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“Second Parent” Same-Sex Adoptions Are Valid if in
the Best Interest of the Child: *In re Adoption of
R.B.F. and R.C.F.*

FAMILY LAW – ADOPTIONS – SAME-SEX COUPLES -- The Pennsylvania Supreme Court held that second-parent same-sex adoptions were permissible if the petitioner could demonstrate cause that such an adoption would be in the best interests of the child

In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pa. 2002)

The validity of “second parent” same-sex adoptions was recently upheld in the Pennsylvania Supreme Court case of *In re Adoption of R.B.F. and R.C.F.*¹ The case arose from two consolidated appeals that raised the same legal and factual issues.² In both cases, the superior court upheld the rejection of adoption petitions filed by same-sex partners to adopt their partners’ children on the basis that the Pennsylvania Adoption Act required the legal or biological parent to relinquish parental rights prior to the adoption of a child by a non-spouse.³ The Pennsylvania Supreme Court reversed, determining that, consistent with the Adoption Act, the lower courts erred in prohibiting the petitioners from demonstrat-

1. *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002)

2. *Id.* at 1196. *In re Adoption of R.B.F.*, commenced when Appellant, B.A.F., sought to adopt the natural children of her partner, C.H.F., while C.H.F. maintained her parental rights of the children. Appellants B.A.F and C.H.F. had been domestic partners since 1983. After the couple became committed to raising a family, C.H.F. conceived through artificial insemination. Soon after, B.A.F legally changed her last name to her partner’s name to solidify their commitment. On March 11, 1997, C.H.F gave birth to twin boys. Almost a year later, on April 24, 1998, B.A.F filed a petition to adopt the boys. *Id.*

The second case consolidated for appeal, *In re Adoption of C.C.G.*, arose from similar legal and factual issues. Appellants J.J.G. and J.C.G., a homosexual couple, had been domestic partners since 1982. Committed to raising a family together, J.J.G. legally adopted C.C.G. on October 24, 1991 and eight years later on April 24, 1999, legally adopted Z.C.G. On June 25, 1998, Appellant J.C.G. legally changed his last name to that of J.J.G. and on May 6, 1999, sought to adopt the children, C.C.G. and Z.C.G. *Id.*

3. See *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739 (Pa. Super. Ct. 2000) and *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000).

ing cause that such an adoption would be in the best interest of the child.⁴

In both cases, each legal parent submitted consent forms necessary for the adoption.⁵ However, on the consent forms, both legal parents omitted the language that relinquished their legal parental rights.⁶ According to the superior court, the only exception to the unqualified consent requirement was Section 2903 of the Adoption Act, which provides that “[w]henver a parent consents to the adoption of his child *by his spouse*, the parent-child relationship between him and his child remain.”⁷ The Adoption Act does not permit a non-spouse to adopt a child where both parents have not relinquished their parental rights.⁸

At the trial level, both courts denied the adoption, and the initial issues raised at the trial level, before the consolidation of the cases, were identical.⁹ In the first case, *In re C.C.G.*, the Court of Common Pleas of Erie County determined that the Pennsylvania Adoption Act prohibited “an eight-year-old boy and a seven-year-old girl, jointly raised since infancy by both their legally recognized adoptive father and their *de facto* second father, to establish a legally recognized relationship with their second father without destroying the children’s existing legal bonds with their legally recognized adoptive father.”¹⁰ And in *In re R.B.F.*¹¹, the Common Pleas Court of Lancaster County determined that the Pennsyl-

4. *In re Adoption of R.B.F.*, 803 A.2d at 1203.

5. *In re Adoption of C.C.G.*, 762 A. 2d at 726; *In re Adoption of R.B.F.*, 762 A. 2d at 739. The Pennsylvania Adoption Act, in Section 2701 and 2711, requires the legal and biological parents of the adoptees to sign consent forms relinquishing their rights as a parent. *Id.* The only exception to this is stated in Section 2903 of the Adoption Act, which permits a spouse of a legal or biological parent to adopt the child without the legal or biological parents relinquishing their parental rights. *Id.*, 23 Pa. C.S. §2903 (2002).

6. *In re Adoption of C.C.G.*, 762 A. 2d at 726.

7. *In re Adoption of R.B.F.*, 803 A.2d.at 1197.

8. *Id.* Under Pennsylvania law, a marriage is only recognized between a man and a woman, and therefore, appellants do not qualify as a spouse. *Id.* Since the legal parents of the children did not relinquish their parental rights and their partner are not considered a spouse under Pennsylvania law, the appellants do not meet the statutory requirements. *Id.* Although the appellants do not meet the statutory requirements, the Pennsylvania Adoption Act leaves the court discretion to permit the adoption if cause is shown why the statutory requirements need not be met. *Id.* The Statute, 23 Pa. C.S. §2901, states, “Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parent’s rights have been terminated, the investigation required by section 2535 (relating to investigation) has been completed, the report of the intermediary has been filed pursuant to section 2533 (relating to report of intermediary) and court may enter a decree of adoption at any time.” 23 Pa. C.S. §2901 (2002).

9. *Id.*

10. *In re Adoption of C.C.G.*, 726 A.2d at 724-726.

11. *In re Adoption of R.B.F.*, 762 A. 2d 739.

vania Adoption Act prohibited the biological mother of the children to maintain her legal parental rights while the children's de facto mother became a legally recognized parent through adoption.¹²

Both trial courts strictly applied the Pennsylvania Adoption Act to forbid the adoptions.¹³ Relying on the language of the Pennsylvania Adoption Act, the courts determined that since the petitioners were not spouses of the legal or biological parent, they could not adopt the children without the legal or biological parent first relinquishing their parental rights.¹⁴ Further, the lower courts rejected the argument that the appellants had the opportunity to establish why, although they do not fulfill the statutory requirements necessary in the Adoption Act, the adoption should be granted.¹⁵ Both the trial court and the superior court stated that the purpose of the "cause shown" language in the statute was to allow the individuals to show why the statutory requirements need not be met.¹⁶

The appellants hoped to show, both at the trial level and the intermediate level, that even though they did not meet the statutory requirements, that adoption was in the best interest and general welfare of the children.¹⁷ The appellants argued that the "cause shown" language in Section 2901 [was] tantamount to a best interest of the child analysis.¹⁸ A majority of the superior court concluded that "until the statutory requirements have been met, or cause shown as to why they need not be met, an analysis of the best interest and general welfare of the children cannot be considered."¹⁹ The superior court determined that the appellants failed to "demonstrate cause" and therefore denied adoption.²⁰ In other words, the superior court did not permit the appellant to demonstrate why, even though the statutory requirements had not been

12. *Id.* at 740.

13. *Id.* at 741.

14. *In re Adoption of R.B.F.*, 762 A. 2d at 742.

15. *Id.* at 743. Section 2901 of the Pennsylvania Adoption Act states, "[u]nless the court for cause shown determines otherwise, no decrees of adoption shall be entered..." 23 Pa. C.S. §2901 (2002).

16. *In re Adoption of R.B.F.*, 803 A. 2d at 1197.

17. *In re Adoption of R.B.F.*, 762 A. 2d at 743.

18. *Id.*

19. *In re Adoption of R.B.F.*, 803 A. 2d at 1198.

20. *Id.*

met, the adoption should be permitted for the best interest and general welfare of the children.²¹

On appeal, the issue raised was whether the "Adoption Act requires a legal parent to relinquish his or her parental rights in cases where a same-sex partner seeks to adopt the legal parent's child."²² More specifically, the supreme court focused on Section 2901 of the Adoption Act.²³ That statute vests the trial court with discretion to determine whether, under the circumstances of a particular case, "cause has been shown to demonstrate why a particular statutory requirement has not been met."²⁴

The appellants argued that they were never given an opportunity to demonstrate why the statutory requirements need not be met.²⁵ In both cases, the appellants asserted they had the right to "set forth a factual basis for finding that the purpose of the relinquishment provision would be fulfilled by maintaining the children's relationship with their existing parent."²⁶

The Pennsylvania Supreme Court, siding with the appellants, reversed.²⁷ The court vacated the decisions and remanded the cases, granting both appellants the opportunity to demonstrate at the trial court level why the adoptions should be granted even though the statutory requirements had not been met.²⁸ The supreme court stated that the lower courts erred in prohibiting the appellants from arguing that they were entitled to show cause under § 2901 that the best interests of the children were to grant the adoptions.²⁹ The court held that if a best interest of the child analysis was not permitted until after the statutory requirements

21. *Id.* at 1196. The superior court relied on *In Interest of Coast*, which held that a "best interest of the child" analysis should not be conducted until *after* the statutory requirements have been satisfied." *In re Interest of Coast*, 561 A.2d 572, 579 (Pa. Super. Ct. 2000). On appeal, the supreme court determined that *In Interest of Coast* was not applicable because its "progeny involved statutory requirements necessary to *terminate* parental rights, rather than those required for *adoption*." *In re Interest of Coast*, 561 A.2d at 579. At the lower court level, the trial court focused on the decision in *In re Adoption of E.M.A.*; however, the supreme court of *In re Adoption of R.B.F.*, rejected the superior court's reliance on *E.M.A.* *In re Adoption of E.M.A.*, 409 A.2d 10 (Pa. 1979). The supreme court determined that the Adoption Act was amended after the ruling in *E.M.A.* and that the trial court now has the discretion to grant an adoption even when the statutory requirements have not been met. *In re Adoption of R.B.F.*, 803 A.2d at 1196.

22. *Id.* at 1202.

23. 23 Pa. C.S. § 2901 (2002).

24. *In re Adoption of R.B.F.*, 803 A.2d at 1197.

25. *Id.*

26. *Id.* at 1201.

27. *Id.* at 1202, n.11

28. *Id.*

29. *In re Adoption of R.B.F.*, 803 A. 2d at 1202, n.11.

were established, it would “render the ‘cause shown’ language meaningless, as a case proceeding under Section 2901 will most likely involve a failure to satisfy the statutory requirements.”³⁰ According to the supreme court, a determination of ‘cause’ under Section 2901 would necessarily involve an examination of the best interests of the child.³¹ In fact, the court determined that the “just cause” language expanded the trial court’s discretion to permit the appellants to establish (even though statutory requirement may not be met) that they were afforded the rights established under the statute.³²

The Pennsylvania Supreme Court remanded the cases back to the lower courts for an evidentiary hearing to allow the appellants an opportunity to demonstrate why the statutory requirements need not be met to permit the adoption.³³

In 1982, Section 2901 of the Adoption Act was amended to include the “just cause” language.³⁴ The amendment to 23 Pa. C.S. §2901 stated,

Unless the court for *cause shown* determines otherwise, no decree of adoption shall be entered unless the natural parent or parents’ have been terminated, the investigation required by section 2535 (relating to investigation) has been completed, the report of the intermediary has been filed pursuant to section 2533 (relating to report of intermediary) and all other le-

30. *Id.*, n.11.

31. *Id.*, n.11. Although the superior court recognized the Amended Section 2901, the lower court determined it did not have an effect on the outcome. The court concluded that: “[u]ntil the statutory requirements have been met, or cause shown as to why they need not be met, an analysis of the best interest and general welfare of the child cannot be considered. A best interest analysis has no place in a determination of whether the statutory requisites have been met...” *In re Adoption of C.C.G.*, 762 A.2d at 729. With this determination, the superior court concluded that the statutory requirements had not been met and that the appellants had not shown just cause as to why the statutory requirements had not been met, and therefore, denied the adoption. *Id.*

32. *In re Adoption of R.B.F.*, 803 A. 2d at 1203.

33. *In re Adoption of R.B.F.*, 803 A. 2d at 1203. However, the supreme court is quick to state that the exercise of the trial courts discretion “does not open the door to unlimited adoptions by legally unrelated adults.” *Id.* Rather, the trial court will use discretion by focusing on the best interest of the child, without the burden on the appellants of first establishing the statutory requirements or why those requirements need not be met. *Id.* The supreme court states that the superior court’s decision was “premised solely on the lack of unqualified consent by the existing legal parent.” *Id.* However, “there is no language in the Adoption Act precluding two unmarried same-sex partners (or two unmarried heterosexual partners) from adopting a child who had no legal parents. *Id.* It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of one of the partners prior to the filing of the adoption petition.” *Id.*

34. 23 Pa. C.S. §2901 (2002).

gal requirements have been met. If all legal requirements have been met, the court may enter a decree of adoption at any time.³⁵

Three prominent Pennsylvania cases have dealt with the issue of the “best interest of the child” in custody disputes. One of the first cases in Pennsylvania to engage in a “best interest of the child” analysis was *In re Rosenthal*.³⁶ In that case, the trial court determined the custody of the Rosenthal children after the parents divorce.³⁷ During the process of divorce, the parents agreed to a split custody arrangement.³⁸ The father, after some alleged problems with the mother’s parenting, filed a petition in the Common Pleas Court of Franklin County to gain complete custody.³⁹ The court stated that the agreement set forth by the parents was not binding on its disposition of the case.⁴⁰ Judge Cunningham stated, “The relationship of parent and child is a status—not a property right. Parents, whether divorced or not, have no property right in their child’s custody, concerning which they may make contracts....”⁴¹ The court continued “[w]here the custody of children is the question, the best interest of the children is the paramount fact.”⁴²

The “best interest of the child” analysis was also applied by the Pennsylvania Supreme Court in a late-1950’s case, *The Cochran Appeal*.⁴³ Again dealing with a custody issue, the supreme court commented, “[t]he law is well settled that [t]he controlling consideration is the welfare of the child. It is presumed to be for the best interest of the child to be in the custody of its natural protector, its parents, and particularly the mother in the case of young children.”⁴⁴

35. 23 Pa. C.S. §2901 (2002). (Emphasis added). Prior to the amended statute, the statute read: “Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the adoptee has resided with the petitioner for at least six months prior to thereto or, in lieu of such residence, the adoptee is at least 18 years of age or is related by blood or marriage to the petitioner.” *In re Adoption of R.B.F.*, 803 A.2d at 1201.

36. *In re Custody of Minor Children of Dunbar A. Rosenthal*, 157 A.2d 342 (Pa. 1931).

37. *In re Rosenthal*, 157 A. 2d at 343.

38. *Id* at 343.

39. *Id*.

40. *Id*. at 344.

41. *Id*. at 344.

42. *In re Rosenthal*, 157 A. 2d at 344, (citing Mr. Justice Brewer, then of the Supreme court of Kansas, in the case of *Petition of Frank B. Bort*, 25 Kan. 308, 37 Am. Rep. 255).

43. *Cochran Appeal*, 145 A.2d 857 (Pa. 1958).

44. *Id*. at 858.

In a later case involving custody issues, *Commonwealth v. Michael*,⁴⁵ the superior court established the relevant factors to consider in a “best interest of the child” analysis: (1) the character and fitness of the parties seeking custody; (2) their respective homes; (3) their ability to adequately care for the child; and (4) their ability to financially provide for the child.⁴⁶

Two appellate court cases have dealt with the interplay between the “best interest of the child analysis” and termination proceedings. In *In re Adoption of R.I.*, the Pennsylvania Supreme Court determined that a “best interest of the child” analysis could not be used until after the termination statutory requirements were met.⁴⁷ The court based its holding on fears that such an analysis would force courts to compare homes and prejudice the termination proceedings.⁴⁸

In another case involving termination proceedings, *In the Interest of Coast*, the superior court was faced with the issue of whether a “best interests of the child” balancing test was appropriate in a termination proceedings.⁴⁹ The court looked into whether the parents were fit to maintain custody of their children.⁵⁰ At the trial court level, the lower court failed to determine whether any additional factors existed that would render termination adverse to the children’s interests.⁵¹ Following *Adoption of R.I.*, the court stated that the “best interests of the child [could not] be considered until after a finding that the statutory requirements [had] been met.”⁵² Thus, neither case examined “just cause”⁵³ language of 23 Pa. C.S. §2901.⁵⁴

The issue whether a non-spouse may adopt with a parent retaining his parental rights was first reached in the supreme court decision *In Re Adoption of E.M.A.*⁵⁵ In *E.M.A.*, the specific issue

45. *Commonwealth v. Michael R.*, 436 A.2d 969 (1981 Pa. Super.).

46. *Michael R.*, 437 A. 2d 969.

47. *Id.* at 297.

48. *Id.* “The welfare of many children might be served by taking them from their homes and placing them in what the officials consider a better home.” *Id.* But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, or to take the children of the illiterate and give them to the cultured, not to take the children of the weak and sickly and give them to the strong and healthy. *Id.*

49. *In the Interest of Coast*, 561 A. 2d 762. (Pa. Super. 1990)

50. *Id.*

51. *Id.* at 765.

52. *Id.* at 769, (citing *Adoption of R.I.*, 361 A. 2d at 300 n.12. (Pa. 1976)).

53. 23 Pa. C.S. §2901 (2002).

54. *In the Interest of Coast*, 561 A.2d at 769.

55. *In re Adoption of E.M.A.*, 409 A. 2d 10 (Pa. 1979).

was whether a third party woman who was not the spouse of the natural father could adopt the child without the father relinquishing his parental rights.⁵⁶ The court determined that the adoption could not proceed since appellant did not fulfill the necessary requirements of being a spouse to the father.⁵⁷ The court explained, "[O]ur courts have no authority to decree an adoption in the absence of the statutorily required consents. Nor may exceptions of the Adoption Act be judicially created where the Legislature did not see fit to create them."⁵⁸ In *E.M.A.*, the court did not give itself authority to look into any adoptions that did not fulfill the statutory requirements.⁵⁹

A subsequent Pennsylvania Supreme Court decision, *In re Adoption of K.M.W.*, relied on its prior ruling in *E.M.A.* to prohibit a grandmother from completing a second-parent adoption.⁶⁰ In *K.M.W.*, the mother sought to retain parental rights while the child's grandmother adopted the child.⁶¹ The court reiterated that "The Adoption Act does not permit a non-spouse to adopt a child where both parents have not relinquished parental rights."⁶²

In both *E.M.A.* and *K.M.W.* the Pennsylvania Supreme Court firmly stated that it would not make exceptions when the statutory requirements were not met.⁶³ However, it is important to note that these two cases are distinguishable from the consolidated cases at hand, *R.B.F.* and *C.C.G.* *E.M.A.* was determined in 1979, three years before the Adoption Act was amended in 1982. Also, in *K.M.W.* the supreme court did not discuss the amended part of the section, which was at the heart of *R.B.F.* on appeal.

The Pennsylvania Adoption Act specifically states that "[a]ny individual may become an adopting parent."⁶⁴ Although the Pennsylvania Supreme Court has yet to reach the issue, a common pleas court decision suggests that the Pennsylvania Adoption Act does not prohibit adoption by two adopters of the same sex.⁶⁵ In

56. *In Re Adoption of E.M.A.*, 409 A. 2d at 11.

57. *Id.*

58. *Id.*

59. *Id.*

60. *In re Adoption of K.M.W.*, 718 A.2d 332 (Pa. 1998).

61. *Id.* at 333.

62. *Id.*

63. *In re Adoption of E.M.A.*, 409 A. 2d at 10; *In re Adoption of K.M.W.*, 718 A. 2d at 332.

64. 23 Pa. C.S. §2312 (2002).

65. *In re Adoption of E.O.G.*, 28 Pa. D. & C. 4th 262, 265 (Pa. D & C. 1993).

that decision, *In re Adoption of E.O.G.*, the Common Pleas Court of York County focused on the adoption of two foreign children from Eastern Europe.⁶⁶ The Eastern European nation (not noted in the opinion to protect the parties) issued a separate decree of adoption for each of the two children naming C.M.G., one of the petitioners, as the sole adopting parent.⁶⁷ At this time, C.M.G. brought the children to the United States and raised them with J.M.B., her lesbian partner, for over ten years.⁶⁸ C.M.G. and J.M.B. sought to adopt the children jointly in the United States.

The court concluded that “the statute does not prohibit adoption by two adopters of the same sex.”⁶⁹ The court further noted, “The Pennsylvania statute is gender neutral and neither expressly prohibits or condones a ‘same sex adoption’.”⁷⁰ Since the court determined that the Adoption Act did not prohibit a homosexual couple from adopting children, the court focused on whether the adoption was in the best interest of the children involved.⁷¹ Relying on the superior court holding in *Blew v. Verta* that “a court may not restrict a homosexual parent’s custodial right absent a showing that the partner’s sexual relationship with her partner will be harmful to the child,” the trial concluded that granting the adoption would not be harmful to the child.⁷²

The ruling in *E.O.G.* suggests that same-sex adoptions are not prohibited in the Commonwealth.⁷³ However, although the Commonwealth permits any individual to adopt, certain requirements must be met before an adoption can be established.⁷⁴ The joint adoption in *E.O.G.* was within the statutory requirements of the Adoption Act, whereas, in *In re Adoption of R.B.F. and R.C.F.*, the appellants were not within the statutory requirements of the Adoption Act.

If the Commonwealth permits joint same-sex adoptions, I see no reason to prohibit appellants from adopting the children while the birth or legal parents maintain their parental rights. Although the Commonwealth prohibits same-sex marriages, adoptions are

66. *Id.* at 262.

67. *Id.*

68. *Id.*

69. *Id.* at 265.

70. *In re Adoption of E.O.G.*, 28 Pa. D. & C. 4th at 265.

71. *Id.* at 265.

72. *In re Adoption of E.O.G.*, 28 Pa. D. & C. 4th 262, 265 (1993), (citing *Blew v. Verta*, 617 A.2d 31, (Pa. Super. 1992)).

73. *Id.*

74. 23 Pa. C.S. §2901 (2002).

determined by analyzing what is in the best interest of the child.⁷⁵ If the best interest of the child is an adoption by a same-sex partner, such an adoption should be permitted by law. Since there are times in which an adoption by same-sex partners is in the best interest of the child, there should not be a *per se* rule that denies same sex adoptions while one parent maintains his/her parental rights. It is imperative to determine, on a case-by-case basis, if a same-sex adoption is within that child's best interest. I agree with Judge Johnson's dissent in the superior court opinion where he states:

Courts have gone to great lengths to provide every child with precisely one mother and one father, the realities of family formation and parenting are considerably more complex. Lesbian-mother families are but one alternative to the presumed form. In resolving disputes about the custody of the children, the court system should recognize the reality of children's lives, however unusual or complex. Courts should design rules to serve children's best interests. By failing to do so, they perpetuate the fiction of a family homogeneity at the expense of the children whose reality does not fit this form.⁷⁶

If the couple planning to adopt a child is stable, loving and capable of supporting and caring for the child, I believe it is in the child's best interest to permit the adoption. Although there are concerns that the child may become confused with her own sexual orientation, or feel different because she has same-sex parents, this is just one of many factors the court has to look at in determining if the adoption is in the child's best interest. It is not the only factor.

The legislature has not specifically prohibited same-sex adoptions.⁷⁷ Until it does, Judge Johnson believes, "[W]e should interpret the laws of our Commonwealth in such a way that adheres to the mandates of legislature and promotes the placement of children in stable families who can provide nurturing and supportive homes."⁷⁸ The court must look at the specific facts of each adoption case, determine what is in the best interest of the child and

75. *In re Adoption of R.B.F.*, 803 A. 2d at 1202.

76. *In re Adoption of R.B.F.*, 762 A. 2d at 748.

77. *Id.* at 750.

78. *Id.*

determine the ruling that will promote the child's best interests.⁷⁹ After all, it is the child's best interest we are concerned with, not the preservation of the traditional family structure in our society.

Shannon E. Smith

79. *Id.*

