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Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring

Mark Strasser*

I. INTRODUCTION

Two recent high-profile cases involving adoptions by same-sex partners highlight the potential difficulties that can arise when families composed of same-sex parents and their children cross state lines. In *Finstuen v. Crutcher*,1 the Tenth Circuit struck down an Oklahoma law that precluded the state from recognizing both of a child's same-sex parents, even when those parent-child relationships had been established in other states in accord with local law.2 In *Miller-Jenkins v. Miller-Jenkins*, both the Vermont Supreme Court3 and a Virginia appellate court4 recognized that Vermont courts had jurisdiction to decide the custody and visitation issues arising from the dissolution of a Vermont civil union.5 While the courts reached the correct results in these cases, the cases themselves and the underlying jurisprudence suggest that differing state practices may both put children at risk and induce individuals to seek dissolutions of their relationships and determinations of custody and visitation rights prematurely.

States are required as a constitutional matter to give full faith and credit to final adoption decrees from other states.6 However, recognition of adoptive status does not afford as much protection as one might think. There is ample room for mischief to families even

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1. 496 F.3d 1139 (10th Cir. 2007).
2. *Id.* at 1141-42 (discussing OKLA. ST. ANN. Tit. 10, § 7502-1.4 (West 2007)).
5. 912 A.2d at 956; 637 S.E.2d at 332.
6. *Hood v. McGhee*, 237 U.S. 611, 614-15 (1915) (holding that Alabama must recognize Louisiana adoption in action regarding inheritance of adopted children because of the Full Faith and Credit Clause); see U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the Acts, Records, and Judicial Proceedings of every other State.").

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when that recognition has been accorded, and the foreseeable
defensive measures that might be taken to prevent certain harms
from occurring might themselves be non-optimal for the families
involved. Because of the ever-increasing mobility of the population,
it is becoming even more important that states act in concert to
prevent individuals from gaming the system and imposing on their
children and ex-partners unnecessary and undeserved costs. 7
Interstate custody and visitation disputes are already complicated
enough, 8 and adding additional layers of complexity and
indeterminacy will result in increased litigation, instability, and
overall harm. Unless additional protective measures are incorporated
into law either by Congress or by the courts, one can only expect
more protracted litigation and more harm to children arising from
these interstate disputes.

Part II of this Article explains that states must give full faith and
credit to adoption decrees issued by other states in accord with local
law, whether those adoptions involve children or adults. Part III
discusses the conditions under which states can modify visitation
orders issued by other state courts in light of the Parental
Kidnapping Prevention Act and the Defense of Marriage Act. Finally,
Part IV offers a brief conclusion explaining that although Finstuen
and Miller-Jenkins are protective of the rights of the same-sex parents,
they nonetheless illustrate some of the dangers faced by same-sex
parents and their children.

II. ADOPTION, CUSTODY, AND VISITATION IN INTERSTATE
DISPUTES

The Full Faith and Credit Clause imposes obligations on the
states with respect to how they must treat the judgments, acts, and
records of other states. 9 Recently, an Oklahoma law precluded state
officials from according full faith and credit to adoptions by same-sex
parents that had been validly performed in other states. 10 As the
Finstuen court recognized, there is no public policy exception

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7. For example, the current system may create incentives to file suit prematurely to
   establish parental rights and obligations. See text following note 209 infra.
   more common and society more mobile, the volume and complexity of interstate child
   custody decrees increased dramatically.”).
9. See U.S. CONST. art. IV, § 1, cl. 3.
permitting states to refuse to recognize valid adoptions from other states. While same-sex parents can take some comfort in the Finstuen decision, a variety of adoption-related issues will still have to be resolved.

A. Full Faith and Credit and Supreme Court Jurisprudence

The Full Faith and Credit Clause reads: “Full Faith and Credit shall be given to each State to the public Acts, Records and judicial Proceedings of every other State.” As the Supreme Court explained in Estin v. Estin, the clause “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.”

Were there no Full Faith and Credit Clause, a state could consider its own public policy when deciding whether to credit another state’s judgment. Under the principles of comity, a state might decide to credit the judgment of another state out of deference or, perhaps, out of the belief that giving full faith and credit to the judgment of a sister state might induce the latter to reciprocate in a future case when the states’ respective positions had been reversed. Nonetheless, the principles of comity permit a forum to refuse to give credit to a foreign state’s judgment if that judgment violates an important public policy of the forum.

The Full Faith and Credit Clause does not afford states the discretion to refuse to give full faith and credit to judgments validly issued in other state courts—the states are not “free to ignore obligations created under the laws or by the judicial proceedings of

11. Finstuen v. Crutchcr, 496 F.3d 1139, 1152–53 (10th Cir. 2007).
14. Id. at 546 (citing Williams v. North Carolina, 317 U.S. 287, 301, 302 (1942)).
15. Cf. Hilton v. Guyot, 159 U.S. 113, 197 (1895) (noting a case in which “Vice Chancellor Wood (afterwards Lord Hatherley) refused to give effect to a judgment in personam of a court in Louisiana, which had declined to recognize the title of a mortgagee of an English ship under the English law”).
16. Jaffe v Accredited Surety & Cas. Co., Inc., 294 F.3d 584, 591 (4th Cir. 2002) (“[A] state can refuse, as Florida did, to recognize a foreign judgment on the ground that it conflicts with the public policy of that state.” (citing Hilton, 159 U.S. at 163)).
17. Id. at 592 (“But neither a state nor a federal court can refuse to give full faith and credit to the judgment of a state court because of disagreement with the public policy basis for that decision.”).
the others.” The clause effected a change in the status of the states, making them “integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.”

The effect of this change must not be minimized, since it means that a state might be required to submit “to hostile policies reflected in the judgment of another State.” The Court has noted that “the requirements of full faith and credit, so far as judgments are concerned, are exacting.” As the Court explained in Nevada v. Hall, “[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter.” For example, when a state court with jurisdiction over the parties and the subject matter issues a final judgment in which money damages are awarded, that judgment is enforceable, even if a different state would have treated the matter differently and would have denied recovery. The validity of the claim is not to be revisited by another state’s court, rather, the sole basis upon which another state court might decide not to enforce such an award would be if the court issuing the judgment lacked jurisdiction over the parties or subject matter.

It might seem that because family matters involve such important interests, the requirements of full faith and credit must be relaxed where such matters are at issue, so that states can give effect to their considered public policies when deciding whether to enforce a sister state’s judgment in such a sensitive and important area. The Full Faith and Credit Clause, however, has been interpreted to take an

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19. Id.
21. Id. (citing Williams v. North Carolina, 317 U.S. 287 (1942)).
23. Id. at 421.
24. Milwaukee County, 296 U.S. at 275 (“A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis.”).
25. Id. (“Recovery upon [the judgment] can be resisted only on the grounds that the court which rendered it was without jurisdiction.” (citations omitted)).
entirely different tack—the importance of the interests at stake militates in favor of the finality of judgments.\footnote{Sherrer v. Sherrer, 334 U.S. 343, 356 (1948).} In \textit{Sherrer v. Sherrer}, the Court reasoned “[t]hat vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation.”\footnote{\textit{Id.} at 356.} That way, marital status and the legitimacy of children would not depend upon the jurisdiction in which an individual happened to find herself.\footnote{Sec Estin v. Estin, 334 U.S. 541, 546-47 (1948) (“For a person domiciled in one State should not be allowed to suffer the penalties of bigamy for living outside the State with the only one which the State of his domicile recognizes as his lawful wife. And children born of the only marriage which is lawful in the State of his domicile should not carry the stigma of bastardy when they move elsewhere.”).}

While the Full Faith and Credit Clause limits the sovereignty of states in that they are not free to refuse to enforce judgments validly issued in other states on public policy grounds, the clause does not impose analogous obligations when something other than a judgment is at issue. The Supreme Court has recognized that states retain their sovereignty when deciding whether to give effect to the statutes of other states. Thus, the Court noted in \textit{Pacific Employers Insurance Co. v. Industrial Accident Commission.}\footnote{306 U.S. 493 (1939).}

\begin{quote}
[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause [sic] as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.\footnote{\textit{Id.} at 501.}
\end{quote}

While one state might decide to defer to another state’s law in the interest of comity, the forum state is not required to do so by the Full Faith and Credit Clause. The Court explained in \textit{Baker by Thomas v. General Motors Corp.}\footnote{522 U.S. 222 (1998).} that a distinction must be made with respect to “the credit owed to laws (legislative measures and common law) and to judgments.”\footnote{\textit{Id.} at 232.} A state need not ignore its own public policy determination and defer to the laws of another state,
even when those laws contradict the public policy of the enforcing state.34 However, the state must yield to a judgment of another state court if the latter court had jurisdiction to issue that judgment.35 Thus, the Baker Court summarized the existing jurisprudence by suggesting that while a “court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy,”36 the Constitution does not support a “roving ‘public policy exception’ to the full faith and credit due judgments.”37 Where there has been a valid, final adoption in one state, sister states will not be permitted to refuse to recognize that judgment.

B. Limitations on Who Can Be a Parent

Some states do not permit those with a same-sex orientation to adopt children.38 Even an individual whose parenting skills are “exemplary” might be precluded from adopting a child because he or she is in a romantic relationship with a same-sex partner.39 Most states do not impose such a restriction, however, and instead permit individuals to adopt singly, regardless of their sexual orientation.40

An individual who adopts might nonetheless be living with another adult in a romantic relationship. States differ with respect to whether each member of a non-marital couple is permitted to establish a legally recognized relationship with the child that they

34. Id. (“The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” (quoting Pacific Employers Ins. Co., 306 U.S. at 501; citing Phillips Petroleum Co. v. Shurtleff, 472 U.S. 797, 818–819 (1985))).
35. Id. at 233 (“Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”).
36. Id. (citing Nevada v. Hall, 440 U.S. 410, 421–24 (1979)).
37. Id. (citing Estin v. Estin, 334 U.S. 541, 546 (1948)).
38. See, e.g., FLA. STAT. ANN. § 63.042(3) (2003) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). Actually, the Florida statute has been construed to be based on sexual activity rather than sexual orientation. See Mark Strasser, Lawrence, Lofton, and Reasoned Judgment: On Who Can Adopt and Why, 18 ST. THOMAS L. REV. 473, 477 (2005) (discussing the construction of the Florida statute).
40. See Mark Strasser, Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results, 5 J.L. & FAM. STUD. 297, 298 (2003) (“As a general matter, singles can adopt and, in most but not all states, gays and lesbians can adopt as single adults.”).
both are raising. For example, one member of a same-sex couple might have adopted a child, had a child in a heterosexual relationship, or made use of advanced reproductive techniques to produce a child. In some states, that individual's same-sex partner would be allowed to adopt that child via a second-parent adoption, so that both adults would be recognized as the legal parents of that child.

Affording legal recognition to the second parent's relationship with a child might not have much effect on that child's day-to-day routine—whether or not both adults were legally recognized as the child's parents, one parent might transport the child to and from school while the other parent might take the child to the doctor. However, according that recognition might have significant effects on the family's finances. For example, the second parent might be the only parent working outside of the home, and the legal recognition of the parent-child relationship might permit that parent to list the child as a dependent entitled to employer-provided medical insurance. According that recognition might also affect the second parent's willingness to invest emotionally in the child, since

41. Compare VT. STAT. ANN. tit. 15A, § 1-102 (b) (2007) (“If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.”) with LA. CHILD CODE ANN. art. 1198 (1992) (“A single person, eighteen years or older, or a married couple jointly may petition to adopt a child through an agency.”). This statute has been interpreted to preclude two unmarried individuals from jointly adopting a child. See Adoption of Meaux, 417 So.2d 522, 523 (La. App. 1982) (“As two single persons jointly petitioning to become the adoptive parents, they are not ‘a single person’ under the statute. Therefore, the statute does not authorize petitioners to jointly adopt their natural child.”).

42. See Christopher Colorado, Tying the Braid of Second-Parent Adoptions—Where Due Process Meets Equal Protection, 74 FORDHAM L. REV. 1425, 1432–33 (2005) (“A second-parent adoption is a ‘procedure that allows a same-sex co-parent to adopt his or her partner’s biological or adopted child.’ Once the second-parent adoption is completed, the birth parent and the adopter parent have equivalent rights vis-à-vis the child.”) (quoting JOAN HEFFETZ HOLLINGER, ADOPTION LAW AND PRACTICE, § 3.06[6] 3–57 (2004); citing Julie Shapiro, A Lesbian-Centered Critique of Second-Parent Adoptions, 14 BERKELEY WOMEN’S L.J. 17, 26 (1999)).

43. See Adoption of Tammy, 619 N.E.2d 315, 320 (Mass. 1993) (permitting second-parent adoption would make child eligible for coverage under partner’s insurance policy).

44. See Deborah L. Forman, Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships, 46 B.C. L. REV. 1, 56 (2004) (“Partners whose rights are vulnerable might refrain from fully assuming their parental role, for fear that their rights could be easily abrogated by a move elsewhere. In addition, uncertainty puts the child at risk of abandonment by the partner, without repercussions.”).
she could be confident that her relationship with the child would continue even if her relationship with her adult partner were to end through death or dissolution.

I. In re Adoption of M.C.D.

Some states do not recognize second-parent adoptions, benefits that might accrue from such recognition notwithstanding. For example, while Oklahoma allows single individuals to adopt and married individuals to adopt, state case law suggests that each member of a non-marital couple will not be permitted to adopt the same child. In In re Adoption of M.C.D., an Oklahoma appellate court addressed whether two divorcing individuals could each adopt the child who had been living with them. The trial court had permitted each adult to adopt the child at issue, and the husband had appealed the trial court’s decision permitting his soon-to-be ex-wife to become the child’s legally recognized mother.

In reversing the trial court, the appellate court made clear that the adoptions at issue were not permitted under local law. However, the court was not entirely clear as to whether it was only suggesting that the kind of adoption before it could not take place or, instead, whether, as a general matter, two unmarried adults would be


The following persons are eligible to adopt a child:

1. A husband and wife jointly if both spouses are at least twenty-one (21) years of age;

2. Either the husband or wife if the other spouse is a parent or a relative of the child;

3. An unmarried person who is at least twenty-one (21) years of age; or

4. A married person at least twenty-one (21) years of age who is legally separated from the other spouse.

Id. This statute has been strictly construed to preclude two divorcing individuals from adopting the same child. See In re Adoption of M.C.D., 42 P.3d 873, 881-82 (Okla. Civ. App. 2001).


48. Id. at 878 (“Husband’s second contention is the trial court erred as a matter of law by ordering a joint adoption by two unmarried people.”).

49. Id. at 885 (“The order granting both Husband’s and Wife’s petitions to adopt M.C.D. are reversed and remanded for redetermination.”).
precluded from each adopting the same child. On one hand, the appellate court indicated that the adoption statute must be strictly construed, which suggests that Oklahoma law does not permit second-parent adoptions. On the other hand, however, when justifying its decision, the court offered a rationale that differentiated the situation in M.C.D. from the context in which second-parent adoption requests often occur. The court wrote:

The requested adoption by two divorcing persons fails to fit within any of the statutory categories of those eligible to adopt. It contravenes the above-stated purpose of the Oklahoma Adoption Act that children should be placed in stable, permanent loving families. The “family” in the instant case is divided by divorce and Husband and Wife clearly have an antagonistic and adversarial relationship. It is therefore not stable, permanent or loving as a family “unit,” despite how stable or loving Husband and Wife may be individually.

The M.C.D. court emphasized that by permitting both of these individuals to adopt the child, the state would not be promoting its goal of placing children in stable, loving families because the adults would be living in different residences and would be antagonistic toward each other. Yet, this is an important difference between the situation in M.C.D. and the situation in the paradigmatic case involving second-parent adoptions where the adults are living together in a harmonious home in which the child is already thriving.

A separate issue is whether permitting the adoptions in M.C.D. would have promoted the best interests of the child. It may be that the child would have been better off having been adopted by each member of the divorcing couple, since that would have assured continued contact with each adult. Given the antagonism between

50. Id. at 882 (“Strict construction of the statute requires that we reverse the order granting both petitions to adopt.”).
51. See Finsteen v. Crutcher, 496 F.3d 1139, 1149 (10th Cir. 2007) (“The state court of civil appeals held that the statute, OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West 2007), categorically denies unmarried couples eligibility to adopt a child, even though it permits single individuals to adopt.” (citing M.C.D., 42 P.3d at 878, 881–82 (Okla. Civ. App. 2001))). Of course, the Finsteen court itself pointed out that its interpretation was not binding. Id. at 1149 n.7 (“We observe, of course, that we lack jurisdiction authoritatively to construe state legislation,” and as such our interpretation does not bind Oklahoma courts.”) (citing United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971) (citation omitted))).
52. M.C.D., 42 P.3d at 881.
the adults, neither of them seemed likely to permit continued contact with the other unless ordered to do so by the court, and denying the child's contact with either of them might have been harmful.\textsuperscript{53} Or, it might be that granting both adoptions would be harmful to the child precisely because each parent could use the child to get back at the former spouse. In any event, the point is not to debate whether the court’s decision promoted the interests of the child but merely to note that there are grounds for reading M.C.D. narrowly so that the Oklahoma statute would not have to be read as precluding second-parent adoption.

2. Finstuen v. Crutcher

At issue in \textit{Finstuen v. Crutcher}\textsuperscript{54} was not the state’s refusal to permit non-marital couples to adopt but, instead, a different Oklahoma statute that precluded the state from recognizing adoptions performed in other states where both parents were of the same sex. In this case, three same-sex couples and their adopted children brought suit against the state of Oklahoma to have the adoption law struck down. Only one of the couples was found to have standing before the court, although each family was harmed by the law.\textsuperscript{55}

The law at issue might have serious consequences. Suppose, for example, that two women were in a long-term relationship in California. One gave birth to a child after having been artificially inseminated, and the other availed herself of the second-parent adoption option permitted under local law.\textsuperscript{56} They lived in California for several years but decided to move to Oklahoma to take advantage of an employment opportunity. The Oklahoma law would preclude recognition of the relationship between the adoptive parent and the child, notwithstanding that the relationship had already existed in California for several years both in law and in fact.

When analyzing the issues implicated in \textit{Finstuen}, the Tenth Circuit Court of Appeals cited to the Supreme Court’s decision in

\textsuperscript{53} \textit{Id.} at 886 (Hansen, C.J., dissenting) ("If Wife is not allowed to adopt M.C.D., C.D.M.D. will have a mother while M.C.D. will not, and M.C.D. will be excluded from C.D.M.D.’s visitations with Wife.").

\textsuperscript{54} 496 F.3d 1139.

\textsuperscript{55} See \textit{id.} at 1141–45.

\textsuperscript{56} See Sharon S. v. Super. Ct., 73 P.3d 554 (Cal. 2003) (holding that second-parent adoption is an option for same-sex couples); \textit{cf. Finstuen}, 496 F.3d at 1142.
Baker for the proposition that the Full Faith and Credit Clause does not include a public policy exception for the credit due judgments, and then held that “final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause.” The court’s decision was unsurprising—as the court itself noted, “many courts—including Oklahoma’s Supreme Court—have determined that the Full Faith and Credit Clause applies to valid adoption decrees from other states.” Indeed, the Oklahoma Attorney General had suggested that Oklahoma was required to give full faith and credit to valid adoptions from other jurisdictions, even if that meant recognizing that a particular child had two fathers. Perhaps believing that the Attorney General was in error or wishing to have the issue settled by the courts, the Oklahoma Legislature passed the law at issue in Finstuen one month after the Oklahoma State Department of Health had issued a new birth certificate that named two men as the parents of the same


58. Id. at 1156.

59. Id. at 1155. The overwhelming view in the secondary literature is that states cannot refuse to recognize such adoptions from other states. See also Barbara J. Cox, Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples, 31 CAP. U. L. REV. 751, 752-53 (2003) (“[A] valid, final adoption decree rendered in one state establishing a parent-child relationship between the adoptive parent(s) and the adoptive child(ren) must be recognized in every other state as equally valid as an adoption decree rendered in that other state.”); Wardle, supra note 45, at 575 (“Many family law scholars agree with the conventional wisdom that states must recognize sister-state adoptions.”); Ralph U. Whitten, Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases, 31 CAP. U. L. REV. 803, 841 (2003) (“There is no question that states must give effect to the valid adoption judgments of other states.”).

60. Finstuen, 496 F.3d at 1142 (“Mr. Greg Hampel and Mr. Ed Swaya are residents of Washington, where they jointly adopted child V in 2002... After V’s adoption, Mr. Hampel and Mr. Swaya requested that OSDH issue a new birth certificate for V. OSDH did so on July 7, 2003, but named only Mr. Hampel as V’s parent. Mr. Hampel and Mr. Swaya contested that action, prompting OSDH to seek an opinion from the Oklahoma attorney general as to whether it must fulfill the request to list both fathers on the birth certificate. The attorney general opined that the U.S. Constitution’s Full Faith and Credit Clause required Oklahoma to recognize any validly issued out-of-state adoption decree.”).
child. The Tenth Circuit made clear that the Oklahoma Attorney General’s analysis had been correct.

a. The Hampel-Swaya family: afraid to cross state lines. A state’s refusal to recognize an adoption poses serious risks. For example, two of the Finstuen plaintiffs, Greg Hampel and Ed Swaya, had entered into an open adoption agreement with the biological mother of the child, agreeing to bring the child to Oklahoma periodically so that the mother could see how the child was progressing. The adoptive couple feared that if there were a medical emergency in which parental consent was required before a procedure could be performed, the state’s announced policy of refusing to recognize the parental rights of both members of the same-sex couple could result in harm to their child. If one of the parents were unable to make a decision because he, too, had been hurt in the automobile accident, the other parent’s medical authorization might not be accepted as valid.

Indeed, one could imagine a scenario in which parental permission for a medical procedure was required and the hospital refused to accept either parent’s authorization, instead choosing to wait until a court determined which parent’s authority would be recognized by the state. Such an action might be taken were there a law or policy requiring that (1) the child’s parent must first be identified, and then (2) that parent would be apprised of all the relevant information so that an informed medical decision could be made, and (3) the decision would be made. Because it might be unclear which adult in the same-sex couple was the “parent” and thus (1) could not be performed without a legal determination of parentage, the hospital administrator might believe that her hands were tied until a court had identified the child’s parent.

In a situation where one of the same-sex partners was a biological parent and the other subsequently adopted, the hospital would

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61. See id. at 1142 (“OSDH subsequently issued a new birth certificate naming both men as parents. The state legislature responded one month later by enacting the adoption amendment.”).

62. See id. at 1141-42 (“Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause. We therefore affirm the order and judgment of the district court declaring the statute unconstitutional . . . .”).

63. Id. at 1142.

64. Id. at 1144.
presumably recognize the biological parent's authority. Where one of the partners had adopted before the other, the hospital would presumably recognize the first parent's authority. But if both parents had adopted at the same time, the hospital might not know whose rights to recognize. Perhaps the hospital would say that as long as each member of the couple gave informed consent to the procedure it would not matter who was recognized by the state as the legal parent and thus the relevant procedure could be performed without waiting for a legal determination of parentage. However, it is not at all clear that the relevant decision-makers would adopt this procedure rather than say that a court would have to declare the "true" parent before the non-emergency procedure could be performed. Any delay might mean that a child would undergo needless pain and suffering.

While recognizing that a situation might occur in which it would be important to establish who was a parent and that harm might result were the statute enforced, the court in Finstuen nonetheless suggested that the harm was merely hypothetical rather than actual and thus that the two men did not have standing to challenge the law. Yet, even if one brackets the medical nightmare in which there is a delay until the "real" parent is identified, it should be clear that the Oklahoma law harmed all of the concerned parties. The fathers in Finstuen suggested that they would have brought their child to Oklahoma to see the child's biological mother, but had refrained from doing so out of fear that something might happen that would require Oklahoma to make a parentage determination. Whether or not the potential harm was sufficiently concrete to confer standing on the parties, an important point is that the parties were acting differently to avoid some of the potential difficulties that might arise, and the change in behavior might have been detrimental to the child, the biological mother, and the fathers themselves.

It is not difficult to imagine that other families involving children and same-sex parents might be reluctant to go to Oklahoma to visit extended family members for some of the same reasons that these fathers had articulated, even though that would mean that a child

65. See id. ("Although a medical emergency might create a scenario in which parental consent is required, such a situation is merely hypothetical, as opposed to an actual or impending contact with Oklahoma authorities that could jeopardize the rights of any member of the Hampel-Swaya family.").

66. Id.
might have more difficulty in establishing and maintaining relationships with cousins, grandparents, and other extended family members. Such a law would undermine rather than promote family values, which suggests that the law is not rationally related to promote a legitimate state interest. After all, it is not as if such a law would deter same-sex parents from establishing legal relationships with their children. Nor would such a law deter parents from living with their children, although such a law might decrease the likelihood that they would have rich and enduring relationships with their Oklahoma relatives.

b. The Finstuen-Magro family: afraid to act as a parent. The Oklahoma statute might also have important implications for families living in the state. Consider the Finstuen-Magro family, who resided in Oklahoma. Anne Magro was the biological mother of the couple’s children, so her parental rights were not jeopardized by the statute. However, Heather Finstuen, who had adopted the children, feared “having her parent-child relationship invalidated, and this fear cause[d] her to avoid signing forms and papers—such as school permission slips or medical releases—that could trigger a question about her legitimacy as a parent.” As if this increased anxiety was not enough of a burden, Finstuen also noted that the children were “fearful due to her uncertain parental status, and that they ha[d] become more ‘clingy’ and [we]re ‘increasingly concerned about when and whether she woul[d] come home.’” The very existence of the statute imposed psychological burdens on the entire family.

Testimony about the psychological effects notwithstanding, the Finstuen court was unconvinced that the statute imposed actual harms on the family. The court noted that Finstuen had “recite[d] no encounter with any public or private official in which her authority as a parent was questioned.” Yet, one infers, her consistent refusal to bring any attention to her role as a parent was

67. See Whitten, supra note 59, at 850 (“Allowing states to reject adoption by same-sex partners in other states will not prevent children from living with such partners, nor will it prevent the parties from informally standing in the relationship of parent and child.”).
68. Finstuen, 496 F.3d at 1142.
69. Id. at 1144-45
70. Id. at 1145.
71. Id.
72. Id.
likely the reason that she did not encounter officials questioning her parental status. Further, given how the children reacted, they too might have been reluctant to treat her as a parent in public for fear that their doing so would have negative results.

While the court may have been correct that Finstuen had not encountered an official who questioned her authority as a parent, this should not be thought to establish that the statute had had no adverse effects on the family. On the contrary, the most plausible assessment would be that all members of the family were adversely affected by the ever-present threat of the state’s refusing to recognize Finstuen’s parental status.

Ironically, the court implicitly suggested that Finstuen should not have adopted a policy of maintaining a low profile. The court noted that Finstuen had not “established that the amendment created an actual, imminent threat to her rights as a parent or the rights of her adopted children, because she [was] not presently seeking to enforce any particular right before Oklahoma authorities.” Of course, she probably feared trying to enforce her rights precisely because she did not know what would happen either to the right that might be put at issue or to any other rights she might have. The court held that neither Heather Finstuen nor Anne Magro had standing to challenge the Oklahoma statute.

c. The Doel family: hospital privileges. Although all the families involved in the suit were harmed by the Oklahoma statute, the Finstuen court held that only two plaintiffs—Jennifer and Lucy Doel—had suffered the type of harm that could confer standing. The Doels had requested the Oklahoma State Department of Health to issue a new birth certificate that included both the first adoptive mother’s name—Lucy Doel—and the second adoptive mother’s name—Jennifer Doel—as the child’s parents. That request was refused. Also, when the child had been brought to the emergency room, the Doels had been told that only Lucy Doel could accompany the child.

73. Id.
74. Id.
75. See id. at 1142.
76. Id. at 1145.
77. Id.
78. Id.
Once standing was established, the court quickly dispensed with the State’s arguments in support of the law. For example, the State had argued that the amendment only precluded the recognition of adoptions by same-sex parents where the adoptions had occurred in a single proceeding.\(^79\) The State thereby suggested that the statute would not preclude recognition of the Doel adoptions, which involved two different proceedings occurring six months apart.\(^80\) However, the court noted that there was “absolutely nothing in the record suggesting that the Oklahoma legislature would find same-sex adoptions more acceptable if they occurred one parent at a time, rather than by both parents at the same time.”\(^81\) Instead, the court reasoned that the “public policy codified by the adoption amendment was plainly meant to prevent recognition of adoptions by same-sex couples.”\(^82\) Lest there be any doubt, the court explained that the “plain language of the statute bars recognition of the legal act of adoption generally, as opposed to merely barring the recognition of a subcategory of adoption proceedings involving both parents in a single proceeding.”\(^83\) This the State simply could not do.

The State offered another argument that would have had far-reaching consequences, if accepted by the court. Essentially, the State argued that there was “no constitutional obligation to recognize California’s adjudication of the Doels’ adoption because no Oklahoma official was a party to the California adoption, and therefore the California court ordering the adoption had no personal jurisdiction over any Oklahoma official to enforce the order against such an official.”\(^84\) However, this would mean that any adoption finalized in one state that violated an important public policy of the forum state would be subject to non-recognition unless a public official of the forum state had been a party to the adoption. The court noted that those seeking to have another state’s final adoption

\(^79\). \textit{Id.} at 1147–48 (“OSDH argues that the adoption amendment applies only to an adoption by a same-sex couple that occurs in a single proceeding.”).
\(^80\). \textit{Id.} at 1142.
\(^81\). \textit{Id.} at 1149.
\(^82\). \textit{Id.} at 1148.
\(^83\). \textit{Id.} at 1149.
\(^84\). \textit{Id.} at 1154–55. \textit{But see} Whitten, \textit{supra} note 59, at 844 (“It should also be noted that a judgment in an action to determine status will also bind non-parties to the action, subject to certain exceptions. [E.g.,] . . . [T]he natural father of a child will not be bound unless . . . [he is] afforded an opportunity to be a party to the action.”).
decree given full faith and credit by Oklahoma are not seeking "to enforce their adoption order against . . . the state of Oklahoma as a matter of claim or issue preclusion,"85 but instead are merely seeking to enforce Oklahoma rights under Oklahoma law, given the State’s obligation to recognize a sister state’s judgment.86 Had the court accepted the State’s argument, full faith and credit guarantees would have been undermined significantly, both with respect to adoption decrees in particular and with respect to judgments from other states more generally.

The Finsten court noted that “although the Full Faith and Credit Clause applies unequivocally to the judgments of sister states, it applies with less force to their statutory laws."87 Oklahoma tried to support the constitutionality of its refusal to give credit to another state’s adoption decree by arguing that forcing it to recognize the adoption would “be tantamount to giving the sister state control over the effect of its judgment in Oklahoma”88 because “the recognition of adoptive status in Oklahoma would extend the gamut of rights and responsibilities to the parents and child of the adoption order, including the right of a child to inherit from his parents . . . .”89 The State further argued that “inheritance is an Oklahoma property right which California courts lack the power to confer.”90

In rejecting Oklahoma’s argument, the Finsten court suggested that the State had “improperly conflated Oklahoma’s obligation to give full faith and credit to a sister state’s judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment.”91 Oklahoma was required by the Full Faith and Credit Clause to recognize the adoption decree from another state, but a separate question to be determined under Oklahoma law was the effect of the adoption, such as inheritance

85. Finsten, 496 F.3d at 1155 (emphasis in original).
86. Id.
87. Id. at 1152 (footnote and citation omitted).
88. Id. at 1153.
89. Id.
90. Id.
91. Id.
rights of adoptive children. Nevertheless, the court did not explore the ramifications of the limitations on the State’s ability to make distinctions within local law with respect to the benefits to which adoptive children or parents might be entitled.

C. Adult Adoptions

The Finstuen court’s distinction between whether an adoption will be recognized and whether the adopted individual will be entitled to particular benefits has a long pedigree. These issues have been litigated both within and across state lines, and the basic distinctions are well established.

Consider, for example, adult adoption, that is, the adoption of one adult by another adult. Some jurisdictions have very permissive policies with respect to adult adoption, whereas others impose severe restrictions limiting the kinds of adult adoptions that can occur within the jurisdiction. Variations among the states

92. See id. at 1154 (“Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship.”).
93. For further discussion of this point, see infra notes 119–21 and accompanying text.
94. See supra notes 87–93 and infra notes 95–126 and accompanying text (distinguishing between whether the valid adoption would be recognized and whether the adoptee would be entitled to particular benefits under local law).
95. Compare ALASKA STAT. § 25.23.010 (2008) (“Any person may be adopted.”), CONN. GEN. STAT. ANN. § 45a-734(a) (West 2004) (“Any person eighteen years of age or older may, by written agreement with another person at least eighteen years of age but younger than himself or herself, unless the other person is his or her wife, husband, brother, sister, uncle or aunt of the whole or half-blood, adopt the other person as his or her child, provided the written agreement shall be approved by the court of probate for the district in which the adopting parent resides or, if the adopting parent is not an inhabitant of this state, for the district in which the adopted person resides.”), FLA. STAT. ANN. § 63.042(1) (2003) (“Any person, a minor or an adult, may be adopted.”), with ARIZ. REV. STAT. § 14-8101(A) (2005) (“Any adult person may adopt another adult person who is a stepchild, niece, nephew, cousin or grandchild of the adopting person, by an agreement of adoption approved by a decree of adoption of the court in the county in which either the person adopting or the person adopted resides. A foster parent may adopt an adult who was placed in his care when the adult was a juvenile if the foster parent has maintained a continuous familial relationship with that person for five or more years.”), and OHIO REV. CODE § 3107.02 (B) (2008) (“An adult may be adopted under any of the following conditions: (1) If the adult is totally and permanently disabled; (2) If the adult is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code; (3) If the adult had established a child-foster caregiver or child-stepparent relationship with the petitioners as a minor, and the adult consents to the adoption; (4) If the adult was, at the time of the adult’s eighteenth birthday, in the permanent custody of a public children services agency or a private child placing agency, and the adult consents to the adoption.”).
notwithstanding, the important point is that a valid adoption, even of an adult, must be given full faith and credit in another state. However, it is less clear what limitations are imposed on the states with respect to the kinds of lines that can be drawn when states distinguish among adoptees, affording particular benefits to some but not others.

1. Why adopt another adult?

One adult might adopt another adult for any number of reasons. It may be because the adopter has had a parent-child relationship with the adoptee for a long time but never formally adopted the individual because of legal impediments. Or, the adopter might wish to secure or protect inheritance rights for the adoptee or the adoptee’s children.

Suppose that Smith marries White, who has a child, John, from a previous relationship. Smith has a wonderful relationship with John and would like to adopt him. However, John’s father has not relinquished his parental rights. If John’s father dies after John has reached maturity, Smith might wish to formalize the parent-child relationship that has existed in fact for a long time and thus might seek to adopt John, notwithstanding John’s having reached adulthood. Indeed, John may not only have reached adulthood but may in addition have a wife and children.

Or, it may be that one adult is adopting another because the former wants to assure that the latter is able to receive an inheritance. That might be because the individuals themselves have a

96. Cf. In re Estate of Brittin, 664 N.E.2d 687, 688 (Ill. App. 1996) (“The facts are undisputed. The record reveals that when William Eugene was about three years of age, his mother, Estelle Willet, married the decedent, Stephen Glenn Brittin. From age three, Stephen and Estelle raised William as their son. The couple had one natural child, Mary Ann Buckman, respondent herein. Estelle Willet Brittin died on July 28, 1975. Shortly thereafter, on October 20, 1976, Stephen adopted William in an adult adoption proceeding in St. Clair County. William was 46 years old at the time of the adoption and had five children, petitioners herein.”); see also First Nat’l Bank v. Mott, 133 So. 78, 79 (Fla. 1931) (“It appears that under the laws of Connecticut Samuel E. Doane and his wife in that state formally adopted Mae J. Mott, a married woman, who, though then living in her own home, had previously resided with the Doanes as a member of the family.”).

97. See, e.g., In re Estate of Griswold, 554 A.2d 717, 723-24 (Morris County Ct. 1976) (discussing the adoption of a forty-one year old man who had three children of his own).
romantic relationship and the adopter wants to provide for his or her loved one.98

There are several different scenarios in which a desire to provide for a romantic partner might lead to an adoption. In In re Adoption of Adult Anonymous,99 a man was adopted by his male lover. The adoptee had feared that unless he established a father-son relationship with his partner, his family would interfere with his attempts to provide for that individual.100 At issue here was not a desire to have the adoptee inherit from someone else, but merely the desire to protect the individual's right to dispose of his own property as he desired. Of course, depending upon the state, one individual adopting another would have certain implications for the relationship. For example, in In re Adoption of Swanson,101 the Delaware Supreme Court discussed the implications of an adult adoption in that state. In this case, one man wanted to adopt his same-sex partner "to facilitate their estate planning," 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 enjoy under Delaware law."102 The Delaware Supreme Court approved the adoption,103 noting that most jurisdictions permitting adult adoptions "recognize that adult adoptions for the purpose of creating inheritance rights are valid."104 However, the Swanson court issued a warning that should be considered whenever individuals think about whether to adopt a romantic partner, namely, that the crime of incest includes "sexual intercourse between a parent and child 'without regard to . . . relationships by adoption.'"105 Thus, the court warned that an

98. See, e.g., J.P. Morgan Chase Bank v. Hickey, No. NC 04-0350, 2006 WL 20807, at *2 (R.I. Super. Ct. 2006) ("Carder never married, but months before his death and years after his father's death, he adopted his companion, Hickey, who was an adult at the date of adoption.").
100. See id. at 528 ("[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.").
102. Id. at 1096.
103. Id. at 1099 ("The Family Court is directed to issue an appropriate decree of adoption.").
104. Id. at 1097.
105. Id. at 1099 (citing DEL. CODE ANN. tit. 11, § 766(b) (2008)). But see In re Adult Anonymous II, 452 N.Y.S.2d 198, 201 (N.Y. App. Div. 1982) ("Incest is only a makeweight
individual who had sexual relations with the adult whom he had
adopted would be open to prosecution for violating the incest
laws.106

Suppose that an adult adoption occurs in one state and an estate
must be administered in another. This situation implicates two
issues: whether the forum state will recognize the adoption and, if
so, whether the adoptee will be allowed to inherit. As a general
matter, states have recognized adult adoptions validly performed in
other states. As the Ohio Supreme Court explained, “The status of
adoption created by the law of the state of New York will be given
the same effect in Ohio as is given by Ohio to the status of adoption
as created by its own law.”107

This means that even if the adoption could not have occurred
locally, it will be given full faith and credit if it was performed in
accord with the law of the state where the adoption took place. In
Delaney v. First National Bank in Albuquerque,108 the New Mexico
Supreme Court addressed the legal effect of an adult adoption
performed in Colorado. Because the adopting adult and the adult
adoptee were only thirteen years apart, the adoption would not have
been permitted under New Mexico law, even though it was
permitted under Colorado law.109 The New Mexico Supreme Court
explained that

the fact that a judgment entered by a foreign court could not have
been entered by a New Mexico court, because it would have
offended the public policy of New Mexico, will not permit the

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106. Swan.son, 623 A.2d at 1099.
107. Barrett v. Delmore, 54 N.E.2d 789, 793 (Ohio 1944). The court noted that its
position is in accord with that suggested by the American Law Institute. Id. at 792 (“The
American Law Institute has stated the rule as follows: ‘The status of adoption, created by
the law of a state having jurisdiction to create it, will be given the same effect in another state as is
given by the latter state to the status of adoption when created by its own law.’” (quoting
RESTATEMENT OF CONFLICT OF LAW 209, § 143 (1934))).
109. Id. at 714. At the time of the adoption of Celia Thompson by Paul Delaney in
Colorado, New Mexico had a statute that permitted the adoption of an unmarried adult by an
adult person, provided the person adopting was at least twenty years older than the person
adopted. N.M. STAT. § 22-2-13 (1953). Since Paul Delaney was only thirteen years older than
Celia Thompson, who was twenty-five years of age at the time, the adoption could not have
been accomplished in New Mexico.
courts of New Mexico to deny it full faith and credit as required under Art. IV, Section 1, U.S. Constitution.\textsuperscript{110}

For that reason, the court felt “constrained to give credence to the Colorado adoption of Celia Thompson by Paul Delaney and [held] that she is his lawful child.”\textsuperscript{111}

2. Inheritance rights of an adopted child

While it is generally accepted that an adoption validly performed in one state must be recognized in another, a different question is whether the adopted individual will be entitled to an inheritance under the laws of the forum state.\textsuperscript{112} In \textit{In re Duke},\textsuperscript{113} a New Jersey court explained the “‘stranger to the adoption’ doctrine.”\textsuperscript{114} This doctrine created “a presumption that an adopted child could not take property under an instrument created by someone other than the adoptive parent unless the instrument itself indicated a specific intent that the adopted child should take.”\textsuperscript{115} Under such a rule, the state would recognize the adoption from another state, whether of an adult or of a minor, but would refuse to permit such an individual to inherit unless, for example, the testator had expressly named that person in the will as her beneficiary.\textsuperscript{116}

Many states no longer employ the stranger to the adoption doctrine.\textsuperscript{117} Now, states tend to treat the adoptive child and the

\textsuperscript{110} Delaney, 386 P.2d at 714.

\textsuperscript{111} Id. at 715.

\textsuperscript{112} See, e.g., \textit{In re Estate of Fenton}, 901 A.2d 455, 465 (N. J. Super. Ct. App. Div. 2006) (“While New Jersey law governs the validity of the adoptions in this case, ‘the legal incidents and effects of that status [adoption] with respect to property,’ are ‘determined by the laws of the state where the property has its situs.’” (quoting \textit{In re Estate of Griswold}, 354 A.2d 717, 720 (Morris County Ct. 1976))).


\textsuperscript{114} Id. at 1017.

\textsuperscript{115} Id.

\textsuperscript{116} In New Jersey, although the stranger to the adoption doctrine is no longer applicable to individuals adopted as children, see \textit{In re Trust Under Agreement of Vander Poe!}, 933 A.2d 628, 635 (N.J. Super. Ct. App. Div. 2007), it is still applicable to adults. See id. at 635–36.

\textsuperscript{117} Hallie E. Still-Caris, Note, \textit{Legislative Reform: Redefining the Parent-Child Relationship in Cases of Adoption}, 71 IOWA L. REV. 265, 285 (1985) (“[T]he stranger to the adoption doctrine was recently rejected in many jurisdictions . . . .”).

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biological child interchangeably.118 For example, many states refuse to treat adopted children any differently for purposes of intestacy.119 However, a court seeking to interpret a will must as an initial matter discern the intent of the testator,120 and some states presume that a testator would not intend to leave an inheritance to an adult who is adopted after the death of the testator.121

For example, suppose that an individual, Roberta Rich, sets up a trust providing that her children, Sam and Terry, will receive the net income from the trust. Upon their deaths, this trust will terminate and be distributed to Sam and Terry's lineal descendants.122 Now, suppose that Roberta dies and then Terry gives birth to two children, Vera and Wayne. Sam has no biological children but a few years after Roberta's death Sam adopts Yolanda, who is an adult at the time of the adoption. Then, a few years later, both Terry and Sam die. The question is whether Yolanda will be entitled to a share of the distributed assets.

In Commerce Bank v. Blasdel,123 a Missouri appellate court answered a similar question in the affirmative based on state law. Missouri's law did not distinguish between biological and adopted children, considering both to be descendants.124 It did not
distinguish between adopted children and adopted adults either. Other states treat child and adult adoptees differently. For example, some states presume that the testator would have intended to benefit a child but not an adult adoptee, or they suggest that every respect pertaining to the relation of parent and child as the adopted child would if the adopted child were the natural child of such parents:); VT. STAT. ANN. tit. 15A, § 1-104 (2007) (“When a decree of adoption becomes final: ... (2) the adoptee is the child, heir, or issue of the adoptive parent for the purposes of interpretation or construction of a donative disposition in any instrument, whether executed before or after an adoption, unless the instrument expressly states a contrary intention or excludes the adoptee by name or by classification not based on a family or parent and child relationship.”).

125. Blasdel, 141 S.W.3d at 446 (“In enacting § 9614, RSMo 1939, the General Assembly declared the law of Missouri to be that from the date of their adoption forward, adoptees were to be considered, for every purpose, exactly as if they were the legitimate, natural-born children of their adoptive parents ...”); see also In re Estate of Brittin, 664 N.E.2d 687, 690 (Ill. App. Ct. 1996) (“A careful review of the Adoption Act reveals no statutory distinction between an adopted adult and an adopted minor with respect to the nature of the legal relationship created between the adoptee and the adopting parent, namely, a parent-child relationship. The adoptee, regardless of his age upon adoption, attains the status of a natural child of the adopting parents.”).

126. See, e.g., TENN. CODE. ANN. § 36-1-121(c) (2008).

In the construction of any instrument, whether will, deed, or otherwise, whether executed before or after August 24, 1995, and whether the testator or other party creating an interest by such instrument died before or after August 24, 1995, or before or after an adoption, a child so adopted and the descendants of such child are deemed included within the class created by any limitation contained in such instrument restricting a devise, bequest or conveyance to the lawful heirs, issue, children, descendants, or the like, as the case may be, of the adoptive parent, or of an ancestor or descendant of one (1) of them, and such adopted child shall be treated as a member of such class unless a contrary intention clearly shall appear by the terms of such instrument or unless the particular estate so limited shall have vested in interest and in possession in and as to the person or persons entitled thereto on August 24, 1995; provided, that this sentence shall not apply in the construction of any instrument as to any child who is over twenty-one (21) years of age at the time of such child’s adoption.

Id.

127. See, e.g., In re Estate of Nicol, 377 A.2d 1201, 1207 (N.J. Super. Ct. App. Div. 1977) (“The distinction between adopted children and adopted adults is by no means an idle one in the search for the probable intent of a testator. It is one thing to ascribe to a testator a contemplation of the possibility of that which has come to be relatively commonplace, namely, the adoption of a child at some time in the future by a member of the family or other relative, or any other prospective beneficiary under a will. Frequently, in such cases, the child is acquired in infancy, although the child may be older where a spouse adopts a stepchild. In both instances, however, the child is reared as one’s own by the adopting parent and is recognized as such among the family and friends.”; id. at 1207–08 (“It is extremely unlikely that a testator would foresee the likelihood that his or her child, or any other prospective beneficiary, might at some time in the future adopt an adult. It is equally improbable that an adopted adult would be embraced in the bosom of the family members other than the adopting parent, as would an adopted child.”).
the adoption statute must be construed differently when an adult adoptee seeks to inherit.128

To complicate matters even more, a different issue is whether one individual is adopting another as a way of thwarting the testator’s will.129 Some states will try to discern whether an adoption was performed to circumvent the wishes of a testator,130 whereas other states refuse to investigate the adopter’s intentions.131 Thus, depending upon the jurisdiction, a court might suggest that even if an adult adoptee could inherit from a grandmother as a general matter, the adoptee seeking to inherit in the case before the court would be precluded from receiving any proceeds from the estate because the adopter and the adoptee had clearly been trying to subvert the wishes of the adopter’s mother. There might be ample evidence, for example, that the adopter’s mother had hated the adoptee and had stated several times that she would never give the adoptee a dime.132

The forum state can apply local law when determining the effect of an adoption. Whether an individual who is adopted as an adult is entitled to be treated in the same way as an individual who was adopted as a child is an issue for the state to determine under its own law. Yet, the fact that a state can give full faith and credit to an

128. See, e.g., First Nat’l Bank v. Mott, 133 So. 78, 79 (Fla. 1931) (“[T]he statute does not contemplate the adoption of an adult married woman by persons so that she ‘shall be considered the heir’ of such persons, and ‘entitled to inherit according to the laws of Florida’”); In re Nowels Estate, 339 N.W.2d 861, 866 (Mich. Ct. App. 1983) (“The presumption created in ... M.S.A. § 27.5128 does not operate in favor of an adult adoptee where an examination of all attendant circumstances indicates that the probable intent of the testator or settlor was not to include the adult adoptee as a beneficiary.”).

129. See, e.g., In re Estate of Griswold, 354 A.2d 717, 719–720 (Morris County Ct. 1976) (“The four surviving children of Alfred Whitney Griswold, who would take the remainder unless Dyke takes, contend that . . . the adoption of Dyke was for the purpose of defeating a testamentary disposition and is a fraud as a matter of law.”).

130. See, e.g., Cross v. Cross, 532 N.E.2d 486, 488–89 (Ill. App. Ct. 1988) (suggesting that adult adoptions should not be permitted to undermine a settlor’s intentions); see also id. at 488 (“Mary was aware of defendant’s 17-year residence with her son and could have made him a permitted appointee, or provided for him separately in the trust. She chose not to do so, even though she twice amended the trust.”).


132. See, e.g., In re Estate of Martin, 635 N.W.2d 473, 475 (S.D. 2001) (“Marilyn Thorson testified that before writing the will Leslie told her that she wanted Ann’s children to have her land and, ‘Ann gets everything else and those other girls are not to get a dime.’”).

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adoption from another state but nonetheless limit the effects of the adoption suggests an area in which there may be further litigation.

Suppose that Oklahoma had passed a law affording fewer benefits to a child adopted by a same-sex couple than would be afforded to a child adopted by a different-sex couple by classifying the child as an heir to only one rather than both of her parents. The state’s decision to discriminate among adoptees in this way might well be struck down as unconstitutional because it is not rationally related to the promotion of a legitimate state interest. After all, it is not clear how anyone would benefit by imposing disadvantages on those adopted by same-sex couples. Nonetheless, the state might try to justify such a law by appealing to moral concerns, although as Justice O’Connor suggested in her concurrence in *Lawrence v. Texas*, 133 "moral disapproval of this group [those with a same-sex orientation], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 134 Thus, a state’s appealing to morality to justify its imposing a burden on the children adopted by same-sex couples or even on the same-sex adopters might be rejected even under rational basis review. On the other hand, were a very deferential rational basis review employed when examining such a law, the statute might be upheld. 135

III. JURISDICTION TO MAKE CUSTODY AND VISITATION DECISIONS

State and federal courts have made clear that other states’ final adoptions must be given full faith and credit. Visitation and custody decisions are more complicated, however, because such judgments are subject to modification should the child’s interest so require. 136 Because the Full Faith and Credit Clause only requires sister states to give a judgment the same credit that it would be given in the issuing

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134. Id. at 582 (O’Connor, J., concurring) (citing U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
135. See, e.g., Williamson v. Lee Optical of Okla., 348 U.S. 483, 487-88 (1955) (“But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).
136. Thompson v. Thompson, 484 U.S. 174, 180 (1988) (“[C]ustody orders characteristically are subject to modification as required by the best interests of the child.”).
state, a judgment that is modifiable in the issuing state can be modified by another state without offending full faith and credit guarantees. Historically, parents who were dissatisfied with a court’s custody decision in one forum would sometimes take the child and retry the case in another forum, especially if the latter forum had a somewhat different analysis of what promoted a child’s best interests. To prevent parents from taking their children to a different jurisdiction to retry custody issues, Congress passed the Parental Kidnapping Prevention Act (PKPA).

A. The Applicability of the PKPA

The PKPA was passed to lend support to the Uniform Child Custody Jurisdiction Act (UCCJA), which specified the conditions under which a state would have jurisdiction to decide custody and visitation issues. At issue in Miller-Jenkins v. Miller-Jenkins was whether Vermont rather than Virginia had jurisdiction to award custodial and visitation rights in a case in which two women were dissolving their civil union. Lisa and Janet had lived together for several years in Virginia in the late 1990s. In December 2000, they traveled to Vermont and entered into a civil union. In 2001, Lisa was artificially inseminated, and in 2002 Lisa gave birth to IMJ. Lisa, Janet, and the child lived together for another four months in

137. Id. ("[T]he Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered.").

138. Id. ("Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child’s best interest.").

139. Id. ("[A] parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue.").

140. Id. at 181 ("[T]he principal problem Congress was seeking to remedy [by passing the PKPA] was the inapplicability of full faith and credit requirements to custody determinations.").


142. Thompson, 484 U.S. at 181 ("The sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders made in accordance with the terms of the UCCJA.").

143. 912 A.2d 951 (Vt. 2006).

144. Id. at 956.

145. Id.

146. Id.
Virginia and then moved to Vermont in August 2002. In the fall of 2003, Lisa and Janet decided to separate, and Lisa moved to Virginia with IMJ. In November 2003, Lisa filed a petition to dissolve the civil union in Vermont. The family court issued a temporary order regarding parental rights and responsibilities in June 2004, awarding Lisa legal and physical custody and Janet parent-child contact for one week per month and three weekends during the summer. The court also required Lisa to permit Janet a telephone call with IMJ once each day.

Lisa did not permit Janet to have any parent-child contact with IMJ after the first court-ordered parent-child contact weekend. On July 1, 2004, Lisa filed a petition in Virginia asking the court to establish IMJ’s parentage. Apprised of Lisa’s having filed elsewhere, the Vermont court reaffirmed its custody order and suggested that Lisa’s refusal to abide by it would result in a hearing regarding whether her parental rights and responsibilities needed to be reallocated.

On September 2, 2004, the Vermont court found Lisa in contempt for her failure to comply with the visitation order. One week later, the Virginia court said that all claims to parentage by Janet were based on a Vermont law that was considered null and void in Virginia. Subsequently, Janet appealed that decision to the Virginia Court of Appeals.

In November 2004, the Vermont court found that both Lisa and Janet had parental rights, and in December held that the Virginia decision regarding Janet’s parental rights was not entitled to full faith and credit. Lisa appealed both decisions.

147. Id.
148. Id. at 956.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id. at 957.
156. Id.
157. Id.
158. Id.
159. Id.
When analyzing the merits of Lisa's challenges on appeal, the Vermont Supreme Court suggested that the case basically involved "an interstate jurisdictional dispute over visitation with a child," which is governed by the PKPA. The Vermont Supreme Court noted that because Vermont was the child's home state, the Vermont trial court had jurisdiction under both the PKPA and local law. Because Vermont had rightly exercised jurisdiction, the Virginia court was precluded from exercising jurisdiction unless Vermont had somehow lost its jurisdiction. But Vermont had never lost its jurisdiction. The state continued to have jurisdiction under local law because IMJ recently had been living in Vermont and because evidence of IMJ's relationship with Janet remained in Vermont. Vermont also continued to have jurisdiction under the PKPA because one of the contestants, Janet, had remained a resident of the state. Thus, because the Vermont court had exercised jurisdiction consistent with the PKPA—which meant that the Virginia court should not have exercised jurisdiction—the Virginia decision had not comported with the PKPA and was not due full faith and credit.

In her appeal, Lisa argued that the PKPA was inapplicable because the issue before the court was a parentage action rather than an action for custody or visitation. The Vermont Supreme Court rejected Lisa's contention, noting that the Virginia court had issued a permanent order that Janet had no right of visitation and concluding that, "[p]lainly, the Virginia court decisions included visitation determinations as the term is defined in the PKPA. Just as plainly, the PKPA applied to those decisions."

Even if the court had accepted Lisa's contention that the PKPA does not apply to parentage actions, the court suggested that it

160. Id.
161. Id. at 958.
162. Id. at 959.
163. Id.
164. Id.
165. Id. at 957.
166. Id.
167. See id. at 959.
168. Id. at 960.
169. Id.; see also In re E.H.H., 16 P.3d 1257, 1259 (Utah Ct. App. 2000) ("[U]nder the PKPA, a termination of parental rights unavoidably works a modification of prior custody and visitation determinations.").
would not have given full faith and credit to the Virginia order. 170 The court reasoned that to suggest that full faith and credit required such a result would be to suggest that “full faith and credit requires the Vermont court to strike its own visitation order because the Virginia court refuses to recognize its validity based entirely on Virginia law.” 171 Thus, Lisa’s theory would require that Vermont not recognize a valid order issued by a Vermont court so that the state could give full faith and credit to a subsequent order by a Virginia court.

This was not the first time that the Vermont Supreme Court had been asked to ignore an order issued by a lower Vermont court in accord with Vermont law so that an order from a court in another state might be credited. The Vermont Supreme Court had already held that Vermont “would not extend full faith and credit to another state’s custody determination if that state’s court refused to extend full faith and credit to an earlier Vermont custody order.” 172 Basically, the court reasoned that Vermont would not give “greater faith and credit to the judgments of the courts of other states” 173 than it would give to the judgments of its own courts. Here, where the Vermont court had had jurisdiction to issue the initial order, where the order was clearly valid in light of local law, and where the Vermont court had retained jurisdiction, there was no justification for giving credit to the order from the Virginia court rather than the order from the Vermont court.

B. Application of DOMA and the Treatment of Same-Sex Unions as Marriages

In offering its analysis, the Vermont Supreme Court mentioned, but then sidestepped, an issue raised by Lisa, who argued that the

170. Miller-Jenkins, 912 A.2d at 959 (“First, she argues that the Virginia proceeding is a parentage action, and the PKPA does not apply to parentage actions. Even if we were to accept this argument, we do not understand how it would determine the question before us—that is, whether the Vermont court must give full faith and credit to the Virginia parentage decision.”).

171. Id. (emphasis added).

172. Id. (citing holding found in Medveskas v. Karparis, 640 A.2d 543, 546-47 (Vt. 1994)).

173. Id. at 959–60 (citing Medveskas, 640 A.2d at 546).
Defense of Marriage Act (DOMA)\textsuperscript{174} modified the PKPA.\textsuperscript{175} The relevant provision of DOMA reads:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.\textsuperscript{176}

Lisa had argued that Janet was a parent by virtue of the civil union into which she and Lisa had entered.\textsuperscript{177} Lisa then suggested both that the Virginia court was authorized by DOMA to refuse to give effect to the Vermont judgment and that Vermont was required to give effect to the Virginia judgment.\textsuperscript{178} In effect, Lisa argued that DOMA rendered the Vermont judgment void, which made the Virginia judgment the initial custody and visitation determination entitled to full faith and credit.

There are several reasons why Lisa’s position does not accurately reflect the law. First, as the Vermont Supreme Court pointed out, DOMA’s “purpose is to provide an authorization \textit{not} to give full faith and credit in the circumstances covered by the statute.”\textsuperscript{179} This means that DOMA did not nullify the Vermont order. Rather, DOMA merely permits a state whose public policy precludes enforcement of the order to refrain from giving that order full faith and credit. Because the Vermont order was in accord with Vermont’s public policy, DOMA would neither require nor authorize Vermont to refuse to enforce an order that was in accord with local policy.

Second, Lisa’s interpretation of congressional intent is not plausible. She suggested that the PKPA, which was passed in

\textsuperscript{175} See Miller-Jenkins, 912 A.2d at 961.
\textsuperscript{176} 28 U.S.C. § 1738C.
\textsuperscript{177} Miller-Jenkins, 912 A.2d at 961 ("[A] Vermont civil union is a relationship between persons of the same sex that is treated as a marriage under Vermont law and that Janet’s right of visitation, if any, arises from that relationship.").
\textsuperscript{178} Id. at 961 ("DOMA authorized the Virginia court to reject any right of visitation based on the Vermont court order, and the Vermont court must give full faith and credit to the Virginia order.").
\textsuperscript{179} Id. at 962.
1980,\textsuperscript{180} was amended by DOMA, which was passed in 1996.\textsuperscript{181} Yet, if that had been Congress's intent, one would have expected Congress to say so expressly.\textsuperscript{182} Not only did Congress fail to say so expressly, but there is no discussion of the effect of DOMA on child custody or visitation in the Congressional Record.\textsuperscript{183} Thus, there is no evidence that it was Congress's intent to modify the PKPA when it passed DOMA,\textsuperscript{184} even bracketing the presumption against reading an implicit repeal into a statute.\textsuperscript{185}

Suppose, however, that one were to reject the importance of the absence of such evidence and one were to offer the implausible suggestion that the express language of DOMA is so clear on this point that no other interpretation is possible.\textsuperscript{186} Ironically, that same kind of analysis might be used to defeat the claim that DOMA modified the PKPA because the PKPA was itself modified after DOMA.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{180} See Social Security Amendments of 1980, Pub. L. No. 96–611, § 8(a).
\item \textsuperscript{181} See Defense of Marriage Act of 1996, Pub. L. No. 104–199.
\item \textsuperscript{182} N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 566 n.22 (1979) ("This Court has often stated that implied repeals and modifications of statutes by subsequent congressional enactments are justified only when the two statutes are otherwise irreconcilable."); United States v. Madigan, 300 U.S. 500, 506 (1937) ("[M]odification by implication of the settled construction of an earlier and different section is not favored.").
\item \textsuperscript{183} The closest members of Congress came to considering custody and visitation issues was in their mentioning that Congress had also used its powers under the Full Faith and Credit Clause to pass the PKPA. See 142 CONG. REC. H7274 (1996) (statement of Rep. Campbell) (July 11, 1996) ("In 1980 the Congress adopted section 1738(a) of title 28, which provided that 'Whereas child custody determinations made by the State where the divorce took place generally are applied in all other States, not so if the couple moved to another State.' And Congress said that the second State did not have to abide by the child custody determinations of the first State where the couple moved to the second State, an explicit use of this second sentence of article 5, section 1, power in the Congress. Then most recently, in 1994, in section 1738(b) of the same title, Congress once again established that rule for child support orders. We have, thus, a rather clear example of power explicitly in the Constitution, recognized by treaties, and used as recently as last year.").
\item \textsuperscript{184} See Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) ("Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations.").
\item \textsuperscript{185} See id. at 336 ("[A]ny Congressional intent to repeal [the PKPA by enacting DOMA] must be by implication. However, '[r]epeal by implication is not favored and the firmly established principle of law is that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each.' (quoting Scott v. Lichford, 180 S.E. 393, 394 (Va. 1935))).
\item \textsuperscript{186} But see id. ("Lisa cites no authority holding that either the plain wording of DOMA or its legislative history was intended to affect or partially repeal the PKPA.").
\end{enumerate}
\end{footnotesize}
If one reads the PKPA as having been modified by DOMA, the modified PKPA version would presumably have said that the "appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any custody determination . . . made consistently with the provisions of this section by a court of another State." However, this version would be read to have an exception, specifying that if a custody decision were made based on the rights arising from a same-sex relationship that was treated like a marriage under another state’s law, custody decisions would not have to be enforced if doing so would violate an important public policy of the forum state.

Yet, the PKPA was modified in 1998—two years after DOMA had been passed. Rather than include the exception allegedly created by DOMA, Congress instead reinforced the limitations imposed by the PKPA. The PKPA was modified to say that "appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." The amended version did not include

187. See 28 U.S.C. § 1738A(a) (2000). The current PKPA specifies that the “appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.” There are exceptions to this rule which are not applicable here.

188. See 28 U.S.C. § 1738A(a). Additional exceptions were added, none of which are applicable here. The exceptions currently are:

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Id. Prior to the 1998 amendment, the only exception had been (f). See Pub. L. No. 105-374 ("Section 1738A(a) of title 28, United States Code, is amended by striking ‘subsection (f) of this section, any child custody determination’ and inserting ‘subsections (f), (g), and (h) of this section, any custody determination or visitation determination.’").
an exception for custody or visitation rights arising from a same-sex relationship that was treated as a marriage under local law. Instead, the amended version of the PKPA spoke to all custody and visitation decisions, whether involving the parental rights and duties of parents of the same sex or of different sexes. Thus, if one were to read the PKPA as having been implicitly amended by DOMA in 1996, one would presumably have to read the implicitly amended PKPA of 1996 as having itself been implicitly amended in 1998 in a way that deleted the implicit DOMA exception.

The PKPA determines which state has jurisdiction to decide parental rights and responsibilities. Basically, under the PKPA,


(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State....

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as
Virginia was told that a Vermont rather than a Virginia court should decide who has custody and visitation rights. Ironically, even if Lisa were correct that Virginia was not required to give full faith and credit to the Vermont order, Virginia still would not have had jurisdiction to modify the order. Virginia was not the child’s home state and none of the exceptions affording jurisdiction to Virginia was triggered.\textsuperscript{190} Thus, as the Virginia appellate court recognized, Virginia simply did not have jurisdiction to make a custody or visitation decision under the PKPA.\textsuperscript{191}

\textbf{C. The Effects of Jurisdictional Issues on Same-Sex Families}

Virginia’s having the power to refuse to enforce the Vermont order would not also have entailed that Virginia had the power to modify visitation. Thus, suppose that Janet had gone to Virginia to enforce her visitation rights. Were Lisa’s interpretation of the PKPA as amended by DOMA accurate, Virginia would not have had to enforce the Vermont visitation decree, assuming that Janet’s parental rights arose solely by virtue of a same-sex relationship that was treated by Vermont as a marriage. But just because Virginia was not required to enforce the rights arising from the civil union would not mean Virginia had jurisdiction to modify the order. The Vermont order would still stand and would still be enforceable in a state whose public policy did not preclude its enforcement.

Vermont’s refusal to “give ‘greater faith and credit’ to another state’s judgment that [was] in conflict with a valid judgment of [its] own courts”\textsuperscript{192} involved, as the Vermont Supreme Court itself noted, a “narrow ground”\textsuperscript{193} upon which to affirm the Vermont trial court. Left for another day was “the broader question of whether DOMA,

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190. See id. (c)(2)(B)–(c)(2)(D).
191. See Miller-Jenkins, 637 S.E.2d at 332 (“We hold that the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction. Accordingly, we vacate the orders of the trial court and remand this case with instruction to grant full faith and credit to the custody and visitation orders of the Vermont court.”).
193. Id.
and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union."194

While expressly reserving that question for another day, dicta in the Vermont Supreme Court’s opinion indicated how that question should be resolved. For example, the court noted the bad public policy implications of Lisa’s position. If Lisa’s explication of the law was accurate, a “Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order unenforceable.”195 But this is exactly what the PKPA was designed to avoid, namely, to prevent parents who disagreed with a visitation or custody decision of one court to take the child to another state to re-litigate the case in hopes that the new forum’s public policy would yield a more desirable result.

If a court were to hold that the PKPA must be interpreted in light of DOMA, any benefits arising by virtue of a same-sex relationship, treated as a marriage under the laws of Vermont, would not have to be recognized in a state if such recognition would violate the state’s public policy. However, it is important to understand the limitation allegedly imposed by DOMA. That Act does not suggest that parental rights of the LGBT (lesbian, gay, bisexual, transgender) community can be ignored as a general matter. Rather, a sister state can only ignore those benefits or rights that are conferred by virtue of a same-sex relationship that is treated like a marriage by another state.

Were the PKPA modified by DOMA, it would be necessary to determine whether a Vermont civil union qualifies as “a same-sex relationship that is treated like a marriage” under Vermont law. Vermont law makes clear that civil unions196 are not marriages197 and thus, arguably, civil unions are not treated as marriages under local law. If that it so, then Vermont civil unions would not seem to trigger the DOMA exception.

194. Id.
195. Id.
196. VT. STAT. ANN. tit. 15, § 1202 (2002) (“For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: ... (2) Be of the same sex and therefore excluded from the marriage laws of this state.”).
197. See id. § 8 (2002) (“Marriage is the legally recognized union of one man and one woman.”).
Of course, civil unions provide the same benefits as do marriages. Perhaps, then, they should be understood to be sufficiently marriage-like so as to trigger DOMA. That would mean the presumption of parentage created by a child's birth into a civil union would not have to be recognized by other states. However, foreclosing the use of that avenue to establish (presumptive) parenthood would not preclude the use of other avenues by which the parent-child relationship could be established.

For example, under Vermont law, an individual who is a non-marital and non-civil union partner of a parent can adopt the parent's child if the parent agrees, if the adoption is in the best interest of the child, and if the adoption does not abridge the rights of someone else. Because the hypothesized DOMA exception to the PKPA is only triggered if the rights or benefits are acquired by virtue of a same-sex marriage-like relationship, DOMA would not be triggered by a second-parent adoption. Thus, individuals in civil unions could protect their parental rights by adopting the child born into the union.

198. Id. § 1204 (a) (2002) (“Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”).

199. See Miller-Jenkins, 912 A.2d at 966 (“[B]ecause Lisa gave birth through artificial insemination, the presumption of parentage contained in § 308 applied to Janet, just as it would have applied to Lisa's husband if she had had one at the time of the birth”).

200. See id. (discussing parentage presumption).

201. Id. at 969 (“Where the presumption cannot apply, it does not mean the individual is not a parent; it simply means we must look to see whether parentage exists without the use of the presumption.”).

202. VT. STAT. ANN. tit. 15A, § 1-102 (b) (2002) (“If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.”).


Civil union couples can take advantage of Vermont's second-parent adoption provision, since the parental relationship would then have been established without having relied on the legal recognition of a same-sex marriage or marriage-like relationship. Although a second-parent adoption would require an investment of resources that doubtless could otherwise be spent in a variety of worthwhile ways, such an investment might nonetheless be a wise expenditure, preventing or reducing the loss of many hours and dollars in possible future litigation, and significantly
The Vermont Supreme Court recognized that forcing all civil union couples to avail themselves of formal adoption procedures was not what the Vermont Legislature intended,\textsuperscript{204} even though Lisa's argument might appear to require that such adoptions take place.\textsuperscript{205} Yet, Lisa's analysis does not account for another feature of Vermont law by which Janet could establish her parental relationship with IMJ. The Vermont Supreme Court noted that an individual who is not formally a parent might nonetheless be recognized by the law as being a child's parent under certain conditions. The court analyzed \textit{Miller-Jenkins} in light of the following relevant factors:

It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent.\textsuperscript{206}

The Vermont court reasoned that because so many factors favored recognizing Janet’s parent-child relationship with IMJ, there was no need to decide which factors might be dispositive in a less-clear case.\textsuperscript{207} However, it is important to understand just what the court suggested. According to local law, Janet’s relationship with IMJ could be recognized by a court on a basis other than that Lisa and Janet had been in a civil union, namely, that all of the described factors applied. If that is true, then a sister state could not refuse to enforce the Vermont trial court’s recognition of the parent-child

\textsuperscript{Id.}

\textsuperscript{204} See \textit{Miller-Jenkins}, 912 A.2d at 968. The disruption that would be caused by requiring adoption of all children conceived by artificial insemination by non-biological parents is particularly at variance with the legislative intent for civil unions. The Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage.

\textsuperscript{205} \textit{Id.} ("The result of Lisa's statutory argument would be to produce separate benefits and protections for couples in civil unions. Under her argument, no partner in a civil union could be the parent of a child conceived by the other partner without formally adopting that child.").

\textsuperscript{206} \textit{Id.} at 970.

\textsuperscript{207} \textit{Id.} at 971.

\footnotesize{1846}
relationship and the provision of visitation rights, even if DOMA modified the PKPA.

While affording recognition to functional parents in Vermont would help Janet Miller-Jenkins, given that custody and visitation rights were decided in Vermont, the limitations of that approach should be made clear. First, the recognition of parental rights based on functional parenthood is a matter of state law and some jurisdictions refuse to award custody or visitation rights on that basis. Just because such factors would provide an independent basis for parenthood in Vermont would not mean they would provide such a basis in another state. Second, because a state is not required to substitute another state’s law for its own, another state would not be required to consider the factors enumerated by the Vermont court in determining whether Janet was IMJ’s parent if doing so would be contrary to local public policy.

Suppose the hypothetical case of Adams v. Bright had the same facts of Miller-Jenkins except this time Lisa Adams waited until after she and her biological child had been living in a different state for seven months and then filed there to determine the parental rights and responsibilities of the different parties. Suppose further that the forum state did not recognize civil unions and did not recognize functional parenthood as a basis for awarding custody or visitation rights. Janet Bright might not even be awarded visitation rights, possible harm to the child notwithstanding.

The above scenario has important implications for an individual who might find herself in a position like Janet’s, not least of which is that she might not be able to afford to risk having another jurisdiction decide parental rights and responsibilities. This might mean that an individual would feel forced to file to have parental rights and responsibilities determined, which might further alienate a partner and remove any chance of reconciliation.

Suppose Jan and Heather entered into a civil union in Vermont. Jan subsequently gives birth to a child, Linda. Jan and Heather have a serious disagreement and Jan decides that she wants to go live with

208. See supra notes 30–34 and accompanying text.
209. Cf. Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 338 (Va. Ct. App. 2006) ("The issue before us is the narrow one of jurisdiction. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction. The PKPA forbids her prosecution of this action in the courts of this Commonwealth.").
her sister for a time. She and Linda go to live with Jan’s sister in Virginia.

Were Jan and Linda to stay in Virginia for a week or even a month, there would not be a problem for purposes here. However, if Jan stayed there for over half a year and then filed for a determination of parental rights, Heather might be cut off from Linda. Rather than allow time to elapse during which Heather and Jan might work out their differences so that their relationship might continue, the law builds in an incentive for Heather to file for a determination of custody and visitation rights before Vermont loses its home-state designation. This might make all of the parties worse off than they would have been had this artificial incentive not been present. Further, it should be noted, at issue here is not merely whether one of the parents might be given an advantage such as an increased likelihood of getting custody or a greater share of shared-parenting time, but rather whether Heather would even be recognized as a parent.

An additional wrinkle might be added here. Suppose that custody and visitation rights and responsibilities are awarded by a Vermont court and the custodial parent wishes to relocate to another state. Should the court take into account the law of the state where the parent wishes to relocate?

Many courts deciding whether to permit a parent and child relocation will consider whether the relationship between the child and the noncustodial parent would suffer were the relocation request granted.210 For example, the Vermont Supreme Court upheld a lower court’s decision to modify custody rather than permit the custodial parent to move with the children, because the lower court had found that remaining in the state would be more likely to preserve the noncustodial parent’s relationship with the children.211

210. See, e.g., Graner v. Graner, 738 N.W.2d 9, 14 (N.D. 2007) (listing as one of the considered factors “[t]he potential negative impact on the relationship between the noncustodial parent and the child, including whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent’s relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation”); see also Mason v. Coleman, 850 N.E.2d 513, 517 (Mass. 2006) (upholding a refusal to grant a relocation because “the move would cause a reduction of the father’s parenting time that would not be in the children’s interests”).

211. See Rogers v. Parrish, 923 A.2d 607, 611 (Vt. 2007) (“On balance, the court concluded that an award of sole legal and physical rights and responsibilities to father was ‘most likely to preserve the children’s relationship with both of their parents and afford them
Often, at least part of the analysis is focused on the willingness of each parent to promote the relationship between the children and the other parent. If a parent seems unwilling to promote contact between the child and the other parent, a court may be less willing to permit the parent to relocate to another state for fear that the non-custodial parent would no longer be able to have a relationship with the child.

A different but related issue is whether the jurisdiction itself would be likely to promote contact between the child and the noncustodial parent. Suppose, for example, that two individuals, Alice and Bernice, had entered into and then dissolved a civil union in Vermont. Bernice was awarded custody of her biological child, Clara, while Alice was awarded liberal visitation rights with Clara, whom she has adopted. Suppose Alice meets someone else, Donna, and enters into a civil union with her. Alice and Donna frequently see Clara and all seem to be getting along quite well.

Bernice receives a very attractive job offer in another state, and seeks to relocate there with Clara. Suppose, however, that the new state’s case law incorporates a presumption that an individual who is cohabiting with a non-marital partner has a bad moral influence on a child and that courts should impose severe restrictions on visitation while the non-custodial parent cohabits with a non-marital partner.

While the Vermont court had jurisdiction over custody and visitation, the presumption against non-marital cohabitation would

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212. See, e.g., ALASKA STAT. § 25.24.150(c) (2006) (“The court shall determine custody in accordance with the best interests of the child. . . . In determining the best interests of the child the court shall consider . . . (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.”).

213. Cf ALA. CODE § 30-3-169.3(a) (2007).

Upon the entry of a temporary order or upon final judgment permitting the change of principal residence of a child, a court may consider a proposed change of principal residence of a child as a factor to support a change of custody of the child. In determining whether a proposed or actual change of principal residence of a minor child should cause a change in custody of that child, a court shall take into account all factors affecting the child, including, but not limited to, the following:

13. Whether or not the proposed new residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, which does not have an adequately functioning legal system, or which otherwise presents a substantial risk of specific and serious harm to the child.

Id.
not affect Alice’s visitation rights. Thus, even were the relocation request granted, Vermont law would govern visitation for some time. However, if the new state was operating under the Uniform Child Custody and Jurisdiction Act (UCCJA), then it could exercise jurisdiction to modify the visitation terms once the new state had become the child’s home state.214 If the new state had a marriage amendment similar to Virginia’s that precluded recognition of a same-sex relationship,215 then Alice and Donna’s civil union would not be recognized and that relationship would simply be viewed as non-marital cohabitation.216 Because under state law Alice would be viewed as cohabiting with a non-marital partner, her visitation rights with Clara would be at risk of being severely limited under local law.

At least two points might be made about the example involving Alice and Donna. First, state law might force Alice to choose between living with Donna and having reasonable visitation with

214. Missouri is one of the few states not to have replaced the UCCJA with the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). The UCCIA would allow the new state to exercise jurisdiction to modify the terms of visitation once the new state was the child’s home state. See Mo. Ann. Stat. § 452.450(1) (West 2007) (“A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) This state: (a) Is the home state of the child at the time of commencement of the proceeding . . . .”)


A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Id.

216. Cf. Burns v. Burns, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (suggesting that the state would not recognize either a civil union or a same-sex marriage as an exception to such a rule). At issue in Burns was an agreement between the divorcing parents which precluded visitation if the non-custodial parent was cohabiting with a non-relative. See id. at 48.

Darian and Susan Burns were divorced on December 4, 1995, and Darian retained full custody of the couple’s three minor children. Three years later Susan filed a motion for contempt, alleging that Darian refused to allow her visitation with the children. As a result the court issued a consent order modifying visitation rights. The modification required and the parties agreed that “[t]here shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree.

It is not clear whether Susan Burns felt forced to agree to this provision, e.g., because she knew that otherwise she would not be allowed to see her children.

Id.
Clara, harm to all three of these parties by such a forced choice notwithstanding. Second, a separate issue is whether the Vermont court deciding whether to permit the relocation should consider that such a relocation would put Alice at risk of having to choose between living with Donna and having reasonable visitation with Clara. While a state with an official policy that same-sex relationships should be viewed with distaste might believe it good public policy to undermine such relationships, Vermont would not hold such a view. Given that Vermont views a relocation request by a custodial parent less favorably if the relocating custodial parent would be likely to undermine the relationship between the child and the noncustodial parent, perhaps the court should also consider whether the state to which the individual wishes to relocate would make the relationship between the child and the noncustodial parent too difficult to maintain.

One of the worries pointed to here is that the UCCJA gives the child’s home state jurisdiction to decide visitation matters, which might mean that the relationship between the child and the noncustodial parent would be at risk if the child moved to a state disapproving of same-sex relationships. That worry has been greatly mitigated because most states have replaced the UCCJA with the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). As the Colorado Supreme Court explains, the UCCJEA includes certain improvements over the UCCJA including that “the UCCJEA provides for exclusive continuing jurisdiction for the state entering the initial custody decree,” 217 as long as one of the parents continues to live there. 218 This means Clara’s home state would not

218. See Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 959 (Vt. 2006) (noting that Janet had remained in the state). Georgia has adopted the UCCJEA. See GA. CODE ANN. §§ 19-9-40 to 19-9-104 (2007). Certain conditions must be true if a Georgia court is to modify a custody or visitation decree from another state. See GA. CODE ANN. § 19-9-63 (2007).

Except as otherwise provided in Code Section 19-9-64 [temporary emergency jurisdiction], a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection (a) of Code Section 19-9-61 and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction . . . or that a court of this state would be a more convenient forum under Code Section 19-9-67; or
be entitled to exercise jurisdiction and make use of that local presumption to modify visitation, assuming that Vermont did not decide to decline to exercise its jurisdiction. However, that would not prevent a related difficulty from arising.

Suppose Alice and Donna are considering whether to relocate to the state where Clara now lives so they can be closer to her and have more regular visitation. Such a move would not be without its risks because by leaving the state Alice would no longer have the protection of Vermont courts. Indeed, the same point might be made even if Alice and Donna wanted to move to another state that would recognize their civil union, namely, they would lose the protection of the Vermont court, and a court in the state where Clara lived might severely limit Clara’s visitation with Alice and Donna.

It might be claimed that the same difficult calculation could be imposed on a different-sex cohabiting couple deciding whether to move to the state where a child lived or, perhaps, to some third state. However, at least as a general matter, such couples are not precluded from having their relationship recognized as a matter of law.

IV. CONCLUSION

The recent high-profile cases, *Finstuen v. Crutchler* and *Miller-Jenkins v. Miller-Jenkins*, illustrate some of the difficulties same-sex
parents and their children may face in the interstate context. While the courts in both cases applied and reaffirmed existing law, there is nonetheless reason to worry about the kinds of cases that are likely to appear in the future. *Finstuen* reaffirms that final adoptions are subject to full faith and credit guarantees, although questions remain with respect to what kinds of incidents might be reserved for particular adoptees or adopters. The dueling cases involving the *Miller-Jenkins* litigation suggest that the Defense of Marriage Act does not modify the Parental Kidnapping Prevention Act and thus states will not be able to circumvent the existing system with respect to which state has jurisdiction to decide custody and visitation matters.

Yet, *Miller-Jenkins* would have been a much different case if Virginia rather than Vermont had been the initial state determining parental rights. Same-sex parents raising children are especially vulnerable to some of the variations in local law, which may make calculations about whether and where to file for a determination of parental rights even more complicated than they are for other kinds of families. Presumably, states should be creating incentives for individuals to stay together rather than to file for dissolution of their relationships. But a race to court might be the best way for an individual to protect her custody or visitation rights should the relationship come to an end.

The point here should not be misunderstood. The claim is not that such individuals are acting selfishly by filing earlier than they otherwise would have. On the contrary, filing early might be the best way to promote the best interests of the child by protecting the relationship between the child and the non-biological parent. Indeed, where there is no official adoptive relationship between the functional parent and the child she has been raising, there may be great incentive to file and take advantage of the protections of local law that might not exist in another jurisdiction.\(^{223}\) The failure to take

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223. *See, e.g.*, *Wakeman v. Dixon*, 921 So.2d 669, 669 (Fla. Dist. Ct. App. 2006) (“*U*nder Florida law, absent evidence of detriment to the child, courts have no authority to grant custody or to compel visitation by a person who is not a natural parent and that agreements providing for visitation by a non-parent are unenforceable.*”).
advantage of such protections might result in great opportunity costs for both the non-official parent and the child. 224

That said, the kind of public policy forcing individuals to make these kinds of choices serves no one’s interests. Congress or the courts must act to prevent states from imposing invidious burdens on same-sex parents and their children, which only result in harm to all concerned. At a time when many decry the break-up of the family and the accompanying instability thereby imposed on innocent children, states’ placing extra burdens on such families is simply unconscionable. All of our country’s families deserve better treatment than that.

224. See id. at 671 (Van Nortwick, J., specially concurring) (“The number of children in Florida raised in so-called non-traditional households, such as the Wakeman-Dixon household, is increasing. I am concerned that, when those households dissolve, Florida law ignores the needs of those children. I write to urge the Florida Legislature to address the needs of the children born into or raised in these non-traditional households when a break-up occurs.”).