Application No. 30806/15, *A.D.-K. & Others* v. *Poland*
European Court of Human Rights, First Section

WRITTEN COMMENTS OF FIDH, PSAL, ILGA-Europe, NELFA, and ECSOL, submitted on 25 July 2019

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), PSAL (Polish Society of Anti-Discrimination Law), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), NELFA (Network of European LGBTIQ* Families Associations), and ECSOL (European Commission on Sexual Orientation Law). Their interest and expertise are set out in their "Application for leave" of 21 May 2019, granted by the President of the Section on 17 June 2019, under Rule 44(3) of the Rules of Court.

I. Introduction and Principles from the Court's Case Law

2. There are three situations in which a lesbian or gay individual might seek to adopt a child: (i) a lesbian or gay individual seeks to adopt as an unmarried individual, in a member state where adoptions by unmarried individuals are permitted (even if only in exceptional cases), and any partner the individual might have acquires no parental rights as a result of the adoption ("individual adoption"); (ii) one member of a same-sex couple, consisting of two women or two men living together as partners, seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child ("second-parent adoption"); and (iii) both members of a same-sex couple seek to jointly adopt a child with no prior genetic or legal connection with either partner, so that both partners simultaneously acquire parental rights vis-à-vis the child ("joint adoption"). This application concerns second-parent adoption, one means of creating a legal relationship between a child and her mother's female partner, who is socially her second mother, as an alternative to recognising a foreign birth certificate listing two women as the parents of a child. Polish legislation excludes same-sex couples from second-parent adoption, which is restricted to married different-sex couples, as it was in *Gas & Dubois* v. *France* (15 March 2012).

3. The question of equal access by lesbian and gay individuals to individual adoption, in member states in which this possibility exists for unmarried heterosexual individuals, was settled by the Grand Chamber in *E.B.* v. *France* (22 Jan. 2008). By 14 votes to 3, the Court adopted the following principle, stated succinctly in para. 3 of the dissenting judgment of Judge Costa (who dissented only on the application of the principle to the facts of the case): "the message sent by our Court to the States Parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality ... our Court ... considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds ... I agree." Excluding a lesbian or gay individual from the possibility of adopting a child as an unmarried individual, solely because of their sexual orientation, is discrimination violating Art. 14 combined with Art. 8 (respect for private or family life).

4. The Court has yet to consider a case in which a same-sex couple has challenged their exclusion from the possibility of joint adoption.

5. With regard to second-parent adoption within a same-sex couple, when second-parent adoption is restricted to married different-sex couples, the Court's only judgment to date is *Gas & Dubois* v. *France* (15 March 2012; see also *X & Others* v. *Austria*, 2013, paras. 105-110). The Court found no difference in treatment, and therefore no discrimination: "69. … the Court must examine [the applicants'] situation compared with that of an unmarried heterosexual couple. The latter may … have entered into a [civil solidarity pact] … [A]ny couple in a comparable legal situation by virtue of having entered into [such a pact] would likewise have their application for a simple-adoption order refused … [The Court] does not therefore observe any difference in treatment based on the applicants' sexual orientation."[1]

6. With regard to second-parent adoption within a same-sex couple, when second-parent adoption is open to unmarried different-sex couples, the Court distinguished *Gas & Dubois* in *X & Others* v. *Austria* (19 Feb. 2013), and found discrimination based on sexual orientation, violating Art. 14 combined with Art. 8 (respect for family life), if the legislation of a member state permits unmarried different-sex couples to apply to adopt each other's children, but makes it legally impossible for unmarried same-sex couples to do so (paras. 96-97, 151-153).

7. These Written Comments will demonstrate that it is time for the Court to reconsider *Gas & Dubois*, in the light of developments since 2012. The child of a lesbian couple, born through donor insemination abroad, should have the same Article 8 right to the possibility of a legal relationship with her/his genetic mother's female partner as the child of a married different-sex couple, born through surrogacy abroad, has to the possibility of a legal relationship with her/his genetic father's female partner. In its *Advisory Opinion of 10 April 2019* (requested by the French Court of Cassation), the Court ruled that: "42. … in view of … the fact that the child's best interests also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, … the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case. … 46. … the Court is of the opinion that … the right to respect for private life, within the meaning of Art. 8 …, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'."

8. Although the child has an Art. 8 right to the possibility of a legal parent-child relationship with the intended (non-genetic) mother, the Court left to Council of Europe member states the choice of the means used to create the legal parent-child relationship: "53. The child's best interests … cannot be taken to mean that recognition of the legal parent-child relationship … entails an obligation for States to register the details of the foreign birth certificate in so far as it designates the intended

[1] In their concurring opinions in *Gas & Dubois*, Judges Costa, Spielmann, and Berro-Lefèvre urged the French legislature to review the exclusion of same-sex couples from second-parent adoption. The outcome in *Gas & Dubois* was reversed by the French legislature by the *Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*. The Court of Cassation made it clear in 2014 that, in the same circumstances as *Gas & Dubois* (child born in France to a lesbian couple after donor insemination abroad), the female spouse of the birth mother could become the child's second legal parent through second-parent adoption in France: *Avis n° 15010 du 22 septembre 2014*, https://www.courdecassation.fr/jurisprudence_2/avis_15/avis_classes_date_239/2014_6164/22_septembre_2014_1470007_6867/15010_22_30157.html.

mother as the legal mother. … [O]ther means may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details."

9. Apart from the particular technique of assisted reproduction (donor insemination vs. combining the husband's sperm, a donor's egg, and a surrogate mother), and the sexual orientation of the child's parents (lesbian vs. heterosexual), the facts of this application are identical to those underlying the questions considered by the Court in the *Advisory Opinion*. The principle of the *Advisory Opinion* applies *a fortiori* to donor insemination abroad, because donor insemination is much less controversial in Europe, and is legally available to different-sex couples (married or unmarried) in France and in Poland. It is thus only the sexual orientation of the child's parents that distinguishes this application from the facts considered in the *Advisory Opinion*. The child's parents, like all same-sex couples, are excluded from second-parent adoption in Poland, which is restricted to married different-sex couples (as was the case in France at the time of *Gas & Dubois*).

10. In view of the child's Art. 8 right to the possibility of recognition of a legal parent-child relationship with the intended (non-genetic) mother, does Art. 14 combined with Art. 8 (respect for private and family life) permit the exclusion of the child's parents from second-parent adoption, because they are a same-sex couple legally unable to marry, and thus directly or indirectly because of the sexual orientation of the child's parents? In the *Advisory Opinion*, the Court referred to: "38. … the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount …" In view of this essential principle, the Court's judgment in *Taddeucci & McCall* v. *Italy* (30 June 2016) suggests that a Council of Europe member state cannot justify excluding a same-sex couple from second-parent adoption, merely because they are legally unable to marry, but must instead treat them differently because of their different situation. This would mean providing some means, other than marriage, for a same-sex couple to become eligible for second-parent adoption, which is in the best interests of their child. In *Taddeucci & McCall*, the Court concluded: "98. … that … by deciding to treat homosexual couples – for the purposes of … a residence permit for family reasons – in the same way as [unmarried] heterosexual couples … infringed the applicants' right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Art. 8 …" One option, if a member state did not wish to open second-parent adoption to same-sex couples without a formal registration, would be for that state to create the "specific legal framework" for same-sex couples that the Court required in *Oliari & Others* v. *Italy* (21 July 2015).

11. It is important to recall that differences in treatment based on sexual orientation are analogous to differences in treatment based on race (*Smith & Grady* v. *UK*, 1999, para. 97), religion (*Mouta* v. *Portugal*, 1999, para. 36), and sex (*L. & V.* v. *Austria*, 2003, para. 45), and can only be justified by "particularly serious reasons". When justifying differences in treatment based on sexual orientation, "the margin of appreciation afforded to States is narrow ... It must ... be shown that it was necessary in order to achieve [the State's] aim to exclude certain categories of people ..." (*Karner* v. *Austria*, 2003, para. 41). This heavy burden of justification applies both to "differences in treatment in analogous situations" and to "comparable treatment in different situations" (*Taddeucci & McCall*, paras. 87-90).

12. In *X & Others* v. *Austria* (2013), the Court applied this heavy burden of justification to second-parent adoption (open to unmarried different-sex couples):

"139. … [G]iven that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family … must necessarily take into account developments in society …, including the fact that there is not just one way or one choice when it comes to leading one's family or private life… 141. … [T]he burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples. 142. … The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that … same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children. … 144. … [T]he Austrian legislation appears to lack coherence. Adoption by one [homosexual] person … is possible. If he or she has a registered partner, the latter has to consent … The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers … 145. The Court finds force in the applicants' argument that de facto families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. … The Court itself has often stressed the importance of granting legal recognition to de facto family life … 151. … [T]he Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. …"[2]

II. There is no justification for discrimination against families composed of a same-sex couple and the children they are raising together.

13. The strongest and most persistent prejudice against the lesbian and gay minority in Europe is that they represent a threat to the well-being of children. This prejudice, held by many members of the heterosexual majority, is reflected in decisions of national courts denying lesbian women and gay men custody of their own children, or the possibility of adopting a child as an unmarried individual. It also appears in national legislation that fails to provide for the reality that, despite the legal obstacles and social prejudice they face, same-sex couples are raising children. Families composed of a same-sex couple and their children exist across Europe, but often face unnecessary problems in their daily lives, or anxieties about their futures, because their children are denied the same possibilities as the children of different-sex couples to establish a legal relationship with the two adults who are raising them.

14. The Court has twice confronted the social prejudice against lesbian women and gay men raising children, and responded with clear legal principles rejecting this prejudice. In *Mouta* v. *Portugal* (21 Dec. 1999), the Court considered a national court's decision to transfer custody of a girl from her gay father to her heterosexual mother. The national court found it unnecessary "to determine whether homosexuality is ... an illness" because, in any case, "it is an abnormality" (para. 34).

[2] After *X & Others* on second-parent adoption, the Constitutional Court of Austria required access to joint adoption for same-sex couples on 11 Dec. 2014, https://www.vfgh.gv.at/downloads/VfGH_G_119-120-2014_AdoptionsV_EN_korr_4.4.17.pdf.

The Court unanimously found a violation of Art. 14 combined with Art. 8, because the national court "36. ... made a distinction based on considerations regarding the applicant's sexual orientation, ... which is not acceptable under the Convention". In *E.B.* v. *France* (para. 3), the Court extended *Mouta* to the blanket exclusion of lesbian women and gay men from the possibility of adopting a child as an unmarried individual (in countries where it exists for unmarried heterosexual individuals).

15. It is implicit in *Mouta*, *E.B.*, and *X & Others* that the Court saw no reason why a child should not be raised by a lesbian or gay individual living with their same-sex partner, because lesbian and gay individuals and same-sex couples are just as capable as heterosexual individuals and different-sex couples of providing the care and upbringing a child needs.[3] It is also implicit that the Court rejected the concerns most often raised regarding the well-being of the children of lesbian and gay parents.

16. On 20 March 2012, five days after *Gas & Dubois*, the Inter-American Court of Human Rights made public its judgment of 24 Feb. 2012 in *Atala* v. *Chile*.[4] The Inter-American Court unanimously found multiple violations of the American Convention on Human Rights in a case very similar to *Mouta*: the Supreme Court of Chile had transferred custody of three girls from their lesbian mother to their heterosexual father, because she and her daughters were living with her female partner. Most importantly, the Inter-American Court provided an express and detailed rejection of common concerns regarding the well-being of the children of lesbian and gay parents: (a) "alleged social discrimination" against them; (b) "alleged confusion of sexual roles"; and (c) a "right to a 'normal and traditional' family".

17. With regard to "alleged social discrimination" by third parties against the children (eg, at school or in the neighbourhood), the Inter-American Court ruled that: "119. ... to justify a distinction in treatment ..., based on the alleged possibility of social discrimination ... that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. ... 121. ... [W]ith regard to the argument that the child's best interest might be affected by the risk of rejection by society, ... potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest."

18. At para. 120, the Inter-American Court cited *Palmore* v. *Sidoti*, 466 U.S. 429 at 433 (1984), in which the U.S. Supreme Court found unconstitutional racial discrimination where a court had transferred custody of a child to her white father, because her white mother had remarried a black man rather than a white man: "There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little

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[3] For the scientific studies, and statements by professional bodies and child welfare organisations, cited to the Court in *E.B.*, see the third-party interveners' Written Comments (3 June 2005), https://www.ilga-europe.org/sites/default/files/Attachments/written_comments_on_e.b._v._france.pdf. See also *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften* (2009), https://www.bmjv.de/SharedDocs/Archiv/Downloads/Forschungsbericht_Die_Lebenssituation_von_Kindern_in_gleichgeschlechtlichen_Lebenspartnerschaften.pdf?__blob=publicationFile&v=3; Golombok, "Adoptive Gay Father Families", (2014) 85 *Child Development* 456, https://onlinelibrary.wiley.com/doi/pdf/10.1111/cdev.12155.

[4] See http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf (paras. 115-146).

difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

19. With regard to "alleged confusion of sexual roles", the Inter-American Court found that: "124. ... the determination of harm must be supported by ... reports from experts and researchers … 125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision ... has been based on the existence of clear, specific and real harm to the children's development. ... Otherwise, there is a risk of basing the decision on stereotypes ... 128. ... [A] number of scientific reports considered representative and authoritative in the field of social sciences ... conclude that living with homosexual parents *per se* does not affect a child's emotional and psychological development. These studies agree that: ... ii) the psychological development and emotional well-being of girls or boys raised by gay fathers or lesbian mothers are comparable to those of girls or boys raised by heterosexual parents; ... iv) the sexual orientation of the mother or father does not affect children's development in terms of ... their sense of themselves as male or female, their gender role, behavior and/or sexual orientation ... 129. The Court notes that the American Psychological Association ... has stated that existing studies on this matter are 'impressively consistent in their failure to identify any deficits in the development of children raised in a lesbian or gay household … [T]he abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree'."

20. With regard to a "right to a 'normal and traditional' family", the Inter-American Court observed, citing *Mouta* and *Karner*: "142. ... the American Convention does not … only protect a 'traditional' model of the family. 145. ... the [Chilean court's] language ... regarding the girls' alleged need to grow up in a 'normally structured family …', ... not in an 'exceptional family', reflects a limited, stereotyped perception of the concept of family, [with] no basis in the Convention ..." The Inter-American Court therefore concluded: "146. ... the [Chilean courts] did not prove ... that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest ... On the contrary they used abstract, stereotyped, and/or discriminating arguments to justify their decisions ..., for which reason said decisions constitute discriminatory treatment against Ms. Atala. ..." There was also a violation of the rights of Ms. Atala's daughters: "154. By having used the mother's sexual orientation as grounds for its decision, the Supreme Court … discriminated against the three girls, [because of] considerations it would not have used if the custody proceedings had been between two heterosexual parents."

III. The level of consensus in Europe regarding two legal parents of the same sex is comparable to the level of consensus in the *Advisory Opinion of 10 April 2019*.

21. In its *Advisory Opinion of 10 April 2019* (requested by the French Court of Cassation), the Court referred to the following level of consensus: "23. … In nineteen of the forty-three [Council of Europe member] States [surveyed] …, it is possible for the intended mother to establish maternity of a child born through a surrogacy arrangement to whom she is not genetically related." This probably means 19 of 47 or 40.4% of Council of Europe member states (assuming that this possibility does not exist in the four member states not included in the survey). The Court described the survey as showing "43. … that, despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through

surrogacy abroad and the intended parents, there is no consensus in Europe on this issue …" This would normally widen the margin of appreciation. However, the Court also observed "44. … that, where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. …", and that "45. … the issues at stake … go beyond the question of the children's identity. Other essential aspects of their private life come into play where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare … This lends further support to the Court's finding regarding the reduction of the margin of appreciation."

22. The level of consensus in Europe regarding two legal parents of the same sex is slightly higher than the level of consensus in the *Advisory Opinion*. In 21 of 47 or 44.7% of Council of Europe member states, a child may have two legal parents of the same sex as the result of a second-parent adoption (or recognition of the birth mother's female partner as a parent from the moment of the birth). These 21 member states are: Andorra, Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the UK (see the Appendix for citations to relevant legislation or case law). In addition, Croatia provides "parent-guardianship" (*partnerska skrb*) to same-sex (registered) life partners, which operates in the same way as a second-parent adoption after the death of the partner who is a legal parent.[5]

23. Further evidence of consensus in Europe is Resolution 2239, "Private and family life: achieving equality regardless of sexual orientation",[6] in which the Parliamentary Assembly of the Council of Europe calls on member states to:

"4.5. protect the rights of parents and children in rainbow families, without discrimination based on sexual orientation or gender identity, and accordingly:

4.5.1. in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.2. provide for joint adoption by same-sex couples, without discrimination on the grounds of sexual orientation;

4.5.3. extend automatic co-parent recognition to the same-sex partner of the parent who has given birth in all cases where this would be extended to a mother's male spouse …"

24. Turning to other democratic societies, there is a clear international trend. A child may have two legal parents of the same sex after a second-parent adoption (or recognition of the birth mother's female partner as a parent from the moment of the birth) in all 50 United States, in all 13 provinces and territories of Canada, in parts of Mexico, in all 8 states and territories of Australia, and in Colombia, Brazil, Uruguay, Argentina, South Africa, Taiwan, and New Zealand. This possibility often existed before the opening up of marriage to same-sex couples (see Appendix II, Written Comments of 1 August 2012, *X & Others* v. *Austria*).[7] If not, it resulted from the opening up of marriage to same-sex couples, and being married might be a condition.

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[5] See http://www.zivotnopartnerstvo.com/wp-content/uploads/2015/06/same-sex-life-partnership-act-croatia.pdf (Arts. 44-49); https://www.zakon.hr/z/732/Zakon-o-%C5%BEivotnom-partnerstvu-osoba-istog-spola; https://tgeu.org/wp-content/uploads/2018/10/COE-Report-Oct18-croatia_.pdf (pp. 51-54).

[6] See http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en.

[7] See https://www.ilga-europe.org/sites/default/files/Attachments/written_comments_on_x_others_v._austria.pdf.

IV. Judicial reasoning in European and other democratic societies supports an obligation not to discriminate against same-sex couples and their children.

25. Courts in South Africa, the US, Germany, Italy, the UK, Brazil, Mexico, Colombia, and Belgium, like the legislatures mentioned in part III, have concluded that the best interests of children being raised by same-sex couples are served by permitting second-parent adoption. The leading decision is *Du Toit* v. *Minister for Welfare and Population Development*,[8] which held unanimously (11-0) that the South African Constitution requires that an unmarried same-sex couple be allowed to adopt children jointly in the same way as a married different-sex couple. The Court's reasoning applies with equal force to exclusion from second-parent adoption.

26. Two women, who had lived as partners for 5 years, were accepted as adoptive parents, and a sister and brother aged 6 and 2 were placed with them. The two women challenged South African legislation permitting only one of them to adopt the children, because they were not a married different-sex couple (paras. 4-7).

27. Justice Skweyiya found that the legislation conflicted with s. 28(2) of the Constitution ("A child's best interests are of paramount importance in every matter concerning the child."): "21. ... [T]he impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships ... Their exclusion surely defeats the … social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development ... 22. Excluding [them by law] from adopting children jointly … is in conflict with … s. 28(2) ... The impugned provisions ... deprive children of the possibility of a loving and stable family life ... "

28. Skweyiya J. also found that the legislation conflicted with the right to be free from discrimination based on sexual orientation (Constitution, s. 9(3)): "26. ... But for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children ..." He found (at para. 37) no justification for the interference with the principle that the best interests of children are paramount, or with the right to equality.

29. Skweyiya J. made the following order in relation to second-parent adoption: "the omission from [the law] … of the words 'or by a person whose permanent same-sex life partner is the parent of the child' is inconsistent with the Constitution …; ... s. 17(c) ... is to be read as though [those] words appear therein ..."

30. On 28 March 2003, Justice Goldstone applied the reasoning of Skweyiya J. to the exclusion of same-sex couples from the automatic recognition of the birth mother's husband as a parent of a child born through donor insemination. The Constitutional Court found sexual orientation discrimination and ordered that the words "or permanent same-sex life partner" be read into the relevant legislation.[9]

31. As long ago as 1993, the Vermont Supreme Court said: "[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. . . To deny legal protection of [the] relationship [between a lesbian mother's female partner and her child], as a matter of law, is inconsistent with the children's best interests ..."[10]

32. In Germany, the 2004 legislation allowing same-sex registered life partners to adopt each other's children was challenged as contrary to the German

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[8] Case CCT40/01, Constitutional Court of South Africa, 10 Sept. 2002, http://www.saflii.org/za/cases/ZACC/2002/20.pdf.

[9] *J. & B.* v. *Director General, Department of Home Affairs*, Case CCT 46/02, Constitutional Court of South Africa, 28 March 2003, http://www.saflii.org/za/cases/ZACC/2003/3.html.

[10] *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vermont Supreme Ct. 1993).

Constitution. On 10 August 2009, the German Federal Constitutional Court upheld the legislation, finding that biological parenthood does not enjoy constitutional supremacy over legal and social-familial parenthood.[11] On 20 April 2016, the German Supreme Court went further, holding that there was no public-order reason not to register the birth through donor insemination of a child in South Africa to two women, both legal parents in South Africa and one a citizen of Germany, making a second-parent adoption in Germany unnecessary.[12] The German Supreme Court had previously (on 10 Dec. 2014) required the recognition of two men (registered life partners) as the legal parents of a child born to a surrogate mother in California.[13]

33. In Italy, on 30 Sept. 2016, the Court of Cassation reached the same conclusion as the German Supreme Court on 20 April 2016: "11.1 … è riconoscibile in Italia l'atto di nascita straniero dal quale risulti che un bambino, nato da un progetto genitoriale di coppia è figlio di due madri (una che l'ha partorito e l'altra che ha donato l'ovulo), non essendo opponibile un principio di ordine pubblico desumibile dalla suddetta regola."[14] A Spanish birth certificate listing two mothers could therefore be recognised in Italy.

34. On 18 June 2008, in *P & Others*,[15] the UK's House of Lords decided (4-1) that Northern Ireland's blanket exclusion of unmarried couples from joint adoption of children was discrimination contrary to Arts. 14 and 8. The case involved an unmarried different-sex couple, raising the 10-year-old daughter of the female partner. Because they did not wish to marry, the male partner was ineligible to adopt the girl. Lady Hale noted the effect of a similar rule in England and Wales, before its amendment in 2002: "97. … Unmarried couples were already in practice allowed to adopt; but only one of them could do so legally, thus reducing the other to second class status ..." She concluded: "112. ... [I]f one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents." In 2013, this reasoning was extended to same-sex couples by the Northern Ireland Court of Appeal.[16]

35. On 27 April 2010, the *Superior Tribunal de Justiça* (STJ), Brazil's highest non-constitutional appellate court, decided a second-parent adoption case brought by two women raising two children, adopted by one of the women as an individual.

36. In its *Ementa*, the STJ reasoned as follows: "9. Se os estudos científicos não sinalizam qualquer prejuízo de qualquer natureza para as crianças, se elas vêm sendo criadas com amor e se cabe ao Estado, ao mesmo tempo, assegurar seus direitos, o deferimento da adoção é medida que se impõe. 10. O Judiciário não pode fechar os olhos para a realidade … são ambas, a requerente e sua companheira, responsáveis pela criação e educação dos dois infantes, de modo que a elas, solidariamente, compete a responsabilidade. 11. Não se pode olvidar que se trata de

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[11] BVerfG, 1 BvL 15/09 vom 10.8.2009, para. 14. See also BVerfG, 1 BvL 1/11 vom 19.02.2013 (second-parent adoption must also be allowed with regard to the legal parent's non-genetic child).

[12] BGH, XII ZB 15/15, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=74985&pos=0&anz=1.

[13] BGH, XII ZB 463/13, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=69759&pos=0&anz=1.

[14] Corte Suprema di Cassazione, prima sez. civ., sentenza n. 19599, 30 settembre 2016, http://schuster.pro/corte-di-cassazione-prima-sez-civ-sentenza-n-19599-30-settembre-2016/.

[15] [2008] UKHL 38, http://www.bailii.org/uk/cases/UKHL/2008/38.html.

[16] See *Northern Ireland Human Rights Commission, Re Judicial Review*, [2013] NICA 37 (27 June 2013), http://www.bailii.org/nie/cases/NICA/2013/37.html.

situação fática consolidada, pois as crianças já chamam as duas mulheres de mães e são cuidadas por ambas como filhos ... 14. … [H]á mais do que reais vantagens para os adotandos ... [O]correrá … prejuízo aos menores caso não deferida a medida. ..."[17]

37. On 16 Aug. 2010, legislation in the Federal District of Mexico, allowing same-sex couples to marry and adopt children jointly, was upheld as constitutional by the *Suprema Corte de Justicia de la Nación*:[18] "324. ... esta Suprema Corte no puede suscribir … que sea la … orientación sexual de un ser humano, el elemento utilizado … para … establecer que una persona o una pareja homosexual no debe tener la opción de adoptar un menor, … pues ello … se constituiría en una discriminación por orientación sexual, proscrita por el artículo 1° constitucional … 334. ... [U]n niño o niña puede ya estar viviendo con su padre o madre biológico y su pareja homosexual. ¿Qué pasa si falta el padre biológico, si en algún momento no está físicamente o muere? ¿Quién se va a hacer cargo del niño? ¿Quién va a tomar las decisiones? Este tipo de adopción también se hace pensando en el interés superior del niño. 335. El cuestionamiento … de que las parejas homosexuales afectan el interés superior del niño y … no debe permitírseles adoptar, es, en sí mismo, discriminatorio y se apoya … en prejuicios que, lejos de convalidarse por esta Corte, deben … superarse …"

38. Colombia's Constitutional Court required access to second-parent adoption for same-sex couples on 18 Feb. 2015,[19] joint adoption on 4 Nov. 2015.[20]

39. On 12 July 2012, the Belgian Constitutional Court decided a case in which a mother had withdrawn her consent to a second-parent adoption.[21] The Court held that: "B.14. L'intérêt potentiel de l'enfant à bénéficier d'un double lien de filiation juridique l'emporte en principe sur le droit de la mère de refuser son consentement à l'adoption par la femme avec laquelle elle était mariée, qui avait engagé avec elle un projet de coparentalité avant la naissance de l'enfant et l'avait poursuivi après celle-ci, dans le cadre d'une procédure d'adoption."

40. Finally, under *Atala* v. *Chile* (part II), the Inter-American Court would certainly hold that a law excluding same-sex couples from second-parent adoption violates the American Convention (see *Advisory Opinion OC-24/17*).

V. Conclusion

41. All 47 Council of Europe member states are parties to the UN Convention on the Rights of the Child. Under its Art. 2, "States Parties … shall ... ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [or] activities ... of the child's parents". Under its Art. 3, "[i]n all actions concerning children, whether undertaken by ... courts of law ..., or legislative bodies, the best interests of the child shall be a primary consideration".

42. It is clearly in the best interests of children being raised by same-sex couples that they should enjoy the same possibility, as children being raised by

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[17] See *Recurso Especial* No. 889.852 (Brasilia, 27 April 2010), https://stj.jusbrasil.com.br/jurisprudencia/16839762/recurso-especial-resp-889852-rs-2006-0209137-4/inteiro-teor-16839763.

[18] *Asunto No. 2/2010, Acción de Inconstitucionalidad promovida por el Procurador General de la República contra actos de la Asamblea Legislativa ... del Distrito Federal ...*, paras. 324-340, https://www.sitios.scjn.gob.mx/codhap/sites/default/files/engrosepdf_sentenciarelevante/MATRIMONIO%20MISMO%20SEXO%20AI%202-2010_0.pdf.

[19] See *Sentencia* C-071-15, http://www.corteconstitucional.gov.co/relatoria/2015/C-071-15.htm.

[20] See *Sentencia* C-683-15, http://www.corteconstitucional.gov.co/RELATORIA/2015/C-683-15.htm.

[21] *Arrêt* no. 93/2012, http://www.const-court.be/public/f/2012/2012-093f.pdf.

married different-sex couples, of establishing a legal relationship with the two adults who are raising them. In his dissenting opinion in *Gas & Dubois* v. *France* (2012), Judge Villiger observed: "… all children should be afforded the same treatment. I cannot see why some children, but not others, should be deprived of their best interests, namely of joint parental custody. Indeed, how can children help it that they were born of a parent of a same-sex couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation?"

43. In its *Advisory Opinion of 10 April 2019*, the Court explained how the child may suffer for the parents' situation: "40. … the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society … In particular, there is a risk that such children will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees; … their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the [birth mother] dies; and they have no protection should their intended mother refuse to take care of them or cease doing so."

44. Under the *Advisory Opinion* (2019), *X & Others* v. *Austria* (2013), and *Taddeucci & McCall* v. *Italy* (2016), Council of Europe member states violate Article 8 (respect for the private life of the child), or Article 14 combined with Article 8 (discrimination based on sexual orientation affecting private and family life), if they do not provide a possibility of recognition of a legal parent-child relationship with the child's second de facto parent (the partner of the child's genetic and/or legal parent), whether through second-parent adoption, registration of the foreign birth details, or other means, solely because of the sexual orientation of the child's parents.

APPENDIX:
COUNCIL OF EUROPE:
LEGISLATION OR CASE LAW ENDING
THE EXCLUSION OF SAME-SEX COUPLES
FROM SECOND-PARENT ADOPTION

1. Andorra - *Llei 34/2014, del 27 de novembre, qualificada de les unions civils*, http://www.consellgeneral.ad/fitxers/documents/lleis-2014/llei-34-2014-del-27-de-novembre-qualificada-de-les-unions-civils-i-de-modificacio-de-la-llei-qualificada-del-matrimoni-de-30-de-juny-de-1995/view:

Article 1: "Dues persones del mateix sexe tenen també dret a casar-se, mitjançant la formalització d'una unió civil entre elles, amb els mateixos efectes que el matrimoni, i a fundar una família d'acord amb les disposicions d'aquesta Llei."

Disposició final primera: "L'adopció pot ésser demanada després de cinc anys de matrimoni, d'unió civil o de convivència, per parelles estables."

2. Austria – *Allgemeines Bürgerliches Gesetzbuch*, § 197 (4) (amended by Law of 6 August 2013 BGBl I 2013/179, https://www.ris.bka.gv.at/eli/bgbl/I/2013/179, implementing the judgment in *X & Others* v. *Austria*, 19 February 2013)

3. Belgium - *Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe*, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006051844&table_name=loi

4. Denmark - Law No. 360 (2 June 1999), amending Law No. 372 (7 June 1989)

5. Estonia – Registered Partnership Act (9 October 2014), para. 15(3), https://www.riigiteataja.ee/en/eli/527112014001/: "A registered partner may adopt a child if: (1) the other registered partner is a biological parent of the child; or (2) the other registered partner was a parent of the child before entry into the registered partnership contract."

6. Finland - Act on Registered Partnerships (950/2001), as amended by Act 391/2009

7. France – Civil Code, Article 365, after *Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&categorieLien=id

8. Germany - *Lebenspartnerschaftsgesetz*, para. 9(7) (amended by Law of 15 Dec. 2004), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Gesetz_zur_Ueberarbeitung_des_Lebenspartnerschaftsrechts.pdf;jsessionid=0E3AF1254E447E8FB1A4AD0F2565C2D1.1_cid289?__blob=publicationFile&v=3

9. Iceland - Law No. 52/2000, amending Law No. 87/1996

10. Ireland – Children and Family Relationships Act 2015, https://data.oireachtas.ie/ie/oireachtas/act/2015/9/eng/enacted/a915.pdf

11. Italy – *Corte Suprema di Cassazione, Sentenza* 12962/16, 26 May 2016, https://www.personaedanno.it/dA/543e3e8d65/allegato/SENTENZA%20CORTE%20DI%20CASSAZIONE.pdf, interpreting *Legge 4 maggio 1983, n. 184. Diritto del minore ad una famiglia*, art. 44(1)(d)

12. Luxembourg – *Loi du 4 juillet 2014*, http://legilux.public.lu/eli/etat/leg/loi/2014/07/04/n1/jo

13. Malta – Civil Unions Act, 14 April 2014, http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1

14. Netherlands - Act of 21 Dec. 2000 amending Book 1 of the Civil Code, *Staatsblad* 2001, nr. 10 (in force on 1 April 2001)

15. Norway - Law No. 36 (15 June 2001), amending Law No. 40 (30 April 1993)

16. Portugal - *Lei n.º 2/2016*, https://dre.pt/home/-/dre/73740375/details/maximized?p_auth=S06z3dSx

17. Slovenia - *Zakon o zakonski zvezi in družinskih razmerjih*, Marriage and Family Relations Act, Article 135, as interpreted by the Supreme Court of the Republic of Slovenia in Decision No. II Ips 462/2009-9 of 28 January 2010: "15 ... Article 135 provides that no one can be adopted by more than one person, save where the adoptive parents are married. Accordingly each of the partners in the same-sex union can subject to general conditions adopt the biological [or adopted] child of his/her partner, while same-sex partners cannot jointly adopt a child that is not a biological descendant [or adopted child] of one of them. [unofficial translation from Slovenian] …" Article 135 has been replaced by Article 213 of the new Family Code (adopted on 21 March 2017, published in the Official Gazette of the Republic of Slovenia, no. 15/17, in force on 15 April 2019), which is likely to be interpreted in the same way.

18. Spain

Civil Code: *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf

Autonomous communities with own family law:
- Aragón - *Ley* 2/2004 (3 May 2004)
- Basque Country - *Ley* 2/2003 (7 May 2003)
- Catalonia - *Llei* 3/2005 (8 April 2005)
- Navarra - *Ley Foral* 6/2000 (3 July 2000)

19. Sweden - SFS 2002:603

20. Switzerland - *Code civil Suisse (Droit de l'adoption), Modification du 17 juin 2016*, art. 264c, https://www.admin.ch/opc/fr/official-compilation/2017/3699.pdf

21. United Kingdom:
- England and Wales, Adoption and Children Act 2002, ss. 50, 51(2), 144(4), 144(7) (in force 30 Dec. 2005); s. 144(4) defines a "couple" who may apply for second-parent adoption as: "(a) a married couple, or (aa) two people who are civil partners of each other, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."
- Scotland, Adoption and Children (Scotland) Act 2007, s. 29(3) (in force 29 Sept. 2009)
- Northern Ireland, *Northern Ireland Human Rights Commission, Re Judicial Review*, [2013] NICA 37 (27 June 2013), http://www.bailii.org/nie/cases/NICA/2013/37.html