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EQUAL OPPORTUNITY ADOPTION & DECLARATORY JUDGMENTS: ACTING IN A CHILD'S BEST INTEREST

Casey Martin*

"[The] best interest of the child is an elusive guideline that belies rigid definition. Its purpose is to maximize a child's opportunity to develop into a stable, well-adjusted adult."¹

I. INTRODUCTION

Suppose a couple is unable to conceive a child, one partner is artificially inseminated or goes through a scientific procedure to bear the child, but afterward the other partner is not allowed to adopt the child.² Consider whether the fact that the couple is heterosexual is surprising; and whether it would be surprising if it were a homosexual couple.

Regardless of the sexual orientation of the couple involved, the inability to adopt is devastating for both the children and the parents.³ The most dramatic illustration of the problem is when a biological parent dies and the living partner does not have legal custody of the children.⁴ In this situation, the children may then be removed from the only home that they have ever known.⁵ This surely would not "maximize a child's opportunity to develop into a stable, well-adjusted adult."⁶

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¹ Adoption of Michelle T., 117 Cal. Rptr. 856, 858 (Cal. Ct. App. 1975).
⁵ See id.
⁶ Adoption of Michelle T., 117 Cal. Rptr. at 858.
Recognizing the importance of focusing on the best interest of the children, the California Legislature enacted a new law that allows registered domestic partners to adopt their partner's children. Although this legislation is at once groundbreaking and historic, it does not solve all the problems that non-conventional adoptive families face in California. The legislature cannot address the ever-changing needs of non-traditional families, due to the rate of social and technological innovation. Only the judiciary has the capacity to tailor solutions to individual families in a timely manner.

This comment discusses the legal justifications for allowing the judiciary to employ declaratory judgment proceedings to address the concerns of non-conventional adoptive families. The comment first considers various aspects of adoption law and second parent adoption law germane to this discussion. Next, it focuses on the types of adoptive families that current law does not adequately provide for. It then analyzes the constitutionality of declaratory judgment in the context of adoption law. Finally, the comment proposes that declaratory judgments should be used as an additional means of providing for all types of adoptive families.

II. BACKGROUND

A. The History of Second Parent Adoptions in California

Of the three forms of adoption available in California prior to the legislature's passage of Assembly Bill 25, only one form—stepparent adoption—allowed a birth parent's spouse to adopt a

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7. See AB-25 supra note 2.
8. See AB-25, supra note 2 (allowing only registered domestic partners to adopt).
10. See In re Marriage of Litowitz, 10 P.3d 1086, 1086-90 (Wash. Ct. App. 2000). In this case, the court employed a declaratory judgment (though unreported) to establish a child's parentage before birth. See id.
11. "Non-conventional" is used in this comment to refer to an unmarried heterosexual couple or an unregistered domestic partnership.
12. See discussion infra Part II.A.
13. See discussion infra Part II.C.
14. See discussion infra Parts II.E., IV.B.
15. See discussion infra Part V.
16. "Birth parent" in this context could be either a biological mother or a biological father, although more often it is a biological mother.
child while maintaining the birth parent's rights in connection with the child. The more traditional forms of agency and independent adoption required a complete relinquishment of rights by the birth parent before any type of adoption could take place. Because a stepparent could adopt his or her partner's children without requiring the spouse to surrender parental rights, stepparent adoption was a popular option for both traditional and non-traditional couples. Stepparent adoption requires one biological parent to give up parental rights, in order to ensure that the child has only two legal parents. Non-traditional unmarried couples frequently refer to stepparent adoption as "second parent adoption." Prior to discussing second parent adoption, this comment explains each of California's traditional forms of adoption.

1. Types of Adoption Allowed in California

The first type of traditional adoption, agency adoption, requires birth parents to surrender their parental rights over the child to a licensed adoption agency or the Department of Social Services. Once parental rights are surrendered, so too are the parental responsibilities, and the agency or the Department of Social Services has control of the child until adoption.

When a couple adopts a child, the agency gives them all the rights and responsibilities associated with the child, and the rights of the birth parents terminate. A birth parent may specify to the agency that he or she would like certain people to adopt the child, and the agency usually abides by the parent's request. However, if parents different from those specifically designated by the birth parent adopt the child, then the birth parent's parental rights do not expire. For example, a mother who gave her child to an adoption agency would relinquish her

18. See id. § 8700.
20. See id.
23. See id.
24. See id.
26. See id. § 8700(f).
27. See id.
rights until the agency adopted her child. If she specified that she wanted her child placed with a particular family, and the agency placed the child with that family, then the mother and the agency relinquish parental rights to the adoptive parents.

The second form of traditional adoption, independent adoption, is different from agency adoption in that the birth parents choose the potential adoptive parents without agency intervention. The birth parents must then agree to the adoption by signing an adoption placement agreement. After a court approves the agreement, the birth parents relinquish all rights to the child, giving these rights directly to the adoptive parents. An example of independent adoption includes a biological mother who gave her child up for adoption by neighbors or people that she knew by signing an adoption agreement. After ninety days, the adoptive parents have full parental rights to the child and the biological mother’s rights to the child terminate.

The third form of adoption, stepparent adoption, enables the non-biological husband or wife of the birth parent to petition the court to adopt the child, pending the permission of one or both birth parents. The primary difference between stepparent adoption and the other traditional forms of adoption is that the birth parent or legal parent in a stepparent adoption does not give up his or her rights to, and responsibilities for, the child. For example, if a child’s stepfather wanted to adopt her, he could do so without causing his wife, the child’s mother, to relinquish any parental rights.

Second parent adoption is a modification of stepparent adoption that allows an unmarried partner to adopt the legal or biological child of the other partner. Like stepparent adoption, the birth parent of the child retains his or her rights while at the same time sharing them equally with his or her partner or spouse. As with other forms of adoption, there may be only

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29. See id. §§ 8524, 8801.
30. See id. § 8801.3(b)-(c).
32. See id. § 9000.
33. See id.
35. This could only occur if the child’s biological father or previous father had either died or given up all parental rights to the child. See id.
36. See Shapiro, supra note 21, at 22-27.
37. See Sharon S., 113 Cal. Rptr. 2d at 107.
two legal parents.\textsuperscript{38} When the adoption takes place, even if one parent retains parental rights, the other parent's rights must be extinguished.\textsuperscript{39} For example, if a stepfather wanted to adopt his wife's child, then the rights of the child's biological father must first be terminated.\textsuperscript{40}

Until the mid to late eighties, unmarried and same-sex couples did not have the option of second parent adoption.\textsuperscript{41} However, in the early nineties, courts began to address the issue. In 1992, California's Third District Appellate Court addressed same-sex second parent adoption for the first time.\textsuperscript{42}

California and sixteen other states allow second parent adoption, while three states have expressly prohibit the procedure.\textsuperscript{43} In many of the remaining states, there is no precedent directly on point,\textsuperscript{44} and the availability of second parent adoptions depends on each court's liberal or conservative interpretation of the state adoption statute.\textsuperscript{45}

2. Sharon S. v. Superior Court of San Diego County\textsuperscript{46} and Its Effect on Second Parent Adoptions in California

Prior to the enactment of AB-25 and the California Court of Appeals decision in Sharon S. v. Superior Court of San Diego,\textsuperscript{47} second parent adoption in California had two different types.\textsuperscript{48} The first type was a modified independent adoption, in which the birth parent agreed to the adoption but intended to retain parental rights.\textsuperscript{49} The second type was an agency adoption, in which the birth parent gave up custody rights to the adoption agency, and specifically appointed him or herself and his or her partner as the adoptive parents.\textsuperscript{50}

Sharon involved an attempt at modified independent adop-

\textsuperscript{38} See Doskow, supra note 19, at 5-7.
\textsuperscript{39} See id.
\textsuperscript{40} See Shapiro, supra note 21, at 22-27.
\textsuperscript{41} See Doskow, supra note 19, at 5-7.
\textsuperscript{43} See id.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} 113 Cal. Rptr. 2d 107 (Cal. Ct. App. 2001).
\textsuperscript{47} Id.
\textsuperscript{48} See id. at 112-13.
\textsuperscript{49} See id.
\textsuperscript{50} The Sharon court declined to rule on this second type of partner adoption, and as a result, pre-AB-25 second parent adoptions of this sort may still be valid. See id.
tion by a same-sex couple. The biological mother, Sharon Silverstein, agreed to a second parent adoption of her children by her partner Annette Friskopp when the partners were living together and maintained a relationship. After the relationship deteriorated but before the adoption was final, Silverstein rescinded permission for Friskopp to adopt her two children, prompting Silverstein to take the matter to court.

Prior to Sharon, various courts, along with the Department of Social Services, had liberally interpreted adoption statutes and permitted second parent adoptions. The trial court followed this precedent and allowed the adoption proceedings to continue as part of a "modified independent adoption, a practice developed by the Department of Social Services." However, the court of appeals expressly repudiated this practice in their decision.

The court of appeals decision stated that there are only three enforceable methods of adoption in the state of California: administrative adoption, independent adoption, and stepparent adoption. Since same-sex partners are unable to marry, the decision precluded Sharon and Friskopp from using either stepparent adoption or modified independent adoption to adopt their partner's children.

The court declined to allow Sharon-type adoptions because it could not "construe past legislative inaction as evidence of the Legislature's approval of the use of modified independent adoption . . . [and] reject[ed] the view that the [L]egislature silently enacts major social policy." The court of appeals interpreted the 1997-1998 California legislature's failure to adopt a second parent adoption bill as "a clear indication that the [L]egislature did not previously authorize the accomplishment of second par-

51. See id. at 107.
52. See Sharon S., 113 Cal. Rptr. 2d at 107.
53. See id.
55. Sharon S., 113 Cal. Rptr. 2d at 111-14.
56. See id. at 107.
57. See id. at 111. Administrative adoption differs from agency adoption I that it encapsulates any type of government entity or agency.
58. See id. at 111-12.
59. Id. at 113-14.
ent adoptions." Since Silverstein neither relinquished her rights to her children nor allowed a "spouse" to adopt them, Silverstein's biological tie to her children prevailed in the case, and she retained custody of her children.

B. AB-25 and the Resurrection of Second Parent Adoption in California

In 2000, California created a registry for domestic partners within the state. The legislature created this registry through Senate Bill 75, which gave domestic partners visitation rights in hospitals and dependents of some state government employees health coverage. On the heels of this legislation, California voters in the year 2000 approved the "protection of marriage initiative," also known as Proposition 22. Proposition 22 defined marriage as a union achievable only between a man and a woman. Despite Proposition 22, the California legislature followed the lead of cities such as Los Angeles, Oakland, and San Francisco, and corporations such as Walt Disney, Ford Motor, and IBM, and passed the progressive domestic partner legislation California AB-25.

Effective January 1, 2002, AB-25 expanded upon Senate Bill 75 and added significant supplemental legal benefits for domestic partners. The legislation grants domestic or same-sex partners the right to stepparent adoption subject to the approval of a family court and any other individual with parental rights over the child. AB-25 also amends the Family Code by defining a domestic partnership as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." This definition includes same-sex couples, as well as individuals over the age of sixty-two. One of the new rights afforded to these domestic partners is the aforementioned

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61. See id. at 111-12.
63. See id.
65. See id.
66. See id.
67. See AB-25, supra note 2.
68. See id.
70. See id.
right to stepparent adoption, codified in section 5 of AB-25:

Section 9000 of the California Family Code is amended to read: (a) a stepparent desiring to adopt a child of the stepparent’s spouse may for that purpose file a petition in the county in which the petitioner resides. (b) a domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.71

Under AB-25, a Sharon-type second parent adoption is valid, as it gives a domestic partner the ability to adopt his or her partner’s child through a variation of traditional stepparent adoption.72 Although AB-25 is both ground-breaking and historic, it does not solve all of the problems facing non-traditional couples trying to adopt or give birth to children.73

One unresolved problem in the wake of AB-25 is the possible invalidation of Sharon-type second parent adoptions that took effect before January 1, 2001.74 Although same-sex adoptive parents have the option of adopting their partner’s child through second parent adoption after AB-25,75 the bill only covers registered domestic partners currently residing in California.76 It does not cover families that have, since the adoption, broken up or moved out of state, nor would it apply if the biological parent has died and the non-biological parent wants to adopt the child.77 These families may or may not be protected by the state adoption code, which says that adoptions lasting longer than twelve months are protected from challenge.78

C. Remaining Questions Under AB-25

Unless the decision in the Sharon case is overruled, AB-25 may not address the concerns of many couples who, since adopting their children, have moved out of state, broken up, or

71. Id. § 9000.
72. See id.
75. See AB-25, supra note 2.
76. See id.
77. See Warren, supra note 64.
if the biological parent has died. Even though the state adoption code says that adoptions longer than twelve months are immune from challenge, if these families are taken to court, they might face significant problems with the validity of the adoption of their children.

Potential parents cannot employ AB-25 unless they want to get married or register as domestic partners. This limitation is problematic because some people may want to refrain from getting married or registering as partners. In addition, AB-25 simply does not address the concerns of families that wish to recognize more than two parents, as it retains the tradition of recognizing just two legal parents.

1. AB-25 and Parents Who Adopted Their Children After the Ruling in Sharon

According to division 13 of the California Family Code, actions to vacate adoptions must take place within one year of the adoption or they are prohibited by the statute of limitations. The California legislature intended adoptions to become final within this fixed period to prevent emotional harm to the child. "Statutes of limitation are statutes of repose, and are based in part upon the proposition that persons who sleep upon their rights may lose them." "We can think of no situation to which the principle is more applicable than that of natural parents who . . . wait for more than five years to attack an adoption . . . ."

Parents who adopted their children within a year after the decision in Sharon are unlikely to face litigation; however, questions of fraud could bring them to court. Parents who have not finalized their adoption and, like the couple in Sharon cannot make an agreement, might also face litigation. Families facing

79. See Egelko, supra note 74.
81. See id.
82. See id. § 297.
83. See Shapiro, supra note 21, at 22-27.
84. See AB-25, supra note 2.
86. See id.
87. The state gives only actions based on fraud an additional three years in which to vacate an adoption. See id.
88. See id. § 9102.
90. See CAL. FAM. CODE § 9012.
91. See Warren, supra note 64.
the death of a biological parent, or those who have since moved out of state, may also find themselves embroiled in litigation. These families need to have stability that the current legal system is incapable of providing.

2. **Addressing the Concerns of People Who May Not Want to Marry or Become Domestic Partners, but Who Would Still Like to Adopt Under AB-25**

Marriage or domestic partnership may not address all circumstances in which people wish to raise children. AB-25 addresses many of the concerns of unequal treatment for homosexual partners wishing to adopt, but it does not necessarily address the needs of non-traditional homosexual or heterosexual couples wishing to pursue traditional or second parent adoption. Many individuals, heterosexual and homosexual alike, would prefer to raise their children outside the legal institutions of marriage or partnership. Children might find themselves excluded from adoption due to the categorization of their potential adoptive parents (or second parents) as unfit due to their lack of a recognized legal relationship.

California courts traditionally have not allowed two unmarried, non-legally bound individuals to adopt a child. However, single individuals have the ability to adopt a child, and there is little, if any evidence that their children are adversely affected by their single marital status. It thus makes little sense to preclude individuals who are in a committed relationship, albeit without legal recognition, from adopting a

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92. See id.
93. See discussion infra Part V.
95. Here, non-traditional is defined as non-married heterosexual partners, non-registered domestic partners, and any additional type of partnership not currently recognized by California law.
97. See AB-25, supra note 2, §§ 5-6.
98. See id.
99. "A man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he both 'receives the child into his home and openly holds out the child as his minor child.'" Adoption of Michael H., 10 Cal. 4th 1043, 1048 (1995).
100. See CAL. FAM. CODE § 8714 (2001).
101. A review of research on children adopted by single, unmarried parents
child. In fact, research indicates that children who grow up in “alternative” households grow up equally as “well-adjusted” as those raised in traditional, heterosexual married households. As the number of fit parents allowed to adopt increases, so does the benefit to children and to society at large.

D. AB-25, Scientific Advances, and Changing Definitions of Legal Parentage

With the advent of new reproductive technologies, many children are born with more than two biological parents. Because the Constitution grants every person a fundamental right to “beget” a child, the legal system must keep pace with genetic scientific innovation and find a way to recognize the best interest of both the parents and children.

Despite countless changes in traditional family dynamics, the state of California continues to recognize only the possibility of two legal parents in traditional adoptions. As an offshoot of traditional adoption, second parent adoption also acknowledges only two legal parents for a child. AB-25 and second parent adoption fail to dismiss the concerns of those parents and children who could benefit by the recognition of more than two legal or biological parents.

Scientific procedures have made it possible for a child to
have six possible biological parents, not including potential adoptive parents. In this environment of scientific and social advances, working in the “best interest” of the child might necessitate the recognition of more than two legal parents.

In a case where several adverse interested parties lay claim to a child as “parents,” the possibility of harm to the child is great. If having more than two legal parents would enable a child to live in a more secure environment, then the law should adapt accordingly. Uncertainty in legal parentage could also have disastrous consequences for a child both emotionally and physically. In facing societal and scientific advances in parenthood, the legislature and the courts must avoid allowing years of a child’s fate to hang in a court-imposed limbo.

Scientific and social innovations are testing the age-old model of marriage as the vehicle for determining parenthood. In vitro fertilization allows a woman to give birth to a child to whom she is genetically unrelated. A woman may also employ techniques such as artificial insemination or assisted reproduction in order to give birth. These techniques allow a couple that is unable to bear children to produce a child using the biological material or entire bodies of other people.

Until 1994, California law provided that motherhood could only be determined through a woman “having given birth to the child.” This definition proved insufficient to address the increasing number of technological advances present in society. The case of In re Baby M was the first to address the disparity between the law and technological advances.

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113. See In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 284 (Cal. Ct. App. 1998). Several sources allude to who the “six parents” include, but I found no clear-cut list.


116. See id. at 1093.

117. See id. at 1092-94.


120. See id.


122. See Garrison, supra note 119.


124. See id. at 1227-32.
The New Jersey case *In re Baby M* questioned the parentage of a child carried by a surrogate mother.\textsuperscript{125} When the surrogate asserted a claim to the child she bore, the biological parents took the issue to court and asked for enforcement of the surrogacy agreement.\textsuperscript{126} The surrogacy agreement required the surrogate mother to relinquish all claims to the child.\textsuperscript{127} The New Jersey Supreme Court declared the surrogate contract void as against public policy, and employed the best interest of the child test in deciding with whom the court should place the child.\textsuperscript{128} The best interest standard is a familiar family law determination that includes: "stability, love, family happiness, tolerance, and ultimately support of independence."\textsuperscript{129} Considering all of these factors, the court granted custody to the biological parents, and granted visitation rights to the surrogate mother.\textsuperscript{130}

*Johnson v. Calvert*\textsuperscript{131} presented California courts with surrogacy issues analogous to those seen in *In re Baby M*.\textsuperscript{132} Despite the similarities between the two cases, the California appellate court reached an entirely different result than the New Jersey Supreme Court. *Calvert* involved a couple who hired a surrogate mother to carry an embryo created from their genetic material. However, "relations between [the Calverts and the surrogate mother] deteriorated" before the child was born and the surrogate refused to give up the child to the Calverts.\textsuperscript{133} The surrogate mother as well as Mr. and Mrs. Calvert petitioned for custody of the child. The California Supreme Court concluded that the Calverts were the child's legal parents.\textsuperscript{134} The court held that even though the state will recognize both birth and biology in the determination of motherhood, "when the two means do not coincide in one woman, she who intended to procreate the child, that is she who intended to bring about the birth of a child she intended to raise on her own is the natural mother under California Law."\textsuperscript{135} When two mothers have a claim to a child

\textsuperscript{125} See id. at 1227.  
\textsuperscript{126} See id.  
\textsuperscript{127} See id.  
\textsuperscript{128} See id.  
\textsuperscript{129} *In re Baby M*, 537 A.2d at 1260.  
\textsuperscript{130} See id. at 1227.  
\textsuperscript{131} 5 Cal. 4th 84 (1993).  
\textsuperscript{132} See *In re Baby M*, 537 A.2d at 1227.  
\textsuperscript{133} *Calvert*, 5 Cal. 4th at 87-88.  
\textsuperscript{134} See id. at 93.  
\textsuperscript{135} Id. at 93.
biologically, California focuses on the intent test as opposed to the best interest test employed by New Jersey in *In re Baby M*.136

The resolution of parentage in the California case *In re Marriage of Moschetta*137 proved more complex than the *In re Baby M* or *Calvert* cases.138 In *Moschetta*, Cynthia and Robert Moschetta entered into a contract with a surrogate who would bear Robert’s child through artificial insemination.139 Here, the court of appeals did not apply the intent test to determine parentage, but instead, employed the *Baby M* best interest test,140 remanding the case to the trial court for determination of the best interest of the child as a factual matter.141

*Buzzanca v. Buzzanca*142 involved a couple who, through a fertility clinic, became parents to a child that bore no relation to either one of them.143 The clinic used a donor sperm and egg and a surrogate mother genetically unrelated to the child.144 The couple divorced, and the husband claimed that there were no children from the marriage because the child lacked a biological relationship with the parents.145 The California Court of Appeals declared that “Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.” 146 The appellate court observed that legal motherhood could be established in ways other than acting as a surrogate or contributing an egg.147 The court held that the intent of the parents to have a child prevailed, as the child’s birth hinged on the creation of “a medical procedure [that] was initiated and consented to by intended parents.”148 Thus baby Jaycee, who the Buzzancas intended to create, would not be relegated to orphan status.149

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136. See *In re Baby M*, 531 A.2d 1227, 1258-60; *Calvert*, 5 Cal. 4th at 84. An example of having two biological mothers is when one woman has her egg implanted in a surrogate.

137. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 893.

138. See *In re Baby M*, 537 A.2d at 1227; *Calvert*, 5 Cal. 4th at 851, 853-57.

139. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 895.

140. See *In re Baby M*, 537 A.2d at 1258-60.

141. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 900-03.


143. See id. at 281-82.

144. See id.

145. See id. at 280.

146. Id. at 282.

147. See id. at 282.

148. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

149. See id. at 285.
Dunkin v. Boskey\textsuperscript{150} represents perhaps one of the strangest decisions in California case law concerning parentage. Dunkin involved a man, Raymond, and a woman, Lisa, who entered into a written agreement at a fertility clinic.\textsuperscript{151} Lisa agreed to have Raymond act as the father of the child to be produced through artificial insemination at the clinic.\textsuperscript{152} His name appeared as the father on the birth certificate, and he cared for the child on a daily basis for two years.\textsuperscript{153} Despite this relationship, the court of appeals dismissed Raymond’s suit for custody when his relationship with Lisa deteriorated and she moved to Wisconsin.\textsuperscript{154} The court concluded that Raymond did not have standing to bring the suit, due to the fact that he was neither an adoptive nor biological father, and he was not married to the mother.\textsuperscript{155} Although the court dismissed the action for custody, it allowed Raymond to sue Lisa for breach of contract.\textsuperscript{156} After litigation, the court ordered Lisa to pay Raymond restitution in the form of the amount he spent in performance of their agreement.\textsuperscript{157} Thus, the court held that the agreement itself proved valid absent the contractual provisions granting custody to Raymond.\textsuperscript{158} California law in this area remains perplexing, but one constant is that “family law has consistently preferred the interests of children and the public to those of parents and parent-claimants.”\textsuperscript{159}

Neither AB-25\textsuperscript{160} nor traditional adoption law address the concerns of all people who wish to adopt. Changing technology and social values make it difficult to legislate for a child’s best interest in every circumstance.\textsuperscript{161} “When the pace of change is rapid and the impact of that change difficult to assess, it may be preferable to deal with new legal issues on an ad hoc basis initially, deferring a more comprehensive approach until consensus emerges on its scope and substance.”\textsuperscript{162} To deal with the revolutionary advances in science and social attitudes toward child-

\textsuperscript{150} 98 Cal. Rptr. 2d 44 (Cal. Ct. App. 2000).
\textsuperscript{151} See id. at 47-48.
\textsuperscript{152} See id.
\textsuperscript{153} See id. at 58-49.
\textsuperscript{154} See id. at 44-48.
\textsuperscript{155} See id. at 44-46.
\textsuperscript{156} See Dunkin, 98 Cal. Rptr. 2d at 44-46.
\textsuperscript{157} See id.
\textsuperscript{158} See id.
\textsuperscript{159} Garrison, supra note 119, at 844.
\textsuperscript{160} See discussion supra Part II.A-B.
\textsuperscript{161} See Garrison, supra note 119.
\textsuperscript{162} Id. at 852.
bearing, courts have tolerated parents who file judicial actions before rather than after birth in order to protect the interests of their child.163

E. Declaratory Judgments in Adoption Cases

A declaratory judgment is a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.164 Declaratory judgments could be used to address the needs of those who wish to adopt outside "normal adoption proceedings."165

In California, Litowitz v. Litowitz166 exemplifies the use of the procedure to enable the law to work in the best interest of the child.167 In Litowitz, the couple arranged for a surrogate mother to bear a child created from a donated egg and the husband’s sperm.168 During the surrogate’s pregnancy, the Litowitzes received a California court order that declared them the legal parents of the child that the surrogate carried.169 If they had not received the declaratory order, then Mr. Litowitz would still be considered both the genetic and intentional father of the child, but the intended mother, Becky Litowitz, would have no biological or legal connection to the child.170 This situation could place her status as the mother of the child in doubt, even if she lived with the child for a long period of time.171 The pre-birth declaratory judgment of parenthood in this case precluded this worry and extinguished the possibility of legal battling.172

1. The Declaratory Judgment Act of 1934

The Declaratory Judgment Act of 1934 authorizes federal courts to interpret brand new laws.173 Under the Act, if a plaintiff can show that an actual controversy exists with a defendant who was threatening enforcement, then she may be entitled to

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164. See BLACK’S LAW DICTIONARY 846 (7th ed. 1999).
165. See AB-25, supra note 2, §§ 5-6.
167. See id. at 1089.
168. See id. at 1086-90.
169. See id.
170. See id.
171. See Litowitz, 10 P.3d at 1086-90.
172. See id. at 1086-87.
declaratory relief.\textsuperscript{174} According to the Act, a declaratory judgment action is meant to permit a party to gain an "authoritative judicial statement of legal relationships."\textsuperscript{175} One intention behind the Act was to spare citizens from the catch-22 of either complying with an allegedly unconstitutional statute or violating the law and facing severe consequences if it were upheld.\textsuperscript{176} However, a consistent application of the law of declaratory judgments may be impossible, as the U.S. Supreme Court's pronouncements on the Act have been inconsistent.\textsuperscript{177}

The Court has repeatedly opined that nothing compels them to entertain declaratory judgment actions, yet they almost always allow the actions in an administrative context.\textsuperscript{178} In \textit{Public Affairs Associates v. Rickover},\textsuperscript{179} the Court stipulated that the Act was an authorization, not a command.\textsuperscript{180} Thus, it did not force the courts to act, but rather gave the courts the ability to make a declaration of rights using public interest as their guide.\textsuperscript{181}

Assuming that a litigant is granted standing for her claim, a declaratory judgment would be of minimal use if not given preclusive effect.\textsuperscript{182} California has not yet tackled the problem of the preclusive effect of declaratory judgments. \textit{Lortz v. Connell}\textsuperscript{183} represents the only case wherein the courts have dealt with the "preclusive effect of declaratory judgments in a subsequent action."\textsuperscript{184} However, \textit{Lortz} does not clearly delineate when an issue is finally settled, thus leaving California law unresolved as to issue preclusion, res judicata, and declaratory judgments.\textsuperscript{185}

2. \textit{The Justiciability of Declaratory Judgments}

Although the declaratory judgment in \textit{Litowitz} provided in-
creased security for the child, extending the use of declaratory judgments to other factual situations might present justiciability problems. Any case brought by adoptive parents must necessarily satisfy three justiciability requirements before it can be heard on the merits: standing, mootness, and ripeness. To meet the requirements of justiciability, the party must have standing to bring a case and the issue may not be moot or ripe. It must also be the type of question best answered by the courts rather than the judiciary.

In order to invoke a court's jurisdiction for standing, a party must demonstrate: (1) injury in fact, meaning an invasion of a legally protected interest that is concrete and particularized, actual and imminent, not conjectural or hypothetical; (2) that the injury "fairly can be traced to the challenged action of the defendant," and (3) that there is a likelihood that the injury will be redressed by a favorable decision.

The mootness doctrine limits the judiciary to resolving live controversies between parties with individual rights at stake. This means that deciding a case after the dispute of the litigants had ended would render that dispute "moot" and thus result in a prohibited advisory opinion.

Although the standing and mootness doctrines have historical precedent, ripeness is an innovation unique to the twentieth century. After the arrival of the Declaratory Judgment Act, the Supreme Court created the ripeness doctrine, in part, to de-

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186. The modern court has treated all justiciability doctrines as "constitutional" in two related senses. The first is textual: Article III's language extending "judicial power" to "Cases" and "controversies" has been construed as limiting federal courts to the adjudication of live disputes between parties with private interests at stake. The second is structural: Judicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters. See Robert J. Pushaw Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 455 (1996).

187. See id. at 455-65.

188. See id.

189. See id. at 472.

190. Id.

191. See id.

192. See Pushaw, supra note 186, at 490.


194. See Pushaw, supra note 186, at 493.

cid when to issue declaratory relief. Ripeness entails postponing a decision until the factual and legal issues have fully matured. The problem of ripeness is two-fold in that the court must evaluate both the fitness of the issues for judicial decision as well as the hardship to the parties if court action is either withheld or granted.

III. IDENTIFICATION OF THE PROBLEM

The right to bear children is a right granted by the Constitution of the United States. For people unable or unwilling to conceive through traditional methods, adoption and assisted reproduction are the only alternatives. It does not logically follow that people should be prohibited from raising children merely as a result of their non-traditional relationships or their inability to procreate.

The passage of AB-25 marked the first expansion of California adoption law to protect same-sex adoptive families. However, AB-25 does not provide the kind of flexible remedy needed to ensure that all fit parents who want to adopt are able to adopt. If neither AB-25 nor traditional adoption laws address the concerns of all adoptive families, the question is left as to what will address these concerns. Two options are leaving the decision to the legislature and allowing courts to adjudicate on a case-by-case basis. If courts adjudicate case-by-case, they must take care concerning how long they allow a child's fate to hang in limbo. Another possibility is the use of declaratory judgment actions by courts to solve the problems created by scientific and social changes. However, in such actions courts must be careful not to overstep their constitutionally granted authority. On the other hand, the widened use of declaratory judgments within adoption law could substantially decrease the chances of a child's fate hanging in limbo as his or her case made

196. See Pushaw, supra note 186, at 494.
197. See id. at 493.
198. Id. at 496 (quoting Abbott Lab. v. Gardner, 387 U.S. 136 (1967)).
201. See AB-25, supra note 2, §§ 5-6.
202. See id.
203. See id.
204. See Hisserich, supra note 182, at 160.
205. See id. at 160.
Finding an adequate method to address adoption concerns of both traditional and non-traditional families is crucial to truly address the "best interest" of a child.

IV. ANALYSIS

A. Adoption Concerns Not Addressed by AB-25

AB-25 does not address the concerns of many families in California. First, AB-25 is an inadequate remedy for children whose parents move or have moved out of state following Sharon, or who suffer or have suffered the death of a biological parent. Second, if a child's biological parent and stepparent fail to finalize their second parent adoption before their separation, as seen in Sharon, then the child's legal parentage becomes uncertain. Third, AB-25 does not speak to the problems of non-traditional couples, heterosexual and homosexual, who wish to adopt. Finally, AB-25 does not address the situation in which a child's best interest includes recognizing more than two legal or biological parents.

For same-sex parents who find themselves unsure of their status in the wake of Sharon, the most logical reaction would include registering under AB-25 as domestic partners and obtaining a second parent adoption. However, this process is not an option for couples that have moved out of state. California adoption law provides a contingency for these couples, in the provision that absent fraud, adoptions may not be challenged after twelve months have elapsed since the proceedings. Other states are required to honor California adoption decisions under the Full Faith and Credit Clause of the United States Constitution. Therefore, only adoptive families that conduct adoptions in California find shelter under California law.

If a child lost her biological parent, or if the adoption pro-

207. See AB-25, supra note 2, §§ 5-6.
209. See id.
210. See AB-25, supra note 2, §§ 5-6.
211. See id.
212. See Sharon S., 113 Cal. Rptr. 2d at 111-13.
213. AB-25 only applies to California residents. See AB-25, supra note 2, §§ 5-6.
214. See id.
ceedings were not finalized before Sharon, she might not find a remedy under AB-25. The loss of the biological parent would preclude the stepparent from giving the necessary consent, or from filing for domestic partnership status under AB-25. Consequently, the death of a partner would make it necessary for the courts to grant special consideration to promote the interests of fairness and justice.

Couples may have reasons for not getting married or registering as domestic partners. Many individuals may feel that the institution of marriage is not something that they wish to participate in. Their reasons could be as simple as having bad marital experiences in the past, or as complicated as feeling that the institution of marriage is patriarchal. However, if two same-sex partners choose not to register as domestic partners for personal reasons, they will find themselves penalized within the adoption system. Many same-sex partners might not wish to register for fear of social condemnation or moral reproach.

However, there may be very real problems associated with allowing partners who do not have a legal relationship to adopt. If the relationship deteriorates between the partners, it might be difficult for the court to decide where the child should be placed. Additionally, courts might not feel comfortable with, for social reasons, giving children to non-traditional couples. It is easier to picture a court granting legal parentage to a married heterosexual couple than to two domestic partners not registered under AB-25. Moreover, requiring marriage or registration for a domestic partnership might offer proof of a commitment to childrearing. Opponents of second parent adoption have proffered this same argument against domestic partners raising children; these children have fared just as well as children placed in traditional family environments.

Although AB-25 represents a milestone, it does not provide

218. Sharon S. does not provide a remedy for people in this situation. See id. See also AB-25, supra note 2, §§ 5-6.
219. See AB-25, supra note 2, §§ 5-6.
220. See Shapiro, supra note 21, at 17-27.
221. See id.
222. See AB-25, supra note 2, §§ 5-6.
for a child created by more than two parents.\textsuperscript{224} A child may be born in this age of technological advance with up to six parents.\textsuperscript{225} As children with just two legal parents often find themselves in the middle of lengthy custody disputes,\textsuperscript{226} it is possible that legal battling over children could become even more complex and involved if courts granted legal parentage to more than two individuals.\textsuperscript{227} However, as \textit{In re Baby M} demonstrates,\textsuperscript{228} zero sum tactics within a child’s parentage probably meet neither the child’s nor the parent’s best interests.\textsuperscript{229}

B. Meeting Justiciability Requirements

Declaratory judgments may enable courts to adjudicate the matter of a child’s best interest quickly and conclusively.\textsuperscript{230} However, the parties must first meet all the requisite tests of justiciability, and California courts would have to accord declaratory judgments preclusive effect.\textsuperscript{231}

1. \textit{Death or Separation Before Adoption Is Finalized}

For families who have either had a biological parent die or who have contention between the biological and the step (or second) parent before the adoption finalized, a declaratory judgment might present a forceful tool of judicial reconciliation.\textsuperscript{232} Although the parents in \textit{Litowitz} received a declaratory judgment relatively early in the life of their child,\textsuperscript{233} it is not illogical to apply the same reasoning to later cases in which the child has lived with a step or second parent for part of her life.\textsuperscript{234}

This argument proves more forceful the longer the child lives with the step or second parent. The closer the attachment to the non-biological parent, the more important conclusive pa-

\textsuperscript{224} See AB-25, \textit{supra} note 2, §§ 5-6.
\textsuperscript{225} See \textit{Johnson v. Calvert}, 5 Cal. 4th 84, 84 (1993).
\textsuperscript{226} See \textit{In re Baby M}, 537 A.2d 1227, 1228-29 (N.J. 1988) (providing an example of a custody dispute with a great deal of litigation).
\textsuperscript{227} See \textit{id}.
\textsuperscript{228} See \textit{id}.
\textsuperscript{229} The \textit{In re Baby M}. court granted the surrogate mother visits with the child. See \textit{id} at 1228-31.
\textsuperscript{231} See \textit{Hisserich}, \textit{supra} note 182, at 160.
\textsuperscript{233} See \textit{Litowitz}, 10 P.3d at 1086-89.
\textsuperscript{234} See \textit{id}.
rental determination becomes. In a situation where the biological parent has died, it would seem that another relative, or even the state, could act as the child's guardian to satisfy justiciability.

As seen in Litowitz, these cases also satisfy the requirements of standing: injury in fact, traceability to the defendant, and likelihood of redress through favorable adjudication. A child taken from the only parent that she has ever known would unquestionably suffer injury in fact. In addition, the child's injury could be fairly traced to the action of the state or relative challenging parentage. Finally, there would be a great likelihood that the injury would be redressed by a favorable decision, meaning that the child would not suffer injury if allowed to stay in the home that satisfies her best interest.

Neither mootness nor ripeness would present a justiciability problem, as the individual rights of the child and the parents would be at stake, in the midst of a live controversy. Hence, the relative factual and legal issues as to where the child would live would be mature. A declaratory judgment, if granted preclusive effect, would give both the parent and child greater stability. With a conclusive determination of parentage, simple family matters such as medical releases and permission slips would not present a daunting task.

2. Non-traditional Couples Wishing to Adopt

Non-traditional couples might also employ declaratory judgments that would enable both partners to be legal parents without future opposition. Standing could be more of a prob-

236. See id.
237. See Litowitz, 10 P.3d at 1086-89.
238. See Pushaw, supra note 186, at 455-65.
239. See id. at 465.
240. See id. at 452.
241. See id. at 460.
242. See id.
246. See Litowitz, 10 P.3d at 1087-89.
lem in such cases unless one member of the couple had already adopted or given birth to the child. Proving that a couple trying to adopt a child together have a live controversy sufficient to overcome mootness may be difficult. Where one partner of a couple already is a guardian of the child, it is somewhat easier to assert that a controversy exists. Additionally, a child residing with one parent and not the other could present a "case or controversy" worthy of adjudication. The court could appoint a guardian ad litem to represent the interests of the child throughout the adoption proceeding. A dispute between the litigants would exist, probably because current adoption law does not allow for a parent to adopt a partner's child absent marriage or domestic partnership.

Like mootness, ripeness most likely would not present a problem, as the issues presented are fit for judicial resolution, and the child and parents would suffer hardship if the court did not consider their plight. If the court decides to allow a declaratory action, as seen in Litowitz, then it would be imperative that the action be given preclusive effect.

3. Greater than Two Biological Parents

Children with more than two biological parents might benefit from each parent having some form of legal parentage over them. In re Baby M, Calvert, Litowitz, Moschetta, and Buzzanca all presented situations where, biologically speaking, more than two parents contributed to the child's creation. Here, justiciability most likely would not present a problem, unless the parties came together without adversity. Even when there is a minimal controversy, Litowitz represents the possibility of a

247. There might be a problem with the issue being ripe, and thus the court must be wary of issuing an advisory opinion if the child has not yet been born. See Pushaw, supra note 186, at 455-65.
248. See Hisserich, supra note 182, at 160-62.
249. See Veilleux, supra note 235, at 1033.
250. See AB-25, supra note 2, §§ 5-6.
251. See discussion supra Part II.
252. See Kannan, supra note 193, at 770-80.
255. See Pushaw, supra note 186, at 455-65.
256. See Litowitz, 10 P.3d at 1086-90.
court utilizing a declaratory judgment to conclusively solve the issue of a child's parentage between the surrogate and biological mother.257

V. PROPOSAL

Although AB-25 represents a colossal step forward in California's ability to provide for all types of adoptive families, it does not address the needs of every couple who wish to become parents.258 Only a mechanism allowing adjudication on a case-by-case basis could truly address the multifaceted and divergent needs of all families in California;259 legislation necessarily takes time as it winds through the different branches of government.260 Adoptive families and children cannot afford to wait while legislation is passed for their benefit.261 Declaratory judgments by the courts would give these families immediate relief.262 However, post-Lortz,263 the preclusive effect of declaratory judgments is not clear.264

The courts ought to use their discretionary authority265 with regards to declaratory judgments to provide an "authoritative judicial statement of legal relationships" for families that can find recourse through no other branch of government.266 Specifically, courts could help make adoption run more smoothly for non-traditional families by extending the twelve month time period after which an adoption may not be challenged.267 The courts should also have the ability to adjudicate prior to birth, so as to solidify a child's living situation from the earliest moment possible.268 By the same token, if a separating same-sex couple did not finalize adoption proceedings before the legislation, additional consideration ought to be granted by the courts in the

257. See id. at 934.
258. See discussion, supra Part II.
259. See Pushaw, supra note 186, at 455-65.
260. AB-25 took nearly two years, while the settlement in Litowitz happened before the baby was born. See AB-25, supra note 2, §§ 5-6; Litowitz, 10 P.3d at 1086-91.
261. Sharon has been both divisive and time consuming for all involved. See generally Sharon S. v. Superior Court of San Diego County, 113 Cal. Rptr. 2d. 107 (Cal. Ct. App. 2001).
262. See Litowitz, 10 P.3d at 1086-91.
264. See id. at 15-16.
265. See Pushaw, supra note 186, at 455-65.
266. See Litowitz, 10 P.3d at 1086-91.
267. See CAL. FAM. CODE § 8700 (West 1999).
268. See Litowitz, 10 P.3d at 1086-91.
interest of stability for the child.  

Considering that single adults may adopt children, the law should not preclude a couple from adopting children simply because they did not get married or register as domestic partners. As long as the couple can provide a child with a loving, nurturing environment, it does not make sense to prohibit them from being parents solely because they choose not to legalize their relationship with one another. The court could use a best interest of the child test to resolve this problem. As with heterosexual couples, this decision should not prohibit a same-sex couple from acting as adoptive parents if they are able to provide a nurturing living environment. Furthermore, parties should make provisions so that they properly meet the requirements of justiciability. For example, if a family brings a case asking for resolution of their child’s parental situation, and all the parties are in agreement, then the case would not present adversity sufficient to overcome mootness. Thus, the court would find itself in danger of issuing an advisory opinion if it rendered a decision. However, if the court allowed the appointment of a guardian ad litem or hospital to represent the best interest of the child, then the requirements of justiciability could be satisfied.

Declaratory judgments with preclusive effect would enable many non-traditional families to find the same type of familial security endowed the Litowitzes. If it would be in the child’s best interest to recognize multiple biological parents, adoptive parents, or some variation thereof, then the courts ought to apply the law accordingly. Assuming the court grants this type of judgment, then it must be given preclusive effect in order to

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269. Second parent adoption from AB-25 doesn’t address this particular concern. See AB-25, supra note 2, §§ 5-6.
270. See CAL. FAM. CODE § 8714 (West 2001).
274. See Groze, supra note 223.
275. See Pushaw, supra note 186, at 455-65.
276. See id. at 455.
277. See id.
278. See Veilleux, supra note 235.
280. This is the best interests test as seen in In re Baby M. See In re Baby M, 537 A.2d, 1227, 1227-32 (N.J. 1998).
be meaningful. For example, the court granted the surrogate mother in *In re Baby M* visitation rights, but it is possible to imagine a situation where she could be granted joint custody with the baby's biological parents. Whatever new procedure the court enacts, it needs to conserve both time and energy in order to act in the best interests of the child. Even so, if the court could limit the legal parentage to a relatively small number of people as seen in the *In re Baby M* case, then a standard of more than two legal parents might prove workable. With a larger pool of fit parents more children are adopted, benefiting both the adoptive children and society at large. Ordinary events can become problematic if parentage is not established. For example, questions quickly arise as to who can authorize medical treatment for a child, or consent to release from the hospital. Therefore, resolving issues of legal parentage at an early stage is imperative. Parents can use declaratory judgments to facilitate early resolution of parentage—a strong reason to incorporate them into the realm of adoption law.

VI. CONCLUSION

With the passage of AB-25, California has shown its willingness to circumvent societal mores in order to provide for its adoptive children. Although AB-25 does enlarge the pool of potential adoptive parents, it does not reach far enough. The scope of adoption law ought to include any type of fit couple, rather than any type of traditional couple. If a fit single parent is allowed to adopt under the law of California, then logic requires that a fit non-traditional couple should also be able to adopt. In a society with continually changing sociology and technology, it is unlikely that any single law or set of laws could speak to the myriad of issues facing adoptive families today.
In order to provide a more stable environment for the child, a mechanism needs to be put in place that would allow a child’s parentage to be both diverse and secure. Courts should employ declaratory judgments as it resolves parentage of children in the most timely and effective manner.

Early resolution of parental disputes would help create security both for the parent and child. Although issues of disputed biological parentage may not lend themselves to a judgment before birth, they may lend themselves to early judicial resolution after birth. For example, a non-married couple not biologically related to their child could use a declaratory judgment to ensure that they are the legal parents of a child. This would prohibit the biological parents, or anyone else who wanted to lay a claim to the child, from challenging their parentage at a later date.

Family law manifests a desire to protect the best interests of the children. Consideration of the best interests of both adoptive children and the public at large dictates that the state should make the pool of fit adoptive parents as large as possible. Studies show that children flourish in loving environments rather than simply traditional environments. Thus, the standard for parenthood ought to be based on the family environment itself and whether it is both loving and nurturing.

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292. See discussion supra Part III.
294. As scientific evidence is complex, it might take a long time to work out the details, even more so when more than the biological father is disputing the parentage. See Jill T. Phillips, Who Is My Daddy?: Using DNA to Help Resolve Post-Death Paternity Cases, 8 ALB. L.J. SCI. & TECH. 151, 151 (1997).
295. See Garrison, supra note 119.
296. See Groze, supra note 222.
297. See id. at 330.