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More parents for more children: The modernization of adoption

By Joseph F. Emmerth, IV

The Adoption Act directs the court to "liberally construe" its provisions;¹ plain and simple, this means that the statute should apply to more cases and situations than it otherwise would if construed strictly. The first part of the statute states:

(a) A reputable person of legal age and of either sex, provided that if such person is married and has not been living separate and apart from his or her spouse for 12 months or longer, his or her spouse shall be a party to the adoption proceeding, including a husband and wife desiring to adopt a child of the other spouse, in all of which cases the adoption shall be by both spouses jointly.²

The second part of the statute states that the "singular includes the plural and the plural includes the singular...as the context of this Act may require."³ While some attorneys assert that "the plural interpretation of 'person' should only be used when married couples are involved," the appellate court clearly decided that a proper and logical reading of Section 2 of the Act implies that

a reputable person of legal age and of either sex may adopt; and that if that person is married, then their spouse must also adopt. Until a decade ago, there was a question of liberal construction and who could adopt.

Same-Sex Couples and Adoption

*In re Petition of K.M.*⁴ consisted of two adoption cases that were heard together. The cases were heard together because they both involved situations in which same-sex couples attempted to adopt a child, or children, that were related to one member of the couple. The cases also shared the same Guardian ad litem, who filed motions to dismiss in each case based on standing, despite his acknowledgement that the adoptions would be in the best interests of the children. The trial court in each case granted the motion to dismiss. The appellate court overturned the trial court's rulings, and held that both of the same-sex couples had standing to adopt under the Illinois Adoption Act.⁵ A closer look at the appellate court's ruling reveals an affirmation of same-sex couples' standing to jointly adopt in Illinois. Perhaps this will even lead to a more flexible adoption process statewide.

In each of the cases decided by *K.M.*, one of the adopting parents was related to the children by blood, while the other was not (a second-parent adoption, akin to stepparent adoptions). There have been rumblings around the state that the appellate court's reading of this provision fails to take into account situations where both adopting parents will not be related to the child

by blood or marriage (co-parent adoption, akin to agency adoptions). While it is true that "the Adoption Act has never explicitly indicated that two persons of the same-sex do not have standing to petition,"⁶ a common argument is that this rationale could easily be turned on its head to say that there has never been an express indication that same-sex couples do have standing. However, this line of attack runs aground on the Act's direction to construe its provisions liberally,⁷ "a liberal construction" being a construction "which makes the statute apply to more things or in more situations than would be the case under strict construction."⁸ Hence, this 'argument from silence' is obviously the more strict interpretation, and thus must fail.

Another argument previously used against same-sex couples is that the lack of any Illinois case concerning a non-married couple seeking to adopt suggests that the Illinois Legislature and Illinois Courts have understood Illinois Adoption law to forbid any unmarried couple from having standing to petition to jointly adopt. This seems as a strict and overly austere inference. This 'absence-as-proof' argument would come as a shock to the drafters of the 14th amendment, the petitioners in *Brown v. Board of Education*, and proponents of the women's suffrage movement. The appellate court in *In re Petition of K.M.* has finally put this argument to sleep.

The Best Interests of the Child

"The best interest of the child should be the paramount concern for pro-

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ceedings under the Adoption Act.⁹ This is true of most areas of litigation concerning children in the state of Illinois. Some attorneys still cling to the notion that the legislature put minimum requirements in the statute for rationally-based reasons, and that the "best interest of the child" standard should not be used by the courts to disregard the statutes' 'clear mandates.' (a thinly-veiled attempt to preserve adoption as a realm for married heterosexuals).

However, when this argument is carried out to its logical conclusion, it places a trial court in a catch-22. Under his rationale, the courts would either have to: 1) obey the legislature's alleged minimum requirements by disregarding the "best interest" standard contained in the statute that the legislature drafted; or 2) follow the explicit language of the statute's "best interest" standard to the contradiction of the statute's alleged minimum requirements. This rationale inevitably leads to the bizarre implication that the legislature should have the authority to make decisions for the child that are not in the best interests of the child.

It is only proper that trial courts make best interest determinations on a case-by-case basis, as they are in the best position to do so, having reviewed all the evidence and having seen and heard the litigants firsthand. And while minimum requirements are a necessary component of the Illinois Adoption Act, it seems unlikely that the legislature would intend a strict interpretation of a procedural section in the Act to countermand the "paramount concern"¹⁰ of proceedings under the Act. Perhaps this is the very reason the Act commands that its provisions be interpreted "liberally,"¹¹ and not strictly.

The decision in the *K.M.* case appeared to clear the way for same-sex adoptions in Illinois. However, the issue of whether an adoptive parent's sexual orientation is relevant to the best interests of the child was not addressed in that case. Four years after the decision in *K.M.*, the Appellate Court for the 1st District addressed this issue in *In re C.M.A. In re C.M.A.*¹² involved two separate adoption cases that were consolidated on appeal. In both cases, the petitioners were lesbian couples jointly petitioning to adopt the child(ren) of one of the partners. In the first of the two cases, the investigative report was favorable and the GAL recommended that the adoption was in the best interests of the child,

expecting that a judgment for adoption would be entered "off-call," as is usual in uncontested adoptions in Cook County. Instead, the trial judge sua sponte ordered a best interests hearing. The evidence presented at trial through the testimony of the petitioners and the court-appointed investigator was overwhelmingly positive regarding the petitioners' parenting skills and commitment to the child. The trial judge's bias against the lesbian petitioners became evident when the only questions the court asked of the petitioners involved their sexual orientation and sexual relationship. At the close of the hearing and for months afterward, the judge continued the case and refused to indicate when a ruling would be issued because she was deciding another case with "similar issues" and refused to make a ruling in this case until hearing evidence in the other case. The parties moved the presiding judge to remove the trial judge for cause based upon her decision to consider evidence in the second, wholly unrelated, case before ruling in their case. The motion was heard and granted by the presiding judge and he entered a final judgment for adoption four days later.

The *C.M.A.* court found that the trial judge had an "extreme and patent bias against the adoptive parents based upon their sexual orientation and that she joined together two totally separate adoptions, whose only common thread was the sexual orientation of the adoptive parents. As a result, she not only injected inadmissible facts into each of the cases, but also inflicted anguish on the petitioners and needlessly prolonged what should have been a simple and straightforward process." The court stated that the "petitioners came to our state court system in order to be allowed to adopt children, children with whom they had already formed a loving relationship over a period of time. A higher purpose cannot be imagined. To have the Petitioners treated in the manner that they were is nothing less than appalling."¹³

Rationale and the Future.

The appellate court's reasoning behind its decision is neither arcane nor a novel interpretation of the statute, as the appellate court cites in its opinion over 35 Illinois cases, numerous cases from sister states, and countless statutes, as well as Black's Law Dictionary definitions. Even a casual reading of *K.M.* reveals that the Appellate

Court performed substantial research, across many different time periods and areas of law, to reach at its ruling. Interestingly enough, if the appellate court's decision is followed to its logical conclusion, the reader will discover that under the Appellate Court's definition of "person," any institution, corporation, or cult group might petition to adopt. This is a fascinating area for discussion. The appellate court, in fact, realized this very implication in its opinion. However, the appellate court placated these concerns by focusing on the fact that a trial court, having reviewed all the evidence, and having seen and heard the litigants firsthand, can easily avoid these sorts of results by applying the best interest standard. Same-sex parents adopting children will therefore not be the gateway to "bizarre adoption" scenarios envisioned by those who fear and fight change.

Ultimately, the appellate court's decision in *K.M.* is the only interpretation of the Illinois Adoption Act that doesn't force the Act to contradict itself. By following the Act's command to interpret its provisions literally, the Appellate Court was able to satisfy the "paramount concern" in proceedings under the Act, the best interests of the child. Any parent, natural or adoptive, will admit that the joy and well-being of their children is the paramount concern of their lives. At the end of the day, if the best interest of the child has not been pursued, what purpose then the Illinois Adoption Act?

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1. 750 ILCS 50/20 (2007).
2. 750 ILCS 50/2(a) (2007).
3. 750 ILCS 50/1(g) (2007).
4. 243 Ill.App.3d 189, 653 N.E.2d 888 (Ill.App. 1st Dist. 1995).
5. Id. at 888, 897.
6. Id.
7. 750 ILCS 50/20 (2007).
8. *K.M.*, 274 Ill.App.3d at 195, 653 N.E.2d at 892.
9. Article, quoting 750 ILCS50/20(a) (2007).
10. 750 ILCS50/20(a) (2007).
11. 750 ILCS 50/20 (2007).
12. 306 Ill.App.3d 1061, 715 N.E.2d 674 (1st Dist. 1999).
13. 306 Ill.App.3d 1068.