, at 512. In some states, homosexual individuals were prohibited from adopting any child or adult, thus rendering adult adoption generally inapplicable to same-sex couples. See Elizabeth G. Lutz, *It’s Me or Your Family: How Florida and the Florida Probate Code Force Same-Sex Couples to Make an Impossible Choice in Estate Planning*, 37 NOVA L. REV. 181, 182 (2012). Florida’s statutory prohibition of adoption by homosexual persons was ruled unconstitutional in 2012. See Fla. Dep’t of Children & Families v. *In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010).

48. Foltz, *supra* note 42, at 512.

49. *Id.*

50. Snodgrass, *supra* note 10, at 80–81.

51. See *supra* note 41 and accompanying text.

52. Snodgrass, *supra* note 10, at 81.

53. There are, of course, cases in which heterosexual individuals adopted adults for reasons not underpinned by such unscrupulous intentions. These include the formalization of a familial

purpose of homosexual adult adoption in this context was to ensure that the adoptee was entitled to take under the will or trust of the adoptive parent. This mitigated the “harsh consequences” of intestacy⁵⁴ law faced by same-sex partners.⁵⁵ The inheritance rights bestowed upon same-sex partners were automatic and fully vested upon adoption, and every state honored the rights of an adopted child to inherit the estate of an unmarried intestate decedent over the rights of the decedent’s “nonimmediate” blood relatives.⁵⁶ Same-sex couples turned to adult adoption because it was “the only mechanism that includ[ed] the surviving partner in the intestate succession distribution scheme.”⁵⁷

Third, adult adoption prevented the testator’s blood relatives from contesting the testator’s will.⁵⁸ The adoption of one partner nullified the heir status of a testator’s collateral blood relatives so that they no longer possessed standing to challenge the will or other testamentary instrument as heirs.⁵⁹ Adult adoption was thus a mechanism to protect against will challenges by collateral relatives and to ensure that the partners’ testamentary wishes were properly fulfilled.⁶⁰

In addition to these three primary benefits, adult adoption conferred several other benefits to same-sex couples, including various

relationship between parents and adult step-children. *See* St. Louis Union Tr. Co. v. Hill, 76 S.W.2d 685, 686, 698 (Mo. 1934) (upholding the adoption of Hill’s two stepchildren, ages twenty-two and twenty-eight).

54. A person dies “intestate” when they die without a valid will. *Intestacy*, BLACK’S LAW DICTIONARY (10th ed. 2014). Intestacy statutes provide for the disposition of an intestate decedent’s probate property. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000). Broadly speaking, intestacy statutes are intended to give the decedent’s property to the decedent’s family. *Id.* at 3. Most states do not provide for an intestate share to go to an unmarried same-sex partner. *Id.* at 4–6.

55. Foltz, *supra* note 42, at 512.

56. Snodgrass, *supra* note 10, at 81.

57. Foltz, *supra* note 42, at 512. For an in-depth discussion of the adult adoption in the context of intestacy under the Uniform Probate Code, see generally Ratliff, *supra* note 29.

58. Fowler, *supra* note 2, at 680; Snodgrass, *supra* note 10, at 81.

59. Foltz, *supra* note 42, at 513. The only persons who have standing to challenge the validity of a will are those who would take if the will were denied probate. DUKEMINIER & SITKOFF, *supra* note 24, at 96. Adult adoption of a same-sex partner makes that partner the only lineal decedent, and therefore the only taker through intestacy, severing the rights of all other biological relatives. *See* Ratliff, *supra* note 29, at 1781. Accordingly, to gain standing to challenge the will, the decedent’s collateral relatives must first overturn any adoption by the decedent. DUKEMINIER & SITKOFF, *supra* note 24, at 96. These challenges to adult adoptions between same-sex partners were often grounded in the doctrine of “undue influence.” *See* SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 76 (2011).

60. Foltz, *supra* note 42, at 513; *see In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 528 (Fam. Ct. 1981) (“[T]he adoptee testified that his family did not approve of the relationship, and he apparently feared that attempts might be made to set aside property arrangements between the parties if they were not legally adoptive father and adopted son.”).

employment-related benefits, tax benefits, and visitation privileges.⁶¹ For example, adult adoption provided a method for gay and lesbian partners to be recognized as one another's nearest living relative.⁶² This, in turn, granted each partner legal recognition in institutions such as hospitals where visitation privileges or consent authorizations are restricted to an individual's immediate family or legal relatives.⁶³

C. Example Cases of Adult Adoption of a Gay or Lesbian Partner

A number of cases have dealt with the adult adoption of a same-sex partner.⁶⁴ These cases provide an interesting view into the decision-making process of judges faced with this unconventional use of state adoption statutes to circumvent the then-existing prohibition against gay marriage. Furthermore, the parties' testimony in each case is informative about the goals of the partners in choosing to use adult adoption. In addition, the majority's reasoning in denying the adoption petition in *In re Adoption of Robert Paul P.*⁶⁵ and the dissent in *In re Adoption of Adult Anonymous II*⁶⁶ may also be useful in illustrating the hurdles faced by same-sex couples who seek to have their adoptions vacated in the post-*Obergefell* era.

61. Foltz, *supra* note 42, at 513; Fowler, *supra* note 2, at 681–86; see Turnipseed *supra* note 11, at 105 (noting advantages of adult adoption such as a lowered inheritance tax rate in some states when property flows to a close relative rather than to someone unrelated).

62. Fowler, *supra* note 2, at 681.

63. *Id.*

64. While the majority of petitions for adult adoption of a gay or lesbian partner were filed in California, there are no reported opinions from California courts dealing with the issue because lower courts in the state routinely approved such adoption petitions. See Fowler, *supra* note 2, at 702; Snodgrass, *supra* note 10, at 85; Urban, *supra* note 31, at 616. Estimates of the number of gay and lesbian adult adoptions performed in California in the early part of the 1980s ranged between sixty and ninety per year. Fowler, *supra* note 2, at 702. There are cases from other jurisdictions dealing with adult adoption between same-sex partners. See, e.g., *In re Adoption of Patricia S.*, 976 A.2d 966 (Me. 2009); *In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993); *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984); *In re Adult Anonymous II*, 452 N.Y.S.2d 198 (1982); *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527 (Fam. Ct. 1981). In one other New York case involving a petition regarding adult adoption, the court initially suspected that the parties were a lesbian couple. See *In re Adoption of Elizabeth P.S.*, 509 N.Y.S.2d 746, 746–47 (Fam. Ct. 1986). The adoptor was a forty-nine-year-old woman who sought to adopt a forty-eight-year-old woman. *Id.* at 746. The pair had been residing with each other for more than twenty years. *Id.* The court, bound by the state high court's ruling in *In re Adoption of Robert Paul P.*, was "troubled . . . upon [its] initial review of the papers submitted" in the case. *Id.* at 747. The court made inquiries of a "sexual nature" to ensure that the "relationship [was] totally outside the ambit of abuse" addressed in *Robert Paul P.* and found the relationship was "totally devoid of any sexual overtones." *Id.* at 748. The petition for adoption was granted. *Id.*

65. 471 N.E.2d at 424

66. 452 N.Y.S.2d at 198.

1. *In re Adoption of Adult Anonymous*

In *In re Adoption of Adult Anonymous*,⁶⁷ the court was faced with the decision of whether to grant the petition of an unmarried twenty-two-year-old male to adopt a twenty-six-year-old male with whom he shared a home.⁶⁸ The state probation department's routine adoption investigation revealed that the parties had a homosexual relationship, and the pair admitted to this at a hearing.⁶⁹ The couple expressed their desire to establish "a legally cognizable relationship in order to facilitate inheritance, the handling of their insurance policies and pension plans, and the acquisition of suitable housing" through the adoption.⁷⁰ The parties insisted that they were not attempting to create a "pseudo-marriage," but rather thought that adult adoption was preferable to other contract-based methods of effectuating a legal relationship because it established a "more permanent legal bond."⁷¹ The adoptor testified that he elected to be the adoptor instead of the adoptee because his mother had died intestate, her estate was not yet settled, and he wanted to maintain his position as heir.⁷²

The court was concerned that a decision to grant the petition would allow the adoption statute "to be used as a shield for the protection of homosexuality, or even to give the appearance of approving or encouraging such practice, much less express approval."⁷³ The court first discussed the language of the adoption statute and found that the normal standard of the "best interests" of the child used in minor adoptions was inapplicable to adult adoption.⁷⁴ The court then reasoned that because the state incest statute was inapplicable due to the lack of a blood relationship between the parties, the state supreme court had recently found unconstitutional a law prohibiting sodomy between consenting adults, and because a consensual homosexual relationship was no longer a crime, the adoption could not be denied on the basis that it encouraged a criminal act or was against public morality.⁷⁵ The petition for adoption was approved.⁷⁶

67. 435 N.Y.S.2d at 527 (Fam. Ct. 1981).

68. *Id.* at 527.

69. *Id.*

70. *Id.* at 527–28.

71. *Id.* at 528.

72. *Id.*

73. *Id.* at 527.

74. *Id.* at 530.

75. *Id.* at 530–31.

76. *Id.* at 531.

2. *In re Adoption of Adult Anonymous II*

In *In re Adoption of Adult Anonymous II*,⁷⁷ the court considered an appeal from an order denying a petition by a thirty-two-year-old male to adopt his forty-three-year-old male partner.⁷⁸ The parties readily admitted their close emotional relationship and their desire to express “in a tangible and open fashion a bonding and emotional commitment which they wish[ed] to formalize” through adult adoption.⁷⁹ Additionally, the couple expressed concern that they would be evicted from their apartment due to a clause in the adoptor’s lease stating that only members of his immediate family could occupy the apartment.⁸⁰ The younger partner chose to be the adoptor because the older partner’s parents had died, and the younger partner wanted to preserve his inheritance and succession rights from and through his natural parents.⁸¹ The lower court had denied the petition on the ground that it violated the legislative intent behind the state’s adult adoption statute, which required an adoption to result in a parent–child relationship.⁸² The appellate court, citing *In re Adoption of Adult Anonymous*, reversed the family court’s denial of the petition.⁸³

The dissenting judge opined “the use of adoption to accomplish what [was] sought here [was] a subversion of the adoption process.”⁸⁴ The dissent reasoned that obtaining a legal status for a homosexual relationship was “nothing more than a cynical distortion of the function of adoption” and clearly violated the legislative intent behind the adult adoption statute.⁸⁵ The dissent focused on the fact that the couple did not make “even a pretense” of any intention to establish a parent–child relationship.⁸⁶ The dissent further noted that the adult adoption statute was enacted in 1873, more than a century before the state’s highest court struck down proscriptions against consensual sodomy, and that it “strain[ed] credulity to believe that a legislature which continued the proscription against homosexual activity could, at the same time, have envisioned the adoption process as a method by which a homosexual relationship could be formalized in the eyes of the law.”⁸⁷

77. 452 N.Y.S.2d 198 (App. Div. 1982).

78. *Id.* at 199.

79. *Id.* at 200.

80. *Id.*

81. *Id.* at 200, 202.

82. *In re Adoption of Adult Anonymous II*, 443 N.Y.S.2d 1008, 1009–10 (Fam. Ct. 1981), *rev’d*, 452 N.Y.S.2d 198 (App. Div. 1982).

83. 452 N.Y.S.2d at 201.

84. *Id.* (Sullivan, J., dissenting).

85. *Id.* at 203.

86. *Id.* at 202.

87. *Id.* at 203.

3. *In re Adoption of Robert Paul P.*

Only two years after New York's intermediate appellate court granted the adoption petition in *In re Adult Anonymous II*, the petition of a fifty-seven-year-old man to adopt his fifty-year-old male partner was denied by the New York Family Court, the Appellate Division, and the Court of Appeals.⁸⁸ The parties shared a homosexual relationship and had resided together continuously for more than twenty-five years.⁸⁹ In an affidavit submitted to the court, the couple stated that they considered themselves to be family, they feared the possibility of eviction from their shared apartment, they were concerned about the disposition of their estates upon death, they were concerned about their ability and right under the law to take care of each other should an unexpected event occur, and that they wished to formalize their emotional ties to one another.⁹⁰

The family court denied the petition because (1) alternative contract-based methods could satisfy the parties' motives for the adoption, (2) their intent was to evade other laws, and (3) the parties had failed to show that they had a parent-child relationship to legitimize and formalize.⁹¹ The denial of the adoption petition was affirmed on appeal by a unanimous panel of the intermediate appellate court.⁹²

The New York Court of Appeals, citing to the dissenting opinion in *In re Adult Anonymous II*, also affirmed the decision of the family court.⁹³ The court reasoned that the adoption laws of New York reflected the general acceptance of the ancient Roman principle that adoption imitates nature, which the court concluded precluded the use of adoption as "a quasi-matrimonial vehicle to provide non-married partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual."⁹⁴ The court found the idea of sexual intimacy "utterly repugnant" to the relationship between child and parent in American society and "wholly inconsistent" with the underlying public policy of providing a parent-child relationship for the welfare of the child.⁹⁵

88. *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 424–25 (N.Y. 1984).

89. *Id.* at 425.

90. *Id.* at 425 n.1.

91. *In re Adoption of Robert P.P.*, 458 N.Y.S.2d 178, 179–80 (Fam. Ct. 1983), *aff'd mem. sub nom.*, *In re Pavlik*, 469 N.Y.S.2d 833 (App. Div. 1983).

92. *In re Pavlik*, 469 N.Y.S.2d at 833, *aff'd sub nom.*, *In re Adoption of Robert Paul P.*, 471 N.E.2d at 424.

93. *In re Adoption of Robert Paul P.*, 471 N.E.2d at 427.

94. *Id.* at 425.

95. *Id.*

4. *In re Adoption of Swanson*

As with the New York cases discussed above, the Delaware Supreme Court, in *In re Adoption of Swanson*,⁹⁶ dealt with an appeal from a family court decision denying the adoption petition brought by one homosexual adult male to adopt his adult partner.⁹⁷ The petitioner was a sixty-six-year-old male who sought to adopt his fifty-one-year-old male partner who had been his romantic companion for seventeen years.⁹⁸ The adoption had two purposes: to formalize the parties' close emotional relationship and to facilitate their estate planning.⁹⁹ The couple sought to prevent collateral claims on their respective estates from remote family members and to obtain the reduced inheritance tax rate which natural and adopted children enjoyed under Delaware law.¹⁰⁰ The family court denied the petition on the basis that there was no preexisting parent-child relationship between the parties despite the fact that the state's adoption statute contained no such requirement.¹⁰¹

On appeal, the court first examined the language of Delaware's adoption statute and found that there was no reference to any condition of a preexisting parent-child relationship.¹⁰² The court explicitly disapproved the *Robert Paul P.* court's imposition of requirements on the New York adoption statute in its decision to deny that adoption.¹⁰³ The court also recognized that most jurisdictions routinely allowed adult adoption for the purpose of creating and securing inheritance rights.¹⁰⁴

Finally, the court found that the adoption did not violate public policy.¹⁰⁵ The court reasoned that "[a]dult adoptions intended to foster a sexual relationship would be against public policy as violative of [Delaware's] incest statute . . . which defines the crime of incest to include sexual intercourse between parent and 'without regard to . . . relationships by adoption.'"¹⁰⁶ However, the court held that the adoption was primarily intended to secure inheritance rights and was thus a "proper exercise of the authority granted by the statute."¹⁰⁷ The court reversed the order of the family court and granted the adoption.¹⁰⁸

96. 623 A.2d 1095 (Del. 1993).

97. *Id.* at 1095-96.

98. *Id.* at 1096.

99. *Id.*

100. *Id.*

101. *Id.* at 1095.

102. *Id.* at 1095-96.

103. *Id.* at 1098-99.

104. *Id.* at 1097-98.

105. *Id.* at 1099.

106. *Id.* (quoting DEL. CODE. ANN. tit. 11, § 766(b) (West 2016)).

107. *Id.*

108. *Id.*

5. *In re Adoption of Patricia S.*

The important benefit of protecting inheritance rights from challenges by collateral blood relatives through adult adoption is well illustrated in *In re Adoption of Patricia S.*,¹⁰⁹ a high-profile case involving an adult adoption between lesbian partners and a claim to a share of a family fortune built by way of IBM's success.¹¹⁰ The adoptor, an heiress to the IBM fortune, and the adoptee had been in a romantic relationship for seventeen years before the adoptor successfully petitioned for adoption.¹¹¹ The romantic relationship ended less than one year after the adoption petition was granted.¹¹² When it later became apparent that the adoptee had retained inheritance rights to the family fortune as a grandchild of the adoptor's mother, collateral heirs to the family fortune brought suit seeking to annul the adoption, arguing that the couple had not fulfilled the residency requirements as set forth in Maine's adoption statute and that the couple obtained the adoption by fraud because the couple did not disclose their relationship to the court.¹¹³ The probate court annulled the adoption and the adoptee appealed.¹¹⁴

The Maine Supreme Court reversed, holding that the challenging heirs did not meet their burden of proof in showing that the couple obtained the adoption by fraud.¹¹⁵ The court also rejected the trustee's claim that the adoption should be annulled based on a public policy prohibiting adoptions involving same-sex couples, reasoning that there are was a "multitude" of valid legal reasons why one adult would adopt another adult, including the protection of inheritance rights.¹¹⁶

II. THE DILEMMA FACED BY ADOPTIVE SAME-SEX PARTNERS IN THE POST-*OBERGEFELL* ERA

While on its face adult adoption may have seemed like a good option for same-sex couples to secure their assets, the practice did not come without serious adverse consequences. One significant disadvantage was the "potential psychological impact of adoption on the dynamics of [an adult emotional and sexual] relationship."¹¹⁷ Additionally, individuals outside the relationship, such as friends, relatives, or coworkers, may have been "unable to tolerate the perversion of social roles that results when life partners become parent and child, creating further

109. 976 A.2d 966 (Me. 2009).

110. *Id.* at 967–68.

111. *Id.*

112. *Id.* at 968.

113. *Id.* at 967–68.

114. *Id.* at 968.

115. *Id.* at 972.

116. *Id.* at 972–73.

117. Snodgrass, *supra* note 10, at 84.

psychological stress for the couple.”¹¹⁸ Furthermore, establishing a parent–child relationship among a romantically involved couple created a “perverse social relationship” that “require[d] a cynical view of the legal system to achieve an outcome that d[id] not reflect the true nature of the relationship.”¹¹⁹

Another negative consequence for same-sex couples that utilized adult adoption was that, in most states, the legal relationship with the adoptee’s natural parents terminated upon adoption by the adoptee’s partner.¹²⁰ Thus, the adoptee’s inheritance rights were destroyed, and the adoptee could only inherit from his or her natural parents by devise.¹²¹ Most couples based their decision as to who would be the adoptor based on this consideration.¹²² For example, if one partner’s parents were dead and the other partner’s parents were living, the partner with the living parents would choose to be the adoptor in order to maintain inheritance rights.¹²³ If both partners’ parents were living, generally the one who stood to inherit more would be the adoptor.¹²⁴

Two crucial disadvantages of adult adoption that are of particular concern to same-sex couples are the irrevocability of adoption and the potential exposure to prosecution for incest.¹²⁵ Adult adoption, unlike marriage, is irreversible, notwithstanding the end of the underlying romantic relationship.¹²⁶ Courts honor adoption annulments only in extreme circumstances.¹²⁷ Generally, unless a third party later adopts the

118. *Id.*

119. Foltz, *supra* note 42, at 516.

120. 2 AM. JUR. 2D *Adoption* § 163 (2017); *see, e.g.*, MD. CODE ANN., EST. & TRUSTS § 1-207(b) (West 2017) (“A child who has been adopted more than once shall be considered to be a child of the parent or parents who have adopted him most recently and shall cease to be considered a child of his previous parents.”).

121. Foltz, *supra* note 42, at 515–16.

122. *Id.* at 516.

123. Snodgrass, *supra* note 10, at 84.

124. *Id.*

125. *See* Green, *supra* note 11.

126. Heeb, *supra* note 10, at 358; Snodgrass, *supra* note 10, at 83; Zimmer, *supra* note 10, at 692.

127. The type of egregious misconduct that must be present in order for an adoption to be vacated was well illustrated in a recent case from the Supreme Court of Mississippi. *See Doe v. Smith*, 200 So. 3d 1028, 1030 (Miss. 2016). The case involved the mother of a newborn who plotted to give the child away without the biological father’s consent. *Id.* at 1030–31. The mother falsely claimed, in both her sworn consent to the adoption and during testimony at the adoption proceedings, that she did not know the identity of the child’s natural father. *Id.* at 1032. The lower court granted the adoption to a third party based on these misrepresentations. *Id.* at 1031. A few months later, the child’s natural father grew suspicious and obtained a court-ordered paternity test that showed him to be child’s father. *Id.* The natural father sought, and the lower court granted, an annulment of the adoption based upon the mother’s fraud. *Id.* at 1032. The adoptive parents appealed, and the state Supreme Court affirmed the annulment of the adoption. *Id.* at 1035.

partner, or unless fraud or undue influence is present, adoption cannot be annulled, and the adoption is permanent.¹²⁸

Absent egregious misconduct, courts are often reluctant to rescind an adoption.¹²⁹ Such courts cite policy reasons that adoption should create a “for better, for worse situation” between the adopted child and adoptive parent.¹³⁰ Courts expect adoptive parents to have considered the “enormous legal, moral, social and financial obligations” they assume in adopting a child.¹³¹ For these reasons, courts generally find public policy to disfavor the revocation of an adoption and instead conclude that adoption is intended to be permanent.¹³²

The irrevocability of adult adoption is of particular concern in the post-*Obergefell* era; a couple that utilized adult adoption as a means to secure inheritance rights is prevented from later marrying in states that prohibit marriages between relatives of direct lineal relation.¹³³ Furthermore, in some states, adopting one’s sexual partner can leave an individual open to incest charges.¹³⁴ Once an adult adoption has taken place, the only legal relationship between the two partners is a parent–child relationship, thus exposing the couple to prosecution.¹³⁵

Same-sex couples can hardly be blamed for taking these risks in utilizing adult adoption. In the years before the *Obergefell* decision, the notion that same-sex couples would be determined to have a constitutional right to marry, let alone that same-sex marriage would be

128. See, e.g., *In re Adoption of Moore*, No. CA08000009-00, 2009 WL 7310724, at *2 (Va. Cir. Ct. 2009) (quoting *Green v. Fitzpatrick*, 295 S.W. 896 (Ky. Ct. App. 1927) (“Where the adopting proceeding was only for the purpose of making the one adopted an heir and that such person was an adult at the time, his or her fraud or undue influence upon the person making the adoption can be relied upon by the heir of the adopter in a proceeding . . . to annul and set aside the adopting decree, just as the latter could if he were living and the nullification proceeding has been instituted by him.”); *In re Adoption of Nesbitt*, 21 P.3d 168, 170–71 (Or. Ct. App. 2001) (vacating adoption due to fraud by adoption agency).

129. See, e.g., *Allen v. Allen*, 330 P.2d 151, 154 (Or. 1958) (“Where one voluntarily assumes the relationship of parent to a child by formal adoption, it cannot be lightly cast aside.”); *Buttrey v. West*, 102 So. 456, 459 (Ala. 1924) (“Courts should not annul the [adoption] for slight cause on either side.”).

130. *In re Adoption of a Minor*, 214 N.E.2d 281, 282 (Mass. 1966) (“Adoption should create a for better, for worse situation.”).

131. *Michael J. v. County of L.A., Dep’t of Adoptions*, 247 Cal. Rptr. 504, 513 (Ct. App. 1988) (“The adoption of a child is an act . . . where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations.”).

132. See, e.g., *In re Adoption of T.B.*, 622 N.E.2d 921, 924 (Ind. 1993) (“[P]ublic policy disfavors a revocation of an adoption because an adoption is intended to bring a parent and child together in a permanent relationship.”).

133. See, e.g., ARK. CODE ANN. § 9-11-106 (2016) (“All marriages between parents and children . . . are declared to be incestuous and absolutely void.”).

134. See Turnipseed, *supra* note 11, at 121 (listing states that include the adopted parent–child relationship within the statutory definition of incest).

135. Snodgrass, *supra* note 10, at 85.

legalized nationwide, was a “remote proposition.”¹³⁶ In 1972, the Supreme Court dismissed an appeal of a decision by the Supreme Court of Minnesota upholding that state’s statute prohibiting same-sex marriage as constitutional in *Baker v. Nelson*.¹³⁷ Relying on this decision, Federal Appellate Courts, as recently as 2014, regularly upheld state and federal prohibitions of same-sex marriage.¹³⁸ Given this discouraging legal climate, many same-sex couples did not believe that they would receive equal marriage rights in their lifetime.¹³⁹

In the face of this uncertainty, same-sex couples were “forced to choose either to endure the significant risk that their testamentary desires upon death [would] not be honored and their life-long partner [would] be left with nothing, or to somewhat guarantee inheritance rights by creating an awkward, perverse, and irreversible parent-child relationship through adult adoption of the partner.”¹⁴⁰ The Supreme Court’s ruling that gay and lesbian couples have a constitutionally protected right to marry has left gay and lesbian partners who chose to adopt prior to the Court’s decision in a difficult position.¹⁴¹ These couples must now rely on judges to vacate these adoptions before they can marry.¹⁴²

A. Efforts by Same-Sex Couples to Vacate Adult Adoptions Prior to Marriage

Anecdotal evidence indicates that courts in the post-*Obergefell* era have been split in deciding whether to allow same-sex couples to have their adoptions vacated in order to allow them to marry.¹⁴³ Within one

136. *Id.* at 94.

137. *Baker v. Nelson*, 409 U.S. 810, 810 (1972), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

138. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *rev’d*, *Obergefell*, 135 S. Ct. at 2584; *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006), *abrogated by* *Obergefell*, 135 S. Ct. at 2584; *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982), *abrogated by* *Obergefell*, 135 S. Ct. at 2584.

139. Evan Perez & Ariane de Vogue, *Couple Seeks Right to Marry. The Hitch? They’re Legally Father and Son*, CNN (Nov. 3, 2015, 3:35 PM), <http://www.cnn.com/2015/11/03/politics/same-sex-marriage-adoption-father-son-pennsylvania/> (quoting a gay couple who utilized adult adoption in 2012 as explaining that “[w]e never thought we’d see the day” that same-sex marriage would be legal in Pennsylvania” and that “adoption ‘gave us the most legitimate thing available to us’ at the time”); Letter from Senator Bob Casey to U.S. Attorney General Loretta Lynch (Nov. 2, 2015), <http://www.washingtonblade.com/content/files/2015/11/151102-DOJ-Gay-Adoption-Letter.pdf>.

140. *See* Foltz, *supra* note 42, at 539.

141. Green, *supra* note 11.

142. *See, e.g.*, ARK. CODE ANN. § 9-11-106 (2016) (“All marriages between parents and children . . . are declared to be incestuous and absolutely void.”); MISS. CODE ANN. § 93-1-1 (2016) (prohibiting marriage between a parent and their adopted child); Green, *supra* note 11 (“For the time being, a lot rests in the hands of judges, who have the power to vacate adoptions.”).

143. *See* Green, *supra* note 11; Perez & de Vogue, *supra* note 139.

month of the *Obergefell* decision and after fifteen years of being in a legal parent–child relationship, one gay couple had successfully vacated their adoption and married.¹⁴⁴ Another same-sex couple brought thirty friends and neighbors to the adoption vacation hearing in order to impress upon the judge the unique circumstances involved.¹⁴⁵ One Pennsylvania judge ruled against a gay couple that sought to annul their adoption in order to marry.¹⁴⁶ The court was “sensitive” to the couple’s situation but declined to annul the adoption without “direction from [Pennsylvania’s] appellate courts” in handling cases involving such circumstances.¹⁴⁷

It is important to note that these anecdotal cases come from Pennsylvania.¹⁴⁸ Pennsylvania legalized same-sex marriage in May 2014, more than a year before the *Obergefell* decision.¹⁴⁹ While in most of the country there have not been problems implementing the Court’s decision, there have been “pockets of resistance.”¹⁵⁰ Some probate judges, other public officials, and judges in jurisdictions where same-sex marriage was prohibited up until the *Obergefell* have been resistant to issuing marriage licenses.¹⁵¹ Judges in these jurisdictions may be less “sensitive” to the difficult situation of adoptive same-sex partners than even the Pennsylvania judge who declined to annul the adoption absent guidance from a higher court.

B. *Exposure to Prosecution for Incest*

The romantic relationship between same-sex couples in an adoptive relationship exposes both partners to the possibility of being prosecuted for incest.¹⁵² By explicit statutory reference, at least twenty-three states and territories include the adoptive parent–child relationship within the definition of incest: Alabama, Arkansas, Colorado, Delaware, Guam, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri,

144. Green, *supra* note 11.

145. *Id.*

146. Perez & de Vogue, *supra* note 139. *But cf. In re Adoption of M.*, 722 A.2d 615, 619, 623 (N.J. Super. Ct. Ch. Div. 1998) (granting petition of adopted father to set aside adoption of adult daughter so that he could marry her, noting that vacation of adoption should occur only in “truly exceptional circumstances” and “ought not to occur absent very unusual facts and circumstances,” where the “paramount consideration remains the best interests of the adoptive child”).

147. Perez & de Vogue, *supra* note 139.

148. Green, *supra* note 11.

149. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (holding that Pennsylvania’s prohibition against same-sex marriage was unconstitutional).

150. Perez & de Vogue, *supra* note 139.

151. *Id.* (“While in most of the country there have not been problems implementing the Supreme Court’s decision in *Obergefell v. Hodges*, there have been some pockets of resistance. Some probate judges and other public officials in the South, citing religious objections, stopped issuing marriage licenses all together to avoid issuing licenses to gay couples.”).

152. *See Turnipseed, supra* note 11, at 121–22.

Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.¹⁵³ Colorado, however, makes a statutory exception to the definition of incest for a person married to an adopted child.¹⁵⁴ Other states, by common law, have included the adoptive parent-child relationship in the definition of incest where the statute does not explicitly do so.¹⁵⁵ While there have been a few successful prosecutions under these statutes, none have involved an adoptive gay or lesbian partner.¹⁵⁶

Given these state incest laws, a partner who adopted his or her romantic partner may also be exposed to federal criminal prosecution

153. ALA. CODE § 13A-13-3(a)(1) (2016); ARK. CODE ANN. § 5-26-202(a)(2) (2016); COLO. REV. STAT. § 18-6-301(1) (2016); DEL. CODE ANN. tit. 11, § 766(b) (2016); 9 GUAM CODE ANN. § 31.15 (2016); 720 ILL. COMP. STAT. 5/11-11 (2016); KY. REV. STAT. ANN. § 530.020(1) (West 2016); LA. CIV. CODE ANN. art. 90 (2016); MINN. STAT. § 517.03 (2016); MISS. CODE ANN. §§ 97-29-5, 93-1-1 (2016); MO. REV. STAT. § 568.020 (2016); MONT. CODE ANN. § 45-5-507(1) (2015); N.H. REV. STAT. ANN. § 639:2(I) (2016); N.C. GEN. STAT. § 14-178(a) (2016); OHIO REV. CODE ANN. § 2907.03(A)(5) (West 2016); OR. REV. STAT. §§ 163.505(2), 163.525(1) (2015); 18 PA. CONS. STAT. § 4302 (2016); S.D. CODIFIED LAWS § 25-1-6 (2016); TENN. CODE ANN. § 39-15-302(a) (2016); TEX. CODE ANN. § 25.02(a)(1) (2015); UTAH CODE ANN. § 76-7-102(b)(ii) (West 2016); W. VA. CODE § 61-8-12(a) (2016); WYO. STAT. ANN. § 6-4-402(a)(i) (2016); *see also* State v. Buck, 757 P.2d 861, 864 (Or. Ct. App. 1988) (“Marrying the natural or adoptive parent of a child creates the relationship that the statutory proscription against incest is intended to protect.”). For a critical analysis of the purported state interests that underlie these incest statutes and the potential conflict with the constitutional right to marry, *see generally* Christine McNiece Metteer, *Some “Incest” Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL’Y 262 (2000).

154. COLO. REV. STAT. § 18-6-301(1) (“For the purpose of this section only, ‘descendant’ includes a child by adoption and a stepchild, but only if the person is not legally married to the child by adoption or the stepchild.”).

155. *See* State v. George B., 785 A.2d 573, 584 (Conn. 2001) (interpreting Connecticut’s incest statute to encompass sexual conduct occurring between persons related by adoption). Dicta in cases from Massachusetts and Georgia strongly indicates that the definition of incest in those states would include relationships by adoption. *See* Edmonson v. State, 464 S.E.2d 839, 842 (Ga. Ct. App. 1995) (quoting GA. CODE ANN. § 19-8-19(a)(2)) (“The effect of this adoption was to create ‘the relationship of parent and child . . . as if the adopted individual were a child of biological issue . . .’ Because adopted individuals ‘enjoy every right and privilege of a biological child,’ they are statutorily protected from incest.”), *overruled on other grounds by* Collins v. State, 495 S.E.2d 59 (Ga. Ct. App. 1997); *see also* Commonwealth v. Rahim, 805 N.E.2d 13, 15 n.2 (Mass. 2004) (“That ‘consanguinity’ is a necessary element of the crime of incest is not inconsistent with the prosecution of incest between a parent and an adopted child. Although the issue is not presented in this case, we note that statutory language in the adoption statute . . . specifically demonstrates the Legislature’s intent that adoptive children be treated as consanguineous for the purpose of the criminal incest prohibition.”).

156. *George B.*, 785 A.2d at 588 (upholding a conviction of sexual assault between a man and the daughter of his adopted daughter); State v. McQuiston, 922 P.2d 519, 527–28 (Mont. 1996) (upholding a conviction of incest between a man and his adopted daughter), *overruled on other grounds by* State v. Herman, 188 P.3d 978 (Mont. 2008).

under the Mann Act.¹⁵⁷ The Mann Act provides that an individual who knowingly transports a person in interstate commerce with the intent to “engage in . . . any sexual activity for which any person can be charged with a criminal offense” can be fined or imprisoned for not more than ten years.¹⁵⁸ Thus, in states where sexual intercourse between individuals related by adoption is a crime, federal prosecutors could utilize the Mann Act to prosecute the parties involved.¹⁵⁹

C. A Legislative Solution

One U.S. Senator has already taken notice of the untenable legal position of same-sex couples that are unable to dissolve an adoption.¹⁶⁰ Senator Bob Casey, after learning that an adoptive gay couple in Pennsylvania was unable to set aside their adoption in order to marry, sent a letter to U.S. Attorney General Loretta Lynch asking the Justice Department to “consider issuing guidance for courts across the country so that gay couples who have previously entered into adoptions can annul them in order to receive marriage licenses.”¹⁶¹ Senator Casey noted the differing state judicial rulings in cases where same-sex couples had sought to annul their adoptions that have occurred in Pennsylvania since the *Obergefell* decision and sought to bring predictability to this area of the law via “guidance” from the Obama Administration.¹⁶²

Importantly, as Senator Casey conceded in his letter, adoption is a state law issue.¹⁶³ Any response from the Justice Department would not be binding on state court judges.¹⁶⁴ It is therefore unclear what impact the

157. See Mann Act, 18 U.S.C. § 2421 (2012); see generally Eric Weiner, *The Long, Colorful History of the Mann Act*, NPR (Mar. 11, 2008, 2:00 PM), <http://www.npr.org/templates/story/story.php?storyId=88104308> (detailing the history of the Mann Act and its use in prosecutions over the last century).

158. 18 U.S.C. § 2421.

159. See *id.* For an interesting analysis of whether the criminalization of sexual relationships between a parent and his or her adopted adult child is unconstitutional after the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), see Turnipseed, *supra* note 11, at 125–32.

160. See Letter from Senator Bob Casey to U.S. Attorney General Loretta Lynch, *supra* note 139.

161. *Id.*

162. *Id.*

163. *Id.*

164. See *U.S. v. Yazell*, 382 U.S. 341, 352 (1966) (“Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.”). *But see* *Lehr v. Robinson*, 463 U.S. 248, 256–62 (1983) (providing an overview of cases where the Court has held that the U.S. Constitution supersedes state law and provides protection for certain formal family relationships).

Justice Department could have in solving this problem.¹⁶⁵ The likely result under Senator Casey's proposed strategy would be a slow resolution of the issue through the state appellate court system.

To avoid a lengthy resolution through the state appellate courts, state legislatures should intervene and enact legislation that requires courts within the respective states to permit gay and lesbian couples who previously entered into adoptions to annul them in order to receive marriage licenses. A legislative mandate would immediately bind the courts of the state and would remove all legal ambiguity facing these same-sex partners. Legislative action to address nonmarital legal statuses utilized by same-sex couples in the pre-*Obergefell* era is not without precedent.¹⁶⁶ States that authorized domestic partnerships or civil unions between same-sex partners in lieu of marriage and that subsequently legalized same-sex marriage in the years before the *Obergefell* decision were faced with the issue of how to deal with these "marriage-like" legal relationships once the rationale for their creation (a prohibition on same-sex marriage) no longer held true.¹⁶⁷ Many of these states' legislatures converted existing domestic partnerships and civil unions into marriage by operation of law.¹⁶⁸

The Connecticut General Assembly established what essentially functioned as an eighteen-month "open enrollment" period in which the parties to a civil union could apply for and be issued a marriage license.¹⁶⁹ After the celebration of the marriage and upon the recording of the proper documents, the civil union was "merged into the marriage by operation of law" as of the date of the marriage indicated in the recorded documents.¹⁷⁰ At the close of this "open enrollment" period, all civil unions that remained in existence, except for those pending the conclusion of a proceeding for dissolution, annulment, or legal separation, were merged into marriage by operation of law.¹⁷¹

Connecticut's "conversion" statute could serve as the model for states that seek to provide adoptive same-sex couples with an easy method to convert their adoptive relationship into a marriage. An "open enrollment"

165. Chris Potter, *Sen. Casey Seeks Justice Department Guidance on Adult Adoptions by Gay Couples*, PITTSBURGH POST-GAZETTE (Nov. 2, 2015), <http://www.post-gazette.com/news/state/2015/11/02/Senator-Casey-seeks-Justice-Dept-guidance-on-adult-adoptions-by-gay-couples/stories/201511010187>.

166. Heidi L. Brady & Robin Fretwell Wilson, *The Precarious Status of Domestic Partnerships for the Elderly in a Post-Obergefell World*, 24 ELDER L.J. 49, 50–51 (2016).

167. *Id.* at 50.

168. CONN. GEN. STAT. §§ 46b-38qq, 46b-38rr (2016); DEL. CODE ANN. tit. 13, § 218 (2016); N.H. REV. STAT. ANN. § 457:46 (2016); R.I. GEN. LAWS § 15-3.1-12 (2016); VT. STAT. ANN. 18, § 5131 (2016).

169. CONN. GEN. STAT. § 46b-38qq(a).

170. *Id.* § 46b-38qq(b).

171. *Id.* § 46b-38rr.

period would be created for same-sex partners who entered into an adoptive relationship to apply for and be issued marriage licenses, and, upon recording of the proper documentation, their adoptive relationship would be merged into the marriage by operation of law. Unlike Connecticut's statute, however, a "conversion" statute for same-sex adult adoptions could not automatically merge all remaining adult adoptions into marriage at the close of the "open enrollment" period. Unlike Connecticut's civil unions, adult adoptions were not exclusively used by same-sex partners in romantic relationships.¹⁷²

The construction of any such legislation could easily eliminate the risk that this "exception" to the general irrevocability of adoption would be abused by clearly indicating that it would only apply where clear evidence existed to show that the adoption was entered into as a pseudo-marriage and not a genuine parent-child relationship. One method of screening out potential misuse would be to require the parties to provide documentation, perhaps including affidavits from family members, evidencing that the adoption was entered into as an alternative to marriage.

State family courts could handle appeals of contested decisions made regarding the eligibility of the parties to merge the adoption into marriage. These courts have proven themselves capable of performing fact-intensive investigations to ensure that the relationship between the parties is proper.¹⁷³ In one particularly illustrative case, the judge suspected that a romantic relationship underlay the petition for adoption of an adult female by another adult female, separated in age by only ten months.¹⁷⁴ The judge held an investigative hearing to determine whether or not the adoption comported with the requirement that the parties not be in a romantic relationship.¹⁷⁵ The judge even went so far as to make "inquiries of a sexual nature" in order to "further assure [himself] that [the] relationship [was] totally outside the ambit of abuse."¹⁷⁶ After finding that the relationship was "totally devoid of any sexual overtones" and was "not a repugnant attempt to pervert the adoption law of the state," the court entered the order of adoption.¹⁷⁷ This case demonstrates how any risk of abuse of such a "conversion" statute could be screened out by judicial fact-finding.

172. Compare *id.* § 46b-38bb (repealed 2009) (limiting eligibility to enter into a civil union to persons not a party to another civil union or marriage, at least eighteen years of age, and of the same sex as the other party to the civil union), with *In re Adoption of Elizabeth P.S. by Eileen C.*, 509 N.Y.S.2d 746, 747-48 (Fam. Ct. 1986) (permitting adoption between two adult females in a platonic relationship).

173. See *In re Adoption of Elizabeth P.S. by Eileen C.*, N.Y.S.2d at 747-48.

174. See *id.*

175. See *id.*

176. See *id.* at 748.

177. See *id.*

In states with legislatures that are resistant to facilitating same-sex marriage and that either refuse to issue a binding mandate to their respective courts or that issue a contrary mandate, a possible solution for adoptive same-sex couples who wish to exercise their right to marry would be for the “child” to be adopted outside of the family by a third party. An adoption by a third party with no familial relationship to the “parent” would completely dissolve the problematic parent–child relationship, allowing the partners to marry without issue.¹⁷⁸ However, this solution, while immediately available, replaces one “false” legal parent–child relationship with another arguably “false” parent–child relationship.¹⁷⁹ Merging the “false” legal parent-child relationship into marriage by operation of law is a preferable solution because it avoids this problem.

CONCLUSION

“The nature of injustice,” wrote Justice Anthony Kennedy in *Obergefell*, “is that we may not always see it in our own times.”¹⁸⁰ While perhaps the injustice faced by homosexual partners in the pre-*Obergefell* era may not have been clearly visible to some, the injustice here is plain to see. Swift legislative action is required at the state level to resolve the untenable position of same-sex partners who entered into adoptive parent–child relationships in the decades preceding *Obergefell*. Following the precedent set by Connecticut’s statute for the conversion of civil unions into marriages, state legislatures should act with similar dispatch to enact legislation to provide a path to marriage for gay and lesbian partners who entered into adoptions.

One particularly important problem that a “conversion” statute would not resolve is the difficulty faced by adoptive same-sex partners who wish to terminate their relationship as opposed to entering into a marriage. Whereas an uncontested dissolution of a civil union is generally no more difficult than the dissolution of a civil marriage, the dissolution of an adoption is a difficult process.¹⁸¹ For this reason, additional legislation

178. See 2 AM. JUR. 2D *Adoption* § 154 (2016); see, e.g., MD. CODE ANN., EST. & TRUSTS § 1-207(b) (West 2017) (“A child who has been adopted more than once shall be considered to be a child of the parent or parents who have adopted him most recently and shall cease to be considered a child of his previous parents.”).

179. See 2 AM. JUR. 2D *Adoption* § 154 (2016); MD. CODE ANN., EST. & TRUSTS § 1-207(b).

180. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

181. Compare 750 ILL. COMP. STAT. 75/45 (2016) (“A court shall enter a judgment of dissolution of a civil union if at the time the action is commenced it meets the grounds for dissolution set forth in Section 401 of the Illinois Marriage and Dissolution of Marriage Act.”), with 750 ILL. COMP. STAT. 50/11(a) (2016) (“[Adoption] shall be irrevocable unless it shall be obtained by fraud or duress . . . No action to void or revoke a consent to or surrender for adoption, including an action based on fraud or duress, may be commenced after 12 months from the date the consent or surrender was executed.”).

must be passed at the state level to facilitate the dissolution, without subsequent merger into marriage, of adult adoptions in circumstances where it is clear that the adoption was entered into as a pseudo-marriage.

Perhaps the best explanation for legislative inaction in this area is a lack of awareness on the part of public officials that same-sex couples had utilized adult adoption in this manner. Senator Casey admitted that he had no knowledge that gay couples had turned to adult adoption as an alternative to marriage and only took action to spur the Justice Department to issue guidance after reading a newspaper article about one couple's struggle to annul their adoption.¹⁸² Increasing awareness of the adoption conundrum facing same-sex couples among state legislators may be the quickest means of achieving legislative action to resolve the matter. Same-sex partners who waited decades for the Supreme Court to affirm their constitutional right to marry should not again have to wait on the courts to remove yet another barrier to marriage.

182. Potter, *supra* note 165 (quoting Senator Casey as saying that prior to seeing the newspaper article, he "wasn't aware that LGBT couples were turning to [adult adoption]").

