

1-1-2012

The Metamorphosis of Marriage and Adoption

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Recommended Citation

Sanford N. Katz and Daniel R. Katz. "The Metamorphosis of Marriage and Adoption." *Massachusetts Lawyers Journal* 19, no.11 (2012): 18-21.

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SECTION REVIEW

The metamorphosis of marriage and adoption

BY SANFORD N. KATZ
AND DANIEL R. KATZ

When the Supreme Judicial Court of Massachusetts issued its opinion in *Goodrich v Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), family law history was made by the court's deciding that failure to issue a marriage license to a same-sex couple violated the couple's constitutional rights under the state's constitution. Since 2003, Connecticut, Vermont, New Hampshire, Iowa, New York, and the District of Columbia have legalized same-sex marriage either by court decision or legislative action. The State of Washington recognized same-sex marriages in June, and in January 2013 Maryland is set to do the same. In addition, in May of this year, the Rhode Island governor signed an Executive Order recognizing same-sex marriages entered into in states that allow such marriages. In the same month, President Obama revealed his support for same-sex marriages in a TV interview, the day after the citizens of North Carolina voted to ban same-sex marriages in its state.

Forty-two American jurisdictions maintain a ban on same-sex marriages. Legislators in those states have enacted statutes or constitutional amendments restricting marriage to a man and a woman. However, same-sex couples may enter civil unions, which provide

them with the same benefits as marriage in Illinois, New Jersey and Rhode Island. The issue of same-sex marriage is likely to be a major one in the upcoming presidential campaign.

One of the arguments against same-sex marriage is that marriage, as a legal institution, has always been a relationship between one man and one woman and the history and tradition of a people should trump all other considerations. Missing in that argument is the fact that marriage has actually changed. It is not the same legal institution that it was during the eighteenth century. It had been said with legal justification that "Marriage is one and that one is the man." Now, it is generally recognized that marriage is not "one," but a partnership between two equal parties, without legal domination of one spouse over another. This is illustrated by the fact that a wife may now own property in her own name; a wife's body is her own and not subject to her husband's abuse with immunity; spouses can sue each other; a wife's domicile does not automatically become that of her husband's upon marriage and husbands can be awarded alimony as well as wives. Perhaps most important is the recognition that contemporary marriage does not result in the loss of one's legal identity.

Because of the same-sex marriage issue, marriage has caught the attention of

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legal scholars and journalists who seem to be examining the institution from every angle. In the popular press it is not unusual to find articles reporting surveys of Americans that reveal their positive attitude toward same-sex marriage (the latest poll indicates that 53 percent of Americans favor same-sex marriage). Other articles may relate to the acceptance of inter-racial marriages and on the prevalence of inter-religious marriages. Governor Romney's Mormonism has given rise to articles about the practice of polygamy, now legally banned but reported to be practiced in a Utah community and the subject of a popular TV series.

While marriage has dominated legal scholarship and the popular press, major changes in adoption law have gone unnoticed. In fact a metamorphosis in adoption laws have occurred. It is not the legal institution it was in 1851, when Massachusetts enacted the first adoption statute that provided a judicial proceed-

ing to adopt a child rather than a private informal agreement of a legislative act to formally change the name of a child and secure the child's right to inheritance. For almost two centuries, adoption was a taboo subject with a veil of secrecy attached to it. In addition, what was a process of locating a child for a childless couple who wanted to start a family and establish an heir has become one for locating a person or persons who can provide a family setting for a child.

For years the process of establishing the adoptive relationship was designed to create the impression that the adopted child could have been the natural child of his adoptive parents. Adoption agencies attempted to place a child with prospective adoptive parents who were of an age that they might have conceived the child, who shared the same ethnic background, skin coloration, race, physical appearance and even religion. So strong was the policy of secrecy that often adopted children did not learn that they had been adopted until they were adults. Sometimes the disclosure was made in the will of the adoptive parent.

The reasons for the changes in adoption law and practice are complex and have a great deal to do with the progress that has occurred in civil rights, the drop in the number of American infants available for adoption, changes in the laws dealing with child abuse and ne- ➤21

SECTION REVIEW

Health care coverage for lawfully residing aliens: Massachusetts and federal perspectives

BY LORIANNE SAINSBURY-WONG
AND NANCY RYAN

The commonwealth's policy of near universal health care coverage extends to noncitizens who are living lawfully in Massachusetts. In April 2006, under then-Governor Mitt Romney, Massachusetts became the first state to implement a near universal requirement for health care coverage when the Legislature enacted chapter 58, § 45, of the Acts of 2006, "An Act Providing Access to Affordable, Quality, Accountable Health Care." A significant feature of this law was the creation of affordable and comprehensive health insurance that would be available to qualified low income individuals who lawfully reside in Massachusetts.¹ This article provides an overview of the payers for health care coverage that is accorded for the legal immigrant population. Covering legal immigrants was first accomplished in Massachusetts with the state acting as sole payer; however, pending federal public benefits law may provide the necessary, economic support to sustain state health care reform initiatives.²

The commonwealth's health care reform combines an insurance requirement to obtain and maintain compre-

hensive coverage for nearly all citizens and legal residents aged nineteen and older, with state subsidies to assist low income residents on a sliding scale basis.³ Specifically, to assist low income residents in transitioning from costly emergency room services to preventive care treatment, the Legislature created the Commonwealth Care Health Insurance Program (Commonwealth Care).⁴ This program essentially filled the gaps of existing public benefit programs by subsidizing monthly premium costs for residents who fell outside of Medicaid or MassHealth eligibility criteria and whose household income did not exceed 300 percent of the Federal Poverty Level (FPL).⁵ Before Commonwealth Care, the poorest of the poor, for example a single adult earning less than \$11,172 or 100 percent FPL,⁶ was left uninsured unless the individual had a disability or was otherwise categorically eligible for Medicaid (MassHealth)⁷. Similarly, an individual who had possessed lawful permanent residency to live and work in the United States but who held such immigration status for less than five years was also left uninsured. Commonwealth Care established coverage for these disadvantaged populations.⁸ In furtherance of the commonwealth's policy of

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near universal coverage and to reduce health and ethnic disparities, the commonwealth provides subsidies to allow qualified residents to enroll in Commonwealth Care, the state's unique health insurance program which benefits low income residents, including disadvantaged populations who are noncitizens. Under this program, the costs associated with health care coverage for legal immigrants are funded entirely by the state and its residents.

Financial ramifications to state fiscs bearing full economic responsibility for health care reform policies may be unsustainable without federal support and legislation.⁹ Beginning in 2006, for ex-

ample, the commonwealth incurred the costs associated with state health care benefits for legal residents because it receives no federal financial reimbursement under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).¹⁰ When during a state budget crisis the Legislature terminated coverage only for legal immigrants, the Massachusetts Supreme Judicial Court determined that these lawful residents constitute a suspect class who are entitled to the state constitutional rights of equal protection on the basis of national origin and alienage. "Aliens, standing by definition outside the body politic and yet subject to its laws, are a prototypical example of the discrete and insular minority. In light of their particularly vulnerable status, it thus remains necessary to exercise heightened vigilance to ensure that the full panoply of constitutional protections are afforded to the commonwealth's resident aliens."¹¹ Because of the decisions in *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655 (2011) and *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232 (2012), approximately 40,000 legal immigrants can be restored to full coverage.

In the *Finch* cases, the cat- ➤22

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glect as well as termination of parental rights and the advancements in assisted reproduction techniques.

During the 1970s, a number of cases were handed down that changed the direction of family law in America. In *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), the Florida Supreme Court decided that an antenuptial agreement that settled the rights of parties upon divorce should be enforced. For years, courts adhered to the view that agreements in contemplation of divorce were unenforceable because it was thought that they would encourage divorce. Later, in 1976, the California Supreme Court decided *Marvin v. Marvin*, 557 P.3d 206 (Cal. 1976), which had the effect of giving a legal claim for compensation in what we would call a contract cohabitation. Today we take it for granted that antenuptial and cohabitation contracts will be enforced assuming that neither is offensive to any state public policy.

In 1972, the United States Supreme Court case of *Stanley v. Illinois*, 404 U.S. 645 (1972) had the effect of changing both adoption law and practice. In that case, the nation's highest court held that to deny an unwed father the right to participate in a proceeding where the custody of his children was involved violated his constitutional rights. The original case was a dependency hearing, but in a footnote, the Court went beyond a dependency hearing and expanded the ruling to include adoption. Thus, a point, relegated to a footnote, made every adoption statute in the country obsolete in so far as fathers' rights were concerned. After *Stanley*, the birth father of a child relinquished for adoption, once a shadow figure in the process, now had rights. How to implement the requirement was a cause for concern and one solution was the establishment of Putative Father Registries, which are available in twenty-five states (Massachusetts has a parental claim form that is available at the Office of General Counsel in the Department of Social Services). These registries are designed to give a putative father the opportunity to be notified if a child he fathered is relinquished for adoption.

During the 1970s, another right was asserted, but not from the putative father but from the adopted child himself. This was the right to learn about one's origin. The phenomenon of concern with one's family tree coincided with the famous miniseries, *Roots*.

For decades in order to learn the identity of one's birth parents an adopted child had to petition the probate court and show "good cause" for release of identifying information. Simple curiosity would not be considered "good

cause," which often related to medical matters. Access to adoption records today is much less formidable, given society's emphasis on individual rights, but still, in the vast majority of the states, a court order is necessary. Some states require the consent of all parties before any information is revealed.

The reasons an adopted child may wish to learn about his birth parents vary, often having to do with his being interested in who his birth parents are, what they look like, what they do and the circumstances surrounding his being relinquished for adoption. The desire to learn about one's birth family may come at any time once the child has learned of his adoption.

Lawyers who respond to an adopted child's request to learn "who he is" should move cautiously and perhaps with the guidance of a social worker experienced in counseling adopted children. The social worker may be better able to understand the psycho-social aspects of the search and deal effectively with all the feelings that accompany the inquiry. It is important that the adopted child be prepared to handle the information he obtains, whatever it is, and continue his life without any lasting disappointments if those are his feelings.

The psychological dimensions of the search for an adopted child's origins were discussed in a brilliant study first published in England in 1973 and in the United States in 1975 by Beacon Press. Entitled *In Search of Origins* and written by Dr. John Triseliotis, a psychiatric social worker doing research in Scotland, the book sheds important light on the question of why adult adopted children search for information about their birth parents. Dr. Triseliotis found that the search is directly related to the adopted person's feelings of loss, which prompt feelings that person has about early separation from his birth mother. The loss can be personal, like the death of an adoptive parent, a close relative or friend. It can also be felt as one moves through the life cycle, for example the loss of childhood or adolescence.

This latter reason may explain why an eighteen-year-old about ready to leave home and enter college is prompted to search for his birth parents. For the adopted parents, their adopted child's decision to search may invoke feelings of disappointment and disloyalty, but when understood as psychologically based, it should alleviate those feelings. To Dr. Triseliotis, the search is not the adopted child's rejection of his adoptive parents, but a need to understand and deal with separation. Indeed, if the lawyer who is hired to file the petition understands the psychological dimension of the request, he may be better able to counsel his client. It is possible that the search may not fully meet the needs of the client without

facing the underlying issues.

Making adoption records more available to adopted children and their birth parents may become increasingly important as we learn more about the source of medical problems which may be genetically based, and the need for a full medical family history. Good social work practice in adoption would ordinarily provide the information to the adoptive couple. Indeed, failure to reveal such information could give rise to a wrongful adoption action. In Massachusetts, the Department of Social Services is under a legal duty to provide adoptive parents with all relevant information about a child to be adopted so that the adoptive parents will have adequate information to make an informed decision to adopt.

The crack in the wall of secrecy has been widened further by the legal phenomenon called open adoption, a term which describes the involvement of the birth parents or even birth relatives, like siblings or grandparents, after the adoption has been finalized. Such a situation is unusual since the law tends to deal in dichotomies: one is either adopted with legal ties to one's birth parents terminate or one is not. If one is not adopted, the child may be either a foster child or have an indefinite legal status. No longer can a clear line be drawn between an adopted child and his relationship with his birth parents and his adoptive parents as well as his adoptive siblings. Stated another way, adoption does not necessarily terminate all legal relationships with the adopted child's birth parents, nor does it create identical legal relationships with the adopted child's adopted siblings.

One source for open adoption is its being an outgrowth of a litigation strategy involving either a settlement or a compromise. For example, in a case in which the fitness of the birth mother was at issue and one side felt that an appeal of the termination order had merit, that party might seek a compromise: the birth parent drops the appeal and the prospective adoptive parent allows the birth parent certain visitation rights with the approval of the judge. Ordinarily, a compromise of that sort would be unthinkable without statutory authorization, but a birth parent's visitation rights can be authorized under the equity power of the judge who can decide that they would be in the best interests of the child.

Open adoption can also be proposed in a situation unrelated to litigation where the birth parent seeks custodial visits in exchange for her relinquishment. That too is subject to judicial approval.

Post adoption contacts, usually in the form of a contract between the birth parent and the adoptive parents, is now widespread with the best interests of the child applied as the guiding principle for its implementation. As a contract, it is

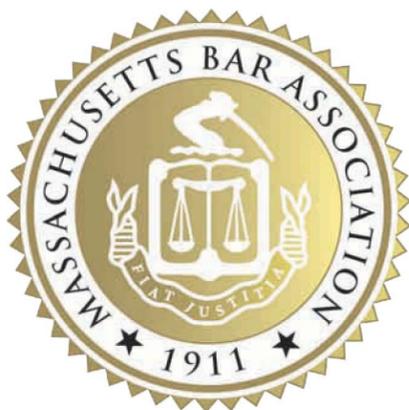
subject to formation, administration and termination rules. For example, the post adoption contract may be time-limited (for the child's minority), may be modified, and may be terminated if certain conditions, like adherence to a visitation schedule, are not fulfilled.

What is so interesting is the recognition that with the adopted child's right to have access to his adoption records and the birth parent's ability to contract with the adoptive parents, adoption can no longer be said to have the effect of severing all legal and practical ties between the birth parents, the child and the adoptive parents. Inheritance rights may be an exception. In all states except for Maine, an adopted child loses his right to inherit from his birth parents and relatives. Maine will allow inheritance rights if the adoption decree so specifies. Except for Wyoming, biological relatives may not inherit from the adopted child, whereas adoptive relatives may inherit from the adopted child.

In a recent State of Washington case, *In re Ingham*, King Co. Sup. Ct. No. 12-2-11602-4 KNT (2012) a judge in its superior court held that adopted siblings unrelated to each other by blood and not reared together may marry. This decision flies in the face of the ordinary statutory provision that adopted children should be treated as if they were the natural children of their adopted parents. If that were the case, a marriage between adopted siblings would be incestuous, but the court wisely looked behind the law and at the reality of the situation.

In *Adoption of a Minor*, 214 N.E.2d 281, 282 (Mass. 1966), an adoptive couple petitioned the Worcester Probate Court to revoke an adoption, which had been issued seven years earlier because along with other reasons the adopted girl, age sixteen at the time the petition for revocation was filed, had become unmanageable. In denying relief to the plaintiffs, the late Chief Justice Wilkins borrowed a phrase from the marriage ceremony when he wrote, "Adoption is for better, for worse." Linking these two legal institutions together seemed curious at the time, but not so odd today. Marriage and adoption do share certain characteristics. For example, both establish a new civil status with certain defined benefits; both have state statutory requirements for their formation and termination and both have undergone a metamorphosis in the last twenty-five years which have brought fundamental changes.

We have not discussed the impact of assisted reproduction technology, especially surrogacy, on adoption, but it has been great. It is hard to imagine what further changes may occur in the laws of marriage and the laws of adoption. If the past is any indication, we may be in for some surprises. ■



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