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# "Minnesota Nice": A Comparative Analysis of Minnesota's Treatment of Adoption by Gay Couples

Christian Eichenlaub

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## COMMENT

# “MINNESOTA NICE”: A COMPARATIVE ANALYSIS OF MINNESOTA’S TREATMENT OF ADOPTION BY GAY COUPLES

CHRISTIAN EICHENLAUB\*

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### I. INTRODUCTION

Minnesota has long been a state at the leading edge of socially progressive issues. It was the first state to offer troops to President Lincoln to fight the Civil War.<sup>1</sup> The first modern sit-in protests occurred in Austin, Minnesota, during the great depression.<sup>2</sup> It was the first state to have a majority of women seated on its Supreme Court.<sup>3</sup> It was the first state to mandate a mix of ethanol in fuel to reduce the state’s dependence on foreign

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\* J.D. 2008, University of St. Thomas School of Law; Senior Editor, *University of St. Thomas Law Journal* (2007-2008); B.A. Marquette University. I would like to thank Wright Walling for his guidance and support in writing this piece, as well as my mentor Amy Johnson for her constant inspiration. Thanks also to the many tremendous editors at the Journal who helped make this piece what it has become.

1. In 1861, “[o]n April 14, Governor Alexander Ramsey offered President Lincoln 1,000 men, making Minnesota the first state to offer troops to the Union. The first Minnesota regiment left Fort Snelling on June 22.” Minnesota Secretary of State, *Minnesota Chronicle*, <http://www.sos.state.mn.us/student/mnchron.html> (last visited Jan. 27, 2008).

2. *Id.*

3. *Id.*

oil.<sup>4</sup> It was the first state to establish a shelter for battered women dedicated to preventing domestic abuse.<sup>5</sup> Just recently, it was the first state to elect a Muslim representative to Congress.<sup>6</sup>

Likewise, from as early as 1947, Minnesota has used the “best interests of the child” standard to determine the suitability of adoptions and other juvenile proceedings.<sup>7</sup> The Minnesota Supreme Court stated early on that “the welfare of the child ought to be the matter of paramount concern, to which—in the event of conflict—every other interest must give way.”<sup>8</sup> The “best interests” standard has developed to encompass such factors as the mental and physical health of all parties involved, the permanence of the family unit, the child’s cultural background, and, perhaps most importantly, “the capacity and disposition of the parties to give the child love, affection, and guidance.”<sup>9</sup> Integral to the judgment of what is in the best interest of a child, both the Minnesota legislature and courts have “clearly supported a policy favoring adoption or relative placement over long-term foster care.”<sup>10</sup> This means that beyond all politics, beyond all moral theorizing, it is best for a child to be placed in a suitable permanent adoptive home rather than await his or her eighteenth birthday in the state’s foster care system. While there are certainly families and support systems in the foster care system that strive to aid children in difficult situations, the courts have recognized that foster care is not a preferable solution for the 7,338 children who were in foster care in Minnesota as of 2003.<sup>11</sup> Many of these children have emotional and physical needs requiring more attention than group homes or other temporary placements can provide.

One example of such a special need would be children who identify themselves as being gay. In a recent study of eight urban areas (including Minneapolis), more than twenty percent of homeless youth reported themselves as being gay.<sup>12</sup> These youths have often fled families or foster care systems that cannot or will not accept their sexuality, and physical and emo-

4. Minnesota Dept. of Agriculture, Frequently Asked Questions About Renewable Energy, <http://www.mda.state.mn.us/renewable/faqs.htm> (last visited Jan. 28, 2008).

5. Molly Beutz et al., *The Government Response to Domestic Abuse Against Refugee and Immigrant Women in the Minneapolis/St. Paul Metropolitan Area: A Human Rights Report*, Minnesota Advocates for Human Rights 3 (Dec. 10, 2004), available at [http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/FINAL\\_REPORT\\_Dec\\_10\\_2004\\_2.pdf](http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/FINAL_REPORT_Dec_10_2004_2.pdf).

6. Carl Hulse, *New Mosaic of Democrats Is Challenge for Leaders*, N.Y. TIMES, Nov. 9, 2006, at P1.

7. *In re Jaren’s Adoption*, 27 N.W.2d 656 (Minn. 1947).

8. *Id.* at 661.

9. MINN. STAT. § 518.17 (2006).

10. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 58 (Minn. 2004) (citing MINN. STAT. § 260C.201, subd. 11(d)(3) (2002)).

11. Barbara L. Jones, *National Foster-Care Summit Held in Minnesota*, THE MINNESOTA LAWYER, Oct. 2, 2005, available at <http://pewfostercare.org/press/files/MinnesotaLawyer100305.pdf> (quoting Pew Commission on Children in Foster Care).

12. Ian Urbina, *Gay Youths Find Place to Call Home in Specialty Shelter*, N.Y. TIMES, May 17, 2007, at A18.

tional abuse is not uncommon for these children.<sup>13</sup> They are also twice as likely as straight youth to have attempted to commit suicide while living on the street.<sup>14</sup> There is clearly a need here that is not being addressed.

In the end, how progressive is Minnesota when it comes to adoption policy? This article will compare Minnesota's treatment of adoption by gay couples to that of other states. States have created various legislative solutions in the face of the growing desire in the gay community to raise and support families. On one extreme, gay citizens have been banned from adopting at all. This is the solution Florida has put into place, and as the harshest policy it will be examined first in this article. Along those same lines, but perhaps less draconian, are states such as Utah, which use marriage or cohabitation as adoption standards, also effectively barring gay couples from adopting. Similarly, in 2004 the Oklahoma legislature changed the state's adoption laws to bar recognition of an adoption by any gay couple, even if it were done in another state. This amendment, however, was quickly found unconstitutional by the federal courts.

Moving along the middle of the continuum, this article will then examine the stance of many states, such as Minnesota, which have completely avoided the issue of gay adoption, leaving the door open for gay couples to adopt as the courts might allow. Finally, this article will look at states on the far opposite extreme from Florida, such as New York and New Jersey, which have undertaken measures to assure that would-be gay adopters will know that they will be treated equally under the law. Based on the evaluation of these various state policies, I will suggest changes to Minnesota's adoption policies that would help the state to better pursue the best interests of the child.

The premise of this article is that adoption by gay couples is positive for communities and that having an increase in adopting families would result in a decrease in the amount of children in foster care around the United States. The purpose of this article is not to prove this premise, which is a social science argument with moral and scientific ideas creating strong reactions on both sides.<sup>15</sup> The basis for this argument is that the foster care system is not a permanent solution for children. With so many children in foster care in the state of Minnesota, until it can be proved that allowing gay couples to adopt jointly is detrimental to child development, the best interest of the child must remain paramount to this debate, and whatever can be

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13. *Id.*

14. *Id.*

15. For an in-depth look at the social science affecting this issue, see Leslie Cooper & Paul Cates, *Too High a Price: The Case Against Restricting Gay Parenting*, 25-73 (2006), available at [http://www.aclu.org/images/asset\\_upload\\_file480\\_27496.pdf](http://www.aclu.org/images/asset_upload_file480_27496.pdf). To read about one author's take on the moral issue, see Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 *LOY. U. CH. L.J.* 379 (Winter 2007).

done to put those children into permanent loving homes should be done.<sup>16</sup> Enabling more gay couples to adopt children is one suggestion to start solving this foster care dilemma.<sup>17</sup>

## II. STATES THAT BAN ADOPTIONS BY GAY PERSONS

The most extreme example of the treatment of gay couples in adoption law would be any state that denies any gay person, singly or jointly, from adopting a child. Florida is currently the only state in the Union with such a policy—banning adoption by any person who is homosexual.<sup>18</sup> This restriction was enacted in 1977, as Anita Bryant and her organization, Save Our Children, Inc., tried to quash the early stages of the gay rights movement.<sup>19</sup> Rather than focusing on any substantive reasons why gay adoption might be detrimental to the best interests of children, in enacting the ban the legislature seemed to be trying to send a political message.<sup>20</sup> One legislator

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16. *In re Adoption of Charles B.*, 552 N.E.2d 884, 889 (Ohio 1990) (quoting *State v. Summers*, 311 N.E.2d 6, 13 (Ohio 1974)).

Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.

*Id.* (Ohio Supreme Court opinion allowing for the adoption of an eight-year-old boy to his counselor even though the counselor was homosexual)).

17. Out of deference to the Catholic nature of the publication in which this article is being printed, it is important to note that the Catholic Church stands firmly against adoption by gay couples, saying specifically that it is “gravely immoral” and would do “violence” to the children. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (July 31, 2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual\\_unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual_unions_en.html). It is interesting to note that such a statement was made in a document arguing not for the advocacy of children, but rather against the political recognition of gay couples. This “means to an end” approach to gay adoption has itself been considered “immoral.” Ball, *supra* note 15. Even so, Catholics, and certainly Catholic academic institutions and their publications, have the pronounced ability, if not duty, to disagree with the Catholic Church on issues of political conscience. After all, the Church, in its beauty and wisdom, has been known to be wrong from time to time. And in this case, even some Catholic social service agencies, including that of Minneapolis, have found ways to “refer out” gay prospective parents rather than deny them access completely, effectively skating the Vatican’s stance on the issue. Advocate.com, *San Francisco’s Catholic Charities Develops Plan to Allow Adoptions by Gays*, Aug. 4, 2006, [http://www.advocate.com/news\\_detail\\_ektid35109.asp](http://www.advocate.com/news_detail_ektid35109.asp). See also Bonnie Miller Rubin, *Are Gay Adoptions Shaping Up as the Nation’s Next Culture Clash?* CHI. TRIBUNE, Mar. 20, 2006, at 1.

18. FLA. STAT. § 63.042 (2003) (later Florida case law has defined “homosexual” as “one who practices homosexual acts,” rather than a person of homosexual orientation); David L. Hudson Jr., *Court Won’t Tie Lawrence to Gay Adoption Law*, ABA J. E-REP. (Feb. 6, 2004).

19. Ball, *supra* note 15, at 383.

20. *Id.* The use of this issue as a political wedge rather than looking toward the best interests of the child is not uncommon when it comes to legislative consideration of adoption by gay couples. In the case of the adoption bill passing through the Colorado legislature in April 2007, while the side supporting progressive adoption rights for gay couples focused on the “best interests of the child,” (“Sen. Jennifer Veiga, D-Denver, said children are already living in same-sex households and having two legal parents would make them eligible for such benefits as health insurance benefits and Social Security payments. She also said it would allow the state to require

wished to express “to homosexuals that ‘[w]e’re really tired of you. We wish you would go back in the closet.’”<sup>21</sup>

If one is, for the sake of argument, to accept that gay households are detrimental to children, the logic of the Florida ban is most puzzling when considering that the state has continually allowed gays to become foster parents.<sup>22</sup> While the foster care system itself seems to be languishing in a series of “glaring failures,”<sup>23</sup> the gay caretakers seem to have been among the better foster parents.<sup>24</sup> If the reality behind Florida’s ban on gay adoption was that the legislature was trying to keep vulnerable children “out of harm’s way” by keeping them out of gay homes, then why do the state’s social service agencies seem to be trusting, without hesitation, the most vulnerable of children with gay couples?

On the other hand, if this were simply a political means for assuring that the state continues to refuse recognition of gay couples, then, and only then, has the state statute served its purpose. In a thorough examination of this issue, Professor Carlos Ball labels this “means to an end” treatment of adoptable children as “immoral.”<sup>25</sup> Other authors continue to question the constitutionality of Florida’s ban after *Lawrence v. Texas*.<sup>26</sup> Even the

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child support payments if the couple breaks up.”) the opponents were far more concerned about the political statements being made (“What’s involved here is the symbolic politics of asking Colorado to endorse same-sex households as the same as any other family,” said Sen. Shawn Mitchell, R-Bloomfield. Similarly, “Sen. Dave Schultheis, R-Colorado Springs, said he feared that allowing gay adoption would pave the way to a judge deciding that same-sex couples should be allowed to have civil unions.”). Colleen Slevin, *Gay Adoption Bill Advances in Senate*, CBS 4 DENVER, (Apr. 11, 2007), [http://cbs4denver.com/politics/local\\_story\\_101192846.html](http://cbs4denver.com/politics/local_story_101192846.html). In the end, “[i]t’s hard to find a respected children’s organization that is opposed to gay and lesbian parent adoptions. You don’t see children’s advocates opposing [these adoptions].” Julie Brienza, *Joint Adoptions by Gays are Put on Even Ground with Heterosexual Couples*, 34 TRIAL 98, 98 (Mar. 1998) (quoting Michael Adams of the American Civil Liberties Union’s Lesbian and Gay Rights Project in New York).

21. Ball, *supra* note 15, at 383 (quoting *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1303 (11th Cir. 2004) (Barkett, J. dissenting from denial of en banc review)).

22. *Id.* at 386–87.

23. *Id.* at 385.

24. As evidenced at least by the cases appealing this statute, one of which, *Lofton*, ended up denying Steven Lofton an adoption of several children with HIV he had raised from infancy. Lofton was, in fact, not only awarded for his excellent care, but an agency named the award after him and his partner. Brief of Appellant at 7, *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (No. 01-16723-DD). Similarly, Curtis Watson and his partner took in a young woman who had been in 17 foster care homes in two months. The transformation in their home was “remarkable,” and while a district court judge could not order an adoption, they received long-term custody of the girl. The court further suggested that the men be used to train future foster parents. Curtis Krueger, *Gay Dads Get Daughters Plus Praise from Judge*, ST. PETERSBURG TIMES, Sept. 9, 2004, at 1A.

25. Ball, *supra* note 15, at 385.

26. Christopher D. Jozwiak, *Lofton v. Secretary of the Department of Children & Family Services: Florida’s Gay Adoption Ban under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 412 (Summer 2005); Jenni Hetzel-Gaynor, Note, *What About the Children? The Fight for Homosexual Adoption After Lawrence and Lofton*, 51 WAYNE L. REV. 1271 (Fall 2005).

American Bar Association does not support the Florida law;<sup>27</sup> however, the ban's supporters continue to defend it with the same circular logic: "[This case] validates Florida's 'conclusion that it is in the best interest of adopted children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored both by a father and a mother,'" said Florida Governor Jeb Bush after the 11th Circuit rejected the constitutional challenges to the Florida ban.<sup>28</sup> And so the "troubled and unstable" children involved in those legal challenges returned to their foster care homes—the homes of homosexual Steven Lofton and his other plaintiffs—where they can live indefinitely as foster children but never be adopted by those parents.<sup>29</sup> In the end, all the ban accomplishes is assuring that these children cannot be adopted by the families that have taken them in, forcing them to forfeit the comfort of a stable legal home and the knowledge that they can be secure in their homestead. From a legal standpoint, they will not have the opportunities to inherit, to recover from a wrongful death, or to receive child support, and medical and educational decisions will be left up to the state, rather than the loving family with whom the state has otherwise entrusted their care.<sup>30</sup> The "best interest of the child" seems to have been left far, far behind.

Regardless of the rationale used in Florida, the same legislative technique of banning gay persons from adopting was also tried in New Hampshire. In 1987 the New Hampshire legislature enacted a ban similar to Florida's, different only in that it also banned gay persons from providing foster care.<sup>31</sup> The New Hampshire ban seemed much more rationally bound to the best interests of the child than the Florida ban, with the legislative intent of the document stating "that being a child in [foster care or an adopted family] is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce."<sup>32</sup> Even though the ban was better grounded in the best interests of the child than the Florida ban, the New Hampshire legislature repealed it in 1999, allowing any individual in the state to adopt.<sup>33</sup> This last year, New Hampshire passed civil union legislation<sup>34</sup> which, while passed for political reasons, will have a positive effect on the best interests of children, allowing gay couples to

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27. Hudson, *supra* note 18.

28. *Id.*

29. *Id.*

30. Ball, *supra* note 15, at 392.

31. N.H. REV. STAT. ANN. § 170-F:6 (repealed 1999), N.H. REV. STAT. ANN. § 170-B:4 (2005).

32. N.H. REV. STAT. ANN. § 170-F:6, Legislative intent; exclusion of homosexuals. 1987, 343:1, eff. July 24, 1987.

33. N.H. Session Laws, ch. 18, H.B. 90 (1999).

34. Pam Belluck, *New Hampshire Adopts Same-Sex Unions*, N.Y. TIMES, June 1, 2007, at A16.

jointly adopt and give their children the protection of two parents recognized by the state.

### III. STATES THAT BAN GAY COUPLES FROM ADOPTING, BUT ALLOW SINGLE GAY ADOPTERS

Looking west to the statutes of two other states, we see examples of laws that are improving, even if still questionable in their ultimate effect on the "best interest of the child." First, the state of Utah will allow an adoption to a "single adult," so long as that person is not "cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."<sup>35</sup> Likewise, in 2004 Oklahoma amended the state's adoption laws, barring the recognition of an adoption to "more than one individual of the same sex."<sup>36</sup> Even though that amendment was subsequently found to be unconstitutional,<sup>37</sup> the ultimate effect of both of these laws was to deprive children of available two-parent homes, rather than saving them from any plight that might result from adoption by gay citizens.

#### A. *Utah*

Because of the unique population of Utah, the proscription against adoption by cohabitating non-married couples seemed to be made not out of anti-gay animus, but out of concern about placement of children with "polygamous clans and with non-marital couples."<sup>38</sup> "It was intended that these changes would preclude the placement of children with unmarried couples, same sex or heterosexual, monogamous or polygamous."<sup>39</sup>

In a 2007 addition to the adoption statute, the Utah legislature passed an amendment stating that a child must be placed "with a man and a woman who are married to each other" unless (a) there are no married couples ready, willing and able; (b) the child is placed with a relative; (c) the child is placed with a person who has already developed a substantial relationship with the child; or (d) the child is placed with a person selected by a biological parent.<sup>40</sup> This amendment reiterates the preference for married heterosexual couples but also creates some interesting facets to the law. While the language barring non-married cohabitating couples from adopting remains unchanged, there now emerges the possibility that a single gay person could be given the same preference in adoption as a married couple if that person was either selected by a birth mother, if he or she had a "substantial rela-

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35. UTAH CODE ANN. § 78-30-1 (2007).

36. OKLA. STAT. ANN. tit. 10, § 7502-1.4 (West 2007).

37. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006), *aff'd*, 496 F.3d 1139 (10th Cir. 2007).

38. Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*, 5 J.L. & FAM. STUD. 203, 204 (2003).

39. *Id.*

40. 2007 Utah Laws (H.B. 343).



tionship” with the child before the adoption proceedings began, or if he or she was related to the child. Additionally, if no married couples were “ready, willing and able” to adopt—which the 2003 Utah legislature itself admitted is often the case<sup>41</sup>—then a single gay adopter would not be barred. Still, the adoption would have to be found to be in the “best interests of the child,” which would, as a judicial determination, likely bar him or her from adopting in many of the judicially conservative areas of Utah. But at least now the legislature, knowingly or not, has provided some legal cover for a gay person to make an argument to be allowed to adopt.

The other addition in the 2007 amendment was language indicating that preference for married couples should be given in foster-care placements as well. In many ways this ban on non-married adopters and the new preference for foster-care placements with married couples is more coherent than the Florida law. It continues to focus on the stability of the children affected by such placements. With the 2007 legislation, Utah has recognized that “foster families [are] always in short supply” (2,500–3,000 children are wards of the state)<sup>42</sup> and allows for gay couples to have a fall-back position in the system, as degrading as they may feel that is to their relationships.

Whatever the reason for passing the law prohibiting adoptions by unmarried cohabitating couples, there can be no doubt that there is a disparate effect on gay couples, and thus the children they could potentially adopt.<sup>43</sup> Unmarried straight couples can easily get married if they so desire. Indeed, the impetus of the state mandating marriage in order for them to adopt may just compel a straight couple to “tie the knot.” However, there is currently nothing that a gay couple can do to circumvent the prohibition set by the Utah legislature. Even getting married in Massachusetts, the only state currently allowing gay couples to marry, would not satisfy that statutory requirement that the relationship be a “legally valid” marriage “under the laws of this state.”<sup>44</sup> The reality for children needing homes, then, is that this gay couple cannot adopt them under any circumstances.

All the while recognizing the necessity for more families to take care of children in need, Utah has allowed its law to overextend the legitimacy of being in the best interest of the child. Even if a preference for married couples stays in place, the ban on non-married adopters who are cohabitating makes little sense when paired with the prohibition of gay marriage in

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41. Clark, *supra* note 38, at 204.

42. *Id.*

43. Consider a 2008 proposed law in Mississippi which would mirror the Utah law but was intended specifically to prevent gay couples from adopting. Mississippi State Representative Philip Gunn said, “We want to be careful not to be overly broad, but clearly we don’t need to encourage or allow in my opinion homosexual couples to adopt in Mississippi.” Jon Kalahar, *Bill Would Prevent Unmarried Couples from Adopting*, WBLT3 (2008), <http://www.wlbt.com/Global/story.asp?S=7971528&nav=1L7t4viX>.

44. UTAH CODE ANN. § 30-1-2 (1953).

the state of Utah. It forces potential gay adopters to either adopt singly, depriving the child of a two-parent household, or not adopt at all, depriving the child of a permanent home altogether. Whether marriage is allowed for gay couples or the ban is lifted, while the two exist together, it cannot be said that the law is in the best interest of the children of the state.

### B. Oklahoma

At first glance, Oklahoma's adoption laws seem to allow any single person to adopt without reference to the adopter's sexuality<sup>45</sup>—a law that is no better or worse for children than many other states. However, in 2004, Oklahoma's legislature added a caveat to the law that governs adoptions of foreign children, stating that no agency of the state may "recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."<sup>46</sup> This, of course, not only applied to gay couples adopting from outside the country, but also to any couple who had legally completed the adoption process in another state.

Oklahoma's new statute has some rather obvious issues to it. Beyond being attacked as immoral for using children to a political end, with the effect of denying them a legal two-parent home,<sup>47</sup> the law was questionable under the equal protection argument set forth in *Romer v. Evans*.<sup>48</sup> One author argued that the statute violated the Parental Kidnapping Prevention Act ("PKPA"), a federal mandate that supersedes Oklahoma's law under the Supremacy Clause.<sup>49</sup> Finally, and perhaps most persuasively, as adoption decrees are final judgments, they are entitled to the same full faith and credit protection as any other type of judgment.<sup>50</sup> Thus it was only a matter of time before "the Oklahoma statute would be found to be unconstitutional."<sup>51</sup> This was, in fact, the same conclusion that the Oklahoma Attorney General came to before the statute was even passed.<sup>52</sup> Lambda Legal, a gay rights legal organization, then brought suit on behalf of three adoptive families in 2006 and the Federal District court found that the statute vio-

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45. OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West 2007).

46. OKLA. STAT. ANN. tit. 10, § 7502-1.4 (West 2007).

47. See Ball, *supra* note 15, at 383.

48. 517 U.S. 620 (1996). In *Romer* the U.S. Supreme Court invalidated a statute "born of animosity" with no rational relation to a legitimate government purpose. It was a statute which named a discrete class of individuals and marked them for legal discrimination. *Id.* at 621.

49. In contrast to many cases holding to the contrary,

[n]o cases exist holding that an adoption is not a custody determination within the meaning of the PKPA. Thus, if [another state makes a final adoption determination] then all other states must recognize that decree. The Oklahoma statute, which would refuse to recognize such adoptions, therefore violates the Act and is unconstitutional under the Supremacy Clause.

Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467, 474 (2005).

50. *Id.* at 475.

51. *Id.* at 477.

52. *Id.*

lated the Equal Protection, Due Process, and Full Faith and Credit clauses of the Constitution.<sup>53</sup>

Beyond being a rather large incentive for gay families to refrain from moving to Oklahoma,<sup>54</sup> some adoptive couples were concerned about the prospect of even traveling through Oklahoma.<sup>55</sup> Even as Florida's adoption laws are severe in regards to the potential for children to be adopted by gay couples, that state has not made any legislative efforts that would seem to deprive legally adopted children from visiting Disney World with their gay parents from the protections of that household. Interestingly, in both the district and appellate court cases regarding the three families involved in litigation against the 2004 amendment, the State failed to articulate a clear statement as to the way in which the "non-recognition clause" served the best interests of the children of Oklahoma.<sup>56</sup> And while the Federal District Court and the Appellate Court affirming the decision have eliminated this questionable use of statutory power, Oklahoma's adoption statutes are now left in the same condition as many states: Gays may adopt singly but dare not try to provide their children with the protections of two legal parents.

#### IV. STATES WITH NONSPECIFIC LAWS REGARDING GAYS AND ADOPTION

Many states have either taken a policy of benign neglect regarding adoption by gay couples, leaving the ultimate decisions up to the courts, or simply ignored the issue altogether. As Minnesota is the ultimate focus of this article, I will discuss the outcome of such legislative inaction, and then after reviewing two more treatments of the issues in other states, conclude with suggestions on bringing the Minnesota system more in line with the values of "Minnesota nice."

While adoption by gay couples was unheard of in the U.S. until as recently as 1987,<sup>57</sup> Minnesota has been willing to allow "any person" to adopt since 1951, if not earlier.<sup>58</sup> For Minnesota, and many other states, the issue of sexual orientation has never entered into the legislative qualifications for the "best interest of the child" in adoptions.<sup>59</sup> Compared to states such as Florida or Utah, this standard seems extremely progressive: "In ef-

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53. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

54. See Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey*, N.J. LAWYER, Apr. 2006, at 36 (warning families to "carefully" consider a move to such a "hostile" state).

55. *Finstuen v. Edmondson*, 497 F.Supp.2d 1295, 1301 (W.D. Oklahoma 2006) (plaintiffs Gregory Hampel and Edmund Swaya feared returning to Oklahoma to allow their adopted child visitation with its birth parents after the enactment of the amendment).

56. *Id.*

57. See case summary: Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54 (1995). This was also largely due to the fact that homosexuality was regarded as a mental disorder by the American Psychiatric Association until 1973. *An Instant Cure*, TIME, Apr. 1, 1974, <http://www.time.com/time/magazine/article/0,9171,904053,00.html>.

58. MINN. STAT. § 259.21–22 (2007).

59. See Legislative History of MINN. STAT. § 259.21–69.

fect then, any person may adopt . . . whether the person be married or single, male or female, minor or adult, of whatever race, creed or color.”<sup>60</sup> And while at least one judge felt that this left her “without discretion” to deny a single gay man an adoption,<sup>61</sup> many judges may not feel the same. This also leaves open the question as to whether a joint petition may be granted to a gay *couple*, which is a difference that can save prospective families thousands of dollars in legal fees, court costs and social services.

In Georgia, a state with comparable statutes to Minnesota as to who may adopt a child,<sup>62</sup> the question of judicial discretion in adoptions by gay couples has conflagrated one adoption matter into “two conflicting court orders, two contempt citations, a State Bar complaint, and a possible habeas action.”<sup>63</sup> Elizabeth Hadaway attempted to adopt Emma, a seven-year-old child of a friend who could no longer care for her.<sup>64</sup> Hadaway filed her adoption petition singly, even though she had a long-time lesbian partner, because Georgia’s statutes only explicitly allow married couples to adopt together.<sup>65</sup> Although Hadaway had already been granted physical custody by one Wilkinson County Superior Court judge, when the adoption petition for legal custody was heard by another judge of the same district, Judge John Lee Parrott, the petition was denied.<sup>66</sup> The denial was based upon the perception that although Hadaway had filed singly, “viewing the instant case on its substance and not its form” Judge Parrott thought it clear that Hadaway intended to raise Emma with her same-sex partner, and the Georgia statute did not allow for that type of “subterfuge.”<sup>67</sup> Judge Parrott ordered Emma back to her biological mother or in the alternative for the state to take custody of her.<sup>68</sup>

When Emma’s birth-mother subsequently refused to take her daughter back, Hadaway kept Emma and moved to another county to seek a more favorable forum for her adoption.<sup>69</sup> In Bibb County, Hadaway’s lawyer went to Superior Court Judge Tilman Self III and spent forty-five minutes

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60. 6 Minn. Prac. Series § 39.3.

61. Interview with Hennepin County District Court Judge Kathryn Quaintance, in Minneapolis, Minn. (July 31, 2006).

62. Compare MINN. STAT. § 259.22 (2007) with GA. CODE ANN. § 19-8-3 (West 2007).

63. Alyson M. Palmer, *Adoption Turned on Views of Sexuality*, DAILY REP., Apr. 19, 2007, [http://www.dailyreportonline.com/Editorial/News/new\\_singleEdit.asp?individual\\_SQL=4%2F19%2F2007%4014742\\_Public\\_.htm](http://www.dailyreportonline.com/Editorial/News/new_singleEdit.asp?individual_SQL=4%2F19%2F2007%4014742_Public_.htm).

64. *Id.*

65. *Id.*; GA. CODE ANN. § 19-8-3. That part of the Georgia statute is comparable with MINN. STAT. § 259.21 subdiv. 7, which provides for a “person with spouse, if there be one,” to petition for adoption.

66. Palmer, *supra* note 61.

67. *In re* Petition of Elizabeth Hadaway to Adopt, Civil Action No. 0609-187 (Ga. Wilkinson County Super., Jan. 8, 2007), available at <http://www.dailyreportonline.com/Editorial/PDF/PDF%20Archive/DOC002.PDF>.

68. Palmer, *supra* note 61.

69. *Id.*

on the record informing him of the situation.<sup>70</sup> In the end, Judge Self ruled in favor of Hadaway's petition, finding that it was in the best interests of Emma to be with Hadaway rather than in foster care.<sup>71</sup> As to the issue of Hadaway's sexuality and her lesbian partner, Judge Self wrote, "This Court declines the temptation to weigh in on what, if any, effect a party's sexual preferences should have on a Petition for Change of Custody."<sup>72</sup>

When Judge Parrott discovered that Hadaway had not turned over Emma as he had ordered and had gone to another county to circumvent his jurisdiction, he ordered the county Division of Family and Children Services to take Emma and held both Hadaway and her lawyer in contempt, sentencing them to ten days in jail and filing a complaint with the state bar against the lawyer.<sup>73</sup> Although the jail time was later stayed, Emma was placed in foster care, despite an evaluation by Child and Family Guidance (the county agency evaluating adoptions) that determined Emma was in need of more individualized attention due to her abandonment issues and that a placement with Hadaway would have been in her best interests.<sup>74</sup> The matter has now become one of conflicting jurisdictions, and continues to be fought in the state court system.<sup>75</sup> As for the best interests of Emma, until this issue is resolved, she remains in her court-ordered foster care placement.<sup>76</sup>

While gay couples in Minnesota may feel a bit more insulated from anti-gay prejudice because of the state's relative tolerance, a case such as Hadaway's is very possible given the ambiguous state of the law. With no solid assurances that this sort of nightmarish legal battle would not be necessary in Minnesota's courts, there can be little doubt as to why a gay couple would be hesitant to try to adopt. Even if there were agreement among Minnesota jurisdictions as to whether gay couples may adopt singly, there is still the question as to whether an adoption may be granted to a gay couple. While the need for joint adoption by a gay couple versus adoption by only one partner may not seem to be immense, one American Law Report "cautions" practitioners that "failure of a partner to adopt a child in cases where two same-sex partners have raised and cared for the child often result in the nonbiological caregiver's loss of custody in the absence of a legally recognized relationship to the child."<sup>77</sup> Just such a case has arisen in

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70. *Id.*

71. *Id.*

72. *Hadaway v. Schultz*, Civ. Action No. 07-CV-46353 (Ga. Bibb County Super. Mar. 30, 2007) (order granting plaintiff's petition for immediate change of custody), available at <http://www.dailyreportonline.com/Editorial/PDF/PDF%20Archive/DOC004.PDF>.

73. Palmer, *supra* note 61.

74. *Id.*

75. *Id.*

76. *Id.*

77. Larsen, *supra* note 55.

Minnesota, leading to a protracted fight not over gay adoption, but over third-party visitation rights.

When Marilyn Johnson adopted two daughters from China, her partner Nancy SooHoo had always intended to adopt the children as well.<sup>78</sup> Johnson was the original adopter because her employer offered adoption tax credits, which SooHoo's employer did not.<sup>79</sup> Why didn't the couple adopt the children jointly? Most likely because they did not know if that was an option. Now that the couple has split up after twenty-two years together, they are embroiled in a legal fight over visitation time with the children—a fight which went all the way to the Minnesota Supreme Court, which decided that SooHoo could legally be afforded visitation rights.<sup>80</sup> If the law were clearer in its application to gay and lesbian couples, this legal struggle might have resulted in a shared-custody arrangement at the district court level, rather than a protracted, emotional, and expensive legal fight.

As with many other states, there is an incredible void in the Minnesota case law dealing with joint petitions from gay couples.<sup>81</sup> Some may not be surprised by a lack of case law in this area, as adoption law is one of statutory creation,<sup>82</sup> but the statute is similarly devoid of any references as to how to deal with this situation, other than that any adoption must be in the "best interests of the child."<sup>83</sup> This article is the first printed in a law review to evaluate Minnesota law in regard to adoption by gay couples.<sup>84</sup> In websites listing states with progressive laws for adoptions to gay couples, multiple sites conclude that while some Minnesota counties (such as urban Hennepin or Ramsey) have allowed adoptions to gay couples, the issue remains unclear.<sup>85</sup>

Minnesota is not alone in having an unarticulated and ambiguous policy toward adoption by gay couples. The Liberty Counsel lists thirty-seven other states with "unclear" policies regarding second-parent same-sex adop-

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78. Jean Hopfensberger, *Nontraditional Families Facing New Frontiers in Family Law*, STAR TRIBUNE, Dec. 12, 2006, at 1B.

79. *Id.*

80. *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

81. This statement comes from extensive searches of Minnesota case law including the following searches: (adoption w/50 lesbian! or gay! or homosexual!) ("same sex" w/30 partner! or relation!) ("same sex" & adoption).

82. *Petition of Sherman*, 63 N.W.2d 573, 576 (Minn. 1954).

83. MINN. STAT. § 259.29 (2007). It is interesting to note that if the legislature were to allow gay couples to marry, then the adoption statute would not need to be altered. However, if civil unions or domestic partnerships become an option in Minnesota, the adoption statutes would still need to be amended to allow for petitions from those partnerships.

84. This statement comes from a search of law journals and reviews with "adopt" and "Minnesota" in the title as of November 11, 2007.

85. Lambda Legal, *Minnesota*, <http://www.lambdalegal.org/our-work/states/minnesota.html> (state-by-state listing of laws affecting gays and lesbians); Liberty Counsel, *Same-Sex Adoption Laws by State*, [http://www.lc.org/ProFamily/samesex\\_adoption\\_by\\_state.pdf](http://www.lc.org/ProFamily/samesex_adoption_by_state.pdf); Human Right's Campaign Foundation, *Minnesota Adoption Law*, Jan. 22, 2008, <http://www.hrc.org/issues/partenting/adoptions/1061.htm>.

tions, including Arizona, Delaware, Maine, Maryland, Montana and Rhode Island.<sup>86</sup> These policies not only have the positive effect of allowing judicial discretion for judges in liberal areas to grant joint petitions to gay couples without much oversight, but also the weakness of allowing that same discretion to judges who may not be so progressive in their views of the “best interests of the child.” This has led to a lack of consistency among, and even within, state jurisdictions, much like was seen in the Hadaway case out of Georgia.<sup>87</sup> In a short film called “Finding Family: Gay Adoption in the U.S.,” John Ireland surveyed the laws of the fifty states and concluded that, “I see an overwhelming percentage of space where secrecy, ambivalence, and even animus toward our families prevent us from protecting our loved ones.”<sup>88</sup> This article will conclude, after reviewing the positive policies of other states, with suggestions for the state of Minnesota and any other state that might wish to dispel the fog of secrecy, ambivalence and possible animus from its adoption laws to further the best interests of children by enabling and encouraging adoptions by gay couples.

#### V. STATES THAT ALLOW ADOPTION BY GAY COUPLES

There are a handful of states that have modified their adoption laws in the last decade to accommodate the best interests of children who have been, or potentially could be, adopted by gay couples. As part of California’s 2001 addition of “domestic partnership” laws, a domestic partner is allowed to adopt the legal child of his or her partner.<sup>89</sup> Similarly, Vermont chose to use the term “partner” in allowing a gay person to adopt his or her significant other’s child.<sup>90</sup> Connecticut enacted legislation in 2000 explicitly recognizing second-parent adoptions.<sup>91</sup> The District of Columbia, Illinois, and Massachusetts have all judicially recognized joint petitions by couples wishing to adopt together.<sup>92</sup>

Additionally, New Jersey and New York are worth reviewing because of the progression of both the judicially-created law and the statutes in those states with regard to granting adoptions to gay couples. As the rest of

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86. Liberty Counsel, *supra* note 83.

87. Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1502 (1998); Palmer, *supra* note 61.

88. John Ireland, *50 Ways to Adopt a Baby*, THE ADVOCATE, Aug. 28, 2007, at 39–41.

89. CAL. FAM. CODE § 9000 (West 2005) (“Domestic partners” under California law are “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” CAL. FAM. CODE § 297 (West 2005). The statute goes on to list a fairly meticulous calculus of how such a relationship is to be measured.)

90. VT. STAT. ANN. tit 15A, § 1-102 (2002).

91. CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2004) (compare to pre-2000 revision requiring the second-parent to be a relative rather than another “person who shares parental responsibility”).

92. *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

the country seems to be slowly moving in this direction, it is valuable to study the development of adoption law in those states.

#### A. *New Jersey*

New Jersey is an interesting study in the slow progression of policy and law that has made the state easier for gay adopters, who are then more likely to adopt children in need. New Jersey was the first state in the nation to address joint petitions by same-sex couples.<sup>93</sup> A class-action lawsuit arose in 1996 against the Division of Youth and Family Services (DYFS), the state's social service agency.<sup>94</sup> Before the complaint was brought, while a married couple was required to adopt jointly, non-married couples had to take an individual approach that many other states continue to require: first one partner goes through the adoption process, then the second proceeds with a second-parent or step-parent adoption.<sup>95</sup> This process can be not only more time consuming but also costly, especially if a separate home study is required.<sup>96</sup> Under a settlement agreement made between the plaintiffs and DYFS, a gay couple is now allowed to adopt jointly<sup>97</sup> and DYFS must apply the same standards to gay couples as it does straight couples.<sup>98</sup> While the settlement dealt with the state's social service agency rather than the court system, it was nonetheless an important step toward equity for adoption by gay couples. As an interesting retrospect, shortly after the decision was made, conservative groups predicted that the settlement would result in adopted children suing the New Jersey government for placing them in the homes of gay couples.<sup>99</sup> More than ten years later, there are no reports of such lawsuits being made.

The New Jersey Superior Court was also one of the first state courts in the nation to determine that, if a placement is found to be in the best interests of a child, a petitioner should be able to adopt even if he or she is homosexual.<sup>100</sup> That case came even before the settlement with DYFS, and the pairing of precedent with policy has made New Jersey one of the most adoption-friendly states in the country for gay couples.<sup>101</sup> In a change that will continue that trend, at the end of 2006 the New Jersey legislature passed the Equal Benefits Act at the behest of the New Jersey Supreme

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93. Julie Brienza, *Joint Adoptions by Gays are Put on Even Ground with Heterosexual Couples*, 34 TRIAL (Mar. 1998).

94. Guston & Singer, *supra* note 53, at 35.

95. Joyce F. Sims, *Homosexuals Battling the Barriers of Mainstream Adoption—and Winning*, 23 T. MARSHALL L. REV. 551, 580–81 (1998).

96. Guston & Singer, *supra* note 53, at 37.

97. *Id.* at 35.

98. Sims, *supra* note 93, at 581.

99. *Id.*

100. *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); Molly Cooper, *What Makes a Family: Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 183 (2004).

101. Guston & Singer, *supra* note 53, at 35.



Court.<sup>102</sup> The language in that legislation changed the adoption law to mandate that a person with an “equal benefits contract” (a civil union) either file jointly with his partner or get his partner’s written consent for the adoption.<sup>103</sup> This ends any question as to the ability of gay couples to adopt jointly, as the language of this new law makes it clear that there is to be no difference in court treatment between “contracted” couples and those who are married.

### B. New York

While the New York adoption statute clearly states that adoptions may be made by an “adult unmarried person or an adult husband and his adult wife together,”<sup>104</sup> decisions from New York’s highest court have encouraged a “departure from a strict reading of the adoption language”<sup>105</sup> when “satisfied that the best interests of the . . . child will be promoted thereby.”<sup>106</sup> In the case of *In re Jacob*,<sup>107</sup> the Court of Appeals of New York creatively interpreted the governing domestic relations law, finding that the term “together” in the statute was intended only to “insure[ ] that one spouse cannot adopt a child without the other spouse’s knowledge or over the other’s objection.”<sup>108</sup> The court declined to preclude unmarried partners from petitioning together simply because it was not required that they do so. This, the court concluded, would “[e]ndow[ ] the word ‘together’ as used [in the statute] with the overpowering significance of enforcing a policy in favor of marriage.”<sup>109</sup>

This holding was then used in 2000 to allow for the adoptions by gay couples of an unrelated child in *In re Adoption of Carl*.<sup>110</sup> In that case, a New York Family Court found that the adoption statute “does not expressly

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102. *Lewis v. Harris*, 188 N.J. 415 (2006) (New Jersey Supreme Court ordered the legislature to “act within 180 days either to redefine the right to marry to include same-gender couples or to ‘enact a parallel statutory structure by another name.’” 2006 NJ S.B. 2414 (legislative statement)).

103. 2006 NJ S.B. 2414 (to be codified in N.J. STAT. ANN. § 9:3-43). Likewise, while the State of New Hampshire has direct case law standing against joint petitions by gay couples (*In re Jason C.*, 129 N.H. 762, 765 (1987)), as of April 2007, legislation was pending in that state to either enact civil unions for the state (H.B. 437, 160th Gen. Court Sess. (N.H. 2007)), or in the alternative, to allow “[t]wo unmarried adults in a familial relationship” to adopt (H.B. 51, 160th Gen. Court Sess. (N.H. 2007)).

104. N.Y. DOM. REL. LAW § 110 (McKinney 2007). Much as with the proposed changes to New Hampshire law (*see supra* note 101), the laws as to who may adopt in New York may be amended even before this article is published. Two different bills have been proposed, one allowing “any two unmarried adults together” to adopt (A.B. 7449, 230th Legis. Sess. (N.Y. 2007)), and one creating domestic partnership rights which would allow domestic partners to adopt together (S.B. 1992 & A.B. 3869, 230th Legis. Sess. (N.Y. 2007)).

105. Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 421 (1996).

106. *In re Jacob*, 86 N.Y.2d 651, 658 (N.Y. 1995).

107. *Id.*

108. *Id.* at 660.

109. *Id.*

110. 709 N.Y.S.2d 905 (N.Y. Fam. Ct. 2000).

prohibit” unmarried partners from jointly adopting together.<sup>111</sup> The court stated that denying the joint petition only because the petitioners were unmarried would “create a family with two unmarried parents only one of whom would be allowed to formalize his or her relationship” with the child, and that such a result would be “contrary to the purpose underlying the adoption statute which is to provide the child with emotional stability and permanency.”<sup>112</sup> As the gay couple in this case was “willing and able to assume the duties of parenthood with respect to Carl and to provide him with a stable and permanent home,” and the court found the adoption to be in his best interests, the court granted the joint petition.<sup>113</sup>

While still claiming that “adoption statutes must be strictly construed,”<sup>114</sup> it is clear that the New York courts have fully asserted themselves since 1995, adjusting the state’s adoption policy to its interpretation of the child’s best interests in a not overly delicate fashion. Creating case law that goes from legislative language stating that “an unmarried person or an adult husband and his adult wife together may adopt” to “any stable and permanent couple may adopt” seems to this author to be a stretch of judicial power. While this is a victory for gay couples and the children they care for, it has taken some creative jurisprudence to get to that point. Fortunately, the legislature has not disagreed with this bending of the statute and, in fact, in 2007 stepped in with two separate pieces of legislation to allow for gay couples to adopt, avoiding judicial guesswork in the future.<sup>115</sup>

## VI. SUGGESTED CHANGES FOR MINNESOTA ADOPTION LAW<sup>116</sup>

In 2003, there were 7,338 children in foster care in the state of Minnesota.<sup>117</sup> This placed the state as twenty-fourth in the nation for the percentage of children who are in foster care. According to an analysis of the 2000 U.S. Census data, there are an estimated 9,147 households with same-sex partners in the state of Minnesota.<sup>118</sup> Given that this was a 200 percent increase from 1990,<sup>119</sup> it is likely that there are even more same-sex partners living in Minnesota now, eight years later. Put that together with a 2001 Kaiser Family Foundation study that showed that forty-nine percent of

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111. *Id.* at 909.

112. *Id.* at 910.

113. *Id.* at 909–10.

114. *Id.* at 907.

115. *See Lewis v. Harris*, 188 N.J. 415 (2006).

116. The most obvious solution to any inequities in Minnesota’s adoption laws would be to allow for either gay marriage or civil unions in the state. This solution, however, is beyond the arguments of this article, and perhaps that which is absolutely necessary to encourage higher rates of adoption by gay couples.

117. Jones, *supra* note 11.

118. Nahal Toosi, *Census Finds More Same-Sex Households*, MILWAUKEE J. SENTINEL, Aug. 22, 2001, available at <http://www2.jsonline.com/news/metro/aug01/samesex22082101a.asp>.

119. HUMAN RIGHTS CAMPAIGN, YOUR COMMUNITY—MINNESOTA, [http://www.hrc.org/your\\_community/3378\\_3503.htm](http://www.hrc.org/your_community/3378_3503.htm) (last visited Jan. 29, 2008).

gay people “would like to adopt” someday, and it is apparent that there are many potential gay adopters.<sup>120</sup> Even if only ten percent of same-sex households in Minnesota could be encouraged to adopt children—encouraged by our agencies, our laws, and our legal community—it could result in almost one thousand homes for the children of this state. What sort of effect would that have on the lives of those who need permanent homes the most?

However, many gay and lesbian couples continue to feel that the court systems in Minnesota are not open to them adopting and are unsure of how they will be treated by social service agencies.<sup>121</sup> There is a notion that the adoption process will be an uphill battle since there is nothing in the law specifically saying that they may adopt as a couple, even as there is nothing saying they may not. There is hesitation to step into a process that is costly, emotionally draining, and invasive if there is not an assurance that in the end the Minnesota court system will treat them as any other couple. These are couples that could provide stable and loving environments as well as serve as positive role models for gay youth who, as noted earlier, make up a disproportionate amount of the homeless youth in urban areas.<sup>122</sup>

From a business perspective, it is advisable to not only allow gay adoption, but to encourage it and market to that community; it has been found that the gay community is a niche market with its own advertising and messaging needs.<sup>123</sup> Eighty-nine percent of gay consumers are highly likely to seek out consumer goods and services that are marketed directly to them.<sup>124</sup> If the Fortune 500 companies are pumping billions of dollars into meeting the marketing needs of this community, it would similarly make

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120. HENRY J. KAISER FAMILY FOUND., *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 4* (2001), <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

121. Interview with Tim Reardon in Minneapolis, Minn. (Aug. 11, 2006) (gay father who adopted in Hennepin County); Interview with Peter Vitale and Stephen Nelson in Minneapolis, Minn. (June 29, 2006) (partners who adopted three children from out-of-state); see also Deborah Yetter, *Unmarried but Cohabiting Gay Couple Blocked in Effort to Adopt*, *LOUISVILLE COURIER-J.*, Mar. 3, 2008, available at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20080303/NEWS01/803030392> (A gay couple in Kentucky was expelled from an adoption agency after already paying extensive fees for a home study by the faith-based children's services organization. The private adoption agency receives approximately \$12.5 million in State funding annually for its services.).

122. Urbina, *supra* note 12. It is notable, as well, that private agencies are already trying to fill this gap in adoption law, even if with limited funding and resources. One Twin Cities agency, the GLBT Host Home Program, matches homeless GLBT youth with adults who volunteer to house them. Heidi Fellner, *Safe as Houses: GLBT Host Home Program Opens Its Doors*, *LAVENDER MAG.*, Apr. 13–26, 2007, at 44, 46.

123. See Carolyn Said, *Marketing Comes Out of the Closet: Advertisers Woo Gays and Lesbians in Ways They Never Did Before*, *S.F. CHRON.*, June 25, 2006, at F1.

124. PlanetOut Inc., *Meet Your Best Customer*, <http://www.planetoutinc.com/sales/> (last visited Jan. 31, 2008) (citing data from SIMMONS, *LESBIAN, GAY, BI-SEXUAL, TRANSGENDER SURVEY*, [http://smrb.com/asp/content.aspx?pid=4&sid=48&page=Solutions\\_Lesbian](http://smrb.com/asp/content.aspx?pid=4&sid=48&page=Solutions_Lesbian)).

sense to make sure that would-be gay parents are addressed by any market that wishes to engage them. This includes the State of Minnesota and its thousands of children in need of homes. At this moment, there is no part of the statute that references gay adopters either positively or negatively. None of the state's treatises on adoption or family law mention gay adopters either. With little to no recruitment on behalf of local agencies and the legal community, and no mention at all in the law as to their legal standing, can there be any doubt as to why gay couples might be hesitant to venture into such unsure waters?

There seem to be three potential answers to the question of developing law in this area for Minnesota. The first, and seemingly simplest, is to ignore the ambiguity that continues to discourage gay couples from adopting. The strongest argument from this perspective is that, if Minnesota is not ready for progressive change on this issue, even bringing the topic to the legislature could create a negative and potentially dangerous legislative reaction against gay couples, resulting in a Florida- or Utah-like law for the state. This is a possibility to be considered, even if dispatched in the knowledge that Minnesotans are unlikely to react in such a fashion.

Further, the result of ignoring this issue would be that inevitably the Minnesota judiciary would have to interpret whether the Minnesota statute indeed allows for joint petitions for unmarried couples. Beyond the democratic idea that a change in the law should come from the legislature, there are many compelling reasons not to rely on the judiciary for such a change. There is little indication whether the resulting case law would be positive or negative for gay couples. Creating a controlling holding against gay couples adopting jointly could hurt Minnesota for many years. Litigating this issue might also force the judiciary into feeling the need for the type of creative jurisprudence that the state of New York has seen. This case law, helpful or hurtful to gay couples, would only complicate an area of law that is otherwise governed strictly by statute. Further, the result of waiting on conclusive authority from the Minnesota Supreme Court could take many years.

A second, and more favorable, proposal would be to create pressure on the state's public and private adoption agencies to make internal changes to both accept and promote adoptions by gay couples. In reviewing different state policies, the agency change that was brought about in New Jersey in 1996 was the most effective state change short of the domestic partnership rights later introduced in that state and others. Further, it is a change that can and should be made at both private and public levels.

In a national study conducted at Rutgers University in 2003, it was shown that although sixty percent of the adoption agencies surveyed were willing to accept applications from gay adopters, less than thirty-nine per-

cent had made such placements.<sup>125</sup> Further, only nineteen percent actively recruited adoptive parents in the gay community.<sup>126</sup> Nearly half the agencies surveyed (forty-eight percent), however, expressed a desire to receive training to work with gay and lesbian families.<sup>127</sup> All agencies should start making advertising efforts to recruit gay couples. Trainings should be made available, both through the state and through private efforts to make social workers in agencies state-wide more comfortable in dealing with gay couples and placements with gay parents.

One agency director created just such a training program for child welfare workers in California. "There was a huge need for understanding about how to work with gay and lesbian families," said Jill Jacobs, Executive Director of Family Builders by Adoption, who has been doing these trainings for about six years, "and I heard from lots of child welfare workers and social workers who wanted to work with gay and lesbian families but felt like they didn't know how, and they were a little afraid. They weren't sure how to ask certain questions."<sup>128</sup> She points to a lack of knowledge of how to conduct a home study for a gay family or confusion over the quality of a relationship when no marriage certificate is available.<sup>129</sup> Some social workers are also unsure about the ability of two women to raise a boy adoptee or two men to raise a girl adoptee.<sup>130</sup> Such issues must be fully addressed for gay couples to be completely and adequately brought into the adoption system as families.

Further, Minnesota's adoption agencies should implement the standards set forth in the Child Welfare League of America's Standards of Excellence for Adoption Services for determining who might be a good parent: "[A]pplicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing lifestyles, or sexual orientation."<sup>131</sup> This standard emphasizes "individual assessment" of parents to "meet the needs of a particular available child."<sup>132</sup>

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125. EVAN B. DONALDSON ADOPTION INST., ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES; EXECUTIVE SUMMARY 2-3 (2003), available at <http://www.adoptioninstitute.org/whowe/Gay%20and%20Lesbian%20Adoption1.html>.

126. *Id.* at 4.

127. *Id.*

128. Jennifer Michael, *Defining Family: Piecing Together how Two Moms or Two Dads Fit into the Picture*, CHILDREN'S VOICE, Sept.-Oct. 2006, available at <http://www.cwla.org/voice/0609family.htm>.

129. *Id.*

130. *Id.*

131. Kristen Kreisher, *Gay Adoption*, CHILDREN'S VOICE, Jan. 2002, available at <http://www.cwla.org/articles/cv0201gayadopt.htm>.

132. *Id.*

Finally, the fastest and most conclusive answer to enabling gay couples to adopt would be to enact legislative changes. The Minnesota "Who may petition" for adoption statute has not been altered since 1998.<sup>133</sup> If the Minnesota legislature were to undertake to amend the adoption statute in a progressive manner, in the end, much of the debate reasonably comes down to semantics about gay relationships. How is the legislature to include into the adoption statute a relationship which otherwise legally does not exist? "Marriage" is a legally finite term. It has a legal beginning (license and ceremony) and a legal end (death or divorce). To include gay couples in the adoption statute before such couples are legally allowed to become married would necessitate an oddly worded and questionably vague relational term to be put in place. A term permitting adoptions to "any person or persons" (as opposed to the singular "any person") could force courts to allow adoptions to polygamist groups, churches, or even business enterprises.<sup>134</sup> A term allowing adoptions to "any two adults," such as the proposal in New York, could be argued to create problems with non-committed couples being able to adopt without any legal, social or amorous structure to their family life. Vermont's usage of the term "partner" might also offer a solution, although the term would have to be defined in its own right. Perhaps New Hampshire's proposal of adding "two unmarried adults in a familial relationship" might also satisfy the situation, but the term "familial" would once again provide a point needing clarification.

This author proposes a solution that might simplify the issue: recognize the relationship of the gay or straight unmarried couple to an adopted child, and thus better serve the best interest of the child. The state of Minnesota should continue to allow "any person" to adopt, but add language empowering "any two persons, heterosexual or homosexual, who have been in a committed relationship for at least one year" to adopt. (Of course the time of the relationship can be increased or decreased as the legislature may deem appropriate, so long as that age-of-relationship requirement is imposed on couples both gay and straight.) This definition, while perhaps cumbersome in length, would solve two key issues. First, this language would acknowledge the simple existence of gay couples wishing to adopt, and would give them the assurance that the State of Minnesota will not stand as a barrier between them and a family. Second, it would limit adoptive parents to two people in a committed relationship for a period of time. This assures that the child's best interests are still being preserved against the possibility of non-committed couples, groups, organizations, or polygamists wishing to take advantage of a newly broadened statute. In eliminating these "slippery slope" possibilities, the threatening nature of

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133. See MINN. STAT. § 259.22 (2007) (and then only amended to change the residence time requirements).

134. A fear that, while comical to some extent, was very much on the minds of the Utah legislature when they enacted their ban on adoptions by adults cohabitating with other adults.

such argued possibilities may be neutralized, even if simply for argument's sake.

## VII. CONCLUSION

In concluding this comparative paper, it is suggested that Minnesota amend its adoption laws to add clarity to the state's view of adoption by gay couples. As a progressive state, Minnesota has a duty to learn from the transgressions of other legislatures, and acknowledge both that there is a problem to be solved with so many children in the state's foster care system and that there are resources that can be tapped into to better serve the interests of those children.

In interviews with various same-sex families who have adopted children in Minnesota and judges who have had the issue before them, it has become clear to this author that the issue for these families is less about what the law is, but more about what the law appears to be.<sup>135</sup> These adopting families saw no affirmative statement that they, after investing monetarily, emotionally and legally into a system to help a child, would not be rejected because of the lives they lead together with their same-sex partners. The law in Minnesota has remained ambiguous as to same-sex adoptions, and, especially for gay men and women who grew up and "came out" in far more conservative eras, there is the assumption on many of their parts that this ambiguity can only work against them. These are couples who are treated differently for tax purposes, for estate purposes, for health care purposes, and even for immigration purposes. Can there be any wonder why they would presume that an unarticulated law for adoption purposes would stand in their way? Without the clear marketing of legal and social services along with unquestionable legislative and judicial language, many of these couples still feel left out in the Minnesota cold. And discouraging available, stable, loving families from permanently bringing foster children into their homes simply is not in the best interests of the children of Minnesota.

The issue of adoptions by gay families has seen recent legislative action in a number of states. Utah's legislation, which was discussed earlier, was amended to add clarifying statements regarding the preference for married couples in adoption as recently as March of 2007.<sup>136</sup> The state of Arkansas saw movement on a bill that would have restricted gay adoption as well in 2007.<sup>137</sup> On the other end of the spectrum, in May of 2007 Colorado's governor signed into law House Bill 1330, allowing gay couples to

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135. Interview with Herbert Lefler, Hennepin County Dist. Court Judge, in Minneapolis, Minn. (Aug. 1, 2006); Interview with Kathryn Quaintance, *supra* note 59; Interview with Tim Reardon, *supra* note 119; Interview with Peter Vitale and Stephen Nelson, *supra* note 119.

136. H.R. 343, 2007 Leg., Gen. Sess. (Utah 2007).

137. Doug Thompson, *Bill to Ban Gay Adoptions, Foster Parenting Advances*, ARK. NEWS BUREAU, Mar. 13, 2007, available at <http://www.arkansasnews.com/archive/2007/03/13/News/341036.html>.

adopt jointly in an adoption process that simulates that of a step-parent adoption.<sup>138</sup> After eleven states banned same-sex marriage through voter initiatives in 2004, there is a high likelihood that conservative movements may try to restrict adoption rights as well.<sup>139</sup> One representative of the Child Welfare League of America, Rob Woronoff, said in a National Public Radio interview, "This is a new issue that is really kind of growing out of the anti-gay marriage movement, but it's a very different issue from marriage. . . . Finding permanent, loving homes for children is a very difficult task that all states face."<sup>140</sup>

As a state with an undeniably progressive history, Minnesota should take the lead of several other states to also be on the forefront of not only allowing, but encouraging, adoptions by all those families who can create homes for the over 520,000 children in the foster care system in the U.S.<sup>141</sup> Amending the state's adoption legislation to dispel any ambiguity and create clear policy terms is in the best interests of adoptable children, and, in the end, this must overcome all political game-playing and moral theorizing; there are children who need permanent homes, and homes to be had.

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138. Ed Sealover, *Gay Couples OK'd to Adopt; Abstinence-Only Sex Ed Cut*, COLO. SPRINGS GAZETTE, May 15, 2007, available at [http://www.gazette.com/articles/bill\\_22409\\_\\_article.html/children\\_sex.html](http://www.gazette.com/articles/bill_22409__article.html/children_sex.html).

139. Greg Quinlan, founder of the Christian conservative Pro-Family Network in Ohio, told USA Today, "Now that we've defined what marriage is, we need to take that further and say children deserve to be in that relationship." Michael, *supra* note 126.

140. *Id.*

141. Andrea Stone, *Both Sides on Gay Adoption Cite Concern for Children*, USA TODAY, Feb. 20, 2006, available at [http://www.usatoday.com/news/nation/2006-02-20-gay-adoption-foster\\_x.htm](http://www.usatoday.com/news/nation/2006-02-20-gay-adoption-foster_x.htm).