CA 10280/01

1. **Jone Doe**
2. **Jone Doe**

**v.**

**Attorney-General**

The Supreme Court sitting as the Court of Civil Appeals

[10 January 2005]

*Before President A. Barak, Vice-President Emeritus E. Mazza and Justices M. Cheshin, J. Türkel, D. Beinisch, E. Rivlin, E.E. Levy, A. Grunis, M. Naor*

Appeal of the judgment of the Tel-Aviv-Jaffa District Court (the honourable Vice-President H. Porat and Justices A. Mishali, S. Rotlevy) on 10 May 2001 in FA 10/99.

**Facts:** The appellants are two women who live together in a single-sex relationship. The appellants gave birth to two children and one child respectively, by means of anonymous sperm donations. They are raising the three children jointly. The appellants applied to the Family Court for adoption orders, so that each of the appellants could adopt the other's children. The applications were dismissed *in limine* by the Family Court and, on appeal, by the District Court (by majority opinion), on the grounds that the appellants were not competent to adopt under the provisions of the Adoption of Children Law. The appellants applied to the Supreme Court for leave to file a further appeal, and leave was granted.

**Held:** (Majority opinion — President Barak and Justices Cheshin, Türkel, Beinisch, Rivlin, Grunis and Naor) The appellants should each be regarded as competent to adopt the children of the other, in the capacity as single adopters, within the framework of s. 3(2) of the Adoption of Children Law; the conditions of this section can be relaxed by virtue of s. 25 of the law, if the adoption is in the best interests of

the adoptee and there are special circumstances. An individual rather than a principled approach should be adopted, so that the applications are not dismissed *in limine* but are considered on the facts of the specific case. Since the facts of the case were not examined by the Family Court (which denied the applications *in limine*), the case should be returned to the Family Court to consider whether the adoptions sought are in the best interests of the adoptees and whether there are special circumstances that justified making the adoption orders.

The majority justices rejected the argument that recognizing the competence of the appellants to adopt in the specific circumstances of this case implies a recognition of a new status of single-sex couples. The question of the appellants' status does not arise in this case. The case only concerns the question of adoption, which focuses on the children.

(Minority opinion — Vice-President Emeritus Mazza) Recognizing a possibility of granting the requested adoptions cannot but constitute a normative recognition of the existence of a single-sex family unit, which is a matter for the legislator to decide.

(Minority opinion — Justice Levy) The interpretation proposed by the majority opinion makes s. 25 of the law, which was intended only for exceptional cases, into a means that allows many persons, who could not otherwise adopt, to become competent to adopt. This is contrary to the purpose of the section, which was only intended to apply to cases that are not addressed by the provisions of s. 3, and therefore this interpretation should be rejected.

Appeal allowed by majority opinion (President Barak and Justices Cheshin, Türkel, Beinisch, Rivlin, Grunis and Naor), Vice-President Emeritus Mazza and Justice Levy dissenting.

**Legislation cited:**

Adoption of Children Law, 5720-1960, s. 22.

Adoption of Children Law, 5741-1981, ss. 1(b), 2, 3, 3(1), 3(2), 8, 8(a), 10, 13, 13(1), 13(2), 25, 25(2).

Equal Employment Opportunities Law (Amendment), 5752-1992.

Family Law Amendment (Maintenance) Law, 5719-1959, s. 4.

Inheritance Law, 5725-1965, ss. 16, 56.

Names Law, 5716-1956, s. 3.

National Insurance Law [Consolidated Version], 5755-1995.

Penal Law (Amendment no. 22), 5748-1988.

Population Registry Law, 5725-1965.

Providing Information concerning the Effect of Legislation on Children's Rights Law, 5762-2002.

Single Parent Families Law, 5752-1992.

Torts Ordinance [New Version], s. 78.

**Israeli Supreme Court cases cited:**

[1] CA 1165/01 *A v. Attorney-General* [2003] IsrSC 57(1) 69.

[2] CFH 7015/94 *Attorney-General v. A* [1996] IsrSC 50(1) 48.

[3] CA 577/83 *Attorney-General v. A* [1984] IsrSC 38(1) 461.

[4] CA 623/80 *A v. Attorney-General* [1981] IsrSC 35(2) 72.

[5] CA 3798/94 *A v. B* [1996] IsrSC 50(3) 133; **[1995-6] IsrLR 243**.

[6] CA 7155/96 *A v. Attorney-General* [1997] IsrSC 51(4) 160.

[7] HCJ 4058/95 *Ben-Menasheh v. Minister of Religious Affairs* [1997] IsrSC 51(3) 876.

[8] HCJ 2458/01 *New Family v. Surrogacy Agreements Approval Committee* [2003] IsrSC 57(1) 419.

[9] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.

[10] HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [1994] IsrSC 48(5) 749; **[1992-4] IsrLR 478**.

[11] HCJ 2078/96 *Vitz v. Minister of Health* (unreported).

[12] CFH 2401/95 *Nahmani v. Nahmani* [1996] IsrSC 50(4) 661; **[1995-6] IsrLR 320**.

HCJ 1779/99 *Brenner-Kaddish v. Minister of Interior* [2000] IsrSC 54(2) 368. [13]
HCJ 293/00 *A v. Great Rabbinical Court* [2001] IsrSC 55(3) 318. [14]
CA 399/79 *Attorney-General v. A* [1981] IsrSC 35(3) 141. [15]
CA 232/85 *A v. Attorney-General* [1986] IsrSC 40(1) 1. [16]
CA 2266/93 *A v. B* [1995] IsrSC 49(1) 221. [17]
CA 209/54 *Steiner v. Attorney-General* [1955] IsrSC 9(1) 241. [18]
HCJ 4365/97 *A v. Minister of Foreign Affairs* (unreported). [19]
CA 3978/94 *A v. B* [1996] IsrSC 50(3) 134. [20]
FH 36/84 *Teichner v. Air France Airlines* [1987] IsrSC 41(1) 589. [21]
HCJ 142/89 *Laor Movement v. Knesset Speaker* [1990] IsrSC 44(3) 529. [22]
CA 2000/97 *Lindorn v. Karnit, Road Accident Victims Fund* [2001] IsrSC 55(1) 12. [23]
HCJ 693/91 *Efrat v. Director of Population Register, Ministry of Interior* [1993] IsrSC 47(1) 749. [24]
HCJ 273/97 *Protection of Individual Rights Association v. Minister of Education* [1997] IsrSC 51(5) 822. [25]
CFH 6407/01 *Golden Channels v. Tele Event Ltd* (not yet reported). [26]
CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221. [27]
HCJ 2740/96 *Chancy v. Diamond Supervisor* [1997] IsrSC 51(4) 491. [28]

HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393. [29]

LCA 6339/97 *Roker v. Salomon* [2001] IsrSC 55(1) 199. [30]

CA 50/55 *Hershkovitz v. Greenberger* [1955] IsrSC 9 791; **IsrSJ 2 411**. [31]

HCJ 143/62 *Schlesinger v. Minister of Interior* [1963] IsrSC 17 225. [32]

HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [2002] IsrSC 56(2) 721. [33]

**American cases cited:**

*Adoption of B.L.V.B. and E.L.V.B.*, 628 A. 2d 1271 (1993). [34]

*Matter of Evan*, 583 N.Y.S. 2d 997 (1992). [35]

*Adoption of Tammy*, 619 N.E. 2d 315 (1993). [36]

*Adoption of Child by J.M.G.*, 632 A. 2d 550 (1993). [37]

*In the Matter of Jacob, an Infant*, 86 N.Y. 2d 651 (1995). [38]

*In Re Adoption of M.M.G.C.*, 785 N.E. 2d 267 (2003). [39]

*In Re Adoption of Infant K.S.P. & J.P.*, 804 N.E. 2d 1253 (2004). [40]

**Canadian cases cited:**

*Re K and B* (1995) 125 D.L.R. (4th) 653. [41]

**English cases cited:**

*Re W (a minor)* [1997] 3 All ER 620. [42]

**European Court of Human Rights cases cited:**
*Fretté v. France* [2004] 38 E.H.R.R. 21. [43]

**Scottish cases cited:**
*Re AMT* [1997] Fam. Law 225. [44]

**South African cases cited:**
*Du Toit v. Minister of Welfare and Population Development*, 2002 (10) BCLR 1006 (CC). [45]

**Jewish law sources cited:**
Babylonian Talmud, Tractate *Gittin* 37a. [46]

For the appellants — Z. Rish, A. Hadar.
For the respondent — O. Son, H. Sandberg.

JUDGMENT

**Vice-President Emeritus E. Mazza**

This appeal mainly concerns the question whether two unmarried women, who are mothers of children and who conduct a joint lifestyle, are competent under the law each to adopt the children of the other. An additional question that arises in the appeal (which I will address in my closing remarks) is whether in the circumstances of the case the lower courts were correct in prohibiting — contrary to the position of the appellants — the publication of details identifying the appellants and their children.

*Factual and procedural background*

2. The appellants are a couple that have lived together and shared a common household since July 1989. To emphasize the strength of the relationship between them, each of the appellants added the family name of

the other to her own family name. During the time they have been living together, the appellants decided and agreed between themselves that they would bring children into the world, in such a manner that each of them would conceive from the sperm of an anonymous donor. In this way, the first appellant gave birth to two sons (one in 1991 and the other in 1997), whereas the second appellant gave birth to one son (in 1994). In 1992, after the first child of the first appellant was born, the appellants signed an agreement concerning their life together, in which they arranged property matters and also matters concerning the raising of the children that would be born to each of them. Within the framework of the agreement, each of the appellants took upon herself full family responsibility for all of the children that would be born to either of them, including joint care and responsibility for the maintenance of each of the children until the age of twenty-one years. Each of the appellants also made a will, which included provisions that were intended to ensure the support and the fulfilment of the other needs of the three children. Since the children were born, the appellants have raised them with joint custody and without any distinction — on the part of either of them — as to the existence or absence of a biological relationship between them. The children also relate to the two appellants as their mothers in every respect, even though each of them knows which of the two is his biological mother.

3. The appellants thought (so it is claimed) that the agreement that they made between them was insufficient to safeguard the welfare of the children to the extent required. Therefore they applied, in 1997, to the Family Court to grant each of them an adoption order with regard to the children of the other. In this way, they claim that they sought to formalize, from a legal viewpoint, the reality of the lives of the three children, who were born within the framework of a family unit where there are *de facto* two mothers, who are full partners in raising and educating them. The appellants relied, in their application for the adoption orders, on s. 3(2) and s. 25(2) of the Adoption of Children Law, 5741-1981 ('the Adoption Law' or 'the law'). The Attorney-General ('the respondent') applied to strike out the adoption applications *in*

*limine*, on the ground that the Adoption Law does not allow the court to grant them. Notwithstanding, he proposed, on his own initiative, that each of the two appellants should be appointed an additional guardian of the other's children. Following this proposal, the appellants filed in the Family Court an application to appoint each of them as additional guardians for the children of the other. At the same time they made it clear that they did not withdraw their application for the adoption orders. Within the framework of the hearing of their application to make guardianship orders, a report was filed in the court by a welfare officer, with regard to the appellants and their children, in which the following was said in summary:

> 'I received the impression that the children have a close relationship with each of the women, and also a close and natural relationship between themselves… this is a relationship that operates as a family and is run by two women who have a cohabitational relationship between them and also raise together the three children… it would appear that both of them provide the physical and emotional needs of the children with joint responsibility. Their application… that each of them should be a guardian of the child or children of the other seems to me a natural application that is implied by their actual lifestyle… the children do not have a father figure and this fact makes the "second mother" into the closest and most significant figure that is suited to be a guardian in this case.'

With the consent of the respondent, and in view of the welfare officer's positive opinion, the court granted the appellants' application and appointed each of them as an additional guardian of the children of the other, without harming the status of each of them as the natural guardian of her own biological children. On the other hand, after considering the appellants' application for the adoption orders, the court decided (on 19 August 1999) to strike out that application *in limine*. The appellants appealed that judgment to the District Court, which decided, by a majority, to deny their appeal. When the appellants applied to this court for leave to appeal the judgment of the

District Court, the Vice-President, Justice S. Levin decided to grant them the leave they sought. This led to the appeal before us.

4. Before I turn to the framework of the dispute, I will first cite the text of sections 3 and 25 of the Adoption Law:

‘Competence of the adopter

3. Adoption may only be done by a man and his wife together; but the court may give an adoption order to a single adopter —

(1) If his spouse is the parent of the adoptee or adopted him previously;

(2) If the parents of the adoptee died and the adopter is one of the relations of the adoptee and is unmarried.’

‘Power to depart from conditions

25. If the court finds that it is in the best interests of the adoptee, it may, in special circumstances and for reasons that it shall state in its decision, depart from the following conditions:

(1) The age of the adoptee under section 2;

(2) The death of the adoptee’s parents and the relationship of the adopter under section 3(2);

(3) An age difference under section 4;

(4) The length of the test period under section 6.’

*The judgment of the Family Court*

Vice-President Emeritus E. Mazza

5. As stated above, the Family Court struck our the appellants' application *in limine*. Its main reason was that s. 3(2) of the law concerns adoption by a 'single adopter,' who is one of the relatives of a child whose parents have died, and therefore it cannot establish a ground for making an adoption order with regard to children that each have a natural mother, within the framework of a family in which there are two parents. This is the position in our case: even though each of the appellants petitioned, separately, for the adoption of the children of the other, it is clear that if the court grants their application, the parenthood of each of the two, as an adoptive mother, with be in addition to the parenthood of the other as the biological mother; thus in the end each of the children will have two parents. According to s. 3(2) — so the court held — 'it is not possible at all, in the guise of an adoption by a single person, to ratify what is *de facto* a two-parent situation.' The court held that, in view of the cohabitational relationship between the appellants, in their applications to recognize each of them as a single adopter of the children of the other there was an attempt to circumvent the provisions of the first part of s. 3 of the Adoption Law, which states that 'Adoption may only be done by a man and his wife together,' and that the provisions of s. 3(1) of the law that concern adoption by someone whose 'spouse is the parent of the adoptee or adopted him previously.' But, in any case, since the appellants did not seek to base their application on s. 3(1) of the Adoption Law — which *prima facie* would be suited to the circumstances of their case — the court did not decide the question whether it would have been possible to grant their application, had they based it on the aforesaid section.

*The judgment of the District Court*

6. In their appeal before the District Court, the appellants argued that the provisions of s. 3(2) of the Adoption Law should be given a broad interpretation, which should be based on the principle of the best interests of the child, and that giving such an interpretation would allow the court to found a judgment in which it granted their application on s. 3(2), together with the provisions of s. 25(2) of the Adoption Law. They argued that the principle of the best interests of the child has decisive weight in their case,

since the best interests of their children justify finding a legal basis for the parental relationship that already exists between them and their children. They further argued that since the enactment of the Adoption Law — more than twenty years ago — a real change has taken place, in the world and in Israel, regarding the attitude of society to the phenomenon of single-sex couples, and that the development that has taken place in social perceptions should affect the interpretation of the provisions of the Adoption Law. According to them, an interpretation of the provisions of the Adoption Law in a manner that applies them solely to heterosexual families will discriminate both against them — on the basis of their sexual orientation — and against their children.

7. The District Court decided, by a majority, to deny the appeal. The majority judges (Vice-President H. Porat and Justice A. Mishali) held that the purpose of the Adoption Law was to create for a child in need an acceptable and stable alternative family, in which there are two parents — a mother and a father who are married to each other — and thereby to grant the adoptee a normal lifestyle in so far as possible against the background of his unusual situation and painful past. In rejecting the interpretation of the Adoption Law that the appellants proposed, the majority justices said:

> 'Homosexual and lesbian couples do not satisfy the conditions and purpose of the law, if only because they are, at the present time, an unusual framework that is not accepted in society, and this will further emphasize and highlight the unusual nature of his [the adoptee's] life, according to the social outlook that currently prevails. This framework has not been accepted at this time as an ordinary, normative and accepted framework in Israel' (square parentheses supplied).

The majority justices also held that the appellants tried to base their application on s. 3(2) together with s. 25(2) of the Adoption Law, but their application did not fall within the scope of s. 3(2), but only — if at all — within the scope of s. 3(1), as the Family Court had thought. Moreover, s. 3(2) could be implemented only in exceptional cases, such as cases of

relatively old or disabled children for whom it was difficult to find two adoptive parents because of their limitations, since only in cases of this kind was it justified to prefer the adoption of the children by a single adoptive parent that putting them into an institution. It was also held that only in exceptional cases that also do not satisfy the conditions of s. 3(2) was it possible to apply s. 25(2) of the law, which constitutes an exception to an exception and should be used sparingly. With regard to the question of the best interests of the child within the framework of the considerations whether to make an adoption order, the majority justices held that the best interests of the child are not an independent ground for adoption, and that they can and should be considered only after a conclusion has been reached that adoption is possible under the provisions of the Adoption Law. Since, according to their approach, the case before us does not satisfy the requirements provided in the law, the court does not need to examine the best interests of the child. The majority justices rejected the appellants' argument that denying their application amounted to discrimination against them on the basis of their sexual orientation, holding that the difference of a same-sex couple living together is relevant for the purpose of applying the provisions of the Adoption Law. It therefore justifies a special attitude to a single-sex couple. It follows that we are speaking of an objective distinction, and not improper discrimination. Finally the majority justices said that if there was a basis for changing the existing legal position, such a change was the concern and responsibility of the legislature, and not the concern of the court.

8. Justice S. Rotlevy, in the minority, was of the opinion that the appeal should be allowed. She said that the majority opinion was based on the purpose that the 'historic' legislator of the Adoption Law gave to the provisions of the law, according to which the law was intended to provide for the needs of children who have no home and adoptive parents who have no children. In her opinion, however, the objective purpose of the Adoption Law is not restricted to satisfying the needs of children who have no home, but it also comprehends other cases in which an adoption order is required by the supreme value of the best interests of the child, and that this broad

interpretive approach allows, and even requires, each of the appellants to be declared the adoptive parent of the children born to her partner. According to her approach, s. 3(1) of the Adoption Law should not be interpreted as an arrangement that applies to *all* cases in which a person applying for adoption wishes to be a parent in addition to an existing parent, since the section applies only to those cases in which the application is based upon the fact that the applicant is married to the parent of the child. This, however, does not make it impossible to grant an adoption application of a person who wishes to act as an additional parent to the child of another, to whom he is not married, in special circumstances that justify the adoption and when the adoption is in the best interests of the child. In the opinion of the minority justice, in the present case there are special circumstances that justify departing from the conditions of s. 3(2), and the best interests of the children require the *de facto* parental relationship that has existed between them and the appellants for years to be given a legal basis that will ensure the rights of the children vis-à-vis the appellants who are their *de facto* parents, and *vice versa*.

*The arguments of the parties*

9. In their appeal before us, the appellants are requesting this court to adopt the opinion of the minority justice in the District Court and to decide accordingly. Their main argument is that the supreme principle of the best interests of the child — even though it is not an independent ground for adoption — constitutes a main criterion for interpreting the provisions of the Adoption Law. They therefore argue that the majority justices erred in their determination that the provisions of the Adoption Law should be interpreted without considering the principle of the best interests of the child. They also erred in adopting a two-stage model, according to which the best interests of the child should be considered by the court only after it finds that the adoption application has a basis in the provisions of the Adoption Law. They further argue that the purpose of the Adoption Law is not merely to place children in another family after their biological parents have failed to care for them, but applies also to every case where the best interests of a child make it

necessary to find a proper solution, which is required to safeguard the child's future, by means of a formal recognition of the parent-child relationship between the child and a person who is not his biological parent. In the circumstances of their case, the appellants argue that the best interests of the child should have been preferred to any other consideration, and that had this been done the court would have granted their application. They argue that the best interests of the child are that the psychological parenting relationship that has existed for a long time between them and the children, and the reality of the children's lives, in that they were born into a family unit that *de facto* has two mothers, should be given formal legal recognition. They also argue that in view of the agreement that exists between the two of them, and since the children do not have known fathers, the court should grant them the adoption orders that they sought without considering the need to declare the children adoptable. They argue that the adoption orders are also required to ensure the best interests of the child in the future and to maintain stability and certainty in their lives, not merely from the psychological and emotional viewpoint, but also from a socio-economic viewpoint. The appellants also argued that the guardianship orders that they were granted do not provide the children with these special needs, since guardianship orders do not establish a family relationship between them and their children and between the children *inter se*. The guardianship orders that they were granted, the mutual wills that they made and the contract that they made between them also do not, in their opinion, guarantee the children the many rights and benefits that involve third parties, nor do they safeguard the best interests of the child in a case that one of them dies. By contrast, adopting the children will also give them a right under the law (and not merely in a contract) to receive maintenance from the partner of their biological mother, both in her lifetime (under s. 4 of the Family Law Amendment (Maintenance) Law, 5719-1959) and after her death (under s. 56 of the Inheritance Law, 5725-1965). Their adoption will give the children a right to inherit from the adoptive mother in an intestacy (under s. 16 of the Inheritance Law) and will give them the status of dependants, within the meaning of that term in s. 78 of the Torts Ordinance, with regard to

each of them. The adoption will also give the children a right to various benefits, by virtue of the National Insurance Law [Consolidated Version], 5755-1995, as well as other kinds of rights and benefits. The appellants add that according to case law the parents of a child are the persons who are competent to determine what are his best interests, and for this reason too, in the absence of a reason to cast doubt on their good intentions, they should be recognized as the joint lawful mothers of the three children.

The appellants repeated their argument that denying their application discriminates both against them, because of their sexual orientation, and their children. According to them, various works of research prove that same-sex couples are no worse parents to their children than heterosexual couples. In addition, the changes that have taken place in recent years, in public opinion around the world and in Israel, with regard to the possible varieties of family and with regard to the recognition of the rights of homosexuals and lesbians make it necessary to recognize their right to adopt the children that they are actually raising. According to them, the position of the majority justices was first and foremost guided by the justices' disgust at their lifestyle and by the concern that granting their application would grant legitimacy to their sexual orientation. But according to their argument, which they emphasized repeatedly, their adoption application is not intended to gain legal recognition or 'approval' from the court for the cohabitational relationship between them. The proof of this is that they refused to base their application on s. 3(1) of the Adoption Law. Had they relied on this section, the court would have been compelled to decide the question whether they should be recognized as a couple, and this would have distracted the attention of the court from the question of the children's best interests, which they regard as the main issue, and focused it on the question of the legal status of the same-sex relationship. By deliberately and expressly refraining from basing their application on s. 3(1) they made it clear that their sole purpose is to achieve legal recognition for the existing parental relationship between each of them and the three children.

10. The respondent argued that the true purpose of the appeal is to obtain a legal status for the 'lesbian family unit,' whereas the recognition thereof is a matter that should be addressed by the legislature. He argues that the appellants sought to achieve this in an indirect manner: when they found no way of basing their application on one of the recognized grounds for adoption, they sought to persuade the court that the exceptional nature of the family unit that they established constituted a special circumstance that justified applying to them the provisions of s. 25(2) of the Adoption Law, which allows a departure from the conditions concerning the adopter being a relation of the adoptee and the death of the adoptee's parent, and thereby establishing for themselves a ground under s. 3(2) of the law. But s. 25 of the Adoption Law should only be applied by the court when there are special circumstances and in the most exceptional of cases, such as when it becomes clear to the court that the child that is adoptable has no one to raise him. In any case, accepting the interpretation proposed by the appellants, according to which their case will be recognized as a special case that justifies a departure from the conditions of s. 3(2), will amount to a change of the law. The respondent also argued that the interpretation given to the provisions of the Adoption Law by the majority justices in the District Court does not constitute discrimination against the appellants. The appellants also cannot rely on the case law that recognizes the equal social and economic rights of homosexuals, since making an adoption order involves granting a personal status whose recognition is the concern of the legislature. Even their argument that the best interests of their children should decide the matter cannot be accepted, since as long as it has not been determined that adoption is possible under the Adoption Law, the question of the best interests of the children does not arise.

*Deliberations*

11. The appellants sought to persuade us that we can and should grant their application by taking into account the specific circumstances of their personal case and the best interests of the three children, without considering the questions concerning the basic attitude of Israeli law to the status of the

single-sex family unit. For this reason, as they explained, they refrained from basing their application on s. 3(1) of the Adoption Law. It is my opinion that the path that the appellants ask us to take is not open to us. Making the requested adoption orders will necessarily be interpreted as the fundamental legal recognition of the right of single-sex couples to adopt children. Even if this recognition is restricted to the adoption of the child of one of the partners by the other (as distinct from the recognition of the possibility of the partners adopting a child that is unrelated to either of them), this will amount to a change in the law with wide-reaching ramifications that reflects — and this is inevitable — a principled judicial determination concerning the legal status of single-sex couples. Indeed, the attempt of the appellants to present their case as merely a private matter is unconvincing. Thus, for example, one may ask whether it is possible that accepting the application of the appellants (who have children) will not oblige the court to consider the capacity of single-sex couples who do not have children to adopt a child to whom they are unrelated. In addition, we will be confronted by the question whether recognizing the competence of a pair of lesbian women to adopt a child will not also oblige us to consider recognizing the competence of a pair of homosexual men to do so. And what will be the law if the court is asked to allow the adoption of the child of a mother and father by a woman living together with the parents of the child in a bigamous family unit, so that the child will have three parents?

But there is no need to resort to guesswork. We need only look at the remarks of counsel for the appellants, in her appearance before the Knesset Committee on the Status of Women, in order to discover that even she is of the opinion that we are not concerned with an exceptional case that calls for an unusual legal remedy but with a broad social issue that is likely to find a solution if the court allows the appeal in the appellants' case. Learned counsel for the appellants said to the committee:

> 'The third case that is pending before the Supreme Court, in which I represent a lesbian couple who are jointly raising the children to which each of them gave birth, is intended to solve

> the problem of *many* lesbians who wish to *adopt* under the Israeli Adoption Law and to obtain recognition for this joint parenthood… I very much hope that this will finally lead to a call for, and recognition of, the reality of the lives of *hundreds of women and children who in practice are growing up in homosexual or lesbian families, with two mothers, sometimes even with two fathers*' (from the minutes of the meeting of the committee on 17 June 2003) (emphases supplied).

Thus we see that deciding the appeal before us requires considering the general fundamental question whether the Adoption Law can and should be interpreted as recognizing the right of single-sex couples to adopt a child. The consideration of this issue should, in my opinion, be conducted without reference to the specific case of the appellants and their children. My opinion on the merits of the aforesaid issue is that in the present legal climate it is not possible to grant the appellants' application. The legislature, which presumably considered the possibility of adoption by a single-sex couple, has refrained from providing an arrangement that recognizes the aforesaid possibility. But even interpreting the Adoption Law in accordance with its objective purpose does not allow such an extension of the law. It would also appear that the recognition in the statute of exceptions to the ordinary rules was intended to provide individual solutions to special and difficult cases, but not to allow the court to recognize new general legal categories. Therefore the critical question in this appeal is whether it is desirable that this court should establish, in case law, a *primary* arrangement on this sensitive and controversial issue, which concerns giving a recognized legal *status* to single-sex couples. In my opinion, the answer to this question is no. The principle of the separation of powers, and the special sensitivity of the issue brought before us, require us to act in this case with caution and restraint. In addition, according to first principles it is correct to allow the legislature to establish the primary arrangement on this subject. But before I address the aforesaid fundamental issue, I should first explain why, in my opinion, the appellants'

case cannot find a solution within the framework of the general and special provisions of the Adoption Law.

*Are the children adoptable?*

12. There are two parties to an adoption: the child who needs to be adopted and the person seeking to adopt. The child must be adoptable (in addition to being 'capable' of being adopted, under s. 2 of the Adoption Law, i.e., someone who has not yet reached the age of 18), whereas the person seeking to adopt must be capable of adopting. A child will be adoptable (under s. 8 of the law) if his parents have agreed to him being adopted, or if he is declared adoptable by the court, under s. 13. Are the three children — the sons of the first appellant and the son of the second appellant — adoptable? The question, *prima facie*, arises against the background of the fact that by being born as a result of artificial insemination with the sperm of anonymous donors, the identity of the fathers of the children is unknown, and it can also be assumed that it will remain unknown (see r. 15 of the Public Health (*In-vitro* Fertilization) Regulations, 5747-1987, which prohibits the giving of information with regard to the identity of a sperm donor; see also P. Shifman, *Israeli Family Law* (vol. 2, 1989), at p. 129, with regard to the method practised in hospitals to conceal the identity of the donors). *Prima facie* it can be argued that a child that is born from an anonymous sperm donation has a 'father,' who under s. 8 of the law has a standing in the proceeding. This question is not at all simple. The artificial insemination of a woman, with sperm taken from an unrelated donor, creates a complex range of medical, psychological, moral and legal questions. There are different opinions on the question of the legal status of the sperm donor and the question of his paternity for various purposes, both in Jewish law and in academic circles (in this regard, see: Shifman, *Israel Family Law*, *supra*, at pp. 108-118).

This difficulty, even though it does not exclude the legal possibility of declaring the children adoptable, does not make it unnecessary to do so, as the appellants claim. The legislature, which took into account such situations, provided that the court may declare a child adoptable, *inter alia*, if it finds

that 'there is no reasonable possibility of identifying the parent, finding him or ascertaining his opinion' (s. 13(1) of the Adoption Law), or that 'the parent is the father of the child but he was not married to the child's mother nor did he recognize the child as his' (first part of s. 13(2)). The majority justices in the District Court pointed out, briefly, that even if we assume that the grounds in ss. 13(1) and (2) will be proved and the children are declared adoptable, the declaration will be purposeless, since the law does not allow such an adoption, and therefore declaring the children adoptable is not in their best interests. I agree that in the absence of a legal ground to permit the adoption that the appellants seek, there is no significance to declaring the children adoptable; moreover, this case does not concern a declaration that a child is adoptable because of a need to remove him from the custody of his biological parents and place him in the custody of an adoptive family. But this does not imply (as the majority justices in the District Court thought) that the adoption of the children, in the manner requested by the appellants, is not in their best interests, since the question of the best interests of the children requires additional consideration.

*Competence to adopt*

13. The first part of s. 3 of the Adoption Law, which concerns the 'competence of the adopter,' establishes the cardinal principle that 'Adoption may only be done by a man and his wife together.' A study of the Knesset Proceedings and the deliberations of the Knesset Public Services Committee, which prepared the Adoption Law, 5720-1960, for the second and third readings, it can be seen that, by combining the words 'a man and his wife together,' the legislature was clearly referring to a lawfully married couple (see *Knesset Proceedings* vol. 27, at p. 2315; vol. 29, at pp. 2136-2137; see also N. Maimon, *Adoption Law* (1994), at p. 105). It would appear that until now the court has not been faced with the need to consider the correctness of this interpretive assumption (cf. CA 1165/01 *A v. Attorney-General* [1]), and such a need does not arise in this case either. Since under the prevailing law a single-sex couple cannot marry, they are consequently incapable of adopting a child 'together,' in the manner of a 'man and his wife.' Notwithstanding,

and as exceptions to the aforesaid rule, the last part of s. 3 of the law allows adoption by a single adopter, when the conditions set out in subsections 3(1) or 3(2) are satisfied. Section 3(1) provides that the court may make an adoption order for a single adopter 'if his spouse is the parent of the adoptee or adopted him previously,' whereas under s. 3(2) of the law, the court may make an adoption order for a single adopter 'if the parents of the adoptee died and the adoptive parent is one of the relations of the adoptee and is unmarried.'

As in their arguments before the lower courts, so too in their appeal the appellants repeatedly clarified that they did not base their application on s. 3(1) of the Adoption Law. I will therefore do as they requested, and like the lower courts I too will refrain from considering the question whether the term 'spouse,' which is used in s. 3(1), may and should also be interpreted to include someone who is 'publicly recognized' as the parent's cohabitee. Consequently, without making any firm determination on this issue, I must assume that s. 3(1) does not allow the adoption of a child by a same-sex partner of the parent. The question that requires consideration is whether s. 3(2) of the law, which is the only one on which the appellants based their position, gives each of them a ground for adoption as a single adopter of the other's children. Section 3(2) makes the competence of a single adopter dependent upon satisfying all of three conditions: first, that the parents of the adoptee are dead; second, that the adopter is one of the relatives of the adoptee; and third, that the adopter is unmarried. The first two conditions — the death of the biological parents of the adoptee and the adopter being one of the relatives of the adoptee — are not satisfied by either of the appellants. It follows that under s. 3(2), on its own, neither of the appellants is competent to be a single adopter. In their attempt to overcome this obstacle, the appellants relied on the provisions of s. 25(2) of the Adoption Law, which provides that the court may — if it finds that this is in the best interests of the adoptee, in special circumstances and for reasons that it should state in its decision — approve an adoption by a single adopter under s. 3(2), while departing from the first two conditions stated therein ('the death of the

adoptive parents and the relationship of the adoptive parent to the adoptee'). The appellants hoped to build their case on the simple meaning of ss. 3(2) and 25(2) of the law. But the implementation of s. 25(2) — as clarified by the first part of s. 25 — is conditional upon the court finding that it is in the best interests of the adoptee and upon the existence of special circumstances and reasons that justify a departure from the conditions set out in s. 3(2). I will now turn to the meaning of these conditions.

*'The best interests of the adoptee'*

14. It is well known that in any matter concerning a child, the best interests of the child constitute a central factor in the considerations that determine the case. This principle extends to all the provisions of the Adoption Law. This can be seen from s. 1(b) of the law:

> 'An adoption order and any other decision under this law shall be made if the court finds that they are in the best interests of the adoptee.'

The combination of words ' the best interests of the adoptee' is intended to reflect the interest of the child whose adoption is being sought (see CFH 7015/94 *Attorney-General v. A* [2], *per* Justice Cheshin, at pp. 97-99). It is well-established case law that the best interests of the adoptee, in themselves, do not constitute a ground for adoption. As Justice Barak said, ' the best interests of a child is a factor within the framework of an existing ground, not a factor that creates a ground that would not otherwise exist' (CA 577/83 *Attorney-General v. A* [3], at p. 468. See also CA 623/80 *A v. Attorney-General* [4], at p. 75, and CA 3798/94 *A v. B* [5], at p. 148 {___}). This means that it is insufficient that the adoption of a child by a specific person is consistent with the best interests of the adoptee; this in itself will not lead to a declaration that the person concerned is competent to adopt a child. Thus, for example, the interest of the child to be adopted by a specific person cannot — in the absence of a lawful ground for adoption — override the right of his biological parents to raise him (CFH 7015/94 *Attorney-General v. A* [2], at pp. 99 and 104; CA 3798/94 *A v. B* [5], at pp. 144 *et seq.* {___ *et seq.*}; CA

1165/01 *A v. Attorney-General* [1], at p. 82; D. Dorner, 'The Best Interests of the Child and the Rights of the Parents,' *Refuah uMishpat (Medicine and Law)* 26, at p. 101).

It follows from this that, according to the normal procedure, only when the court finds that the competence of the adoptive parent and the existence of a ground for adoption have been proved, the court will turn to examine — as it is obliged to do under s. 1(b) of the law — whether making the adoption order is in the best interests of the child. But it would appear that the normal procedure is not appropriate in a case where the court is required to decide whether making an order for the adoption of a child by a single adoptive parent, in a departure from the conditions of s. 2(3) of the law, is in the best interests of the adoptee. The question of the best interests of the adoptee, in such a case, constitutes one of the factors that the court is supposed to consider when deciding the question whether the conditions of s. 25(2) of the Adoption Law, have been proved, since proving these is a prerequisite for recognizing the existence of a ground for adoption under s. 3(2) of the law, when departing from the conditions of the aforesaid section. Consequently, in cases of this type the court is also required to depart from the ordinary procedure and to determine the best interests of the adoptee in the context of deciding whether a ground exists.

15. Deciding the question of the best interests of the adoptee, where we are not concerned with an abandoned child that needs an adoptive family in order to provide his essential needs, raises questions that are not simple. Even in less complex cases than the one before us, the question whether the adoption is 'in the best interests of the adoptee' (i.e., is consistent with his interests) cannot be decided without considering conflicting interests of other individuals or of the public. And when the court finds that the best interests of the adoptee are in conflict with other interests, it must base its decision on a proper balance between the conflicting interests (cf. CFH 7015/94 *Attorney-General v. A* [2], *per* Justice Cheshin, at p. 97). Indeed, the best interests of the adoptee have great weight. But the best interests of the adoptee are not the only consideration. In this matter, it is possible to refer to

the international Convention on the Rights of the Child, 1989, to which Israel is a party (*Treaties* 1038, vol. 31, at p. 224). Article 3(1) of the convention provides that in any decision concerning the interests of a child, the best interests of the child shall be 'a primary consideration.' It should be noted that the covenant says 'a *primary* consideration,' not a *sole* or *decisive* consideration. This criterion is also a proper one when determining the place of the best interests of the child whose adoption is being considered on the scale of the considerations that the court should take into account.

This naturally also gives rise to the question of what are the criteria according to which the court will decide that making an order for adoption by a single adopter, for a child whose parents are not dead and who does not suffer from the absence of a supporting parental framework, is in the best interests of the child. When the question of the 'best interests of the child' arose in CA 1165/01 *A v. Attorney-General* [1], the court saw no difficulty in deciding it. But that case concerned a young woman who had grown up and expressed a clear desire to be adopted by her father's wife, who had raised her since her mother died when she was a small girl. In those circumstances, the court saw no difficulty in deciding that the wishes of the adoptee reflected her best interests. As Justice Cheshin said:

> 'Once we know that the girl — who is now a grown woman — has expressed her desire to be adopted, we know that this is in her best interests. For who could possibly say otherwise?' (*ibid.* [1], at p. 81).

The adoption of an adult (notwithstanding the fact that it is a departure from the normal course of the law) justifies, by its very nature, special treatment; and if the court does not find that recognition of the parental relationship between the adopted parent and the adult adoptee harms a public interest or the right of another individual, it will tend to permit this as an exceptional case (CA 7155/96 *A v. Attorney-General* [6], *per* Justice Beinisch at pp. 174 *et seq.*). But what are the criteria according to which the court will decide the question whether the adoption, in the aforesaid circumstances, is in the best interests of a minor adoptee? This question arises in our case most

forcefully, since all three children in this case are minors. I am prepared to assume, as the appellants claim, that the three children do indeed 'agree' to the adoption, and also 'want' it. But the consent and wishes of a child cannot decide the case, and the court is required to decide his best interests in accordance with what appears to the court to be the best interests of the child (see the remarks of Justice Cheshin in CFH 7015/94 *Attorney-General v. A* [2], at pp. 97-99). The appellants, who sought to persuade us that, even according to the criterion of the best interests of the children, making the adoption orders is in their best interests, provided us with a list of all the material and other benefits that will accrue to the children by giving legal recognition to the family relationship that exists *de facto* between them and the children and between the children *inter se*. I am prepared to accept that the adoption of each of the children by his mother's partner is consistent with his material interests. Thus, for example, his right to maintenance, which currently depends upon the reciprocal contractual obligations of the appellants, will become a legal right. This is true also of his right of inheritance, which will no longer depend upon the making of a valid will in accordance with the agreement between the appellants. His adoption will also give him rights under the law that he does not currently have (the details appear in the appellants' arguments, and I shall not repeat them). But is the adoption of each of the children in his best interests — i.e., is it consistent with his interests — from other perspectives as well? The answer to this question is less obvious. Thus, for example, it is possible to ask whether a change in the personal status of a child, from being the son of a single-parent mother to being the son of two single-parent mothers, is from his perspective a change for the better? This question should be examined with regard to the future: how will his unusual status affect the way in which he regards his position, the attitudes of other people towards him and his attitudes towards others? The answer to these questions depends to a large extent on the scope of the consensus in Israeli society. A study of the appellants' arguments has not satisfied me that from the aforesaid additional viewpoint they have

succeeded in proving that making the adoption orders as requested is in the best interests of the children.

*'Special circumstances'*

16. The departure from the first two conditions of the exception to the rule, which is provided in s. 3(2) of the law, is permitted — according to s. 25 — when there are 'special circumstances.' Since the legislature did not see fit to stipulate what circumstances should be considered special circumstances for this purpose, the court is obliged to decided this in accordance with its discretion. But the discretion given to the court, no matter how broad, is not unlimited.

In CA 7155/96 *A v. Attorney-General* [6], the question under discussion was how to interpret s. 25(1) of the Adoption Law, which, in certain circumstances allows the court to depart from the restriction provided in s. 2 of the law, according to which 'Only a person who has not yet reached the age of 18 years can be adopted.' In addressing the nature of the requirement that there are 'special circumstances' in that context, Justice Beinisch said:

> 'Indeed, the test of the existence of a parental-child relationship should constitute the focus of the discretion of the court in Israel when it examine whether in the case before it there are special circumstances within the meaning of s. 25 of the Adoption Law… If there is a sincere intention to have a parental-child relationship, and if there is a solid basis for believing that such a relationship has already been established, then *prima facie* there are "special circumstances," and if the adoption is "in the best interests of the adoptee," *the court should examine whether there is a proper reason not to give legal recognition to that relationship by means of an adoption order*… as a subtest the court will attribute considerable weight to the duration of the parental-child relationship, and the date on when it was created. The longer the relationship has lasted, and the earlier it began, the more the court will tend to recognize these as "special

> circumstances" that justify an adoption order' (*ibid*. [6], at pp. 181-183; emphasis supplied).

The court relied on these remarks, which related to the interpretation of 'special circumstances' for applying s. 3(1) of the law, in CA 1165/01 *A v. Attorney-General* [1], in which it was required to decide the question whether there were 'special circumstances' for the purpose of applying s. 3(2). It should be noted that in both cases the court was confronted with the question whether to permit the adoption of an adult. Although from that perspective our case is different, I am prepared to agree that the existence of a *de facto* parental relationship for a long period between the person seeking to adopt and the person whom he wants to adopt constitutes an important factor in deciding the question of whether there are special circumstances, within the meaning thereof in s. 25, for applying the provisions of ss. 3(1) and 4(3). However, although this is an important factor, it is not a factor that is capable of allowing every adoption. My opinion is that the condition that requires the existence of 'special circumstances' is a condition that contains an internal system of checks and balances. On the one hand, it allows the court a degree of flexibility in special cases, where the circumstances in its opinion justify a departure from the strict conditions of the law. On the other hand, it places on the court restrictions that derive from the legislative purpose of the Adoption Law. I agree with the finding of Justice Beinisch that when there is a *de facto* parental relationship between the person seeking to adopt and the person he wants to adopt, the court is obliged to consider 'if there is a proper reason not to give legal recognition to that relationship by means of an adoption order.' But in my opinion the examination of the aforesaid question is not 'extrinsic' to the decision as to the existence of special circumstances, but it constitutes a part of the intrinsic balance that the court should make between the facts and circumstances of the individual case that is under consideration, on the one hand, and considerations that are required by the outlook that, in applying s. 25 of the law, the court is not entitled to allow a departure from the strict conditions provided in the Adoption Law, if the departure is not consistent with the purpose of the law. Consideration of the case before us

has led me to the conclusion that the adoption requested by the appellants is not consistent with the purpose of the law, and it follows that in our case there are no 'special circumstances' as required by s. 25(2) of the law.

17. I see no need to speak at length with regard to the 'subjective' purpose of the Adoption Law, namely the purpose that the legislature considered when the law was enacted. It is sufficient to say that it can be clearly seen from the legislative process of the law, as well as from the legislative process of the Adoption of Children Law, 5720-1960, that the recognition of the right of a single-sex couple to adopt a child was not even considered by the legislature. By contrast, it is clear that the enactment of s. 25 of the law (like the similar provision in the old law, s. 22 of the Adoption of Children Law, 5720-1960) was intended to allow a certain degree of flexibility in applying the provisions of the law, where the best interests of the adoptee and the exceptional circumstances of the specific case justify, in the opinion of the court, a departure from one of the strict conditions of the law. The rule, as aforesaid, is that only a person who has not yet reached the age of 18 years can be adopted, and he can only be adopted by a 'man and his wife together.' Sections 3(1) and 3(2), which were intended to provide a solution to exceptional cases, allow a departure from the rule subject to conditions that are set out in each of those subsections. Section 25, which allows a departure from the conditions of ss. 3(1) and 3(2), is therefore an exception to the exceptions. This background led to the approach — on which the respondent relied in the arguments in his reply to the appeal — that s. 25 is intended for exceptional cases, in which there arises an urgent human need to allow an adoption of children for whom a home cannot be found in the usual manner. According to this approach, the use of s. 25 of the law should be restricted to cases of abandoned or problematic children, which usually means older or disabled children who have been rejected by their families or by the families that were going to adopt them. The assumption is that allowing such a child to be adopted by a single adoptive parent, who is not one of his relatives, is preferable to leaving him in an institution, and it is therefore the lesser of two evils (see N. Maimon, *Adoption Law*, *supra*, at p. 109, and P. Shifman, *Israeli*

*Family Law*, *supra*, at pp. 148-149 and 180, note 24). According to this approach, s. 25 has no application at all in a case where the child whose adoption is being sought has a parent who is raising him and caring for him properly, and whose capacity to carry out his parental duties is not the subject of dispute.

18. This approach, which restricts the scope of application of s. 25, in accordance with the purpose considered by the legislature when it enacted it, merely to the difficult cases of abandoned and disabled children is no longer accepted. The origins of this approach lie, as aforesaid, in the purpose that the legislature considered when the Adoption Law was enacted. This is indeed the subjective purpose of the law. But the purposive interpretation of a law is not limited to the purpose that underlay it when it was enacted. As President Barak has said:

> 'Alongside the subjective purposes there are objective purposes that arise from the language of the law and from external sources and that are derived from the fundamental values of the legal system. All of these together constitute the purpose of the legislation. This approach with regard to the purpose of the legislation allows the law to be adapted to social changes and to the "changing conditions of life." The law was enacted in the past, but it was intended to provide a solution to the problems of the future. As a rule, the legislature does not enact a law that applies only to the past. The law provides a solution to problems that arise over the course of the time. Time does not stand still, nor does the solution that the law provides' (A. Barak, *Legal Interpretation* (vol. 2, 1993), at p. 265).

The approach that the purposive interpretation of a law should also address its objective purpose has already been applied by the court, *de facto*, to the interpretation of s. 25(2) of the Adoption Law. When the question arose in CA 1165/01 *A v. Attorney-General* [1], Justice Englard said:

> 'In my opinion, the legislative history cannot restrict the independent meaning of the text of the law, which after being enacted has an independent life of its own against the background of its purpose. Thus, I see no need to restrict the provisions of s. 25(2) of the law to cases of children that are abandoned and living in an institution, on the basis of explanations that were given by Knesset members in the proceedings that led to its enactment' (*ibid.* [1], at p. 76).

19. The appellants argued that their case is no different from the case in CA 1165/01 *A v. Attorney-General* [1], and since the court found an interpretive method of approving the adoption in that case, it ought also to approve the adoptions sought by them. My opinion is that the two cases are not the same.

The case in CA 1165/01 *A v. Attorney-General* [1] concerned the competence of a woman to adopt the adult daughter (who was 21 years old) of her partner. The daughter's mother had died when she was a baby. It was made clear that the applicant had lived with the father of the girl since his wife had died, was a mother to his daughter and raised her. The court (with an expanded panel) held, unanimously, that in that case the conditions of s. 25(2) of the Adoption Law were satisfied, and therefore the court was able to depart from the conditions of s. 2 of the law (with regard to the age of the adoptee) and the conditions of s. 3(2) of the law (with regard to the death of the parents of the adoptee and the relationship of the adoptive parent), since making the requested adoption order was in the best interests of the adoptee, who expressly stated her desire that the parental relationship that existed between the applicant and herself since she was a baby should be formalized, and that in the special circumstances of the case it was right to allow the adoption. As we said above, the court chose to base its decision on the provisions of s. 3(2) of the law, on which basis the applicant was recognized as a single adoptive parent, and thus we were spared the need to confront the question whether the 'spouse' of the adoptee's parent, within the meaning of

s. 3(1) of the law, also includes a person who is publicly recognized as a spouse.

The case before us differs from the case in CA 1165/01 *A v. Attorney-General* [1] in at least two respects: *first*, with regard to the question whether making the orders requested by the appellants is indeed in the best interests of the adoptees. In CA 1165/01 *A v. Attorney-General* [1], deciding this question gave rise to no difficulty. That case concerned an adult, who stated her desire, openly and expressly, that the relationship with the person who since her infancy had raised her as a mother should be recognized formally. I have already cited the remarks of Justice Cheshin, who was satisfied by the adoptee's declaration as irrefutable proof that the adoption would be in her best interests. It should be stated that even Justice Englard stated in his opinion (*ibid*. [1], at pp. 76-77) 'that the case under discussion concerns the adoption of an adult, and the considerations relating to an adult are inherently different from the considerations concerning the adoption of a minor child.' I have already addressed the difference between considering the best interests of an adult adoptee and considering the best interests of a minor adoptee, by relying, *inter alia*, on the remarks of Justice Beinisch in CA 7155/96 *A v. Attorney-General* [6] (at pp. 174 *et seq*.). In our case, as I have already said, the arguments of the appellants have not persuaded me that even from the non-material viewpoint the adoption of each of the three children by his mother's partner is in his best interests. The *second* difference concerns the composition of the family unit within which framework each of the appellants seeks to be recognized as a single adoptive parent. It should be noted that in his arguments before the court in CA 1165/01 *A v. Attorney-General* [1], the respondent raised the concern that a decision in favour of the applicant (who was, as aforesaid, the recognized partner of the adoptee's father) would also lead to recognition of adoption by single-sex couples. In rejecting this argument, Justice Cheshin said (without taking a stand on the question of the capacity of a single-sex couple) that 'the conflicting interests in a situation involving a single-sex couple are different from the conflicting interests in the case before us' (*ibid*. [1], at p. 82). In the judgment in CA

1165/01 *A v. Attorney-General* [1], the court did indeed see fit to rely on s. 25(2) as a basis for departing from the provisions of s. 3(2) that allows adoption by a single adoptive parent (who is a relative of the adoptee) 'if the parents of the adoptee have died.' In my opinion, this decision does not lead us to accept the appellants' argument that each of them can be declared the single adoptive mother of the other's children, without this involving the adoption of a principled position by the court with regard to the status of single-sex couples and the question of their right to adopt children. Even from this viewpoint, their case is not similar to the case in CA 1165/01 *A v. Attorney-General* [1]: there we were concerned with an adoptee whose mother had died, whereas in this case we are concerned with children who all have a mother. As I stated in my opening remarks, granting the application of the appellants will necessarily be interpreted — and in my opinion cannot but be interpreted — as recognizing the right of single-sex couples to adopt a child, or at least for one partner to adopt the children of the other. By making such a decision, we would be making a principled statement whose ramifications are clear. Thus we are not being asked to decide the individual case where there are 'special circumstances' — in so far as the appellants purported to present their case — but a general category of cases that have similar circumstances. Is a decision of this kind consistent with the objective purpose of the Adoption Law? This question, as I have already clarified at the outset, should in my opinion be given the answer no. I shall now turn to this issue.

*Adoption within the framework of a single-sex family unit*

20. Making an adoption order gives a new personal status to the adopter and the adopted child: by virtue of the order, the adopter becomes the parent of the adopted child, whereas the adopted child becomes the *lawful* 'child' of the adopter. What is especially troubling in our case is the *second* part of the equation: if the appellants' application is granted, they will both become the legal mothers of the three children; this means that each of the three children will have two mothers, one of whom is his biological mother and the other his adoptive mother; I have already said that, in my opinion, it is not at all

clear that such a change in the status of each of the children is in his best interests. In any case, recognizing the requested adoption — and there is no escaping this — will constitute a normative recognition of the existence of a single-sex family unit. Hitherto the law has recognized, in addition to the traditional family unit, which includes parents married to one another and their children, also the existence of the 'single parent' family unit (see the Single Parent Families Law, 5752-1992). For various purposes the law has also recognized the existence of the a family unit that includes parents that are 'publicly recognized' cohabitees, a man and woman living together without marriage; and a certain degree of legal recognition has also been given to this within the framework of the relationship between unmarried parents and their children. Thus, for example, s. 21 of the Population Register Law, 5725-1965, provides that:

> 'The name of the father of a child who was born to an unmarried woman shall be registered in accordance with the joint notification of the father and mother, or pursuant to a judgment of a competent court or religious court' (and see, in the same context, the provisions of the last part of s. 3 of the Names Law, 5716-1956).

But until now neither statute nor the case law of the court concerning the question of personal status (as distinct from the question of various material rights) has recognized the normative existence of a family unit that includes a same-sex couple. Approval of the requested adoption will constitute, therefore, the first fundamental recognition of its kind with regard to the existence of a family unit that the legislature has not yet seen fit to recognize.

I am not ignoring the claims of the appellants that the existence of single-sex couples is more common and familiar to the general public than it was in the past. Even I accept that the attitude of not an insignificant part of the public to the phenomenon of the existence of such couples is today far more rational — and therefore also more tolerant — that it was in the past. This change has also found some expression in statute: in 1988 the criminal prohibition against sexual intercourse between men was repealed (see the

Penal Law (Amendment no. 22), 5748-1988, and in 1992 the legislature prohibited discrimination at work on grounds of sexual orientation (see the Equal Employment Opportunities Law (Amendment), 5752-1992). In 1993 army regulations were also amended to prohibit discrimination on account of sexual orientation; and in 1998 the army totally cancelled orders that addressed homosexual soldiers (with regard to the development, see A. Harel, 'The Rise and Fall of the Israeli Gay Legal Revolution,' 7 *HaMishpat (The Law)* 195). But it is obvious that the attitude of Israeli society to homosexuals and lesbians is still far from being unanimous, and that among extensive sectors of the public the phenomenon of single-sex couples is regarded as an unusual phenomenon. My opinion is that in this situation there is no basis for accepting the claim that interpretation that supports the granting of the appellants' application is consistent with the purpose of the Adoption Law. Granting their application will, by means of interpretation, create a new category of adoptive parents, of which there is not even the slightest hint or an implied reference in the Adoption Law. There is absolutely no basis in the Adoption Law for such a major interpretive extension of the exceptions in which the court may grant an adoption order while departing from the recognized and known grounds for adoption; even interpreting the law against the background of its objective purpose, while giving the most weight possible to the developments that have occurred in social outlooks since it was enacted, is not capable of bridging the gap.

21. It is therefore my opinion that the words 'special circumstances' in s. 25 of the law cannot be interpreted in a manner that will recognize — even if only indirectly and by implication — the legal status of single-sex couples. I would like to add that giving such an interpretation is also undesirable. This is, first, because we are concerned with a primary arrangement that concerns the sphere of personal status, which has legal ramifications that go beyond the relationship between the actual litigants; and second, because the social attitude to the phenomenon of single-sex couples is still a subject of bitter dispute among most of the public. The combination of these two reasons leads to the conclusion that the question whether (and in what cases) we

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should recognize the right of single-sex couples to adopt a child is the concern of the legislature. The principle of the separation of powers, as well as the character and complexity of the subject, leads me to think that the court should refrain from creating and granting, by means of case law, a new legal status. The words of my colleague, the president, with regard to the introduction of civil marriage, are apt in this context:

> 'The question of the introduction of civil marriage between couples who have no religious community — as well as the introduction of civil marriage between couples who belong to different religious communities — is a difficult and complex question. There is no national consensus on this question. It concerns the recognition of a status that operates vis-à-vis everyone. In such circumstances, it would appear *prima facie* that the proper institution for dealing with and regulating the issue is the Knesset, and not the court' (HCJ 4058/95 *Ben-Menasheh v. Minister of Religious Affairs* [7], at p. 878).

The president made remarks in a similar vein, in his book *Judicial Discretion*, with regard to creating a new institution of adoption:

> 'A special case of establishing institutional structures is that of recognizing a special status. In principle, this matter should be addressed by means of legislation by the legislature, since status has ramifications in all branches of the law, and case law development by means of judicial legislation is undesirable. There are therefore those who believe that an institution of adoption should not be created by means of case law. But I think that in this matter too no firm rules should be laid down' (A. Barak, *Judicial Discretion* (1987), at p. 258).

The president went on to discuss (*ibid*., at pp. 289-290) the duty of the judge to take into account, when he is deciding a question of social values and legal norms that derive therefrom, the extent of the social consensus or the lack thereof with regard to those values:

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> ‘My opinion is that the judge should take into account in his considerations the degree of the social consensus or the lack thereof on the question of the social values and legal norms that derive from them. The judge should aim to reach a solution that is consistent with the social consensus, or at least does not conflict therewith. In my opinion, he should refrain from choosing an option that is blatantly contrary to the basic perceptions of the public… the reason for this approach lies in considerations of democracy, the separation of powers and the need to maintain public confidence. In my opinion, a judge should not regard himself as the standard bearer for a new social consensus. As a rule, the house of elected representatives is the proper institution for creating drastic changes in this regard. An act that is contrary to the social consensus will, in the long term, damage public confidence in the court system and the ability of the courts to function properly.’

Thus we see there are cases, albeit rare ones, in which the court should refrain from deciding an issue that comes before it, and this should, because of its nature, be left to the legislature (cf. HCJ 2458/01 *New Family v. Surrogacy Agreements Approval Committee* [8]). This is also required, *inter alia*, by the principle of the separation of powers, which is one of the values of our democratic legal system. It should be noted that this principle does not derogate from the power of the court to decide, within the framework of its authority and at its discretion, any matter brought before it. Notwithstanding, it is capable of influencing the judge in choosing one of the various options available to him. There are cases in which refraining from making a decision is also one of the options available to him, and the question of the recognition of the right of single-sex spouses to adopt a child is included among those matters that the court should leave to the legislature.

22. We ought to mention that the issue has already found its way onto the agenda of the legislature. In recent years several proposals to amend the Adoption Law have been tabled in the Knesset. Some of these (private

members' bills) proposed that adoption should also be allowed by single-sex couples, but these proposals were rejected by the Knesset in the preliminary reading. Thus we see that those Knesset members who support the recognition of the capacity of single-sex couples to adopt a child have until now been in the minority. It is also difficult to foresee any change in the position of the legislature in the near future. The recognition of the capacity of single-sex couples to adopt a child is dependent upon giving recognition to their status as a couple, and as long as the legislature has not provided an alternative path to marriage, for heterosexual couples who are not able to contract a religious marriage, it is difficult to foresee how it will devote itself to regulating in statute the status of single-sex couples. But this does not mean that the court should rush into recognizing, in its case law, the legal status of single-sex couples and introduce a new institution of adoption in lieu of the legislature.

23. What I have said up to this point is sufficient in order to lead me to the conclusion that the appeal of the appellants with regard to the adoption of their children should be denied. For the sake of completeness, I shall also briefly address the claim of discrimination raised by the appellants. I shall also briefly consider the law of western countries in which the appellants also hoped to find support for their position.

*Discrimination*

24. The appellants, it will be recalled, argued that denying their application discriminated against them on account of their sexual orientation, and it also discriminated against their children. In this context, they pointed to cases in which the court was not deterred from recognize various rights of homosexuals and they argued that this approach should also be applied to their case.

I cannot accept these arguments. With regard to the claim that denying their application will discriminate against the appellants because of their sexual orientation, I accept the finding of the majority justices in the District Court that the difference of a single-sex couple from other couples is relevant

for the purpose of the application of the Adoption Law, and it was found that this was a legitimate distinction, not improper discrimination (cf. HCJ 4541/94 *Miller v. Minister of Defence* [9], at pp. 109-110 {___-___}). I should add that no person has a right to adopt a child. The claim that every citizen has a right to adopt relies on an approach that regards children as property, which was abandoned long ago by the enlightened world (H. Goldschmidt, 'The Chequered Identity Card of an Israeli Family — Legal Ramifications of Case Law concerning Adoption by a Single-Sex Couple,' 7 *HaMishpat (The Law)* 217, at p. 238). The claim concerning discrimination against the children should also be rejected. A child has a right to be raised by his parents and to receive from them everything that he needs for his proper development until he becomes an adult. But this does not mean that a child that is looked after and cared for properly by one of his parents has a right to be adopted by the parent's partner.

25. The appellants can also not rely on judgments in which this court recognized various rights of homosexuals. In HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [10], on which the appellants relied, the court recognized the right of a homosexual steward to receive benefits given to the spouse of an employee as part of his employment conditions. This case concerned social rights that derive from the employment conditions of one of a single-sex couple. Our case is different. Here we are being asked to establish a valid personal status, for all purposes, that has effect vis-à-vis the whole world. In the other references cited in the appellants' pleadings there is also no basis for their argument that their application too should be granted. HCJ 2078/96 *Vitz v. Minister of Health* [11], on which they relied in their pleadings, is totally irrelevant. In this judgment the court (with the state's consent) cancelled provisions of subordinate legislation, according to which unmarried women and lesbians were required to undergo a psychiatric test as a condition for receiving artificial insemination and *in-vitro* fertilization services, and instead it was determined that in special cases the treating physician, at his discretion, could require a social worker's opinion. But the cancellation of the aforesaid provisions was based upon the right to

parenthood (CFH 2401/95 *Nahmani v. Nahmani* [12]; but cf. *New Family v. Surrogacy Agreements Approval Committee* [8]), and there is no connection between *Vitz v. Minister of Health* [11] and our case. The case of HCJ 1779/99 *Brenner-Kaddish v. Minister of Interior* [13] also cannot help the appellants. In our judgment in that case, the court ordered the registration official at the Ministry of the Interior to register in the population register one of the petitioners as a second mother to a child who was born to her life partner, by virtue of an adoption order made in her favour in California. It should be noted that a petition for a further hearing on that judgment (HCJFH 4252/00) is still pending in the court. But even on the merits the judgment in *Brenner-Kaddish v. Minister of Interior* [13] cannot affect our decision; the question under consideration in that case merely concerned the scope of the discretion given to the registration official to refuse to register a *foreign* adoption judgment, which was given in another country in accordance with its laws. As distinct from that question, which mainly concerns accepted and proper administrative procedures, the question before us is a *substantive* one, and it concerns the creation of a new institution of adoption under our law. The same is true with regard to HCJ 293/00 *A v. Great Rabbinical Court* [14], in which this court cancelled an order made by the Rabbinical Court to the effect that a lesbian mother was prohibited from meeting her daughters with her life partner. The judgment in that case focused on the question of the jurisdiction of the Rabbinical Court to impose such a prohibition, and it expressly refrained from considering the content of the Rabbinical Court's decision (see p. 326 of the judgment). Thus even that judgment does not support the appellants' position.

*Comparative law*

26. The appellants argued that in various legal systems in the western world arrangements have been formulated that could also constitute a model for the proper decision in their case. I, however, am of the opinion that the decision in a matter such as the one before us depends, *inter alia*, on the tradition, culture and fundamental outlooks of society, and these are not the same in different places. Justice Elon rightly said — with regard to the

difficulty involved in relying on comparative law in matters of adoption — that 'these matters, perhaps more than any other legal sphere, are very closely related to community background, tradition, experience and mentality, and it is difficult to draw an analogy from one to the other' (CA 399/79 *Attorney-General v. A* [15], at p. 152). Indeed, the question of the adoption by single-sex couples has, in western countries, been given a broad range of different and strange arrangements. Dr Marin, who researched the legal status of single-sex couples in comparative law, classified the various arrangements into four categories (or 'models'): same-sex marriage, registered partnership, domestic partnership and cohabitation, and it would appear that the extent of the recognition given by the various countries to the right of the single-sex couple to adopt a child derives in most cases from the recognition by the country of the 'model' to which the relationship between the couple is attributed (Y. Merin, 'Marriage between Same-Sex Couples and the Failure of Alternatives to Legal Regulation of Single-Sex Couples,' 7 *HaMishpat (The Law)* 253).

I will mention, briefly, some of the arrangements that are practised. In the United States, where there is no Federal adoption law, adoption issues are regulated in each state in accordance with its laws. It appears that only one state (Florida) expressly prohibits in legislation any adoption by single-sex couples. In several other states adoption of this kind is prohibited by the case law of the courts; whereas in many other states the courts have held that a woman may adopt the child of her same-sex partner, if it is proved that the adoption is in the best interests of the child (for a review of comparative law in the United States, see Merin, 'Marriage between Same-Sex Couples and the Failure of Alternatives to Legal Regulation of Single-Sex Couples,' *supra*, at pp. 263-264; Goldschmidt, 'The Chequered Identity Card of an Israeli Family — Legal Ramifications of Case Law concerning Adoption by a Single-Sex Couple,' *supra*, at pp. 243-244; T.E. Lin, 'Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases,' 99 *Colum. L. Rev.* (1999) 739, at pp. 768-769; C. Bridge and H. Swindells, *Adoption: The Modern Law* (2003), at pp. 44, 46).

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In European countries the position is completely different. The laws of many countries (including France, Germany and several Scandinavian countries) prohibit adoption by same-sex couples. In Holland, which is one of the few countries in the world that permit *marriage* between same-sex couples in its statutes, the law also allows adoption by these couples, provided that the adopted child was born in Holland. The laws of Denmark and Iceland allow an adoption of the kind requested by the appellants, but prohibit single-sex couples from adopting the child of others (for a review of the comparative law in Europe, see Y. Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2002), at pp. 238-239). Finally, it should be noted that the European Court of Human Rights recently held in *Fretté v. France* [43] that the prohibition of adoption by single-sex couples does not conflict with the European Convention on Human Rights, and that the states that are members of the European Union may distinguish, for this purpose, between same-sex couples and heterosexual couples (Bridge and Swindells, *Adoption: The Modern Law*, *supra*, at pp. 46-47).

From this brief survey of comparative law it can be seen that most western countries (with the exception of some of the United States) have regulated the issue of adoption by single-sex couples in legislation. The specific arrangements that have been made cannot be of any avail in deciding the appellants' case; and the sole conclusion that I am able to reach from the study of the arrangements in other countries is that we too should leave the regulation of this issue to the legislature.

*Supplementary remarks*

27. My colleague President Barak proposes that we return the appellants' case to the Family Court in order to complete the examination of the question whether there are special circumstances, within the meaning thereof in s. 25 of the Adoption Law, and also the question whether granting their application will be in the best interests of the children. My colleague's assumption is that denying the appellants' application *in limine* prevented them from having the opportunity to submit evidence with regard to the existence of special

circumstances as aforesaid, and with regard to the best interests of the children.

With all respect, I see no reason to return this case to the Family Court for further clarification of the facts, since the appellants did not ask for this at all. There is also no practical reason for doing this, since the facts required for making a decision are not in dispute. It should be noted that the appellants did not complain in their pleadings before us that they were prevented from having the opportunity to bring evidence with regard to any of the questions that were presented for a decision. On the contrary, their express argument is that they submitted substantial amounts of evidence to support their arguments, and they therefore requested that we decide here and now on the merits of the case and direct that the requested adoption orders should be made. The special circumstances, on which the appellants based their pleadings, were clear and obvious from their arguments, namely that they live together in a single-sex family unit and that their children were born into this framework. These circumstances do not make the case of the appellants any different from the cases of other same-sex couples where each partner wishes to adopt the other's children. The same is true with regard to the best interests of the child. In my opinion, the main question in this respect is whether making the children the legal children of both single-parent mothers is in their interests, in view of the consensus in our society. It should also be noted that the appellants did not argue that they wanted to present any additional expert opinions in this regard or any other evidence to the Family Court, and that the court prevented them from doing so.

*Publication*

28. In their appeal, the appellants also attacked the propriety of the decisions of the lower courts to prohibit publication of their identities and the identities of their children. My opinion is that this part of their appeal should be allowed. The Family Court held that its judgment could be published without stating the names of the appellants and their children, or any other details that might result in identifying them. In their appeal before the District Court, the appellants applied to cancel the ban against publication, on the

grounds that they wish to bring their case to the attention of the general public. The majority justices held that this application should be denied. Their reason for this was that denying the appeal also rejected the legitimacy of the lifestyle that the appellants chose for the children, and therefore the publication was likely to embarrass the children. They also held that the right of the public to know what was happening in the appellants' case would be completely satisfied by publishing the judgment without stating the names of the appellants and their children. In my opinion, which is different in this regard from the approach of the majority justices in the District Court, in not granting the appellants' adoption applications we are not embracing a negative attitude to the legitimacy of their lifestyle. It also seems to me that the concern of the majority justices, that publishing the names of the appellants and their children would embarrass the children, has no sound basis. The appellants do not conceal the character of the family framework within which the children are growing, and it can be assumed that also in the children's social environment this is not a secret. It is very clear that the appellants are of the opinion that publishing their names and the names of the children may assist them in influencing public opinion that will support their ideological struggle. Since this is their wish, I see no convincing reason to deny them this.

29. My conclusion from all of the aforesaid is that the appeal against the dismissal of the adoption application should be denied, whereas the appeal against the publication ban of the names of the appellants and their three children should be allowed.

**President A. Barak**

I regret that I cannot agree with the opinion of my colleague, Vice-President E. Mazza. In my opinion, the appeal should be allowed. The judgments of the Family Court and the District Court should be set aside. The case should be returned to the Family Court for it to consider whether each of the appellants satisfies the requirements of s. 25 of the Adoption Law ('the

best interests of the adoptee' and 'special circumstances') and the other requirements of the Adoption Law.

*Competence of the adopter: the rule and the exceptions thereto*

1. The key question in this appeal is this: are there circumstances in which the Adoption Law recognizes the competence of a person to adopt the minor child of his life partner, where the person seeking to adopt and the biological parent are of the same sex? The premise is that *prima facie* there is a ground to declare the child adoptable (the consent of the biological parent (s. 8) and the absence of a reasonable possibility of identifying, finding or ascertaining the opinion of the father (s. 13(1))). The question is whether, on the basis of this premise, the partner of the biological mother is competent to adopt the biological mother's minor child? The answer to this question lies in ss. 1(b), 3 and 25 of the Adoption Law. Section 1(b) provides:

'Adoption order 1. (a) …

(b) An adoption order and any other decision under this law shall be made if the court finds that they are in the best interests of the adoptee.'

Section 3 provides:

'Competence of the adopter 3. Adoption may only be done by a man and his wife together; but the court may give an adoption order to a single adopter —

(1) If his spouse is the parent of the adoptee or adopted him previously;

(2) If the parents of the adoptee died and the adopter is one of the relations of the adoptee and is unmarried.'

Section 25 provides:

'Power to depart from conditions

25. If, it may, in special circumstances and for reasons that it shall state in its decision, depart from the following conditions:

(1) The age of the adoptee under section 2;

(2) The death of the adoptee's parents and the relationship of the adopter under section 3(2);

(3) An age difference under section 4;

(4) The length of the test period under section 6.'

The premise is therefore that the stage of recognizing each of the children as 'adoptable' is satisfied in the case before us (the consent of the biological mother, the lack of a possibility of identifying the father). Against this background, each of the appellants is seeking to adopt the biological son of her life partner. In the appeal before us, we are concerned with an application for an adoption order of a 'single adopter.' Each of the appellants is a single adopter. Within the framework of the recognition of a single adopter, there is no claim before us that each of the appellants is the 'spouse' of the other, as stated in the provisions of s. 3(1) of the Adoption Law. It follows that the interpretive problem before us is whether it is possible, in principle, to recognize each of the appellants as a 'single adopter' within the framework of s. 3(2) of the Adoption Law, assuming of course that each of the children is adoptable. One of the conditions of this provision — that the single adopter is not married — is satisfied by each of the appellants. The other two conditions of s. 3(2) of the Adoption Law are not satisfied by the appellants, since the parents of the adoptees have not died (the mother is alive and the father is unknown) and neither of the appellants is 'one of the relations of the adoptee'; according to the appellants' argument, this is unimportant, since the provisions of s. 25(2) allow the court to depart from these two conditions,

provided that the requirements in that section are satisfied (special circumstances and the best interests of the adoptee). The interpretive question before us is whether this argument is well-founded.

2. The answer to this question is not at all simple. The Family Court (Vice-President J. Stoffman) and the District Court justices (Vice-President H. Porat, Justices A. Mishali and Justice S. Rotlevy) rightly pondered over it. The main arguments of the parties revolved around this question, at the beginning of the hearing of this appeal. While this appeal was pending, the question before us was decided in CA 1165/01 *A v. Attorney-General* [1], in so far as it concerns a man and woman who live together publicly. In that case, a woman applied to adopt the child of her publicly recognized partner. In that case also — as in the case before us — the competence of the woman to be a single adopter was examined; in that case also — as in the case before us — the hearing focused on the question whether it was possible to recognize the competence of the single adopter within the framework of s. 3(2) of the law, by availing ourselves of the provisions of s. 25(2) of the Adoption Law; in that case also — as in the case before us — the Attorney-General raised arguments to the effect that the provisions of s. 25 of the Adoption Law should be applied to an adoption by a single person only where the adoptee does not have a parent who is raising him, and he is being raised in an institution. An extended panel of nine justices unanimously rejected the arguments of the Attorney-General, and held that it is possible to 'rely on the provisions of s. 3(2) of the law, in combination with the power to depart from its conditions that is found in s. 25 of the law' (*per* Justice I. Englard, *ibid.* [1], at p. 77). This argument is also possible in the case where the adoptee has a father who is raising him, and the woman applying to adopt him lives with the father of the adoptee as his publicly recognized partner. In his reasoning for this approach, Justice I. Englard wrote:

> 'The intention of the legislature was to make the general requirements flexible when it is in the best interests of the adoptee to do so and when there are special circumstances. I do not see any conflict in principle between the use of the

> possibilities of being flexible under s. 25 of the law and the basic requirements of adoption. Departing from the general requirements is conditional upon the existence of special circumstances and giving the reasons for this in the decision of the court. The decisive test is the best interests of the adoptee. Assuming that the conditions for departing from the general requirements are satisfied, why should we prevent the adoption that is in the best interests of the adoptee? In my opinion, to prevent such an adoption is contrary to the intention of the legislature who sought to make the requirements for adoption flexible… Admittedly, in the circumstances of the case under discussion the adoption is being made in favour of a woman who is a publicly recognized partner of the girl's father. For the purposes of this case, I assume as aforesaid that the term "spouse" in s. 3(1) of the law does not include a person who is a publicly recognized partner. This assumption prevents the woman from relying on this provision, which allows adoption by a single adopter without the requirement of special circumstances, but I see no basis in the law for preventing this woman from relying on the alternative path found in the provisions of s. 3(2) of the law, in combination with the provisions of s. 25 of the law, where the fulfilment of the conditions required therein is proved. In other words, I see no basis in the law that justifies discriminating against this woman and punishing her merely because she lives together with the father of the girl. The decisive test is, as aforesaid, the best interests of the adoptee, in all its aspects.'

3. I agreed with that opinion. I said in that case that s. 25 of the Adoption Law makes it possible to depart from the conditions provided in s. 3(2) of the law. This departure applies to two of the three conditions that are included in the restriction imposed by s. 3(2) of the law.

> 'Instead of this restriction there are the conditions provided in s. 25(2) of the law that allow this departure. These conditions are two in number: one is that "it is in the bests interests of the adoptee" (the first part of s. 25 of the law)… the other is that there are "special circumstances"' (*ibid.* [1], at p. 84).

Later in my opinion I wrote:

> 'Section 25 of the law does indeed allow flexibility of the strict requirements provided in s. 3(2) of the law. This does not involve a departure from the whole framework of the law, since instead of the conditions provided in s. 3(2) of the law there are the requirements provided in s. 25 of the law' (*ibid*. [1]).

4. Justice M. Cheshin also regarded the provisions of s. 25 of the Adoption Law as allowing flexibility of the conditions provided in s. 3(2) of the Adoption Law with regard to adoption by a single person. He too did not regard the fact that the adoptee is not a child in an institution who is not being raised by a parent as something that prevents the application of the flexibility provisions in s. 25 of the Adoption Law.

5. Justice J. Türkel also was of the opinion that s. 25 of the Adoption Law applied in that case. Justice Türkel wrote:

> 'In my opinion too there is no need to decide the question whether a couple who are publicly recognized as partners, but are not married, are included within the expression "a man and his wife together" or within the expression "his spouse" in s. 3 of the law, since under the provisions of the first part of s. 25 of the law, the court may depart from the conditions in s. 3(2) of the law and make an adoption order even for an adopter such as the appellant. Such a departure is permitted if two cumulative conditions are satisfied, that the adoption "is in the best interests of the adoptee" and that there are "special circumstances." In my opinion the main condition is the first condition, that the adoption "is in the best interests of the adoptee," and not

> necessarily the second condition, "special circumstances," which falls within the "supreme obligation" under s. 1(b) of the law' (*ibid*. [1], at p. 86).

In applying this approach to the case that was before us, Justice J. Türkel held that the best interests of the adoptee required the adoption to take place.

6. The principle that arises from CA 1165/01 *A v. Attorney-General* [1] is this: the strict provision in s. 3 of the Adoption Law, which provides rigid conditions for the competence of the adopter, can be made more flexible by means of the power to depart from those conditions that is given to the court in s. 25 of the Adoption Law. This flexibility is possible, in principle, also with regard to a single adopter who wishes to adopt an adoptable child that has a parent who is raising him, and that lives together with the person seeking to adopt the child: a condition for this relaxation of the conditions is that 'the court finds that it is in the best interests of the adoptee' and that there are 'special circumstances.' This principle was applied and decided in CA 1165/01 *A v. Attorney-General* [1] with regard to publicly recognized partners who were a man and a woman. The question before us is whether this law applies also to publicly recognized partners who are of the same sex. I will now turn to examine this question.

*Three interpretive approaches*

7. It is possible to approach the solution to the question I posed from three perspectives. According to the *first* perspective, in view of the importance of the interests contending for precedence, s. 25 of the Adoption Law is inferior to the other provisions of the law. The significance of this is that s. 25 of the Adoption Law does not apply in our case. Section 3 of the Adoption Law applies in full, and according to it the appellants are not competent to adopt the children of one another. It is possible to call this approach an external approach. It does not consider the question whether the requirements of s. 25 of the Adoption Law are satisfied in the case before us or not. A balance of the interests against the background of the purpose of the Adoption Law is external to the provisions of s. 25 of the Adoption Law, and

it leads to a conclusion that it does not apply at all in the type of case before us. The *second* perspective is that in our case s. 25 of the Adoption Law does apply. This approach proceeds to examine the elements of the section on the basis of the purpose underlying it. This examination may lead to one of two conclusions: the conclusion that in principle in a case of an adoption of a child among persons of the same sex who live together the adoption is not in the best interests of the adoptee and there are no special circumstances for departing from the requirements of s. 3 of the Adoption Law; or the conclusion that in principle such an adoption does satisfy the conditions of s. 25, in that it is capable of ensuring the best interests of the adoptee and it indicates the existence of special circumstances. We can call this approach a principled internal one. The *third* perspective holds, like the second perspective, that in our case s. 25 of the Adoption Law does apply. This is, therefore, an internal approach. However, its criterion is not a principled one but an individual one. It examines each case on its merits. This examination may, in the final analysis, show that according to the position of scientific research, social perceptions and the other circumstances of the case, adoption between persons of the same sex who live together is not in the best interests of the child. It may show, in the final analysis, that the adoption is in the best interests of the child. In any case, the decision should not be made on a principled basis, but on an individual basis, which takes into account all of the circumstances, including the practical implications of the principled arguments in the specific case. We can call this an individual internal approach. What is common to the three approaches is the premise that, in principle, the child may be adopted, since his biological mother agrees to the adoption and there is no reasonable possibility of identifying the father. The difference between the approaches concerns whether an adoption order will actually be made. Initially, I will discuss the first two approaches that lie at the heart of the Attorney-General's position and the opinion of my colleague, Vice-President E. Mazza. I will indicate the reasons that lead, in my opinion, to the conclusion that they are undesirable. I will then turn to the third approach, which is in my opinion the proper approach. I will discuss its

character, viewpoint and method of application. This approach does not allow the case to be decided by this court. It requires the case to be returned to the Family Court to examine whether, in the circumstances of the case before us, there is a basis for implementing the provisions of s. 25 of the Adoption Law.

*External interpretation*

8. The Attorney-General argued before us — as he did in the Family Court and the District Court — that an external interpretive approach should be adopted. He reiterated before us the arguments that he made before the panel in CA 1165/01 *A v. Attorney-General* [1], and added those arguments to his arguments in this case. He emphasized before us that 'the position of the Attorney-General in CA 1165/01 *A v. Attorney-General* [1] is identical, in so far as the present case is concerned, to the position expressed by the Attorney-General in the present case.' He argued that even if, in principle, it was possible to declare the children adoptable, there is no basis for making an adoption order since the women seeking to adopt them are not competent to do so. This is because the power of the court to depart from the conditions prescribed in s. 3 of the Adoption Law does not apply to the case before us. The basis for this approach is the argument that the case before us falls within the scope of s. 3(1) of the Adoption Law and not within the scope of s. 3(2) of the Adoption Law; he also argued before us that the provisions of s. 25 of the Adoption Law apply only in the most exceptional cases, such as that of a child who has no one at all to raise him. These arguments were rejected in CA 1165/01 *A v. Attorney-General* [1], and I see no reason to raise them once again.

9. When some of the arguments of the Attorney-General in CA 1165/01 *A v. Attorney-General* [1] were rejected, the Attorney-General presented before us the argument that the appeal should be denied because the appellants are seeking to create an adoption in a 'family unit' that has not been recognized by the legislature. Recognition of a new 'family unit' is the concern of the legislature. This claim found a sympathetic ear with my colleague, Vice-President E. Mazza. Notwithstanding, he did not see it as an argument that rules our the actual application of s. 25 of the Adoption Law

('external interpretation'). According to my colleague, this arguments finds its place internally within the framework of s. 25 of the Adoption Law. On this basis, my colleague reaches the fundamental conclusion that the requirement of 'special circumstances' in s. 15 of the Adoption Law is not satisfied ('principled internal interpretation'). I will therefore examine the argument of the Attorney-General together with the position of my colleague within the framework of principled internal interpretation.

10. In addition to the arguments of the Attorney-General, it is possible to make another argument that *prima facie* supports the external interpretation. This line of argument seeks to rely on the approach of my colleague, Justice M. Cheshin, in CA 1165/01 *A v. Attorney-General* [1], according to which the struggle between the provisions of s. 3(2) of the Adoption Law and the provisions of s. 25(2) 'will be found in examining the strength of these two provisions of statute relative to one another' (*ibid*. [1], at p. 83). These remarks could be interpreted as implying an external interpretive approach. According to this, first it will be determined whether s. 25 of the Adoption Law has any fundamental application, and only if the answer is yes will the court examine whether the conditions of s. 25 are satisfied.

11. In my opinion, the legislature itself set out the rule and the exception to it. The examination of the question whether the rule applies should be carried out by considering the question whether the (internal) elements of the exception are satisfied, namely whether the adoption order is in the best interests of the adoptee and whether there are special circumstances for making the adoption order. There is no basis for considering the best interests of the adoptee twice: once when considering whether s. 25 of the Adoption Law actually applies, and a second time when considering whether its conditions are satisfied. A single consideration will also prevent a split between the general aspect and the individual aspect. One comprehensive consideration should be made within the framework of s. 25 of the Adoption Law. I think that this was the meaning of my colleague, Justice Cheshin, when he said:

> 'We will not say — we are not permitted to say — that whoever regards himself as needing to adopt should be allowed to adopt even if he does not satisfy the conditions of s. 3(2) of the Adoption Law. As the law says in the first part of s. 25, the best interests of the adoptee are paramount, but they are not sufficient in themselves; there is an additional need for special circumstances and reasons that the court will state in its decision. Each case should be considered on its merits and every interest should be examined to determine its importance' (*ibid*. [1], at p. 82).

*Principled internal interpretive approach*

12. The second interpretive approach is a principled internal approach. From significant parts of his opinion, it would appear that this is also the approach of my colleague Vice-President E. Mazza. Through this perspective, my colleague analyzes the problem before him on the basis of the approach that s. 25 of the Adoption Law does apply in our case. Notwithstanding, the elements contained inside it ('the best interests of the adoptee' and 'special circumstances') are not satisfied. An adoption order, in the case before us, is not in the best interests of the adoptee, nor are there special circumstances in this case that justify making such an order, even if there are *prima facie* grounds to declare the child adoptable. Let us turn to examine this position of my colleague.

*'The best interests of the adoptee'*

13. With regard to the best interests of the adoptee, my colleague Vice-President E. Mazza says that he is prepared to accept that the adoption of a child by his mother's partner is consistent with the material interests of the minor (such as the right to maintenance and inheritance rights). Notwithstanding, he was not persuaded that the adoption was consistent with the best interests of the child in other respects. My colleague writes:

> 'But is the adoption of each of the children in his best interests — i.e., is it consistent with his interests — from other

> perspectives as well? The answer to this question is less obvious. Thus, for example, it is possible to ask whether a change in the personal status of a child, from being the son of a single-parent mother to being the son of two single-parent mothers, is from his perspective a change for the better? This question should be examined with regard to the future: how will his unusual status affect the way in which he regards his position, the attitudes of other people towards him and his attitudes towards others? The answer to these questions depends to a large extent on the scope of the consensus in Israeli society. A study of the appellants' arguments has not satisfied me that from the aforesaid additional viewpoint they have succeeded in proving that making the adoption orders as requested is in the best interests of the children.'

Elsewhere in his opinion, my colleague says that:

> '… the arguments of the appellants have not persuaded me that also from the non-material viewpoint the adoption of each of the three children by his mother's partner is in his best interests' (para. 19).

Indeed, I too agree that the appellants have not succeeded in proving that making the desired adoption orders would be in the best interests of the children. But why did the appellants fail in this? They did not fail because their evidence was unfounded. They failed because their action was dismissed *in limine*, and they were not given an opportunity to present their evidence. It is of course possible that, at the end of the trial, when all the evidence has been presented, they will still be unable to prove that making the requested adoption orders will be in the best interests of the children. But they should be given a proper opportunity to present their position. They were denied this opportunity. My colleague rightly says that the answer to the question whether their adoption of the children is consistent with their non-material interests is 'less obvious.' But how can this question be clarified without examining all of the evidence and without giving the appellants a

chance to present all of their arguments on the basis of that evidence? Why should the appellants be deprived of the possibility of proving that not only the material interests of the children before us but all of their interests lead to the conclusion that in the overall balance 'the best interests of the child' require an adoption order to be made? The answer to this question cannot be that there is no point in the appellants presenting their evidence, since their evidence is weak. As long as the evidence has not been examined, its weight cannot be assessed. The only answer that can be given to this question is — and it would appear that my colleague Vice-President Mazza was compelled to resort to this position — that there is no basis for examining the evidence that the appellants have, since no matter how great the internal weight thereof, the 'best interests of the adoptee' in s. 25 of the Adoption Law is satisfied by the principled assessment that the adoption of the children is contrary to the 'consensus in Israeli society,' and this is sufficient for the purposes of s. 25 of the Adoption Law. I cannot agree with this approach.

14. My premise is that the phrase 'the best interests of the adoptee' is an expression of a 'complex principle with different aspects' (CA 232/85 *A v. Attorney-General* [16], at p. 12). I accept that the best interests of the child are not merely his material interests. They are his interests in every respect. Therefore not only the material interests of the child must be considered, but also his social and spiritual interests. Indeed, the best interests of the child are considered on many levels of criteria that all focus on the child. Some of the criteria reflect material considerations; some reflect spiritual, social, ethical and moral considerations. Some reflections short term considerations; others reflect long term considerations. Some reflect the relationship between him and his (biological and adoptive) parents; others reflect the relationship between him and the society in which he lives and will continue to live. We are concerned with the best interests of the adoptee in the family in which he will live and in the society in which he will grow up.

15. This approach to the 'best interests of the adoptee' is a holistic one. The child is a world in and of himself, and his whole world — in the present

and the future — should be considered. A partial consideration should not satisfy us. This outlook was well expressed by President M. Shamgar:

> 'The best interests of the child require a decision in the specific case that is before the court, and the best interests of the specific child before the court should be considered. No decision should be made on the basis of theoretical assumptions concerning the best interests of children in general… there is no doubt that the decision is influenced by the outlook of the judge and the social situation in which context he acts. There is also no doubt that the concept of the best interests of the child also includes, at least in principle, the social outlooks of society, and within this framework the customs and outlooks of society should be taken into account… Within the framework of the best interests of the child, (some) weight should be given to the consideration of the way in which the child's natural environment differs and departs from the social norm, both with regard to the way in which the child perceives himself and his position in society, and with regard to the way in which society perceives the child. Indeed, the court should not give in to close-mindedness and intolerance of any part of society, and one of its roles is to create norms for society. But within the framework of resolving the specific dispute under consideration, when we are concerned with the best interests of the child, it will not be appropriate to ignore completely the reality and social outlooks that may affect the child. Obviously the best interests of the child that are being considered are the best interests of the specific child, and all of the aforesaid remarks are merely a part of the definition of the social position in which context we operate. Therefore there is a need for evidence with regard to the effect of the aforesaid situation on the specific child, in the situation in which he finds himself…' (CA 2266/93 *A v. B* [17], at pp. 250-251).

This is the case whenever the best interests of the adoptee arise. There is no basis for an approach according to which precisely within the framework of s. 25 of the Adoption Law the phrase 'the best interests of the adoptee' undergoes a change such that it applies only (or mainly) to the effect of the 'consensus in Israeli society' upon all of the other considerations. My colleague Justice M. Cheshin rightly pointed out in CA 1165/01 *A v. Attorney-General* [1] that:

> 'We are not speaking of rules or principles in the law; we are speaking of persons of flesh and blood, of persons in pain, of living and breathing persons who come before us for judgment' (*ibid.* [1], at p. 88).

Indeed, 'the best interests of the adoptee' place the 'adoptee' at the centre of the stage. He is a specific adoptee, an individual, who lives and breathes. He is not the abstract and theoretical adoptee. Notwithstanding, within the framework of the best interests of the specific adoptee, we cannot limit ourselves merely to the relationship between him and his (biological and adoptive) parents, but we must contemplate the whole world of the child, in the present and the future. We must take into account all of the relevant circumstances. These circumstances reflect the world of the child, in the present and the future, with all that this entails. It should not be said that the only circumstances that should be taken into account are the circumstances that concern his relationship with his parents; it should also not be said that the only circumstances that should be taken into account are the attitudes of society. Both of these should be taken into account, along with the reality of the life of the specific child. In so far as a conflict exists between the internal familial considerations and the external societal considerations, a balance should be struck between them. We should not say from the outset, without examining all aspects of the picture, that 'societal' considerations always take precedence. The court is the 'father of orphans' (Babylonian Talmud, *Gittin* 37a [46]). The child whose case is under consideration is like the child of the court. That is how he should be regarded, as a unique person, a world in himself, with the special circumstances of his life. General outlooks and

preconceived assumptions do not befit the sensitive treatment that is required in such matters as the adoption of children. Each case is a new case. Each case should be decided on its merits.

16. This approach was well expressed in the judgment of Lord Hope in *Re AMT* [44]. In that case the trial judge refused to make an adoption order because of the sexual orientation of the person seeking to adopt the child. The Court of Session (the supreme civil court in Scotland) allowed the appeal. Lord President Hope wrote:

> 'In my opinion the short answer to the concerns which the Lord Ordinary has expressed on this point is that the present case raises no such fundamental question of principle. Section 6 of the 1978 Act states that, in reaching any decision relating to the adoption of a child, the court shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood. There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the welfare of the child. Issues relating to the sexual orientation, life style, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child. The suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship finds no expression in the language of the statute, and in my opinion it conflicts with the rule which is set out in section 6 of the Act.'

The same is true in our case. It cannot be said *a priori* that because of the homosexuality of the appellants, adoption be them will not be in the best interests of the adoptee. Each case should be considered on its merits; each case should be considered according to its circumstances. I accept that the attitudes of society with regard to the effect of a single-sex couple on the best

interests of the adoptee is a part of the circumstances. But they are not the whole picture. They are certainly not the sole consideration within the framework of s. 25 of the Adoption Law.

17. In the absence of details, I do not wish to adopt any position with regard to the question whether in the circumstances of the case before us the condition of 'the best interests of the adoptee' provided in s. 25 of the Adoption Law is satisfied. I will merely say the following: the question that the Family Court will need to decide is not whether it is preferable that each of the children should be adopted by a man (who lives with their mother, either as a married couple or as publicly recognized partners) or by one of the appellants (who lives with their mother as her publicly recognized partner). The real question before the Family Court is whether each of the children should continue to live in the single-sex family in which he lives without an adoption order being made, or whether they should continue to have the same family life with an adoption order being made. This is the true dilemma in the case before us. It is different, from this viewpoint, from other cases where the biological mother 'is no longer in the picture' (whether because she agrees to adoption or because she fulfils one of the conditions provided in s. 13 of the Adoption Law), and a choice must be made between a homosexual adoptive family and a heterosexual adoptive family, or between adoption by a single adoptive parent who is homosexual and adoption by a single adoptive parent who is heterosexual. In each of these situations the considerations are different; in each of them the court must confront different considerations that concern the requirement of 'the best interests of the adoptee' that is provided in s. 25 of the Adoption Law.

*'Special circumstances'*

18. My colleague Vice-President E. Mazza determined in his opinion that not only do each of the appellants not satisfy the requirement provided in s. 25 of the Adoption Law with regard to the 'best interests of the adoptee,' but they also do not satisfy the condition of 'special circumstances.' My colleague writes:

> '… the condition that requires the existence of "special circumstances" is a condition that contains an internal system of checks and balances. On the one hand, it allows the court a degree of flexibility in special cases, where the circumstances in its opinion justify a departure from the strict conditions of the law. On the other hand, it places on the court restrictions that derive from the legislative purpose of the Adoption Law… Consideration of the case before us has led me to the conclusion that the adoption requested by the appellants is not consistent with the purpose of the law, and it follows that in our case there are no "special circumstances" as required by s. 25(2) of the law' (para. 16).

According to my colleague, 'recognition of the right of a single-sex couple to adopt a child' (para. 17) is not implied by the subjective purpose of the law. It 'was not even considered by the legislature' (*ibid.*). Similarly, it does not derive from the objective purpose of the law, since it involves the court adopting a principled position with regard to the status of single-sex couples and the question of their right to adopt children. It is not part of the objective purpose of the Adoption Law that, within the framework of the requirement of 'special circumstances,' the court should give 'the first fundamental recognition of its kind with regard to the existence of a family unit that the legislature has not yet seen fit to recognize' (para. 20). This leads to the conclusion of my colleague, Vice-President E. Mazza, that:

> '… the words "special circumstances" in s. 25 of the law cannot be interpreted in a manner that will recognize — even if only indirectly and by implication — the legal status of single-sex couples' (para. 21).

19. I do not accept at all my colleague's interpretation of the phrase 'special circumstances.' My colleague Justice D. Beinisch rightly pointed out that s. 25 of the Adoption Law provides an exception that:

> '… leaves a broad opening for the discretion of the court when it decides what are special circumstances… Since the legislator did not see fit to make a firm determination and define the nature of the considerations, the decision on the question of the proper balance between the exception and the rule — i.e., what are the "special circumstances" — remains with the court' (CA 7155/96 *A v. Attorney-General* [6], at p. 169).

Naturally, this discretion — like all judicial discretion — is not absolute. It is restricted to realizing the purpose of the Adoption Law. This purpose was in the past and is today, first and foremost to ensure that an adoption order — after it is determined that the child is adoptable — will be made if the adoption is 'in the best interests of the adoptee.' Indeed, the best interests of the child are a supreme principle. This principle is enshrined in art. 3(1) of the United Nations Convention on the Rights of the Child ('In all actions concerning children… the best interests of the child shall be a primary consideration': see CFH 7015/94 *Attorney-General v. A* [2], at pp. 66, 96; this convention has influence in Israel: see the Providing Information concerning the Effect of Legislation on Children's Rights Law, 5762-2002). This principle is sometimes given express constitutional expression (see s. 28(2) of the Constitution of South Africa: 'A child's best interests are of paramount importance in every matter concerning the child'). In Israel the principle of the best interests of the child are 'a principle that is second to none' (Justice M. Silberg in CA 209/54 *Steiner v. Attorney-General* [18], at p. 251). The remarks made by Justice M. Cheshin in one case are illuminating:

> 'Who is greater than the Rishon LeZion, Rabbi Bakshi-Doron, the Chief Rabbi of Israel and the president of the Great Rabbinical Court, who wrote to the court in Barcelona an opinion on the question of a rebellious wife [quoting from the letter]:
>
> > "7. I should point out and emphasize: according to civil law and Jewish religious law in the State of Israel, questions concerning the rights of parents

> and their children are decided solely, without exception, in accordance with the principle of the best interests of the child, which serves as a supreme principle under Jewish religious law and the laws of the State of Israel, and is equally binding in all the religious and civil courts."

If we add to these remarks, we will merely detract from them. Therefore we will not add to them' (HCJ 4365/97 *A v. Minister of Foreign Affairs* [19], at para. 39).

This is the case in general. It is especially true of the Adoption Law (see the remarks of Justice D. Dorner in CA 3978/94 *A v. B* [20], at p. 144: 'The principle of the best interests of the child has a supreme status: see s. 1(b) of the Adoption Law'). This is also the case when making the strict rules of competence to adopt more flexible by means of the provisions of s. 25 of the Adoption Law. Justice I. Englard wrote in CA 1165/01 *A v. Attorney-General* [1]:

> 'The intention of the legislature was to make the general requirements flexible when it is in the best interests of the adoptee to do so and when there are special circumstances. I do not see any conflict in principle between availing ourselves of the possibilities of being flexible under s. 25 of the law and the basic requirements of adoption. A departure from the general requirements is conditional upon the existence of special circumstances and giving the reasons for this in the decision of the court. The decisive test is the best interests of the adoptee' (*ibid*. [1], at p. 77).

Therefore, the 'special circumstances' must relate to the specific child with regard to whom an adoption order is being sought. The question is not whether there are 'special circumstances' for the adoption of a theoretical' child; the question is whether there are 'special circumstances' for the adoption of the specific child who stands before the court. Within this

framework, I accept that the circumstances should be 'special.' The 'ordinary' circumstances required for making an adoption order are insufficient. I discussed this in CA 1165/01 *A v. Attorney-General* [1], where I said:

> 'The second condition is that there are "special circumstances" (the first part of s. 25). These circumstances also concern the best interests of the child but they provide additional requirements in addition to the general requirement provided in s. 1(b) of the law.'

Notwithstanding, the special circumstances always need to relate to the specific child and to his material and social world, and not to considerations that are foreign to this viewpoint.

*Subjective purpose*

20. My colleague Vice-President E. Mazza says, with regard to the subjective purpose ('the intention of the legislator') that:

> '… the recognition of the right of a single-sex couple to adopt a child was not even considered by the legislature' (para. 17).

I am prepared to agree with this, even though we have no real information to support this and all that we have are assumptions and guesses. But the legal question is not what were the images that the Knesset members were thinking of when the law was enacted (the interpretive intention; the outcome intention; the practicable intention: see R. Dworkin, *A Matter of Principle* (1985), at p. 48; see also FH 36/84 *Teichner v. Air France Airlines* [21], at p. 619). The legal question is what is the abstract subjective purpose ('the intention') that was considered by the Knesset members when the law was enacted. I discussed this in one case, where I said:

> 'The judge tries to ascertain from the legislative history the purpose of the legislation — he does not try to ascertain from it the interpretive outlooks of the Knesset members, and how they understood or interpreted a concept or expression or how they would resolve the legal problem that is before the judge' (HCJ

> 142/89 *Laor Movement v. Knesset Speaker* [22], at p. 544; see also A. Barak, *Purposive Interpretation in the Law* (203), at p. 172).

Therefore the question that should be asked in the appeal before us is not whether the Knesset members that enacted the Adoption Law thought that there might be 'special circumstances' in which an adoption order would be made in favour of a single-sex partner. The question that should be asked in the case before us is what is the (general) purpose that the Knesset members sought to realize when they required 'special circumstances.' The answer to this is that they sought to make the strict provisions of the law more flexible, in order to realize the 'best interests of the adoptee' in special circumstances. This purpose can of course also be realized in a specific case by making an adoption order in favour of a same-sex partner, if the circumstances so justify, and if the circumstances that justify this are special ones. These determinations fall within the scope of the discretion given to the judge within the framework of s. 25 of the Adoption Law.

*Objective purpose*

21. The main reasoning of my colleague, Vice-President E. Mazza, is based on the objective purpose. From this he deduces that it was not the purpose of the Adoption Law to allow, by means of s. 25 of the Adoption Law, a recognition of the legal status of single-sex couples. According to my colleague's approach:

> '… granting the application of the appellants will necessarily be interpreted — and in my opinion cannot but be interpreted — as recognizing the right of single-sex couples to adopt a child, or at least for one partner to adopt the children of the other' (para. 19).

My colleague goes on to say that:

> '… we are not being asked to decide the individual case where there are "special circumstances" — in so far as the appellants

> purported to present their case — but a general category of cases that have similar circumstances' (*ibid*.).

In my colleague's opinion, this decision is not consistent with the objective purpose of the Adoption Law (*ibid*.). My colleague writes:

> 'The principle of the separation of powers, and the special sensitivity of the issue brought before us, require us to act in this case with caution and restraint. In addition, according to first principles it is correct to allow the legislature to establish the primary arrangement on this subject' (para. 11).

Later in his opinion my colleague Vice-President E. Mazza says:

> '… the question whether (and in what cases) we should recognize the right of single-sex couples to adopt a child is the concern of the legislature. The principle of the separation of powers, as well as the character and complexity of the subject, leads me to think that the court should refrain from creating and granting, by means of case law, a new legal status… there are cases, albeit rare ones, in which the court should refrain from deciding an issue that comes before it, and this should, because of its nature, be left to the legislature… the question of the recognition of the right of single-sex spouses to adopt a child is included among those matters that the court should leave to the legislature' (para. 21).

I do not accept this approach of my colleague at all, and this is for four cumulative reasons.

22. *First*, we have not been asked to recognize the right of single-sex couples to adopt children in principle. In the appeal before us there is no argument that the appellants are competent to adopt two children jointly. The contrary has been expressly stated. Indeed, the application that was filed was the separate application of each of the appellants to adopt, as a single adopter, the child of the other. The relationship between the biological mother and the woman seeking to adopt her child is relevant before us only to the extent that

it affects the best interests of the child or whether there are special circumstances that justify the adoption. The same problem would arise if the biological mother did not have parental capacity and the person seeking to adopt her child was a lesbian woman with no relationship between her and the biological mother. Would the claim that we are being asked to recognize in principle the right of same-sex couples to adopt children be raised in that case too? I think that the answer is no (see M. Strasser, 'Adoption and the Best Interests of the Child: On the Use and Abuse of Studies,' 38 *New Eng. L. Rev.* 629 (2004)). The sexual orientation of the person seeking to adopt should not be examined on a principled basis but on a case by case basis, to discover whether adoption by her is in the best interests of the adoptee and whether there are special circumstances for making an adoption order in favour of a single adopter. The same is true here. The intimate relationship between the biological mother and the person seeking to receive an adoption order in favour of a single adopter — the fact that they are a single-sex couple — is a fact that should be taken into account in the adoption of a single person. It is not a normative fact; it does not make an adoption by a single person into a joint adoption; it does not create a legal status that did not exist previously; it does not recognize a single-sex couple as 'a man and his wife'; it does not involve any recognition of either of them as the 'spouse' of the other (within the meaning of these concepts in s. 3(1) of the Adoption Law). All that it involves is taking into account the personal details within the framework of an individual determination with regard to the best interests of the adoptee and with regard to the existence of special circumstances for making an adoption order for a single adoptive parent — not for making an adoption for a single-sex family. Of course, within the framework of this taking account of personal details, weight should be given to the nature of the family in which the child is living. The homosexuality of this family is an important fact that should not be ignored. Notwithstanding, taking this fact into account does not amount to a recognition of a new legal status.

23. It is clear and obvious that the Adoption Law limited the possibilities of 'adoption by a single person.' When a single adopter wishes to adopt the

minor child of his same-sex partner, we assume that he does not fall within the scope of the rule provided in s. 3 of the Adoption Law. He must satisfy the requirements of s. 25 of the Adoption Law, i.e., that the adoption order is in the best interests of the child and there are special circumstances. The same is true in any other case of adoption by a single person, such as the adoption of a minor child by a publicly recognized partner in a heterosexual relationship. Even in such a case we assume that we are concerned with adoption by a single person, which requires the conditions provided in s. 25 of the Adoption Law to be satisfied. Indeed, the Adoption Law makes a clear distinction between the general approach to adoption by a single person and the exceptions thereto. Our assumption is that the case before us, as well as the cases of heterosexual publicly recognized partners, are exceptional cases. With regard to these cases, I wrote in CA 1165/01 *A v. Attorney-General* [1]:

> 'One might ask the question: what is the difference between the case before us, where we are leaving the fundamental question of the status of publicly recognized couples open, and the case where we would positively determine that publicly recognized couples fall within the scope of s. 3 of the law? The answer is that were we to make such a determination, all that would remain would be to decide the question whether making an adoption order is in the best interests of the adoptee (s. 1(b) of the law). Now… we must also determine that in the case before us there are "special circumstances" as required in s. 25 of the law' (*ibid*. [1], at p. 85).

It follows that I accept that in the Adoption Law in general, and in s. 25 of the Adoption Law in particular, there is no general principle that the best interests of the adoptee are sufficient for making an adoption order in favour of single-sex partners or heterosexual publicly recognized partners. All that the Adoption Law provides is that making an adoption order for an adoption by a single person and for an adoption within the framework of a single-sex couple or within the framework of publicly recognized partners in a heterosexual relationship requires two conditions: that it is in the best

interests of the adoptee and that there are special circumstances. These conditions are not determined with a view to a hypothetical and abstract child. These conditions are determined with a view to the specific and particular child.

24. When considering the 'special circumstances' in the case of a specific and particular child, and when making an adoption order where such circumstances exist, there is no basis for adopting a principled position with regard to the status of single-sex couples as a rule, or with regard to the status of heterosexual publicly recognized couples in general. All that the court considers is the 'specific' circumstances of a specific child, while focusing on those circumstances that are 'special.' The fact that the biological parent and the person seeking to adopt are involved in a single-sex relationship or a heterosexual relationship is merely one of the circumstances in the complete picture. It is not an essential condition; it is not a sufficient condition; it is not a general condition. Everything depends upon the sum total of all the circumstances, and the nature of the relationship — homosexual or heterosexual — is one of those circumstances that should be taken into account. I cannot accept the approach of my colleague that if we recognize the existence of 'special circumstances' in the cases before us, this will amount to the 'adoption of a principled position by the court with regard to the status of single-sex couples and the question of their right to adopt children' (para. 19). Indeed, recognition of the existence of 'special circumstances' will need to take into account a whole range of circumstances, including the fact that the biological mother and the person seeking to adopt her child are a single-sex couple. Recognition of the existence of 'special circumstances' in a specific case does not involve the 'adoption of a principled position by the court with regard to the status of single-sex couples and the question of their right to adopt children,' just as refusing recognition in a specific case does not involve the adoption of a contrary principled position. We are not concerned, in the context of s. 25 of the Adoption Law, with principled positions; we are not concerned with the principled question of the right to adopt children. We are concerned, in the context of s. 25 of the

Adoption Law, with a specific case; we are concerned with the competence of specific single adopters to adopt specific children.

25. In CA 1165/01 *A v. Attorney-General* [1], my colleague Justice M. Cheshin addressed the argument of the Attorney-General that there was a concern that a decision in favour of the appellant in that case (the heterosexual publicly recognized partner) would lead — almost automatically — to adoption by single-sex couples, which is an adoption that, in the opinion of the Attorney-General, is undesirable. Justice M. Cheshin rejected this argument. My colleague wrote:

> 'This argument is unfounded, if only for the reason that the conflicting interests in a situation involving a single-sex couple… are different from the conflicting interests in the case before us. As we have said more than once, in every case and in every matter we are obliged to examine the strength of the relevant interests, and the decision in one case cannot affect the decision in another case. Each case involves different interests, and our case is not like the case of a single-sex couple (without our expressing any opinion on that issue). There are interests of the individual and there are interests of the public, and each case is unique. We will not say — we are not permitted to say — that whoever regards himself as needing to adopt should be allowed to adopt even if he does not satisfy the conditions of s. 3(2) of the Adoption Law. As the law says in the first part of s. 25, the best interests of the adoptee are paramount, but they are not sufficient in themselves; there is an additional need for special circumstances and reasons that the court will state in its decision. Each case should be considered on its merits and every interest should be examined to determine its importance' (*ibid*. [1], at p. 82).

I agree with these remarks. 'Each case should be considered on its merits and every interest should be examined to determine its importance.' When we examine the case of the appellants, and when judicial discretion is exercised

to determine whether on the basis of all of the evidence the conditions of s. 25 of the Adoption Law are satisfied, we should also examine the fact that we are concerned with a single-sex couple. We cannot say, *ab initio* and *a priori*, that the homosexuality of the biological mother and the single adopter prevents, in all cases, the existence of the special circumstances; in the same degree, it cannot be said that it satisfies, in all cases, the existence of the special circumstances. Each case should be considered on its merits, and every interest should be examined to determine its importance. In all cases we should consider the 'circumstances,' and we should not exclude from the scope of the 'special circumstances' a whole category of cases where there is a homosexual relationship between the biological parent and the person seeking to adopt.

26. *Second*, my colleague's approach that we should not act within the framework of s. 25 of the Adoption Law, because applying it would amount to recognition of a new legal status that has not yet been recognized, was expressly rejected by this court in CA 1165/01 *A v. Attorney-General* [1]. It will be recalled that in that case the Attorney-General argued that the court should not apply s. 25 of the Adoption Law since the legal status of publicly recognized partners would thereby be recognized. In rejecting this argument, Justice Englard wrote:

> 'And if someone were to argue that the adoption under discussion involves an undermining of the institution of marriage because it extends the recognition of the status of a publicly recognized partner by considering her as if she were married, it would appear that this is not the case, since an absolute condition in s. 3(2) of the law is that the single adoptive parent is unmarried. Were he considered to be married, s. 3(1) of the law would apply. It follows that the reliance on s. 3(2) of the law involves a determination that the adoptive parent is not considered a married person. It follows that the aforesaid concern — even for someone who has such a concern — does

> not exist in the circumstances of the case before us' (*ibid.* [1], at p. 77).

The same applies in our case. We are not determining a rule that a single-sex couple constitutes 'a man and his wife together'; we are not being asked to make a joint adoption order. We are concerned with an adoption by someone who is not married. Recognition thereof in the specific case before us does not involve any fundamental recognition of the right of single-sex couples to adopt a child; it also does not involve a recognition that each member of a single-sex couple is the 'spouse' of the other for the purposes of s. 3(1) of the Adoption Law. Our judgment does not contain any determination, implication or hint of status. Justice I. Englard further says:

> 'I see no basis in the law for preventing this woman from relying on the alternative path found in the provisions of s. 3(2) of the law, in combination with the provisions of s. 25 of the law, where the fulfilment of the conditions required therein is proved. In other words, I see no basis in the law that justifies discriminating against this woman and punishing her merely because she lives together with the father of the girl. The decisive test is, as aforesaid, the best interests of the adoptee, in all its aspects' (*ibid.* [1]).

The same is true here, if we adapt the remarks of Justice I. Englard to the case before us. I see no basis in the law for preventing the single-sex partner of the biological mother from relying on the alternative method found in the provisions of s. 3(2) of the law, in combination with the provisions of s. 25 of the law, where she proves that the conditions required therein are satisfied. In other words, I see no basis in the law that justifies discriminating against this woman and punishing her merely because she lives together with the child's mother. Similarly, I see no basis in the law that justifies discriminating against the child and punishing him merely because of the lifestyle of his mother. The decisive test is, as aforesaid, whether the adoption if in the best interests of the adoptee, in all its aspects, and whether there are special circumstances. And if someone were to argue that the adoption under

discussion involves an undermining of the institution of marriage because it extends the recognition of the status of publicly recognized partners of the same sex as if they were married, it would appear that this is not the case, since an absolute condition in s. 3(2) of the law is that the single adopter is unmarried.

27. My colleague, Justice M. Cheshin, adopted a similar approach in CA 1165/01 *A v. Attorney-General* [1], where he said:

> 'We are speaking solely with regard to the circumstances of the case before us, and therefore we should reject the Attorney-General's argument that the decision that we are making is tantamount to our attributing to the legislature the recognition of "publicly recognized partners." It is nothing of the kind.
>
> We are not speaking of rules or principles in the law; we are speaking of persons of flesh and blood, of persons in pain, of living and breathing persons who come before us for judgment' (*ibid.* [1], at p. 80).

The same is true of our case. We are speaking solely of the circumstances of the case before us. We do not attribute to the legislature the recognition of single-sex couples. We are not speaking of rules or principles in the law; we are speaking of persons of flesh and blood, of persons in pain, of living and breathing persons who come before us for judgment.

28. This determination should not be regarded lightly. In a long line of cases this court has repeatedly held that the situation of 'publicly recognized partners' does not create a new legal status (see CA 2000/97 *Lindorn v. Karnit, Road Accident Victims Fund* [23], at p. 35). It was argued that recognizing an adoption by a publicly recognized partner who adopted the daughter of her publicly recognized partner would give a legal status to publicly recognized partners. The argument was rejected, and rightly so. The same argument is raised before us with regard to publicly recognized partners of the same sex. Here too the argument should be rejected, for the same reasons.

29. *Third*, I accept my colleague's approach that in principle the recognition of a new legal status — whether it is a status of civil marriage or a status of a single-sex family — should be the concern of the legislature and not of the court. My approach in this matter is derived from my fundamental outlook that:

> 'As a rule, a judge should not regard himself as the standard bearer for a new social consensus. He should give expression to basic values that are recognized in his society, and not create them' (A. Barak, *A Judge in a Democracy* (2004), at p. 47).

This outlook is of a principled character. Within its framework, there is a basis for recognizing exceptions that are required in order to 'discover what is principled and fundamental, while rejecting what is temporary and fleeting' (HCJ 693/91 *Efrat v. Director of Population Register, Ministry of Interior* [24], at p. 780). Indeed —

> 'The social consensus within which the judge should operate is a consensus based on the fundamental values of society. This is the consensus to the principle of democracy. The judge should not operate within the framework of a social consensus that reflects passing trends. The judge should operate within the framework of what is central and fundamental. He should refrain from operating within the framework of what is temporary and fleeting. When society is not true to itself, the judge is not liable to give expression to passing trends. He should oppose them. He should give expression to the social consensus that reflects the basic principles and the credo of the society in which he lives and operates' (*ibid.* [24], at p. 149).

30. In the appeal before us we are not required to examine whether this approach is proper or not, and we can leave this undecided. The reason for this is that in the appeal before us we are not called upon to recognize a new legal status; we are not required to recognize a legal status of a single-sex family; we are not required to depart from the social consensus. All we called

upon to do in the appeal before us is to give expression to the social consensus that reflects our basic values according to which an adoption order will only be made if it is in the best interests of the adoptee. This is the sole fundamental aspect that arises in the appeal before us, and it lies entirely within the framework of the social consensus in Israel. Indeed, if the legislature is of the opinion that the principle of 'the best interests of the adoptee' should not apply with regard to a single-sex family, it should say so, and we will be required to examine whether this statement is constitutional (cf. *Du Toit v. Minister of Welfare and Population Development* [45]; *Re K and B* [41]; *Fretté v. France* [43], which concern the question of the harm to constitutional values such as human dignity and the right to equality). This is the proper judicial approach. It was expressed by Lord Weir in *Re AMT* [44], where he wrote:

> '… Views on this type of adoption application no doubt differ, but I am firmly of opinion that on a question of this kind it is for Parliament and not for judges (who would after all be at risk of expressing an individual preference) to pronounce a verdict. If it is the wish of the legislature that adoption by homosexuals should be barred, then that is a matter for Parliament, but as far as the court is concerned the provisions of the Act of 1978 have to be followed and under present law no such prohibition exists. The court must therefore proceed on a case-by-case basis. In doing so, the court proceeds under the very clear guidance of section 6 of the Act of 1978 which requires it, in reaching any decision, to have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood. Among the circumstances to which regard must be had will be the suitability or otherwise for one reason or another of the adoptive parent or parents and in that connection no hard and fast rules can be laid down' (*ibid.* [44], at p. 14).

A similar approach was adopted by Justice Singer in *Re W (a minor)* [42]. In that case, the natural parents refused to consent to their child being adopted by a single adopter. According to the relevant law, it was possible to declare the child adoptable if the refusal of the parents was unreasonable and it was possible to give him over for adoption to a single adopter if this was in the best interests of the child. It was argued, *inter alia*, that the refusal was reasonable because the person seeking to adopt was a single homosexual person in a homosexual relationship with a partner. The court rejected this argument. The judge wrote:

> 'This spectrum of approach over a relatively short span of years warns me clearly how unruly is the horse of public policy which I am asked to mount, and upon what shifting sands I would be riding if I did so. I have formed the firm conclusion not only that the Act cannot be construed in so restricted and discriminatory a fashion as is proposed, but also that public policy considerations should not fall within the province of judges to define within this sphere. If there is to be a line drawn as a matter of policy to prevent homosexual cohabiting couples or single persons with homosexual orientation applying to adopt, then it is for Parliament so to conclude and with clarity to enact. But at the moment the 1976 Act is drawn in words so wide as to cover all these categories. If that conceals a gap in the intended construction of the act then it is for Parliament and not the courts to close it' (*ibid*. [42], at pp. 625-626).

Many of the courts that have dealt with this question have adopted a similar approach. Naturally, the problem does not arise if statute expressly provides that adoption should not be allowed in the case of a single-sex couple (such as in the State of Florida in the United States, which is the only state in the United States that has this practice). Similarly, the problem before us would not arise if statute expressly provides that the sexual orientation of the person seeking to adopt is of no relevance (as was provided recently in England: see ss. 49, 50 and 144(4) of the Adoption and Children Act 2002)

(see C. Bridge and H. Swindells, *Adoption: The Modern Law* (2003), at pp. 98, 195). The interpretive question before us arises in those states such as Israel where the adoption law can be interpreted as allowing, in certain conditions, an adoption in the case of a single adopter in a single-sex couple. In the situations the courts were, of course, aware of the outlooks that prevail among the public. It was also argued before them that adoption within the framework of a single-sex couple would be interpreted as adopting a principled position on the part of the courts with regard to the status of single-sex couples. Notwithstanding, they were not influenced by these arguments, and they directed their attention to the supreme principle of the best interests of the child. Thus it was held in the Supreme Court of the State of Vermont (*per* Justice Johnson) in *Adoption of B.L.V.B. and E.L.V.B.* [34], at p. 1276:

> '… our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being.'

In that case it was held — on the basis of the factual basis presented in the trial court and the extensive literature brought before the court — that the interests of the children justified making an adoption order. In other cases, the result could be different. The approach must be a pragmatic, not a principled one. We are not concerned with a single-sex family that is seeking the state's recognition by means of the adoption order. We are concerned with a child who is seeking recognition of his interest by means of an adoption order in favour of a single adopter who constitutes a part of a single-

sex family. The remarks of Justice S. Rotlevy, who was in the minority in the judgment of the District Court, are illuminating:

> 'I am not required to decide the question of giving a licence for a single-sex marriage; I must decide how to find a just solution for the three children, who have no alternative of another family unit other than the family unit into which they were born and in which they are living… By making an adoption order in the circumstances of the case before us, the court has absolutely no need to consider the question whether the single-sex relationship is desirable or undesirable. By making an adoption order in the circumstances of the case before us, the court merely gives legal validity to the parental relationship and closeness that exists between them' (paras. 4.11 and 7.2 of the opinion).

31. *Fourth*, my colleague's position denies each of the appellants in principle the competence to adopt as a single person the child of the other merely because the relationship between them is a homosexual one. Thereby the court adopts a principled position in a matter that my colleague himself thinks should be left to the legislature. Indeed, my colleague's position is that 'the question whether (and in what cases) we should recognize the right of single-sex couples to adopt a child is the concern of the legislature' (para. 21). If so, why does my colleague decide this question? Why does he deny the application of the appellants without considering it on its merits, merely because of the principled position that he himself says the court ought not to adopt? Indeed, this is the difference between my colleague's approach and my approach. Whereas my colleague bases his determination on a principled basis, which rejects adoption by a single person where the adoptive parent is engaged in a single-sex relationship with the natural parent, my approach distances itself from any such principled value-based determination. The only principled value-based determination is the best interests of the adoptee, which is made while examining whether there are special circumstances. The homosexual relationship is also taken into account, not as a principled value-based factor that rules out competence to adopt, but as an objective factual

criterion for determining the best interests of the adoptee and the existence of special circumstances in each specific case. The proper interpretive approach is therefore 'internal' and not external.

32. In the absence of the facts, I do not intend to adopt a position even with regard to whether the condition of 'special circumstances' provided in s. 25 of the Adoption Law is satisfied in the case before us. I will merely point out that it should not be assumed that the condition of 'the best interests of the adoptee' is identical with the condition of 'special circumstances.' The best interests of the adoptee is the rule. The special circumstances indicate, within this rule, those cases that justify the making of an adoption order in accordance with the exceptional conditions of s. 25. These circumstances may be of different kinds. In our case, it can be assumed that they will include, *inter alia*, the existence of a current relationship between the adopter and the adoptee, the period of time during which this relationship has continued and the strength of the relationship. My colleague, Justice D. Beinisch, addressed this issue in the context of s. 25(1) of the Adoption Law, and her remarks are also pertinent to our case:

> 'Indeed, the test whether there is a parent-child relationship should lie at the heart of the discretion of the court in Israel when it considers whether, in the case before it, there are special circumstances within the meaning of that term in s. 25 of the Adoption of Children Law' (CA 1165/01 *A v. Attorney-General* [1], at p. 181, and also at pp. 182-183).

In this general category weight may also be attributed to the legal status that has already been given to the relationship, in the context of the law of guardianship. These and other circumstances may, when taken together, be considered sufficiently 'special' that they justify adoption under s. 25.

*Individual internal interpretation*

33. The proper approach, in my opinion, is an interpretive approach that is an individual internal one. Because it is internal, it is made in its entirety within the framework of s. 25 of the Adoption Law. Because it is individual,

it examines the competence of the single adopter before the court and the best interests of the adoptee before the court, and the existence or absence of special circumstances for recognizing the competence of the person applying for adoption. The examination is a holistic one. Every aspect of the best interests of the child is taken into account. His best interests are examined with regard to the continuity of his life, in the present and the future. Within this framework, we should also take into account the fact that the person applying to adopt the child and the mother of the child are involved in a homosexual relationship. What is the relevance of this fact?

34. There are some who think that this fact is of no relevance to the best interests of the adoptee. According to this approach to the best interests of the adoptee, there is no difference between a heterosexual single adopter and a homosexual single adopter, and a homosexual relationship is the same as a heterosexual relationship. This approach is based on extensive scientific literature which has examined the best interests of adopted children who live with homosexual adoptive parents and compared it with the best interests of adopted children who live with heterosexual adoptive parents (married or unmarried). This literature examines the various claims made against adoption within the framework of a single-sex couple, one by one, and rejects them as being based on prejudices and stereotypes and as having no scientific basis. The position of the American Psychological Association in 1995 is characteristic in this regard:

> 'Not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents' (C.J. Patterson, 'Lesbian and Gay Parents and their Children: Summary of Research Findings,' in: American Psychological Association, Lesbian and Gay Parenting, APA Online, 1995, at p. 15).

A similar statement was published by the Canadian Psychological Association in 2003 (see Canadian Psychological Association, *Press Release: Gays and Lesbians Make Bad Parents: There is No Basis in the Scientific*

*Literature for this Perception*, 6 August 2003).[1] Similar findings were also included in a report of the American Academy of Pediatrics:

> '… the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with one or more gay parents' (E.C. Perrin and Committee on Psychosocial Aspects of Child and Family Health, 'Technical Report: Coparent or Second-Parent Adoption by Same-sex Parents,' 109 *Pediatrics* (no. 2) 341 (2002)).

This approach is a consistent one that appears in a long line of research in various countries. The following is a sample list: Herek, 'Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research,' 1 *Law and Sexuality* 133 (1991); C.J. Patterson, 'Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective,' 2 *Duke Journal of Gender Law and Policy* (vol. 1) 191; M.S. Peltz, 'Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights,' 3 *Mich J. Gender & L.* 175 (1995); J.F. Davies, 'Note, Two Moms and a Baby: Protecting the Nontraditional Family through Second Parent Adoptions,' 29 *New Eng. L. Rev.* 1055 (1995); W.E. Adams, 'Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children,' 30 *New Eng. L. Rev.* 579 (1996); K.M. Eichinger-Swainston, 'Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families,' 32 Tulsa L. J. 57 (1996); P.F. Strasser, "Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child,' 45 *Kan. L. Rev.* 49 (1996); F.L. Tasker and S. Golombok, *Growing Up in a Lesbian Family : Effects on Child Development*

[1] Published on the web at www.cpa.ca.

(1997); C.J. Patterson, 'Children of Lesbian and Gay Parents,' in T. H. Ollendick and R.J. Prinz (eds.), *Advances in Clinical Child Psychology* 235 (1997); S. Golombok, 'Lesbian Mother Families,' in A. Bainham, S. Day Sclater and M. Richards, *What is a Parent? A Socio-Legal Analysis*, at p. 163 (1999); J. Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' 12 *Aus. J. Fam. Law* 99 (1998). This approach has also been expressed in professional literature in Israel: see H. Goldschmidt, 'The Chequered Identity Card of an Israeli Family — Legal Ramifications of Case Law concerning Adoption by a Single-Sex Couple,' 7 *HaMishpat (The Law)* 217 (2002).

35. There is also another approach, according to which the case of a child adopted by a homosexual single adopter is different from that of one adopted by a heterosexual single adopter. This approach criticizes the various research works and indicates the flaws in them (see L.D. Wardle, 'The Potential Impact of Homosexual Parenting on Children,' 1997 *U. Ill. L. Rev.* 833; L.D. Wardle, 'Fighting With Phantoms: A Reply to Warring With Wardle,' 1998 *U. Ill. L. Rev*. 629; J. Stacey and T.J. Biblarz, '(How) Does the Sexual Orientation of Parents Matter,' 66 *Am. Soc. Rev.* (no. 2) 159 (2001); W.L. Pierce, 'In Defense of the Argument that Marriage Should be a Rebuttable Presumption in Government Adoption Policy,' 5 *J. L. Fam Stud.* 239 (2003); L.M. Kohm, 'Moral Realism and the Adoption of Children by Homosexuals,' 38 New Eng. L. Rev. 643 (2004); L.D. Wardle, 'Considering the Impacts on Children and Society of "Lesbigay" Parenting", 23 *Quinnipiac L. Rev*. 541 (2004)).

36. We are not required, nor are we able, to decide at this stage between the various approaches. The decision should be made, first and foremost, in the Family Court. It is before the Family Court that expert testimonies should be presented and the various research submitted (see M. Gallagher and J.K. Baker, "Do Moms and Dads Matter? Evidence From the Social Sciences on Family Structure and the Best Interest of the Child,' 4 *Margins* 161 (2004). These works of research should provide a clear picture, in so far as possible, as to how the homosexual relationship between the biological

mother and her life partner who wishes to adopt the child affects the child being adopted. It will also be appropriate to examine the attitude of the society in which the child lives on this relationship. I am not at all sure that the description of my colleague, Vice-President E. Mazza, in this regard — which is not based on a factual basis that was presented to us — reflects Israeli reality. The Family Court will also examine the question whether the attitude of society is capable of influencing the best interests of the child in the future. Is there a better alternative? Will the position of the child (in the present and in the future) be better or worse if the adoption is not recognized? These questions and many others should be presented before the Family Court. We should remember that the real question that the court will be required to decide is whether the given lifestyle of the appellants and their children will continue with an adoption order or without one. The Family Court will place these facts together with all the facts before it with regard to 'the best interests of the adoptee.' On the basis of all of the material before it, the Family Court will reach a conclusion as to the best interests of the children in the case before us, and whether there are 'special circumstances.' It will be a decision that concerns these children and their environment. If the matter comes before us in an appeal, we too will decide it. Our decision will of course affect subsequent cases. There will be no further need to refer to the old literature. There will, of course, be a basis for revising it. This is how matters have developed in other legal systems. The court proceeds from one specific case to another (see *Matter of Evan* [35]; *Adoption of B.L.V.B.* [34]; *Adoption of Tammy* [36]; *Adoption of Child by J.M.G.* [37]; *In the Matter of Jacob, an Infant* [38]; *Re K and B* [41]; *In Re Adoption of M.M.G.C.* [39]; *In Re Adoption of Infant K.S.P. & J.P.* [40]). This should also be the solution in the case before us.

*Other matters*

37. Before I end my opinion, I would like to comment on four issues: *first*, I accept the approach of my colleague, Vice-President E. Mazza, that there is no real reason, in the special circumstances of the case, not to publish the names of the appellants. In ordinary circumstances, this question should have

been left to the decision of the Family Court, which would be based on a specific consideration of the best interests of the children. But in our case we are speaking of a joint lifestyle that has existed for a very long time, and it practice it is known to everyone in the environment of the appellants and their children. In such circumstances, there is no longer any need to restrict the publication.

38. *Second*, s. 25 of the Adoption Law discusses, in so far as it concerns appeals before us, a departure from the provisions set out in s. 3 of the Adoption Law with regard to the making of an adoption order. It is clear that nothing in this provision is capable of influencing the question whether the child is adoptable. This question is determined in accordance with the usual rules, which involve the consent of the biological parents (ss. 8 and 10 of the Adoption Law) or the existence of one of the conditions provided in s. 13 of the Adoption Law (see the remarks of my colleague, Justice D. Beinisch, in CA 1165/01 *A v. Attorney-General* [1], at p. 186 ('When s. 25(1) made it possible to depart from the conditions provided in the Adoption Law, it contained no provision according to which the proceeding can be exempted from the provisions of s. 8(a) or the provisions of s. 13 of the law')). Only when it becomes clear that the child is adoptable, and the hearing passes on to the stage of making an adoption order, does the question underlying the appeal before us arise. This situation gives rise to practical difficulties, which my colleague Justice D. Beinisch discussed in CA 1165/01 *A v. Attorney-General* [1]. These difficulties arise in all the cases where the court is asked to apply s. 25 of the Adoption Law, and these are not limited to the case before us. Thus, for example, the question arises as to whether the proceeding under s. 25 of the Adoption Law will precede or follow the declaration that the child is adoptable. Is it possible to merge it — in a case where the mother consents to adoption by her partner and where the mother became fertile as a result of sperm from an anonymous donor — between the stage under s. 25 of the Adoption Law and the stage concerning the making of the adoption order? These and other questions require a solution, and the legislature should address them.

39. *Third*, in the normal situation, the adoption order 'terminates the duties and rights between the adoptee and his parents' (s. 16 of the Adoption Law). Obviously, there is no basis for applying this provision where the biological mother agrees that her child should be adopted by someone who lives together with her. How is this solution achieved? In this matter too we have no need to make a decision. It is possible that in such a case the provisions of s. 16 of the Adoption Law, in so far as the natural mother is concerned, do not apply. It is possible that there is a need for a specific determination by the judge making the adoption order that its consequences do not apply to the biological mother (as stated in s. 16(1) of the Adoption Law). An express legislative arrangement is also desirable in this regard. The absence of such an arrangement has caused major difficulties in several states in the United States. The difficulties should be prevented by means of an express provision in this regard.

40. *Fourth*, in CA 1165/01 *A v. Attorney-General* [1] I wrote:

> 'The time has come to amend the law — as well as other laws — and instead of "static" provisions that relate to a man and his wife, or spouses, there should be "dynamic" provisions that concern the objective circumstances that justify granting the right or the duty provided in the law… A real solution should be provided for a real problem, by circumventing ideological problems that are a subject of serious dispute and that have nothing whatsoever to do with the practical needs of "living and breathing" persons (to use the expression of my colleague Justice M. Cheshin)' (*ibid.* [1], at p. 85).

Let us hope that the Knesset will adopt this recommendation.

The result is that the appeal should be allowed; the judgments of the Family Court and the District Court are set aside; the case shall be returned to the Family Court, which shall decide it in accordance with what is stated in our judgment. The respondent shall be liable for the appellants' expenses in a total amount of NIS 20,000.

**Justice M. Naor**

I agree with the opinion of my colleague President A. Barak.

**Justice E. Rivlin**

I agree with the opinion of my colleague President A. Barak.

**Justice M. Cheshin**

A woman, whom we shall call A, is a mother to two boys, and no one knows who is their father. Another woman, whom we shall call B, is a mother to a boy, and no one knows who is his father. A and B live together as a couple, and the five of them — A, B and the three boys — live as one family. Each of the three children regards both A and B as a mother to him. The three boys each have two mothers. A and B are each applying to adopt the children of the other, and the application of each of them is made with the knowledge and the consent of the other. Assuming that all the other necessary preconditions are satisfied, is A competent, under the law, to adopt B's son, and is B competent to adopt A's sons? This is the question that has come before us for a decision.

2. I have before me the opinions of my colleagues, Vice-President Mazza and President Barak, and they are diametrically opposed. The Vice-President utterly rejects a possibility that A can adopt B's son as her own and that B can adopt A's sons as her own. By contrast, the President is not prepared to deny the appellants' application *in limine* and he does not rule out the possibility of an adoption by A and B. On the contrary, he is of the opinion that there is nothing in principle to prevent the adoption applications from being granted, and he wishes to postpone the decision on the merits of the applications filed by A and B until a thorough examination has been made by the court. I will confess, without shame, that in this case my thoughts have wavered, from one extreme to the other, in a way that has not happened for a

long time. This is not to be wondered at. The law that we are struggling to interpret is a short law; it is of insufficient dimensions to contain the emotional burden and the turbulent emotions involved in this case. When the law under discussion was enacted, the legislature never imagined that a day would come when society would need to contend with problems like the problem that is now before us. But the day has come. The result is therefore that, without intending to do so — literally without realizing it — the legislature has imposed upon us an interpretive task that is very close to legislation. And we are not permitted to shirk our duty to hear, consider and make a decision.

*The issue*

3. The relevant question is whether A and B, who are before us, are each 'competent' to adopt each other's sons. Like my colleagues before me, I too will begin with the provisions of the relevant law, which are the provisions of ss. 3 and 25 of the Adoption of Children Law, 5741-1981 (the law or the Adoption Law). The law, in these provisions, tells us the following:

'Competence of the adopter

3. Adoption may only be done by a man and his wife together; but the court may give an adoption order to a single adopter —

(1) If his spouse is the parent of the adoptee or adopted him previously;

(2) If the parents of the adoptee died and the adopter is one of the relations of the adoptee and is unmarried.'

'Power to depart from conditions

25. If the court finds that it is in the best interests of the adoptee, it may, in special circumstances and for reasons

that it shall state in its decision, depart from the following conditions:

(1) …

(2) The death of the adoptee's parents and the relationship of the adopter under section 3(2);

(3) …'

It is unnecessary to mention the provisions of s. 1(b) of the Adoption Law, but we will mention them nonetheless. This is the provision that lies at the heart of all the provisions of the law, and this is the provision that accompanies us wherever we turn in matters of adoption:

'Adoption order 1. (a) …

(b) An adoption order and any other decision under this law shall be made if the court finds that they are in the best interests of the adoptee.'

*Two preliminary remarks*

4. Before we become engrossed in the case before us, I would like to make two remarks, and these will accompany us continually upon our path. These remarks are not restricted to the question of adoption, but I think that in our present case they have special importance. We discussed these matters in CA 1165/01 *A v. Attorney-General* [1] — a case that also concerned adoption — and now we will add somewhat to the remarks we made there.

5. We are concerned with interpreting and determining the scope of various provisions of statute in the Adoption Law, and the relationship between those provisions *inter se*. With regard to this task of ours we say that when we are about to interpret a certain provision of statute, we must exercise — already at the beginning of the interpretive voyage — a special strength indicator, to measure the strength of the interest inherent in that provision. This strength indicator will serve as an essential tool for examining

and interpreting provisions of statute, especially when two provisions of statute find themselves, in specific circumstances, upon a collision course. The importance of this strength indicator is incalculable, and without it we are likely to lose our way. In CA 1165/01 *A v. Attorney-General* [1], at pp. 78-79, we spoke of strict and semi-strict provisions of the Adoption Law, and this classification is merely one of the aspects of the question of strength.

6. Moreover, there are three main interested parties in every adoption case: the biological parents (or one of them); the parents or the individual who are intended to be the adoptive parents; and the third, who is really the first and most important, the child who is intended to be adopted. In every decision required under the Adoption Law — including interim decisions — one or more of these interested parties are involved, directly or indirectly; and in each case we are required to identify, first and foremost, the interested parties involved, to identify the interests that they represent, and to discover the strength of each of the interests that are contending with one other and vying for supremacy. See also CA 1165/01 *A v. Attorney-General* [1], at pp. 80-81. A good example of the conflicting interests can be found in the question of the parental capacity of the biological parents in the interpretation of the provisions of s. 13(7) of the Adoption Law, as is well known. It need not be said that the law is also a main interested party in addition to the three other interested parties.

7. Against the background of these general remarks, let us look closer at the provisions of statute that are relevant to this case.

*The rule and the exceptions thereto*

8. There are three provisions that are relevant to the present case: the first part of s. 3 of the law; the exception thereto in s. 3(2); and the exception to the exception in s. 25(2) — the primary, secondary and tertiary provisions, respectively. In the primary provision, the law declares its credo in matters of adoption, and this is the general norm that governs matters of the 'competence of the adopter.' If this is the strength of the primary provision, the secondary and tertiary provisions — each in its own sphere — are

stronger than the primary provision; they are stronger and have greater power than the primary provision. And the tertiary provision is stronger and has a greater impact — in its own sphere — than the secondary provision. Indeed, this is the nature of an exception, that in its own sphere its strength and weight are greater than the strength and weight of the rule to which it is an exception. For the exception — as its name and character imply — is intended to give expression to what is different, special, exceptional, and such cases are more focused and starker than the cases of persons who are not special or different. We said of this in CA 1165/01 *A v. Attorney-General* [1], at p. 79:

> 'A law in intended for the commonplace, the ordinary, the average; and the need for flexibility is required in consequence, even if it is only in order not to trample the minority and the exceptional case… A rule that is based on the ordinary and the average is, by its very nature, likely to cause an injustice to someone who is neither ordinary nor average. This is why flexibility is required to adapt the rules — which were originally created for the ordinary and the average — to someone who is neither ordinary nor average.'

9. The primary provision informs us of the rule: 'Adoption may only be done by a man and his wife together.' Adoption, as a rule, is therefore done by a married couple. The purpose of this provisions of statute is obvious. In principle, the law wishes to give the intended adoptee a family in place of the one he never had; and a family is — according to the model stated in the law — a mother and father married to one another, together with their children. The law seeks to create for the intended adoptee a life that he has never had; just as a child usually has a mother and a father, so too will the intended adoptee have a mother and a father, a family. It is in the best interests of the child to receive what he has not received in the natural way. The law seeks to imitate nature and replace it. Thus we see that the best interests of the adoptee are the backbone of the provisions of the first part of s. 3 of the law. Indeed, all the provisions of the Adoption Law are steeped and

immersed in the best interests of the adoptee, but many provisions of the law also involve the interests of others, such as the interests of the biological parents. Unlike those provisions, the provisions of the first part of s. 3 of the law are concerned mainly with the best interests of the child, but we will not ignore the provisions of the law that the adoptive parents are specifically required to be a couple married to one another.

10. Now that we know that the interests of the intended adoptee are what breathe life into the provisions of the first part of s. 3 of the law, it is only natural that we turn to the exception to the rule. If the best interests of the child are what dictates adoption to be specifically 'by a man and his wife together,' we inherently know that where the best interests of the child require otherwise, the law will recommend adoption that is not necessarily by a man and his wife together. Indeed, this is what led to the provisions of s. 3(2) of the law — alongside the provisions of s. 3(1) — according to which the court may make an adoption order in favour of a single adopter:

> '… If the parents of the adoptee died and the adopter is one of the relations of the adoptee and is unmarried.'

Let us note that here, when determining the scope of the exception, the law provides what appear to be strict formal frameworks for the best interests of the intended adoptee. In other words, we are not speaking of the best interests of the child in a general sense as a guideline for making an adoption order in favour of a single adopter; the best interests of the child interest must find their place within the frameworks that the law provided, by satisfying (seemingly) strict preconditions, all of which as set out in s. 3(2).

11. The provisions of s. 3(2) of the law provide that three cumulative conditions should be satisfied before applying the exception that allows an adoption order to be made in favour of a single adopter: the adoptee's parents are dead; the adoptive parent is one of the relations of the adoptee; the adoptive parent is unmarried. If all three of these conditions are satisfied, the court may make an adoption order in favour of a single adoptive parent. If only one of these three conditions is not satisfied, the exception does not

apply. Each of the three conditions has its own logic, and the best interests of the adoptee are what dictate it. At the same time, we agree — for how could we do otherwise — that the legal framework created by the legislature for the best interests of the adoptee is *prima facie* a strict framework. The best interests of the adoptee underwent a process of crystallization in the provisions of s. 3(2) of the law, and in consequence the substantive element — the best interests of the child in themselves — cannot be applied other than within the frameworks provided. The dictates of the legislature are binding.

Until now we have been speaking of the secondary provision. Now let us turn to the tertiary provision, the exception to the exception to the provision requiring 'a man and his wife together.'

12. The tertiary provision is the one in s. 25(2) of the law, according to which —

> 'Power to depart from conditions
>
> 25. If the court finds that it is in the best interests of the adoptee, it may, in special circumstances and for reasons that it shall state in its decision, depart from the following conditions:
>
> (1) …
>
> (2) The death of the adoptee's parents and the relationship of the adopter under section 3(2);

We see from this that where the court finds that 'it is in the best interests of the adoptee, it may, in special circumstances and for reasons that it shall state in its decision,' depart from the provisions of s. 3(2) of the law, and waive the condition of the death of the adoptee's parents and the condition of the family relationship between the adopter and the intended adoptee. We should note that it is possible to waive only two of the three conditions listed in the provisions of s. 3(2) of the law. The third condition — the condition that the intended adoptee is 'unmarried' — remains unchanged. In our case,

this condition does not give rise to any difficulty , so we will not discuss this matter further.

We should also point out — and this is nothing new — that the best interests of the child is the main principle in this case: first, in the first part of the s. 3, in the provision 'a man and his wife together,' then in s. 3(2), and finally in the first part of s. 25 and in s. 25(2) of the law. We should also direct our attention to the fact that the best interests of the child take on greater weight the further we distance ourselves from the provision 'a man and his wife together' and we draw closer to the best interests of the child and the special circumstances in s. 25. Thus, whereas at the beginning of the voyage we were concerned with the abstract and general best interests of the child, further on our way — in the provisions of s. 25 of the law — the law instructs us with regard to the concretization of the best interests of the child, namely how to examine the best interests of the flesh and blood child that comes before the court.

13. How should the court exercise its discretion in accordance with the provisions of s. 25 of the law? It would appear that the elements that comprise the discretion will come in part from s. 3(2) and in part from s. 25. But if this is the case with regard to the sources of the discretion, in the relationship of these two provisions *inter se*, the provisions of s. 25 take precedence and are the heart of the matter. In other words, the internal strength of the conditions provided in the first part of s. 25 — namely the best interests of the adoptee in special circumstances — is greater than the strength of the two conditions provided in s. 3(2) of the law, and as a conclusion that follows from this, the latter will yield to the former. Indeed, the starting point for the voyage of meditation and interpretation will be found in the provisions of s. 3(2) of the law — or perhaps we should say in the provision 'a man and his wife together' in the first part of s. 3, and further in the provisions of s. 3(2) of the law. But when the court finds that the matter is in the best interests of the adoptee, then 'in special circumstances, and for reasons that it shall state in its decision,' it may waive the two conditions of the death of the parents and the family relationship of the adoptive parent to

the adoptee, and make an adoption order in favour of a single adopter. The simple meaning of this is that the best interests of the adoptee and the special circumstances take precedence in the considerations of the court whether it will make an adoption order in favour of a single adopter or not.

14. Moreover, when we define the limits of the exception to the exception — the provisions of s. 25 of the law that concern the best interests of the child in special circumstances — let us remember that the primary provision, which is the provision of 'a man and his wife together' in the first part of s. 3 of the law, is a provision that was enacted against a specific social background, in a society that recognized only one family model, a mother and father married to one another. It is therefore no wonder that this model was provided, in principle, as a model that would serve the best interests of the child. But times have changed. Since the Adoption Law was enacted, western society — including Israeli society — has undergone such great and significant changes that we shall find it difficult to apply the provisions of the Adoption Law in accordance with their simple meaning to current phenomena. Let us look around us and see that the social climate and background have changed considerably, and that today we meet many families that no longer regard themselves bound by the model of the past. These families can also — as a rule, of course — further the best interests of the child in the same way as the model of the past. We discussed a similar issue in *New Family v. Surrogacy Agreements Approval Committee* [8], at p. 441, and this is what we said:

> 'Let us first consider the social background… In times past, the phenomenon of the single-parent mother was an exceptional and marginal phenomenon in society. A woman who had any self-respect did not dare to give birth unless she was married… This is not the case today in many parts of the society in which we live. In today's world more and more women are choosing of their own free will to become single-parent mothers, and the phenomenon of single-parent motherhood is continually increasing. Indeed, the phenomenon of the mother who gives

> birth without a partner is a phenomenon that is not unusual at all, and no one will turn their head in amazement when he meets a single-parent mother walking with her little child… A woman who gives birth without having a permanent partner is accepted in many circles in society without batting an eyelid. From a social viewpoint, therefore, the society in which we live has accepted the phenomenon of the single-parent mother who does not have a permanent partner.

And later (*ibid*. [8], at p. 452):

> 'The accepted social perspective,' according to which a single-parent mother — merely because she is a single parent, and without addressing her economic and social position, with her personal qualities and the psychological makeup of her personality — cannot adequately guarantee the bests interests of a child… is a perspective that cannot be tolerated. In the past, the position might have been otherwise… against the social background of times past, only exceptional women or women on the margin of society dared to become pregnant and bear children without a husband to support them, but we all know what huge changes society has undergone, and what is the status of women in modern society, at least in certain sectors of society. Indeed, customs have changed, the status of women in society has changed, social perspectives have changed and the law too has changed. Today a woman can support herself, even support a family with dignity, without a husband at her side. Even the social stigma that in the past was attached to a woman that raised a child without a husband at her side no longer exists, if not in all sectors of society, at least in certain sectors of society. And as we have seen, not only has the phenomenon of a single-parent mother become an accepted phenomenon in our society, but the legislature has even taken steps to help her in various ways.'

Justice M. Cheshin

Against this background, we remarked in that case that we doubted whether the provisions of s. 3 of the Adoption Law — a section that has accompanied us since the Adoption Law, 5720-1960 — 'is a proper provision in our time and place' (*ibid*. [8], at pp. 447-448). Nonetheless, we have also emphasized that the family model under discussion in that case — a single-parent family — should be considered very carefully, in order to discover whether it furthers the best interests of the child (or, in our case, the best interests of the intended adoptee), and the existence of the special family model may serve as a main consideration when we consider the best interests of the child. This is true in general, and it is true in every case on its merits. As we said (*ibid.* [8], at pp. 453, 454):

> 'Everyone agrees — and no great explanation is required in order to understand the distinction — that a single-parent family is different from a two-parent family; that a person who raises a child on his own is different from parents who raise a child together; that a child who is raised in a single-parent family is not like a child who is raised in a two-parent family… It should be noted that we did not say that an application of a woman who has no husband will be granted approval for a surrogacy agreement in the same way as an application of a couple. This is not the case at all. The fact that the application is the application of a single woman will be a legitimate factor in the discretion of the Approvals Committee, all of which in accordance with the provisions of the law.'

This is true of surrogacy and it is also true of adoption.

It need not be said that we did not cite the remarks that we made in *New Family v. Surrogacy Agreements Approval Committee* [8] — with regard to single-parent families — as a binding precedent for our present case. Our intention is merely to try and derive an analogy from another case that is similar but not identical, with regard to changes that have occurred in the customs of society and that have led as a result to a need to adapt the law and

case law to new forms of social behaviour. Cf. also HCJ 273/97 *Protection of Individual Rights Association v. Minister of Education* [25].

15. Let us therefore agree and declare openly: there is no doubt that there is a disparity between the arrangements provided in the statutes enacted in the world of yesteryear and the customs of the world of today, and one of the tasks before us — before the court — is to do what can and should be done, within the framework of the language of the law and the purpose of the law, to extend the scope of the law to phenomena that came into the world after it was enacted, even if at the time the law was enacted, the legislator could not even have imagined the existence of those phenomena. We discussed this recently in CFH 6407/01 *Golden Channels v. Tele Event Ltd* [26], where we said (in paras. 29 and 30 of our opinion):

> 'It is true to say that the courts have always been required to contend with disparities between the statutes and case law of yesteryear and the realities of life at the time of the trial. Case law and statutes are always the case law and statutes of yesteryear, and their progress is slow, careful and calculated. Reality, however, is constantly changing, sometimes at a frenetic pace. This is true not only of reality but also of disputes that arise against the background of that reality… but for the most part case law succeeds in adapting itself to changing realities, and even when a disparity is created between the language of the law and reality, we take up the tools of interpretation and with their assistance we act in order to bridge the gap and catch the innovations of reality within the net of the law.
>
> …
>
> … The courts have always acted in this way; they do what can be done — within the limitations of the text — to extend the scope of the written law to phenomena that came into being after the law was enacted, even if at the time when the legislation was

> enacted the legislature could not have imagined the existence of those phenomena. The first duty of the court is to do justice between the litigants before it, and in discharging this duty it will do everything possible within the framework of the existing law, even if a solution found in this way is not the optimal solution.'

We addressed this very question in CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [27], where we said (at p. 567):

> 'The way of the law… is the way of the long-distance runner. Life changes all the time, and with it so does the law. A law that does not adapt itself to life is a regressive law. The legal system in its relationship to life is like an actor standing on a revolving stage that is moving. If the actor does not move, he will disappear from the audience's sight backstage. He must move at least at the speed at which the stage moves, even if he merely wishes to stay in the same place, and certainly if he wishes to move forward. When the revolving stage suddenly increases its speed and the actor does not also increase his speed, the actor will stumble and may even lose his balance. And if the actor increases his speed to a greater degree than the speed of the stage, he is also likely to disappear backstage. Our wisdom — the wisdom of the law — is that we know how to adapt our speed to the world around us.'

See also and cf. HCJ 2740/96 *Chancy v. Diamond Supervisor* [28]; A. Barak, *A Judge in a Democracy* (2004), at pp. 55 *et seq*.. Once we realize that the exception to the exception, namely s. 25 of the Adoption Law, does not conform to the ordinary model, the model of 'a man and his wife together,' and that the best interests of the intended adoptee in special circumstances alone will determine the matter, we will also realize that we are required to interpret that exception to the exception and bridge between the provisions of statute and modern reality, a reality that the court did not create, but for which it is required to provide order and justice, all of which in order to

ensure that the main purpose of the Adoption Law — safeguarding the best interests of the intended adoptee — will be upheld in the best possible way. It is true that the court was not intended to march in the vanguard, nor was it charged with testing uncharted waters. The judiciary, in essence, was not given the task of delineating and paving new paths in social matters. See, for example, HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [29], at p. 460, and the references cited there. For this reason, it is possible that had we been asked to recognize a new status of a single-sex couple, our path would have been different. But we are concerned in this case with the best interests of the children, and if the best interests of the children direct us to grant the appellants' request — and we should recall that this matter has yet to be decided — we should act as we have been accustomed to do in the past, in the best interests of the children.

16. It follows that not only do the provisions of s. 25 prevail over the provisions of the first part of s. 3 and the provisions of s. 3(b) of the Adoption Law when analyzing the law in accordance with its internal logic, but the provisions of s. 3 in themselves suffer from an internal weakness. In the struggle between the provisions of s. 25 and the provisions of s. 3, that weakness is capable of strengthening the provisions of s. 25 as a supreme norm in adoption law. In other words, from the outset and in principle the provisions of the first part of s. 3 and s. 3(2) of the Adoption Law should be interpreted while continually and consistently referring to the provisions of s. 25, a provision that was originally intended to permit what is prohibited both by the provisions of the first part of s. 3 and by s. 3(2) of the law.

*From general principles to the specific case*

17. In our case, does the fact that A and B are of the same sex and have a relationship between them preclude them absolutely from being competent to adopt each other's children? My colleague the Vice-President was of the opinion that the Adoption Law is surrounded by a negative arrangement, which precludes the possibility of recognizing, in principle, the competence of the appellants to adopt each other's children. The reason for this is that such a decision would be 'a principled judicial determination concerning the

legal status of single-sex couples' (para. 11 of his opinion), and that in this way the single-sex family unit (or, as the state calls it, 'a lesbian family unit') will acquire — even if only indirectly and by implication — a legal status. I find these remarks unacceptable, even if only because the centre of gravity of our case lies in the best interests of the children, whereas the question of the relationship between A and B only forms the background to the case. It is true, and we will not hide this, that by recognizing in principle the right of the appellants to adopt each other's children, our decision will strengthen the single-sex relationship between the appellants. Notwithstanding, that decision will not be a principled judicial determination or a fundamental one with regard to the status of single-sex couples. Our decision is limited to the provisions of the Adoption Law and the status created by virtue of the law — the parent-child status — and it has no implications outside this limited framework. It certainly does not create a status that is external to the Adoption Law. Moreover, if after examining the facts of the matter we discover that making adoption orders is in the best interests of the children, should we really contemplate rejecting the best interests of the children merely because they will strengthen the relationship between the appellants? My answer to this question is no.

18. My conclusion is therefore that if after examining the facts of the matter — and these have not yet been examined on their merits — we find that making adoption orders is in the best interests of the children and that the circumstances of the case are special circumstances, the interests of the children will prevail, and the case will fall within the scope of the provisions of s. 25 of the law. In such circumstances, why should we refuse the application before us? In this context, I can only cite — in agreement —the remarks made by our colleague Justice Beinisch in CA 7155/96 *A v. Attorney-General* [6], at pp. 181, 182, 183:

> 'Indeed, the test of the existence of a parental-child relationship should constitute the focus of the discretion of the court in Israel when it examine whether in the case before it there are special circumstances within the meaning of s. 25 of the Adoption Law.

> …
>
> If there is a sincere intention to have a parental-child relationship, and if there is a solid basis for believing that such a relationship has already been established, then *prima facie* there are "special circumstances," and if the adoption is "in the best interests of the adoptee," the court should examine whether there is a proper reason not to give legal recognition to that relationship by means of an adoption order.
>
> …
>
> It would appear that where a parent-child relationship exists *de facto*… and for some reason this relationship has not been given the official approval of adoption *de jure*, this fact can clearly be considered to constitute "special circumstances" for the purposes of s. 25 of the law.
>
> …
>
> Therefore, when it considers whether there are before it special circumstances that justify a departure from what is stated in s. 2 of the law, as a subtest the court will attribute considerable weight to the duration of the parental-child relationship, and the date on when it was created. The longer the relationship has lasted, and the earlier it began, the more the court will tend to recognize these as "special factors" that justify an adoption order.'

But let us not prejudge the issue. The appellants are still required to prove the circumstances of the case to the court.

19. I agree with the opinion of my colleague President Barak that we should allow the appeal, set aside the judgments of the District Court and the Family Court, and return the case to the Family Court, for it to examine the best interests of the children according to the circumstances of the case.

**Justice D. Beinisch**

I agree with what is stated in the opinion of President Barak and with the opinion of my colleague Justice Cheshin that, in principle, if there is a justification for doing so, it is possible to make an adoption order as requested in the appeal before us within the framework of the provisions of ss. 3(2) and 25 of the Adoption Law.

Therefore I too am of the opinion that the appeal should be allowed and that the matter should be returned to the Family Court to examine whether, in the specific circumstances of the case before us, on the basis of the principle of 'the best interests of the adoptee,' within the meaning thereof in the aforesaid s. 25, each of the appellants should be allowed to adopt the biological son of her partner.

**Justice A. Grunis**

As my colleague President A. Barak said (in para. 17 of his opinion), from a practical viewpoint there are two possibilities in this case with regard to the future of the three children in the framework in which they are being raised, namely a single-sex family: one is a continuation of the existing position *without an adoption order*, and the other is a continuation of the existing position *pursuant to an adoption order*. Alongside this we should remember that the decision in the Family Court was made without considering the merits of the case; the two adoption applications were struck out *in limine*, so the best interests of the children were never examined on a concrete basis. Against this background, I agree with the opinion of my colleagues, President A. Barak and Justice M. Cheshin.

**Justice E.E. Levy**

1. I have studied the opinions of my esteemed colleagues, on both sides of this case, and regrettably I cannot agree with any of the reasons on which my colleagues based their remarks.

Justice E.E. Levy

Let me first say that in my opinion the appeal should be denied. According to my position, which differs from the opinion of my colleagues in the majority, the sexual orientation of the appellants has nothing to do with the case, nor does the giving of official approval to the existence of a family framework of one kind or another. The focus of the case concerns one question only: whether the appellants' case falls within the scope of the exception in s. 25 of the Adoption of Children Law, 5741-1981 (hereafter: the law or the Adoption Law) — this and nothing more.

2. As my colleagues have shown, the well-trodden path delineated in the first part of s. 3 of the Adoption Law, which should usually be taken, is that a child should be given over for adoption to a man and his wife, i.e., to a family framework that includes a male father and a female mother, who are married to one another. Thus the legislature — which wove the principle of the best interests of the adoptee like a golden thread throughout the Adoption Law — sought to express an outlook that it is best for a child to be raised in such a framework.

Notwithstanding, the legislator was aware of the possibility that the best interests of the adoptee would sometimes require a departure from the rule. Therefore it created the exceptions that are found in ss. 3(1) and 3(2) of the Adoption Law. These exceptions address several situations in which the main principle — adoption by two persons, a married man and woman together — is not satisfied, and despite this there is a basis to allow the adoption by a single person. The first exception, which is addressed by s. 3(1), is a case of a person who entered into a relationship with the biological parent or the adoptive parent of a child, and now wishes to adopt the child as his child. The law is prepared, in my opinion, to allow the adoption in these circumstances, since although the adopter is a single person, and although there is not necessarily a bond of marriage between him and his partner, when the adoption is completed, the child becomes the child of both persons, who are also joint parents from the formal legal perspective.

According to the second exception, which is provided in s. 3(2), the court may make an adoption order *for a single adopter* 'if the parents of the

adoptee died and the adoptive parent is one of the relations of the adoptee and is unmarried.' This exception is intended in essence to allow the adoption of a child by a relative if his parents have died, instead of placing him in care. In this regard, the law prefers the family relationship to an arrangement involving two married parents who are unrelated to the child.

3. Notwithstanding, the legislature did not rule out the possibility of allowing the adoption of a child by a *single person* where the conditions of s. 3(2) are not satisfied. For this purpose it provided in s. 25 of the Adoption Law an exception to this provision. As I have noted, the scope of the hearing of the case before us is the manner of interpreting this exception and the scope of its application. According to the provisions of s. 25, the court may, in special circumstances, approve the adoption of a child by a single adopter, even if he is not one of the relatives of the adoptee, and even if the biological parents of the child are still alive, but — and this is how in my opinion the exception should be interpreted — neither of them is competent or prepared to raise the child.

In this respect I will add that the exception currently enshrined in s. 25, like the provisions of s. 3 of the Adoption Law mentioned above, appeared already in the original version of the Adoption Law (the Adoption of Children Law, 5720-1960, *Laws*, vol. 317, at p. 96). The 'historic' purpose that led to the inclusion of the exception in the law was discussed at that time by the chairman of the Committee for Public Services of the Knesset, MK N. Nir-Rafalkes:

> 'We have introduced this innovation on the basis of the reasons that I mentioned: we did not want to give this law a rigid framework, for it is precisely among adoption cases… that there are many different and diverse cases, which are very rare in other countries. I will not say that in Israel it may be an everyday phenomenon, but there can be diverse cases' (*Knesset Proceedings*, vol. 29, at p. 2135).

Justice E.E. Levy

4. It follows that the edifice of the Adoption Law, which was intended to regulate an issue that, before its enactment, was well known to be devoid of any regulation, has a main entrance, of considerable proportions, which is the first part of s. 3 of the law, through which — so at least it was assumed when the law was enacted — most of the persons seeking to adopt in Israel would pass, namely married couples consisting of a husband and wife, who wish to adopt a child jointly. Notwithstanding, after considering all those persons who are not competent to enter by that entrance, the legislature provided a smaller entrance (s. 3(1)), which is intended for all those individuals who wish to adopt a child and are involved in a relationship with the biological parent or adoptive parent of the child. In such a case, the legislature was prepared to recognize the need for an adoption order, since it is capable of guaranteeing the child a family unit that is very similar to the one outlined in s. 3 of the law. In a third case also, after considering the best interests of the adoptee, the legislature did not adopt a restrictive position, and once again introduced a smaller entrance (s. 3(2)), much smaller in its dimensions that the previous ones, whose purpose is to allow an entrance into the edifice of adoption also to individuals who seek to give a relative, whose parents have died, an alternative parent within the family circle. Finally, the legislature also gave the court the key to the last lock of the smallest of entrances, which is s. 25, through which, in special circumstances and for reasons that will be recorded, it will allow the admission of those few people who are not a married man and woman adopting together, nor a spouse of the adoptee's parent, nor even one of the relatives of the adoptee, but who seek to adopt a child whose biological parents, even if they are alive, are not raising him. The law was prepared to consider the need for an adoption order in such a case, simply because of the concern that without one the child would be left abandoned without any family framework whatsoever.

At this point we are presented with the opinions of my colleagues President A. Barak and Justice M. Cheshin, which follow on from the decision of this court in CA 1165/01 *A v. Attorney-General* [1], and seek to open up an new entrance, which circumvents the framework outlined in the

law. It would appear that many persons will be able to pass through this entrance, in a manner that turns an exception to an exception in the Adoption Law into a main entrance, even in cases where the law sees no justification for making an adoption order.

My colleagues wish to persuade us that this entrance is not a large one at all, since the court holds the key to it, and the court will prevent, in each case according to its merits, the entry of those persons who should not be recognized as adopters because it would not be in the best interests of the adoptee. The problem is that this was not the intention of the legislature when it created the Adoption Law, nor — and this is more important — is it the purpose of the law as it ought to be interpreted today.

5. It is an established principle in Israeli law that an act of legislation does not become outdated. It is like a living creature, that abandons one interpretive guise and takes on another against a background of the manner in which its purpose is reflected in the changing times (see, in this regard, the remarks of my colleague Justice M. Cheshin in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [27], at p. 567; the remarks of Justice I. Englard in CA 1165/01 *A v. Attorney-General* [1], at p. 76 — 'the legislative history cannot restrict the independent meaning of the text of the law, which after being enacted has an independent life of its own against the background of its purpose'; see also A. Barak, *Legal Interpretation*, vol. 2 (1993), at pp. 351 *et seq.*). But the art of interpretation — and this too is well known — has limits that are delineated first and foremost by the purpose of the law that we are seeking to interpret (see *Efrat v. Director of Population Register, Ministry of Interior* [24], at p. 762). It has also been said that the language of the statute cannot be weighed down with more than 'it is capable of bearing' (see A. Barak, *Purposive Interpretation in Law*, 2003, at p. 147; see also LCA 6339/97 *Roker v. Salomon* [30], at p. 253). In my opinion, the interpretive method that my colleagues the majority justices propose in this case is extreme, and it departs from the purpose underlying the Adoption Law in general and s. 25 in particular.

Let me clarify my remarks: I agree that the guiding principle on which the law is based is the one stated in s. 1(b), namely the best interests of the adoptee. Indeed, in every case the court is required to examine, first and foremost, whether the adoption is in the best interests of the child or not. Notwithstanding, there is a reason why the law does not satisfy itself with this fundamental provision, but provides, in s. 3, an order of precedence, which reflects its approach to the institution of adoption and consequently to the best interests of the adoptee, an approach that is supposed to guide the courts in their work. According to this approach, which provides, as my colleague Justice Cheshin rightly pointed out, quite a rigid framework, although not without exceptions, the adoption order is intended to give the adoptee a parental framework, which is as similar as possible to the 'classical' model that has a pair of biological parents who are married to one another. Notwithstanding, if there is no possibility of this, the law is prepared to grant an adoption order in so far as it is capable of allowing a child, who is being raised by one of his parents, a framework of two parents. When this condition is not satisfied, the court is even prepared to waive the 'two-parent principle,' provided that the child is found a place in his original family.

This perspective of priorities also determines the scope of the exception contained in s. 25 of the law. For when it is not possible to give a child a family framework in one of the aforesaid ways, the law is prepared, by means of s. 25, to recognize the need for an adoption order in order to find for the adoptee a parental framework of some kind. But because of the great distance of this situation from the model to which the law aspires in the first part of s. 3, the law is prepared that it should be done only in special circumstances and for reasons that the court hearing the adoption case deems appropriate. Section 25 is therefore the finishing point and not the starting point, and it only comes into operation as a last resort. In my opinion, this provision has no application when the adoptee is protected by means of another of the frameworks described above. To my understanding, any other interpretation makes the provisions of s. 3 of the Adoption Law redundant and meaningless.

6. The interpretation that I propose, even though it is required in my opinion by the purpose of the Adoption Law, is not a simple one. It requires us to contend with complex issues that my colleagues, when addressing the line of argument chosen by the appellants, did not see fit to decide within the scope of this appeal. I am of the opinion that it is essential to contend with these issues, by means of examining the issue in accordance with one of the *direct* paths of the Adoption Law, before making use of the exception in s. 25. It is important both when addressing the wishes of the legislature and the purpose of the law, and because of the importance of this issue itself. Moreover, it is clear to me that the time has come to examine to what extent the Adoption Law is suited to modern needs, which it would seem are different in more than one respect from the reality that confronted the original drafters of the law. I would have preferred to refrain from making any firm ruling at this time and to assume that the appellants' case cannot be resolved in this manner.

However, as my colleagues have pointed out, the appellants expressly chose to base their arguments solely on s. 25 of the Adoption Law, and they emphasized time and again that this court is not being asked to decide to what extent they conform to any of the other criteria provided in s. 3 of the law. In these circumstances, and for the reasons that I have set out, there is no alternative to denying their appeal. I can only assume that the issue will return to occupy the courts in the future. It would have been better — and this is not merely a vague wish — if the legislature had addressed the matter before it arose. In this regard, it would appear that nothing is more appropriate than to allude, by way of paraphrase, to remarks made by Vice-President S.Z. Cheshin, naturally in different circumstances, in CA 50/55 *Hershkovitz v. Greenberger* [31], at p. 804 {___}, which would appear to be appropriate even today:

> 'There is no field in the law in Israel where there are so many irregularities as in matters concerning children, and especially in the area of the adoption of children… Adoption orders and guardianship orders are made every week and every day by

> means of fictions, circumventions, false analogies, dubious interpretations, circuitous arguments and imaginative constructions… the whole problem cries out for a legislative arrangement.'

7. If my opinion were accepted, we would deny the appeal, in so far as it concerns the application for making an adoption order. On the question of publishing the names of the appellants, my opinion is identical with that of my colleagues.

**Justice J. Türkel**

1. There are cases where, after a legal ruling is handed down, it goes beyond its original scope and spreads to areas that the persons who made it never imagined it would reach. In my opinion, a blatant example of such a situation is the ruling that was made in HCJ 143/62 *Schlesinger v. Minister of Interior* [32], which was originally intended merely to distinguish between the technical, formal and statistical means of registering a person as a Jew at the Population Registry and granting the status of a Jew to someone who was so registered (concerning the need to eliminate the split by cancelling the case law and introducing new legislation, see my remarks in HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [33], at pp. 762-768). In our case, does returning the hearing of the issue before us to the Family Court, to be examined as my esteemed colleague President A. Barak proposes in his opinion, involve an implied recognition of a legal status of a single-sex family unit, which is a matter that should be addressed by the legislature? And is this decision likely to spread into areas that we never imagined, even when we made our ruling in CA 1165/01 *A v. Attorney-General* [1]?

2. In the words of my esteemed colleague, Vice-President E. Mazza, in his opinion:

> 'The question whether (and in what cases) we should recognize the right of single-sex couples to adopt a child is the concern of

> the legislature… the court should refrain from creating and granting, by means of case law, a new legal status.'

I agree with these remarks; and yet I find it difficult to determine that they are capable of preventing, *ab initio*, an examination of the question of what are the best interests of specific children whose adoption comes before the court, and whether their case involves special circumstances under s. 25 of the Adoption of Children Law, 5741-1981 (hereafter: the Adoption Law). To this I will add that under s. 1(b) of the Adoption Law:

> 'An adoption order *and any other decision* under this law shall be made if the court finds that they are in the best interests of the adoptee' (emphasis supplied).

As I said in CA 1165/01 *A v. Attorney-General* [1], the duty of the court under this section is a 'supreme duty,' and, according to my outlook, examining the best interests of the adoptee is a condition for making any order under the Adoption Law, whether it grants an adoption application or rejects it. Thus, even when the court acts to preserve the *status quo*, it has the duty to examine whether preserving the *status quo* is in the best interests of the adoptee.

3. My colleague the President qualified his opinion (in para. 22) by saying, *inter alia*, that:

> 'The intimate relationship between the biological mother and the person seeking to receive an adoption order in favour of a single adopter — the fact that they are a single-sex couple — is a fact that should be taken into account in the adoption of a single person. It is not a normative fact; it does not make an adoption by a single person into a joint adoption; it does not create a legal status that did not exist previously; it does not recognize a single-sex couple as 'a man and his wife'; it does not involve any recognition of either of them as the 'spouse' of the other (within the meaning of these concepts in s. 3(1) of the Adoption Law). All that it involves is taking into account the personal

> details within the framework of an individual determination with regard to the best interests of the adoptee and with regard to the existence of special circumstances for making an adoption order for a single adoptive parent — not for making an adoption for a single-sex family. Of course, within the framework of this taking account of personal details, weight should be given to the nature of the family in which the child is living. The homosexuality of this family is an important fact that should not be ignored. Notwithstanding, *taking this fact into account does not amount to recognition of a new legal status*' (emphasis supplied).

If we consider these remarks — and if we also remain mindful of them in the future — then the decision to return the case to the Family Court, with which I agree, does not in itself involve recognition of a legal status of a single-sex family unit, without this being done by legislation. With regard to allowing the publication of the details of the appellants and their children, I agree with the opinion of my colleague the Vice-President.

Appeal allowed by majority opinion (President Barak and Justices Cheshin, Türkel, Beinisch, Rivlin, Grunis and Naor), Vice-President Emeritus Mazza and Justice Levy dissenting.

29 Tevet 5765.
10 January 2005.