

Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice

Michael J. Ritter*

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I. INTRODUCTION

Like those of many other states, the laws of Texas are unclear as to whether same-sex couples may adopt children; they lack both an express permission and an express denial of such adoptions.¹ Texas is

* J.D. candidate, The University of Texas School of Law, 2010; B.A. Trinity University, 2007. I thank Professor John J. Sampson, Kate Semmler, Molly Tucker, Carrie Puttermann, and Lisa Jacobs for their extensive feedback and help with this Note.

¹ See generally HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION 2 (2009), http://www.hrc.org/documents/parenting_laws_maps.pdf.

representative of many states whose laws leave the issue open to interpretation by courts and child protective services.² This Note argues that Texas's laws' ambiguity can create additional burdens on same-sex couples that do not exist for opposite-sex couples or for same-sex couples in other states. Though many organizations, commentators, and courts have briefly reviewed or mentioned the lack of clarity in Texas's and other states' laws, none have conducted an in-depth exploration of legal barriers to same-sex adoption.³ This Note explores this legal issue. It contends that although Texas does not expressly prohibit or permit same-sex adoption, state statutory and administrative law bestows considerable discretion upon judges and officials in the Department of Family and Protective Services ("DFPS"). Courts and DFPS officials should resolve these tensions by relying on the public policy goals of the state's adoption process. These goals do not support categorically prohibiting a same-sex couple from obtaining a joint or second-parent adoption.

Part II of this Note surveys same-sex adoption⁴ in Texas, focusing

² See, e.g. Janet McConaughay, *5th Circuit Court Hears Arguments for 2 Dads*, S.F. EXAMINER, Oct. 7, 2009, <http://www.sfexaminer.com/local/ap/5th-us-circuit-court-hears-arguments-for-2-dads-63696112.html>. At the trial level in this case the District Court for the Eastern District of Louisiana found that a same-sex adoption decree from New York was entitled to full faith and credit under Louisiana law and held that the same-sex adoptive parents were entitled to an amended birth certificate. The Fifth Circuit took the case and affirmed the district court's holding in *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010).

³ See, e.g., Linda B. Thomas & Ardita L. Vick, *Family Law: Parent & Child*, 61 SMU L. REV. 819, 825–26 (2008) (reviewing the facts of *Hobbs v. Van Stavern* and *Goodson v. Castellanos* discussed *infra* Part III); Patience Crozier, *Nuts and Bolts: Estate Planning and Family Law Considerations for Same-Sex Families*, 30 W. NEW ENG. L. REV. 751, 767 n.101 (2008) (cursorily mentioning a Texas restriction on supplemental birth certificates, which is discussed more at length *infra* Part II.B.2); Kisha A. Brown, *Family Law Chapter: Foster Parenting and Adoption*, 4 GEO. J. GENDER & L. 283, 292 n.56 (2002) (briefly stating in a footnote that Texas is among states whose trial courts have granted same-sex second-parent adoption); Jason N.W. Plowman, Note, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 84 (2008) (briefly discussing the facts of *Hobbs v. Van Stavern*); Tracy Kapsarek, Comment, *Fostering to Children's Needs or Fostering to Legislators' Personal Agendas?*, 9 SCHOLAR 313, 313–341 (2007) (analyzing bill on foster/adopt options for homosexuals in Texas); Cynthia J. Sgalla McClure, Note, *A Case for Same-Sex Marriage: A Look at Changes Around the Globe and in the United States, Including Baker v. Vermont*, 29 CAP. U. L. REV. 783, 806 (2002) (including Texas in a list of states that permits same-sex adoption); Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159, 166 (1999) (noting that Texas adopted a statute restricting supplementary birth certificates); Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption—And Winning*, 23 T. MARSHALL L. REV. 551, 555 (1998) (stating that Texas has no requirement that homosexuals be permitted to adopt children in its custody); HUMAN RIGHTS CAMPAIGN, TEXAS ADOPTION LAW (2009), <http://www.hrc.org/issues/parenting/adoptions/1746.htm> (reporting that, in Texas, "LGBT individuals" can adopt; and that there is no explicit prohibition against joint or second-parent adoption by same-sex couples).

⁴ The focus of this Note is the legal ability of a same-sex couple to obtain state recognition of parent-child relationships between each parent and child. This has at least four important implications for defining the scope of this Note. First, though same-sex parents almost always have two homosexual or bisexual members, this Note does not focus much on the general ability of homosexuals to adopt. Second, because this Note focuses on the establishment of parent-child relationships, it will only address foster parenting as it pertains to the foster placement or adoption of children by the DFPS. Third, this Note does not focus on the issue of courts granting custody to homosexuals of members of a former same-sex couple since it focuses on the narrower issue of establishing parent-child

particularly on private adoption arrangements made by same-sex couples. Part III delves into Texas's legal procedures for adoption and identifies indirect barriers and burdens for prospective adoptive parents of the same sex by reviewing various state statutes and judicial opinions. It concludes by asking whether courts should interpret these statutes to permit or prohibit same-sex adoption. Part IV seeks to answer this question in light of Texas's public policy objectives of promoting adoption and serving the best interests of the child. It concludes that categorically excluding same-sex couples will not further the public policy objectives of Texas law. As a result of this conclusion, this Note proposes that Texas state courts and DFPS officials should not preclude same-sex individuals from establishing parent-child relationships through foster or adoption based merely on the same-sex nature of the couple. Part V concludes this Note with a few summarizing remarks.

II. SAME-SEX ADOPTION OPTIONS

A child can enter into the lives of a same-sex couple in a limited number of ways. One or both of the partners may have a biological or adoptive child prior to entering the relationship. If neither partner does, the same-sex couple can bring a child into their family through biological reproduction involving a person of the opposite sex outside of the relationship, or by adoption of a non-biological child. When adopting, same-sex couples can attempt to adopt either jointly or individually. For a same-sex couple in Texas, problems can arise in either situation: when the couple attempts to jointly adopt a child ("joint adoption"), or when the partner of a child's biological or adoptive parent adopts the child as a second parent ("second-parent adoption"). A second-parent adoption may involve terminating an existing parent's relationship with the child.⁵

The benefits of joint adoptions and second-parent adoptions—regardless of the sexes of the couples—are not identical. Joint adoptions potentially benefit several parties: the adopted child, the adoptive

relationships with two people of the same-sex who are currently coupled. Lastly, it does not analyze the possibility of equitable adoption because that doctrine pertains mostly to probate law. In addition to statutory adoption pursuant to the Family Code, Texas law also recognizes equitable adoption or "adoption by estoppel" in defining "child" for the purposes of probate. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[1] (citing TEX. PROB. CODE ANN. § 3). The equitable adoption doctrine may be invoked to prove inheritance rights in either or both of two circumstances: when a statutory adoption is ineffective due to the lack of strict statutory compliance (such as when a person involved in an adoption proceeding dies) and when an adoption agreement went unperformed. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[1] (citing *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963)). Though the doctrine has been applied in determinations of heirship, trespass to try title, entitlement to government benefits, some survival actions, and testate succession cases, it has not been successfully deployed in cases for child support, custody, or conservatorship. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[2]-[3].

⁵ TEX. FAM. CODE ANN. § 162.001(b)(2)-(3) (Vernon 2008).

parents, and the state. The advantages to the adopted child are not only the stability and care provided by being raised in a home with two parents, but also the child's additional financial and legal security.⁶ A joint adoption gives the would-be adoptive parents the ability to start a family that otherwise would not be available due to reproductive disabilities or incapacities. Couples that foster or adopt through the DFPS benefit the state of Texas by lifting burdens on taxpayers who must fund a social system to care for children in DFPS.⁷ Each child in foster care costs Texas taxpayers approximately \$40,000 per year,⁸ and as of 2008 approximately 15,000 children were in the care of DFPS.⁹

Second-parent adoptions provide similar benefits. Although a child adopted by a second parent has a pre-established parent-child relationship (unlike those children adopted through joint adoptions by couples), the net benefits that second-parent adoptions provide to children are at least threefold. A second-parent adoption affords the child additional financial and legal security through the second parent, such as healthcare coverage from that parent's employer, workers' compensation or Social Security benefits, and child support in the event of a separation or divorce.¹⁰ Moreover, a second-parent adoption reduces or eliminates the risk of the child being removed from its home if the biological parent becomes sick or dies.¹¹ As a related result, the adoption benefits the existing parent by minimizing the potentially crippling financial burdens of a serious illness of the parent or child.¹² The state's recognition of the second parent's membership in the family also benefits the him or her.¹³

A same-sex couple can attempt to jointly or individually search for an adoptable child from at least four different sources. First, couples can turn to private adoption agencies licensed by Texas. A Residential Child Care Licensing branch must license these private "child-placing agencies," which must meet several statutory requirements outlined in the Texas Administrative Code.¹⁴ Texas has at least forty private adoption agencies,¹⁵ many of which impose age, religious, or marriage

⁶ Timothy F. Brewer, *Benefits of Second Parent Adoption*, http://www.tfbrewer.com/pdfs/benefits_second-parent_adoption.pdf (last visited April 9, 2010).

⁷ TEX. NETWORK OF YOUTH SERVICES, SERVS. TO AT-RISK YOUTH ("STAR") PROGRAM, FACT SHEET 2 (2009), <http://www.tnoys.org/advocacy/documents/Fact%20Sheet%20-%20STAR.pdf>.

⁸ *Id.*

⁹ TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., 2008 DATA BOOK 52 (2008), http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2008/Databook/DataBook08.pdf.

¹⁰ Brewer, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., CHILD CARE STANDARDS AND REGULATIONS, http://www.dfps.state.tx.us/CHILD_CARE/Child_Care_Standards_and_Regulations/default.asp (last visited April 24, 2010).

¹⁵ TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., PRIVATE ADOPTION AGENCIES (TARE), http://www.dfps.state.tx.us/Adoption_and_Foster_care/adoption_partners/private.asp (last visited April 24, 2010).

requirements on potential adoptive parents,¹⁶ thereby excluding same-sex and other unmarried couples from their services.¹⁷ Second, same-sex couples may attempt to adopt or foster through DFPS, which welcomes single and married parents.¹⁸ Third, adopting from another state might be an option, depending upon that particular state's laws. Finally, international adoption is another possibility. Although all countries once prohibited adoption by gays and lesbians and same-sex couples, several have removed these restrictions in recent years.¹⁹

III. RECOGNITION OF SAME-SEX ADOPTION IN TEXAS

A. A Brief History of Adoption in Texas

Prior to the mid-1800s, Texas did not officially recognize any adoption mechanism by which adults could acquire rights relative to the biological children of others.²⁰ As one of the first states to recognize adoption,²¹ Texas passed a statute in 1850 that provided for adoption by deed.²² Under the statute, which remained in effect until 1931, children

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ TEX. DEPARTMENT OF FAMILY AND PROTECTIVE SERVS, REQUIREMENTS FOR FOSTER/ADOPT FAMILY (TARE), http://www.dfps.state.tx.us/Adoption_and_Foster_Care/Get_Started/requirements.asp. The DFPS website describes the foster and adoption process: "Many families are interested in both fostering and adopting. They agree with the agency that the children's needs come first. In most cases, this means helping prepare children for reunification with their birth family, mentoring the birth parents, or working toward a relative or kinship placement. When termination of parental rights is in the children's best interest and adoption is their plan, then foster parents who have cared for the children will be given the opportunity to adopt. Dual certification of parents to both foster and adopt speeds up the placement process, reduces the number of moves a child makes, and allows relationships to evolve with the initial placement process. Nearly half the adoptions of children in DFPS foster care are by their foster families." *Id.* Moreover, applicants must "share information regarding their background and lifestyle," and "show proof of marriage and/or divorce (if applicable)." *Id.*

¹⁹ Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT'L & COMP. L. REV. 113, 113–14 (2008).

²⁰ Peter N. Fowler, Comment, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 671 (1984).

²¹ Thanda A. Fields, Note, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 977 n.12 (1996).

²² ROBERT HAMLETT BRENNER, CHILDREN AND YOUTH IN AMERICA: 1600–1865, 369 (1974). The statute provided: Be it enacted by the Legislature of the State of Texas, That any person wishing to adopt another as his or her legal heir, may do so by filing in the office of the Clerk of the County Court in which county he or she may reside, a statement in writing, by him or signed and duly authenticated or acknowledged, as deeds are required to be, which statement shall recite in substance, that he or she adopts the person named therein as his or her legal heir, and the same shall be admitted to record in said office. Be it further enacted, That such statement in writing, signed and authenticated, or acknowledged and recorded as aforesaid, shall entitle the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him or her. Provided, however, that if the party adopting such person have, at the time of such adopting, or shall

were transferred between and among adults similar to the way title to real property is transferred.²³ In providing methods of recording adoptions, this statute did not explicitly link adoption to the welfare of children, but instead emphasized the right of the adoptive parent over the adopted child.²⁴ It “was intended to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, or carry on the family line.”²⁵ In 1931, the Texas Legislature passed a law that permitted the legal recognition of adoptive parents’ rights through court order only, and not by deed, laying the groundwork for the basic statutory scheme that exists today.²⁶ The primary consideration of the current adoption process is the welfare of children over all other interests, including the property right of adoptive parents over their adoptive children.²⁷

B. Current Texas Laws on Same-Sex Adoption

States vary in their approaches to same-sex adoption. Ten states and the District of Columbia explicitly permit same-sex couples to adopt any adoptable child using the same statutory procedures as opposite-sex couples.²⁸ Certain courts in counties in eighteen other states grant second-parent adoptions.²⁹ Kentucky, Ohio, Nebraska, and Wisconsin courts have prohibited same-sex couples from using the second-parent mechanism to adopt. In Texas, the Family Code, Health and Safety Code, and Administrative Code, as well as decisions issued by courts throughout the state, do not directly address the exact issue of the permissibility of same-sex adoption.³⁰ Because its statutes neither expressly permit nor deny adoptive rights to a same-sex couple, Texas falls into the category of states in which trial courts and child protective services officials have discretion over whether to permit same-sex adoptions.³¹

thereafter have a child or children, begotten in lawful wedlock, such adopted child or children shall in no case inherit more than the one-fourth of the estate of the party adopting him or her, which can be disposed of by will. (citing *Laws of the State of Texs*, 3d Leg. Ch. 39 (1850).

²³ *Id.*

²⁴ Fowler, *supra* note 20, at 672 n.20.

²⁵ Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 441 (1996).

²⁶ *Grant v. Marshall*, 280 S.W.2d 559, 563 (Tex. 1955).

²⁷ TEX. FAM. CODE ANN. § 153.002 (Vernon 2008).

²⁸ Human Rights Campaign, *Where Are Second-Parent and Joint Adoption for Same-Sex Couples Available?*, <http://www.hrc.org/issues/parenting/2397.htm> (listing California, Connecticut, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and the District of Columbia) (last visited April 24, 2010).

²⁹ *Id.* (listing Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Texas and Washington).

³⁰ See *infra* Part III.B. However, when these provisions were enacted, they did not contemplate permitting two individuals of the same sex to adopt the same child. Interview with John J. Sampson, Professor of Law, The University of Texas School of Law in Austin, Texas (Oct. 27, 2009); Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

³¹ Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

1. *The Texas Family Code*

Chapter 162 of the Texas Family Code designates who may adopt a child and which children may be adopted.³² The chapter places three limitations on an individual filing an adoption petition: the adopting party (1) must be “an adult,” who (2) seeks to adopt “a child who may be adopted,” and (3) has standing to sue in state court.³³ A “child who may be adopted” must meet one of four disjunctive requirements.³⁴ First, the relationship between the child and each living biological parent is terminated or in the process of being terminated.³⁵ Second, the petitioner is seeking a stepparent adoption and is the spouse of an individual that still has parental rights with the child.³⁶ Third, the child is at least two years of age, its parent-child relationship with one parent has been terminated, and the petitioner has had a managing conservatorship or “actual care, possession, and control of the child” for at least six months before adoption.³⁷ Fourth, if the adoption lacks the consent of a parent whose parental rights have been terminated, the petitioner “is the child’s former stepparent *and* has been a managing conservator or has had actual care, possession, and control of the child for . . . one year” prior to adoption.³⁸ If a court considering an adoption petition finds that the requirements for adoption have been met and that adoption is in the best interest of the child, it must grant the petition.³⁹ Once issued, courts’ adoption decrees establish a new parent-child relationship between the new adoptive parent and the child.⁴⁰

Chapter 162 appears to permit a same-sex couple to adopt children only through the first and third requirements. The first requirement is a possible route if courts have terminated—or are in the process of terminating—the rights of a child’s living parents.⁴¹ Under the third requirement, a same-sex couple may also adopt when one member of the couple has a parent-child relationship with the child,⁴²

³² TEX. FAM. CODE ANN. § 162.001 (Vernon 2009).

³³ *Id.* § 162.001(a). This Note only discusses these limitations briefly as none categorically impacts the ability of same-sex couples to adopt.

³⁴ See *id.* § 162.001(b)(1)–(4) (listing four disjunctive conditions under which children may be adopted).

³⁵ *Id.* § 162.001(b)(1).

³⁶ *Id.* § 162.001(b)(2).

³⁷ *Id.* § 162.001(b)(3).

³⁸ TEX. FAM. CODE ANN. § 162.001(b)(4) (Vernon 2009) (emphasis added).

³⁹ *Id.* § 162.016(b) (“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.”) (emphasis added). Thus, one reasonable interpretation of Chapter 162 is that a Texas court is *required* to grant an adoption by a same-sex couple when a couple meets the statutory requirements, if the court finds that such an adoption will be in the child’s best interests.

⁴⁰ *Id.* § 162.017.

⁴¹ *Id.* § 162.001(b)(1). The text of this provision provides no statutory basis for an exclusion based on sex or marital status.

⁴² *Id.* § 162.001(b)(1).

which may be established through a biological relationship or an individual adoption under the first requirement.⁴³ The other member of the same-sex couple seeking the second-parent adoption must wait until the child is at least two years old, obtain the consent of the child's current parent, and have either a managing conservatorship or "actual care, control, and possession of the child for at least six months."⁴⁴ Because the Texas Constitution and Family Code do not recognize same-sex marriage,⁴⁵ a same-sex couple may not adopt under the second or fourth provisions because of the spousal and stepparent requirements.⁴⁶ Unlike an opposite-sex couple, a same-sex couple may not consensually adopt children when one member of the couple has the only parental relationship with the child until the child reaches the age of two, and the nonparent member has a managing conservatorship or "actual care, possession, and control of the child" for at least six months before adoption.⁴⁷ Opposite sex couples need not meet these requirements because they may marry⁴⁸ and thus may adopt sooner under the second requirement.⁴⁹

Although the adoption procedures in the Family Code neither expressly prohibit nor permit same-sex adoptions, those challenging the validity of same-sex adoption in court have highlighted other statutes that may conflict with permitting such adoptions. They have pointed to Chapter 101 of the Family Code,⁵⁰ which defines "[p]arent" as "the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father."⁵¹ A Texas court rejected this argument because this provision provides that adoptive mothers and fathers are considered "parents" for the purposes of a suit affecting the parent-child relationship (SAPCR) and fails to imply that two members of the same sex cannot be adoptive parents.⁵² Challengers have also drawn courts' attention to Section 101.025 of the Family Code, which defines "parent-child relationship [as] the legal relationship between a child and the child's parents . . . including the mother and child relationship and the father and child relationship."⁵³ However, this definition does not preclude the possibility of two mother-child or two

⁴³ TEX. FAM. CODE ANN. § 162.001(b)(3).

⁴⁴ *Id.* § 162.001(b)(3).

⁴⁵ TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. §§ 2.001(b), 6.204, *cf.* 2.401.

⁴⁶ See TEX. FAM. CODE ANN. §§ 162.001(b)(2) & 162.001(b)(4) (Vernon 2009).

⁴⁷ *Id.* § 162.001(b)(3).

⁴⁸ *Id.* § 2.001(a).

⁴⁹ *Id.* § 162.001(b)(2).

⁵⁰ E.g., *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App.—Austin, 2007, *pet. denied*); *Hobbs v. Van Stavern*, 249 S.W.3d 1 (Tex. App.—Houston, 2006, *pet. denied*).

⁵¹ TEX. FAM. CODE ANN. § 101.024 (Vernon 2009). The opinion that notes that this argument was made did not elaborate to any extent on the argument. *Goodson*, 214 S.W.3d at 746.

⁵² *Hobbs*, 249 S.W.3d at 3–5. The facts of this case are discussed *infra* text accompanying notes 88–96.

⁵³ TEX. FAM. CODE ANN. § 101.025 (Vernon 2009).

father–child relationships for a single child.⁵⁴ While Texas courts have not reached the merits of such arguments, they are far from prohibiting same-sex adoption.

2. *The Texas Health & Safety Code*

Section 192.008 of the Health and Safety Code stipulates that the supplementary birth records of adopted children “must be in the names of the adoptive parents, one of whom must be a female . . . and the other of whom must be a male . . . This subsection does not prohibit a single individual, male or female, from adopting a child.”⁵⁵ This section of the Health and Safety Code seems to present another argument that Texas law disfavors adoption by same-sex couples because of its ambiguous concluding statement—“This subsection does not prohibit a single individual, man or woman, from adopting a child.”⁵⁶ A court or agency official could possibly read the subsection as requiring a supplemental birth certificate to be in the name of one man and one woman *if there is more than one adoptive parent* and as not prohibiting supplemental birth certificates in the name of one single parent.⁵⁷

Although a court could understand this provision to preclude adoption by same-sex couples, such a construction is contrary to statutorily mandated modes of construction. In deciphering the meaning of civil statutes, Texas courts construe words consistent with their ordinary meaning,⁵⁸ “diligently attempt to ascertain legislative intent,”⁵⁹

⁵⁴ *Id.*

⁵⁵ TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005). In addition to Texas, several other states permit supplementary birth certificates to be granted after an adoption, which entails changing the names of the birth parent(s) to the name of the adoptive parent(s). *E.g.*, OKLA. STAT. tit. 10, § 7505-6.6 (2009); N.Y. PUB. HEALTH LAW § 4138 (McKinney 2009); 35 PA. CONS. STAT. § 450.603 (2009). In the context of same-sex adoption, listing both parents’ names on a supplementary birth certificate would not seem to achieve the goal of concealing the fact of adoption. Interview with John J. Sampson, Professor of Law, The University of Texas School of Law in Austin, Tex., (Oct. 27, 2009); *see supra* Part II. Thus, this Note argues that the supplementary birth certificates cannot accomplish the same goals in the context of same-sex adoption, where the mere presence of the names of two persons of the same sex would do nothing to cover up an adoption.

⁵⁶ TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005); *see, e.g.*, *Goodson v. Castellanos*, 214 S.W.3d 741, 746 (Tex. App.—Austin 2007, *pet. denied*) (“Goodson refers to . . . the family code as proof that two individuals of the same sex cannot both be parents of one child. Goodson also refers to . . . the health and safety code, which states that a supplementary birth certificate for an adopted child must be in the names of the adoptive parents, one of whom must be a female . . . and the other of whom must be a male.” (internal citations and quotations omitted)). This Texas law also supports one of the predominant views that same-sex adoption is not valid in Texas because same-sex adoptive parents cannot obtain a birth certificate that reflects the adoption. Telephone Interview with Heidi Brugel-Cox, Executive Vice President and General Counsel, Gladney Center for Adoption (Dec. 14, 2009).

⁵⁷ This interpretation would express tension with same-sex adoption by precluding same-sex couples from procuring a supplementary birth certificate as an additional memorial of the adoption.

⁵⁸ TEX. GOV’T CODE ANN. § 312.002 (Vernon 2007).

⁵⁹ *Id.* § 312.005.

and give all words effect as to avoid surplusage.⁶⁰ Because Texas does not recognize same-sex marriages, the individuals comprising a same-sex couple would be considered “single.”⁶¹ To deny both members of a same-sex couple the ability to obtain supplementary birth certificates under this statute would seem to deny a “single individual” from adopting a child under the ordinary meaning of the statute.⁶²

Moreover, an interpretation that restricted an adoption by a same-sex couple would not serve the purposes of the statute, as indicated by its legislative history. In 1997, the Texas bill that added the requirement that a supplementary birth certificate be in the name of two opposite-sex individuals also created the state’s paternity registry rather than placing restrictions on who could adopt or which children could be adopted.⁶³ The placement of the language in the Health and Safety Code rather than in the Family Code further attests to the absence of legislative intent to restrict adoption rights.⁶⁴ The author of the bill, Representative Toby Goodman, did not refer to same-sex adoption when supporting his bill. He offered it as a way “to streamline adoption processes by amending the Family Code provisions relating to terminating parental rights, contesting adoption proceedings and preferential settings, as well as eliminating duplicative paperwork [to] clarify[] current law as to affidavits of relinquishment.”⁶⁵ In fact, the changes to the Health and Safety Code prompted no floor debate about same-sex adoption; the debate was instead focused solely on paternity registration.⁶⁶ Moreover, a construction of this statute unfavorable to a same-sex couple would, at most, only prohibit the granting of a supplementary birth certificate, which is not a prerequisite to a valid adoption.⁶⁷ Contrary to the ordinary meaning and legislative intent canons, a court in its discretion might stretch this provision to deny an adoption petition.⁶⁸

⁶⁰ *Marks v. St. Luke's Episcopal Hosp.*, No. 07-0783, 2009 Tex. LEXIS 636, at *8 (Tex. Aug. 28, 2009).

⁶¹ TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 2.001(b) (Vernon 2009).

⁶² TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005). *See also* TEX. GOV'T CODE ANN. § 312.003(b) (Vernon 2007) (“The singular includes the plural and the plural includes the singular unless expressly provided otherwise.”).

⁶³ H.B. 1091, 75th Leg., Reg. Sess. (Tex. 1997).

⁶⁴ TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005).

⁶⁵ Audio tape: Introduction of H.B. 1091 by Representative Goodman, Second Reading, Texas House of Representatives (Apr. 29, 1997) (on file with the Texas House of Representatives Video/Audio Services).

⁶⁶ *Id.*

⁶⁷ *See* TEX. HEALTH & SAFETY CODE ANN. § 192.006 (Vernon 2009) (“A supplementary birth certificate *may* be filed”) (emphasis added). Furthermore, as interpreted by state agencies, this provision does not preclude a same-sex adoption. Instead, a birth certificate may be issued in the name of one of the adoptive parents with no other parent listed. TEX. DEP'T OF STATE HEALTH SERVS., ADOPTION: FREQUENTLY ASKED QUESTIONS (2007), <http://www.dshs.state.tx.us/vs/reqproc/faq/adoption.shtm> (“To meet this statutory requirement, when a child is adopted by a same-sex couple, one of the adoptive parents must choose to be designated on the birth certificate as the father, in the case of a male couple, or the mother, in the case of a female couple. The other adoptive parent is not listed.”).

⁶⁸ A similar denial in Louisiana was overturned by the 5th Circuit, which could have implications for Texas’s law. *See supra* note 2.

3. *The Texas Administrative Code*

The Department of Family and Protective Services (“DFPS”) rules contained within the Texas Administrative Code govern the processing of inquiries into and applications for placement of children in foster or adoptive homes. These rules do not explicitly prohibit either the consideration of homosexual applicants or the discrimination against homosexual applicants.⁶⁹ Applicants must be, among other things, at least twenty-one years old;⁷⁰ sufficiently healthy, both mentally and physically;⁷¹ and financially capable of caring for the child’s basic material needs.⁷² The Texas Administrative Code rules are somewhat restrictive as to the marital status of an applicant. If an applicant is married, both husband and wife must apply for the placement⁷³ and show that they have been married for at least two years, unless they “cohabited for two years prior to the marriage or obtained a civil registration of common law marriage for the length of time required . . .”⁷⁴ If an applicant is married but seeking a divorce, the couple must finalize the divorce before DFPS may approve either for adoption.⁷⁵ Despite the two-year requirement for married couples, single parents may apply to adopt, but “are evaluated in terms of their ability to nurture and provide for a child without the assistance of a spouse,” which has no strict time requirement.⁷⁶

The Texas Administrative Code is unclear as to whether an unmarried couple may foster/adopt regardless of the partners’ sexes. Because unmarried couples are legally single, they may be considered “single parent” applicants. However, this understanding of the rules seems at tension with the State’s public policy, which promotes the marriage relationship⁷⁷ because it would make it easier for unmarried couples to jointly apply as “single parents.” As noted above, married couples must meet the additional time requirements before DFPS will approve the couple for an adoption.⁷⁸ Ultimately though, whether this consideration is sufficient to preclude a same-sex couple from fostering

⁶⁹ 40 TEX. ADMIN. CODE § 700.1502 (Vernon 2006).

⁷⁰ *Id.* § 700.1502(2)(A).

⁷¹ *See id.* § 700.1502(2)(I).

⁷² *Id.* § 700.1502(2)(H).

⁷³ *Id.* § 700.1502(2)(B).

⁷⁴ *Id.* § 700.1502(2)(C).

⁷⁵ *Id.* § 700.1502(2)(B).

⁷⁶ *Id.* § 700.1502(2)(D).

⁷⁷ TEX. FAM. CODE ANN. §1.101 (Vernon 2007) (presuming the validity of marriage against attack “to promote the public health and welfare . . .”); *see* Southwestern Bell Tel. Co. v. Gravitt, 551 S.W.2d 421, 427 (Tex. App.—San Antonio 1976, *writ ref’d n.r.e.*) (*citing* 17 C.J.S. Contracts § 233a); Coulter v. Melady, 489 S.W.2d 156, 158 (Tex. Civ. App.—Texarkana, 1972, *writ ref’d n.r.e.*) (“Public policy that favors the relationship and preserves and upholds the validity of marriage is articulated therein.”).

⁷⁸ TEX. ADMIN. CODE § 700.1502(2)(C) (Vernon 2006).

or adopting a child is a decision left to DFPS.⁷⁹

4. *State Court Decisions*

Texas appellate court decisions have been inconsistent with regard to the ability of same-sex couples to adopt. Some courts generously grant adoption petitions by same-sex couples,⁸⁰ while others are more hesitant.⁸¹ Other courts have imposed barriers to the full benefits of a same-sex adoption by not allowing both adoptive parents' names on birth certificates.⁸² One Dallas judge overseeing a legal procedure to change an adopted child's name to reflect second-parent adoption by a same-sex couple purportedly balled up their petition and claimed, "Get out of my courtroom, I would never do this for you."⁸³ Courts addressing the legal validity of particular adoptions by two individuals of the same sex have shied away from clarifying whether Texas law prohibits or permits same-sex adoption.⁸⁴

Three state courts of appeals have declined to consider the merits of challenges to adoption. *Hobbs v. Van Stavern*⁸⁵ addressed a collateral attack on an adoption decree issued to Kathleen Van Stavern and Julie Hobbs.⁸⁶ Hobbs and Van Stavern were in a romantic relationship. When the couple decided to have a child, Hobbs became artificially inseminated.⁸⁷ In June 1998, Hobbs gave birth to T.L.H., for whom Hobbs and Van Stavern jointly cared through August 2001, when they jointly petitioned a county court for the termination of the donor-father's rights and establishment of Van Stavern as a second parent to T.L.H.⁸⁸ When the couple separated almost three years later, Van Stavern filed a SAPCR requesting to have joint managing conservatorship over T.L.H.⁸⁹ Hobbs defended against this suit by collaterally asserting the impropriety of the county court's adoption decree.⁹⁰ After Hobbs lost at the trial

⁷⁹ Whether or not to place a child with a particular family is usually up to the particular district or regional office or particular caseworkers. Telephone Interview with Heidi Brugel-Cox, Executive Vice President and General Counsel, Gladney Center for Adoption (Dec. 14, 2009).

⁸⁰ See, e.g., *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied); *Hobbs v. Van Stavern*, 249 S.W.3d 1 (Tex. App.—Houston [1st Dist.], 2006, pet. denied) (both cases appealed trial courts' grants of adoption decrees to same-sex couples).

⁸¹ Telephone Interview with Ellen A. Yarrell, Attorney at Law and President, American Academy of Adoption Attorneys (Dec. 7, 2009).

⁸² LYNNE Z. GOLD-BIKIN, HUMAN RIGHTS CAMPAIGN, WHICH STATES PERMIT SAME-SEX PARENTS TO BE LISTED ON A BIRTH CERTIFICATE (2010), <http://www.hrc.org/issues/1627.htm>.

⁸³ Taylor Gandossy, *Gay Adoption: A New Take on the American Family*, CNN.COM, June 27, 2007, <http://www.cnn.com/2007/US/06/25/gay.adoption/index.html>.

⁸⁴ E.g., *Hobbs*, 249 S.W.3d at 4 n.2 ("We express no opinion on the validity of [Hobbs'] claim.").

⁸⁵ 249 S.W.3d 1.

⁸⁶ *Id.* at 2.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2–3.

⁸⁹ *Hobbs*, 249 S.W.3d at 3.

⁹⁰ *Id.*

level, she appealed the decision citing various provisions of the Texas Family Code and the Texas Health and Safety Code for the argument that same-sex parents may not adopt.⁹¹ The appellate court “express[ed] no opinion on the validity of [Hobbs’s] claim[,]”⁹² and instead held that Hobbs’s collateral attack was untimely under Section 162.012, which forecloses attacks on adoption decrees after the six months following the adoption order.⁹³

*Goodson v. Castellanos*⁹⁴ also considered a collateral attack contesting the validity of an adoption decree in similar circumstances.⁹⁵ Elizabeth Goodson and her girlfriend Adelina Castellanos decided to adopt a baby.⁹⁶ Goodson traveled to Kazakhstan, applied with the appropriate authorities for an adoption, and returned with a three-year-old child, K.G., who Goodson and Castellanos sought to adopt by filing a joint petition in a Bexar County court.⁹⁷ The trial court granted the petition and issued an adoption decree.⁹⁸ After Goodson and Castellanos ended their relationship a little more than a year later, Castellanos filed a SAPCR for temporary joint managing conservatorship for K.G.⁹⁹ Goodson collaterally attacked the trial court’s adoption decree as a defense in the SAPCR, contending that the decree was void.¹⁰⁰ The court went on to “[a]ssum[e] without deciding that the district court erred in issuing the adoption decree”¹⁰¹ and precluded Goodson’s attack because “[she] did not attack the validity of the adoption within the deadline mandated by statute.”¹⁰² The appellate court explained the policy rationale behind the six-month deadline:

To encourage adoptions, adoptive parents should be assured that, after a reasonable amount of time, their parental claims may not be brutally revoked due to a procedural error, birth parents changing their mind years later, or a change in relationship with another parent. The destruction of a parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing

⁹¹ *Id.* at 3–4.

⁹² *Id.* at 4 n.2.

⁹³ *Id.* at 4.

⁹⁴ *Goodson v. Castellanos*, 214 S.W.3d 741 at 746 (Tex. App.—Austin 2007, *pet. denied*).

⁹⁵ *Id.*

⁹⁶ *Id.* at 745.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Goodson*, 214 S.W.3d at 745.

¹⁰⁰ *Id.* at 745–46.

¹⁰¹ *Id.* at 748.

¹⁰² *Id.*

parent-child relationship is in the best interest of the child.¹⁰³

These considerations counseled strict adherence to the six-month rule and against permitting parties thereafter to challenge courts' adoption decrees.¹⁰⁴

More recently, *In the Interest of S.D.S.-C* addressed a similar situation.¹⁰⁵ In June 2003, Shirlinda Casey and her partner, Sonya Sanders, successfully petitioned a trial court to establish a parent-child relationship between Sanders and Casey's biological child, S.D.S.-C.¹⁰⁶ In 2008, Casey sought a declaration that the adoption decree was void on the grounds that the trial court lacked jurisdiction to issue the adoption order because it failed to terminate the sperm donor father's rights.¹⁰⁷ Just as in the prior decisions, the appellate court also upheld the adoption decree because the collateral attack fell outside of the six-month period permitted to challenge adoption decrees.¹⁰⁸

Yet another Texas court of appeals recently reached the merits of a similar adoption case. *In the Interest of M.K.S.-V.*¹⁰⁹ involved an appeal from a trial court's denial of an adoption petition to a woman, T.S., who sought to adopt her former partner's biological child, for whom T.S. had cared.¹¹⁰ The trial court dismissed T.S.'s petition on the grounds that she lacked standing.¹¹¹ On appeal, the court looked beyond the standing issue into the elements of adoption.¹¹² It noted that consent was an element under both methods of achieving state recognition of an adoption and held that T.S. failed to provide sufficient evidence that her former partner ever consented, or would consent, to the adoption.¹¹³ Although the petition sought to name an individual as a second, same-sex parent of a child, neither the trial court nor the appellate court rejected the adoption petition on the grounds that the current parent was the same sex as the petitioner. This case could be read as showing that some courts exercise discretion in not barring same-sex couples from adopting children under Chapter 162.

¹⁰³ *Id.* at 749 (citation omitted).

¹⁰⁴ *Goodson*, 214 S.W.3d at 749..

¹⁰⁵ No. 04-08-00593-CV, 2009 Tex. App. LEXIS 1828 (Tex. App.—San Antonio, Mar. 18, 2009, *pet. denied*).

¹⁰⁶ *Id.* at *1–2.

¹⁰⁷ *Id.* at *2.

¹⁰⁸ *Id.* at *3–5.

¹⁰⁹ *In the Interest of M.S.K.-V.*, No. 05-08-00568-CV, 2009 Tex. App. LEXIS 6212 (Tex. App.—Dallas, Aug. 11, 2009, *reh'g overruled* in *In the Interest of M.S.*, 2009 Tex. App. LEXIS 7463 (Tex. App.—Dallas, Sept. 15, 2009), vacated by and substituted opinion at 2009 Tex. App. LEXIS 9167 (Tex. App.—Dallas, Dec. 1, 2009)).

¹¹⁰ *Id.* at **2–5.

¹¹¹ *Id.* at *8.

¹¹² *Id.* at *15.

¹¹³ *Id.* at **15–16.

C. Barriers to Same-Sex Adoption in Texas

Given the lack of clarity regarding the law on same-sex adoption, these couples can face at least five different issues in the adoption process. First, because the Family Code, and Texas law generally, is not clear either way as to the permissibility of same-sex adoptions, some courts may not be inclined to grant an adult's adoption petition for otherwise-qualifying children. A second related difficulty is that this lack of clarity may result in inconsistent granting of adoption petitions based on the views of a particular judge in any given county.¹¹⁴ Third, though not prohibiting single, homosexual individuals from adopting, DFPS rules seem at tension with joint foster parenting and adoptions by same-sex couples because they may not marry under state law. Fourth, the DFPS's counterparts—private child-placement agencies in the state—sometimes impose similar marriage prerequisites on an applicant seeking adoption, as do many foreign countries. Finally, a same-sex adoptive couple may experience difficulties in obtaining a supplemental birth certificate or name change for an adopted child. Thus, a second-parent adoption seems to be the path of least resistance for an adoption by a same-sex couple, rather than seeking a joint adoption through DFPS, some private agencies, or foreign countries.¹¹⁵

IV. THE PUBLIC POLICY DEBATE OVER SAME-SEX ADOPTION

A. Statements of Public Policy

Both the Texas Family Code and decisions from the Texas Supreme Court articulate public policy goals that implicate the state's adoption procedures. In *Green v. Remling*,¹¹⁶ the Texas Supreme Court noted that “[t]he paramount considerations in adoption proceedings are the rights and welfare of the children involved and these statutes are to be [so] construed . . .”¹¹⁷ In a less broad statement of public policy, the Family Code outlines a statement with regard to conservatorship, possession,

¹¹⁴ See *Green v. Remling*, 608 S.W.2d 905, 908 (Tex. 1980) (noting that trial courts are invested with great discretionary authority over whether or not to issue adoption orders). Ms. Ellen Yarrell explains that whether an adoption petition is granted can depend on the particular judge. Because Texas judges are elected, they might decide to avoid the issue to avoid hurting their chances of reelection. Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

¹¹⁵ Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009). Ms. Yarrell also recommends establishing a parent-child relationship with one parent and petitioning a court to make the other parent the joint-managing conservator.

¹¹⁶ 608 S.W.2d 905 (Tex. 1980).

¹¹⁷ *Id.* at 907.

and access to children. It provides that the public policy of the state is to “assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child [and] provide a safe, stable, and nonviolent environment for the child.”¹¹⁸ This provision also states that the public policy is to “encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.”¹¹⁹

B. Legislative Proposals and Debate

Due to the ambiguity of Texas law regarding same-sex adoption, state legislators have introduced bills answering the same-sex adoption question in the negative by proposing express prohibitions on homosexuals becoming foster parents. This would preclude same-sex couples from both fostering and adopting children. In the regular session of the Seventy-Sixth Texas Legislature (1999), Representatives Robert Talton and Warren Chisum each introduced bills that would disqualify homosexuals from becoming foster parents.

Representative Talton’s bill, H.B. 415, proposed that DFPS inquire into the sexuality of foster parents and foster parents applicants.¹²⁰ If a foster parent or applicant disclosed, or if the DFPS determined, that the foster parent or applicant was homosexual or bisexual, the bill would have prohibited DFPS from allowing the applicant to become a foster parent, or from placing or leaving a child with that foster parent.¹²¹ Representative Talton’s bill would have thus prohibited those who were forthright about their sexuality from being foster or adoptive parents. Because the bill would only have affected DFPS, it would not have required private adoption agencies to follow the same standards or prohibited courts from issuing adoption decrees to same-sex couples.¹²² The State Affairs Committee took no action on the bill.¹²³ Though Representative Talton reintroduced this same bill in the Seventy-Eighth Regular Session (2003),¹²⁴ it met the same fate as his previous effort.¹²⁵

Representative Chisum introduced a bill that attempted to achieve the same effect. House Bill 382 sought to investigate not only the sexuality of the foster parent, but also whether “homosexual conduct occurs or is likely to occur.”¹²⁶ The bill would have required DFPS to

¹¹⁸ TEX. FAM. CODE ANN. § 153.001 (Vernon 1999).

¹¹⁹ *Id.*

¹²⁰ H.B. 415, 1999 Leg., 76th Reg. Sess. (Tex. 1999).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ H.B. 194, 2003 Leg., 78th Reg. Sess. (Tex. 2003).

¹²⁵ *Id.*

¹²⁶ H.B. 382, 1999 Leg., 76th Reg. Sess. (Tex. 1999).

investigate into whether homosexual activity—defined as “deviate sexual intercourse with another individual of the same sex”—was occurring or was likely to occur in the particular adoptive home.¹²⁷ After testimony was taken on the bill, it was left pending in committee.¹²⁸

As the testimony on Representative Chisum’s H.B. 382 demonstrates, these bills were supported on multiple grounds. First, members of the public testified that homosexuals were categorically unfit to foster or adopt children from DFPS.¹²⁹ One particular proponent stated that this unfitness resulted from the inherent guilt held by all homosexuals about their sinfulness, homosexual men’s disproportionately low life expectancy, and the possibility that they have diseases.¹³⁰ As a result, the proponent believed that children would be better left in orphanages than with two same-sex parents or with one homosexual adoptive parent.¹³¹ Second, the same proponent contended that homosexual conduct should be regulated, but that such regulation was not an inherent attack on “those that practice homosexual conduct.”¹³² Other proponents argued that children should not be placed with those who frequently commit sex-related crimes.¹³³ Finally, proponents argued that it was in the best interests of children to have one mother and one father because having a homosexual parent (or two homosexual parents) would result in bullying of the child at school, increased risk of sexual abuse by adoptive parents, higher incidence of sexual promiscuity, and sexual and gender confusion resulting in the child being a homosexual as an adult.¹³⁴

Opponents of the proposed bill countered these contentions by arguing that generalizations and stereotypes should not be used to preclude a category of people from serving as adoptive parents. First, some witnesses argued that sexual orientation is irrelevant to whether a person is able to act in the best interest of a child.¹³⁵ Second, some provided personal narratives about being homosexual and not having diseases and testified that their children never experienced harassment or bullying because of the parents’ sexual orientation.¹³⁶ Third, opponents argued that by reducing the pool of qualified applicants willing to take the children considered “tougher to adopt,” more children are left in

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Hearing on H.B. 382 Before the Texas State Affairs Committee*, 1999 Leg., 76th Reg. Sess. (Tex. 1999) (on file with the House of Representatives Video/Audio Services) (hereinafter Public Hearing).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Public Hearing *supra* note 129.

¹³⁵ *Id.*

¹³⁶ *Id.*

institutional care and the burden on taxpayers is heightened.¹³⁷ Finally, Representative Debra Danburg testified that when controlling for the background of a child, the children's outcomes do not significantly vary between fostering and adoption by opposite-sex couples and that by same-sex couples.¹³⁸ She also cited an American Psychological Association study that concluded that ninety percent of sexual abuse of children is perpetrated by heterosexuals and that most homosexual individuals are raised by opposite-sex parents.¹³⁹

C. Analysis of the Debate

Although the previously discussed legislative debate concerned proposed bills on fostering and adoption through DFPS, many arguments logically implicate the adoption and foster care public policy goals outlined in Chapter 153 of the Texas Family Code, and the "best interest of the child" factors.¹⁴⁰ This section analyzes the merits of those arguments in the specific framework of the public policy goals that Texas adoption law attempts to achieve. Though subjectively formulated for specific parents and children, the goals implicit within the public policy statements of Chapter 153 can be generalized into objectives that would apply to all adoptable children in Texas.¹⁴¹

Chapter 153's first goal is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child."¹⁴² Categorically excluding classes of potentially adoptive couples from consideration seems antithetical to the goal of providing children with access to parents who have shown the ability to act in the best interest of children. Even if some homosexual individuals or same-sex couples are unfit parents, these characteristics are inherent neither in the sex composition of the couples nor in their sexual orientation.¹⁴³ The preference against categorical exclusion is further demonstrated by the Family Code, which does not consider race, ethnicity, sex, or marital status as factors in determining adoption and conservatorship of children.¹⁴⁴ Excluding same-sex couples from joint

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* Since 2005, no bills have been introduced in the Texas Legislature relating to same-sex adoption.

¹⁴⁰ Many of the arguments do not directly implicate the public policy goals outlined in the Texas Family Code, but rather reflect other legislative judgments concerning administrative efficiency and taxpayer burdens, which are outside the scope of the three-pronged statement of public policy. See TEX. FAM. CODE ANN. § 153.001 (Vernon 1999).

¹⁴¹ See, e.g., *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied) (applying the subjective test to justify application of the strict six-month limitation on attacking adoption decrees).

¹⁴² TEX. FAM. CODE ANN. § 153.001(a)(1) (Vernon 2009).

¹⁴³ Public Hearing, *supra* note 129.

¹⁴⁴ TEX. FAM. CODE ANN. §§ 153.003 & 162.015 (Vernon 2007).

foster care adoption would give children access to fewer parents who would be capable of acting in the children's best interests, thereby undermining the first aim of the Family Code.¹⁴⁵ If Texas law prohibited same-sex second-parent adoptions, a parent's partner, who may have demonstrated an ability to act in the best interest of the child, would have no rights regarding that child.

The other relevant goal of the Family Code is to "provide a safe, stable, and nonviolent environment for [children]."¹⁴⁶ The debate over H.B. 382 also implicated this goal, as the bill's proponents argued that providing an environment of opposite-sex couples provides a safer, more stable, and less violent environment for children.¹⁴⁷ Supporters of joint same-sex adoption argue that same-sex couples can offer safe and loving homes for older children in need of adoption. Further, it is difficult to objectively quantify the risks of harms a child would experience as a result of having same-sex parents—most notably, experiencing increased harassment—especially given the mixed results of studies on the issue. These risks would vary based on the predominant attitudes of the particular community in which the child was raised. However, openness of Texas's laws to a single-parent adoption provides a formalistic procedure to bypass opposition to joint same-sex adoption, because second-parent adoptions are always available after a single-parent adoption: one person in a same-sex couple could foster or adopt a child as a single parent, and then the other in the couple could seek a second-parent adoption. Thus, as long as single-parent adoption is permitted, any advantages or disadvantages of joint same-sex adoptions can be actualized through a single-parent adoption followed by a second-parent adoption.

Recognizing same-sex second-parent adoptions, on the other hand, would not threaten the policy regarding safety and stability of the child's environment. The potential adoptive child would already have a home in which two adult figures play parental roles in the child's life, but only one has a legally established parent-child relationship with the child. Thus, establishing a legal relationship with a second parent would not affect the safety or stability of the child's environment. The public policy goals of the Texas Family Code appear to strongly support the recognition of same-sex second-parent adoptions. Even if joint same-sex adoptions do not necessarily provide safer and more stable environments for children, permitting single-parent adoption makes these concerns irrelevant. Failing to recognize same-sex adoptions offers fewer stable homes to children in need and inhibits their access to individuals capable of acting in their best interest.

¹⁴⁵ TEX. FAM. CODE ANN. § 153.001(a)(2).

¹⁴⁶ *Id.*

¹⁴⁷ Public Hearing *supra* note 129.

V. CONCLUSION

A same-sex couple generally has two options to establish a parent-child relationship between each member of the couple and the child: a joint adoption, or a second-parent adoption of the biological or adopted child of one of the partners. Texas law is unclear as to whether it recognizes these options because it contains no express permission for or prohibition on either option. Chapter 162 of the Texas Family Code does not seem to preclude a same-sex couple from jointly adopting as two single individuals, or having one member adopt the other's biological or adopted child.¹⁴⁸ While challenges fashioned from other statutory provisions on adoptions granted under Chapter 162 ultimately have not been successful, Texas appellate courts have not addressed the merits of attacks based on the provisions of other Texas statutes. Rather, appellate courts have uniformly upheld adoptions under a strict application of the statute of limitations for challenging adoptions. This result is based on public policy considerations of maintaining a stable environment for adopted children.

Despite the general tendency of courts to uphold these adoptions after they are granted, a particular district court may decide not to grant adoption petitions, and a DFPS official may decide not to place children in the homes of same-sex couples. A judge or DFPS official might attempt to justify a denial of an adoption petition by citing provisions in the state statutes expressing tension with the idea of same-sex adoption. However, Texas appellate courts should follow the lead of district courts that have granted same-sex couples' adoption petitions. The best interest of a particular child cannot be used to justify such categorical exclusions of potential parents based on their sexes. Rather, such exclusion would greatly reduce the chances for a child to be jointly adopted by a couple that can provide a safe, stable, and nonviolent environment: exclusion would preclude a child from receiving healthcare coverage, child support, and other benefits from recognizing a second-parent adoption.

¹⁴⁸ There are several requirements for second-parent adoption. See *infra* Part II.