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At a Crossroads: Bringing Minnesota's Same-Sex Couples Into the Law

Keywords

Same-sex marriage, Gay couples--Legal status laws etc.

AT A CROSSROADS: BRINGING MINNESOTA'S SAME-SEX COUPLES INTO THE LAW

Phil Duran*

Introduction:

Travel up the North Shore's Highway 61 to Canada, or down I-35 to Iowa, and you will find, within a few hours' drive, destinations where discrimination in marriage has come to an end and same-sex couples from Minnesota and elsewhere may legally marry.¹ Travel west on I-90, or in either direction on I-94, and you will soon enter states whose constitutions have been amended by popular vote to deny same-sex couples access to marriage (and in some cases to any other form of legal recognition).² In the middle of it all stands Minnesota: Minnesota statutes prohibit same-sex couples from marrying, but efforts to write this policy into our constitution have seemingly ground to a halt.³

At the same time, our current legislative and gubernatorial alignment has produced a stalemate of sorts, with progress on acknowledging same-sex couples coming, if at all, in limited and somewhat surreptitious forms.⁴ While committed advocates on both sides of the marriage-equality issue may fret that their most cherished proposals are not currently moving forward, this stalemate-induced lack of significant movement may, in fact, provide Minnesota with a breathing space in which to more carefully consider its options and make public-policy decisions that are thoughtful, constructive, and sustainable.

At the outset, it is critical to acknowledge that opinion in the gay, lesbian, bisexual, and transgender (GLBT) community regarding the movement toward marriage equality is anything but uniform and monolithic.⁵ Significant differences of opinion exist among those many expect would be the most committed supporters

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¹ See Civil Marriage Act, 2005 S.C., ch. 33 (Can.); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

² See Kavan Peterson, 50-State Rundown on Gay Marriage Laws (Nov. 3, 2004), <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576> (providing current status of state laws regarding same-sex marriage). Note that Wisconsin, North Dakota, South Dakota, Wyoming and Montana all currently ban same-sex marriage by Constitutional Amendment.

³ See Minn. Stat. §§ 517.01, .03. The most recent legislative bills that propose a constitutional amendment defining marriage as between a man and woman were introduced in March 2009. These bills are HF 1824/SF 1976, HF 1870/SF 1975, and HF 1871/SF 1974. The bills are still pending in the legislature. See Minnesota Legislative Reference Library, Resources on Minnesota Issues: Same-Sex Marriage in Minnesota (June 23, 2009), <http://www.leg.state.mn.us/LRL/Issues/gay.asp>.

⁴ See *id.*

⁵ See *infra* notes 6-12.

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of marriage equality. For example, some argue that because full legal equality for same-sex couples necessarily involves marriage equality, advocates should press for this outcome and absolutely nothing else.⁶ Others argue that because the road to full marriage equality may be long, it may be, or even must be, necessary to advocate for incremental progress along the way.⁷

In addition, supporters of same-sex couples differ on terminology. For example, some argue that because the word “marriage” is highly-charged and associated with religion, same-sex couples should simply avoid that morass altogether and press for an alternative legal structure, e.g., civil unions.⁸ On the other hand, the fight to secure legal equality for same-sex couples (whether termed “marriage,” “civil unions,” or something else) only reinforces the privileges of those predominantly white, middle-class couples who conform to heterosexist notions of the desirable family structures, while leaving behind those who are not coupled or who do not adhere to the traditional two-adult family model.⁹ Still others argue that the fight to secure marriage equality distracts the GLBT community from other pressing issues, including the needs of youth at risk, low-income GLBT populations, and transgender people.¹⁰ Additional disagreements involve strategy over whether to use litigation, push for immediate legislation, or wait until legislation is politically feasible.¹¹

While some conservative opponents of marriage equality criticize the concept as an attack designed to destroy the family, America, and/or western civilization¹² and some gays and lesbians dismiss the marriage-

⁶ See American Civil Liberties Union, Lesbian Gay Bisexual Transgender Project, <http://www.aclu.org/lgbt/relationships/index.html>; see Human Rights Campaign, Answers to Questions About Marriage Equality, http://www.hrc.org/documents/HRC_Foundation_Answers_to_Questions_About_Marriage_Equality_2009.pdf.

⁷ See Rosemary Black, *Gay Rights Advocate Complain Over President Obama's Handling of Same-Sex Marriage*, New York Daily News, June 29, 2009, http://www.nydailynews.com/news/politics/2009/06/29/2009-06-29_gayrights_advocate_complain_over_president_obamas_handling_of_samesex_marriage.html (Note Representative Barney Frank's comment); see The Board, *Gay Rights, the Transgendered, and Accepting Partial Progress* <http://theboard.blogs.nytimes.com/2007/11/09/gay-rights-the-transgendered-and-accepting-partial-progress/> (Nov. 9, 2007) (Note the quote by Speaker Nancy Pelosi).

⁸ See Alternatives to Marriage Project, <http://www.unmarried.org/> (suggesting that marriage may not be the best option for everyone); see also Nancy D. Polikoff, *Beyond Straight and Gay Marriage: Valuing All Families Under the Law* (Beacon Press 2008).

⁹ See Dale Carpenter, *Pay Your Money, Choose Your Radicals*, <http://www.indogayforum.org/news/show/31246.html>.

¹⁰ See Michael K. Lavers, *Gays Differ on Marriage Fight*, 2008, <http://www.gay.com/content/slideshow/splash.html?coll=4977&navpath=/channels/community>; see also Kerry Eleveld, *LGBT Group Looks 'Beyond Marriage'*, Aug. 7, 2006, http://www.thetaskforce.org/TF_in_news/06_0810/stories/beyondmarr_nyblade.pdf; see also Queers for Economic Justice, <http://q4ej.org/>.

¹¹ See OutFront Minnesota, Project 515 and Rainbow Families, Joint Statement Regarding Legal Strategies to Achieve Marriage Equality (Sept. 10, 2008) http://www.project515.org/index.asp?Type=B_PR&SEC=%7BF66D5B1A-ABC3-43E6-AA84-48A578E2D5BE%7D&DE=%7BB4E76592-1BC3-4375-A917-75DBA9A83D76%7D (stating that the organization opposes litigation and promotes the use of legislation to achieve marriage equality in Minnesota).

¹² See Opposing Views, Posting of Family Research Council to <http://www.opposingviews.com/arguments/gay-marriage-harms-traditional-marriage> (2008); Posting by Focus on the Family to

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equality issue as one that has been foisted onto them by conservatives,¹³ the roots of the debate lie in the not particularly gay-friendly nineteenth century.¹⁴ Roughly at the time of Minnesota's admission as a state in 1858, marriage – from a legal standpoint – was significantly different from its current conceptualization.¹⁵ A century and a half ago, the roles of “husband” and “wife” were strictly defined, in blindingly unequal terms.¹⁶ The male husband quite literally ruled the roost: his female wife lost her “legal personality” upon marriage, often being unable to formally own property, enter contracts, file lawsuits, or hold her husband accountable for abuse, among other limitations.¹⁷ In such a world of highly distinct, gendered roles, the notion of same-sex marriage would likely have been viewed as inherently impossible, as it would of necessity involve either having a woman controlling a marriage (or a man being controlled), or having a marriage where *neither* party was in control of the other.¹⁸

These gender roles reflected a vast societal inequality between women and men.¹⁹ But even contemporary critics made biting comparisons between the status of married women and the status of slaves.²⁰ The critique of marriage in the early mid-nineteenth century helped fuel the so-called “free love” movement, which, while maintaining the essential heterosexual nature of relationships, challenged the shape and texture of, and need for, legal marriage.²¹ Although the “free love” movement petered out, it and the budding women's movement contributed to over a century's worth of successful reforms to marriage that ultimately culminated in full legal equality between spouses.²² Because the historically gendered roles of “husband” and “wife” were no longer distinct, inevitably the question arose as to whether those roles needed to be tied to gender at all and whether a marriage could indeed consist of two women or two men.²³

The unambiguous legal answer to that question is “yes;” marriage can indeed be two men or two women but the political answer to that question occasionally has been something else.²⁴

<http://www.opposingviews.com/arguments/redefining-marriage-undermines-the-family-structure-best-for-children> (2008).

¹³ See *supra* note 10.

¹⁴ See Steven M. Tipton & John Witte, Jr., *Family Transformed: Religion, Values, and Society in American Life* 250, 253 (Georgetown University Press 2005).

¹⁵ See *id.* at 256.

¹⁶ See Nancy F. Cott, *Public Vows* 12 (Harvard University Press 2d ed. 2002) (2000).

¹⁷ See *id.*

¹⁸ Set aside the additional fact that the concept of a gay person or a lesbian person did not even begin to emerge until the last third of the nineteenth century in Europe.

¹⁹ See *supra* note 14, at 256.

²⁰ See *supra* note 16, at 61-63.

²¹ See Steven Mintz & Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* 203 (The Free Press 1988).

²² See *supra* note 14, at 258.

²³ See George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 59-60 (Basic Books 2004).

²⁴ See *supra* notes 10, 12.

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An early Minnesota Supreme Court decision, backed up by subsequent legislative developments has significantly delayed progress toward marriage equality and continues to discourage renewed litigation. In recent years, however, developments in the legislature and local governments signal that forward movement may be in the offing. Within the judicial branch, positive steps in administrative policies are supportive of domestic partners (even while avoiding the use of such a term) yet stand in contrast to recent decisions harmful to unmarried couples' interests. In the end, as the following examples illustrate, these mixed signals suggest Minnesota is in a time of slow transition toward recognition of same-sex couples.

Baker v. Nelson:

Minnesota led the way in terms of considering the question of marriage equality, but many who view Minnesota as a progressive paradise are surprised to learn that it was Minnesota that first ruled against marriage equality in *Baker v. Nelson*.²⁵ In *Baker*, plaintiffs brought a rather complex set of facts to the table and were denied a marriage license in Hennepin County.²⁶ As a result, plaintiffs brought suit based on the Fourteenth Amendment to the U.S. Constitution, arguing that Minnesota denied them equal protection under the law by permitting different-sex, but not same-sex, couples to marry.²⁷ Moreover, plaintiffs noted that at the time, Minnesota law did not specify that a marriage had to be between a man and a woman.²⁸

The Minnesota Supreme Court held that the Fourteenth Amendment did not protect a same-sex couple's right to marry.²⁹ The court's view was what might be called an essentialist approach that reflected the nineteenth-century view of marriage. Going back to the Book of Genesis, marriage was, in its very essence, a relationship between a man and a woman; a marriage between two men or two women was impossible and certainly not a constitutional entitlement.³⁰ Coming less than two years after the birth of the modern GLBT-rights movement, (understood to have occurred in June 1969 at the Stonewall riots in New York City) it is far from inconceivable that the court viewed the entire argument as mere sophistry not worthy of searching analysis. Still, subsequent litigation suggests that the plaintiffs' arguments were decades ahead of their time; virtually identical arguments, made under state constitutions across the country, have been somewhat successful.³¹ Someday, history will likely vindicate the *Baker* plaintiffs.³²

²⁵ 191 N.W.2d 185 (Minn. 1971).

²⁶ *See id.* at 185.

²⁷ *See id.* at 186.

²⁸ *See id.* at 185.

²⁹ *See id.* at 187.

³⁰ *See id.* at 186.

³¹ It is critical to note that the vast majority of marriage-equality cases have not resulted in marriage equality. Litigation in Hawaii, Washington, Oregon, Arizona, Minnesota, Indiana, New York, and Maryland was unsuccessful. Litigation in Vermont and New Jersey was marginally successful. Litigation in California (since interrupted) and Connecticut was successful in the limited context of requiring "upgrades" of existing domestic partnership/civil union arrangements to full marriage. *See* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 Rutgers L. Rev. 567 (2009) (discussing state recognition of same-sex couples). Only litigation in Massachusetts and Iowa was successful in securing marriage equality where no legal recognition of same-sex couples previously existed. *See id.*

³² This does not mean that *Baker* does not cast a long shadow over Minnesota. In addition to rendering renewed marriage-equality litigation in Minnesota untenable in the eyes of most, who believe the current court would revive

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Thus far, however, the Minnesota Legislature has not vindicated the *Baker* plaintiffs. In 1977, the legislature amended Minnesota Statutes section 517.01 to include the gender-specific limiting language, the absence of which the *Baker* plaintiffs had noted (and which the court had in effect written into the statute). This addition defined marriage in Minnesota as “a civil contract between a man and a woman.”³³ In 1993, when voting to add “sexual orientation” to the Minnesota Human Rights Act³⁴ (“MHRA”) against the backdrop of the then-radical litigation over marriage equality in Hawaii, the Minnesota Legislature added language to the MHRA that removed from its scope questions regarding access to or recognition of same-sex marriages.³⁵ Finally, in the wake of the mid-1990s hysteria over the possibility of same-sex marriage, the legislature approved amendments to Minnesota Statutes section 517.03 in 1997 (referred to as the “Defense of Marriage Act” or DOMA), specifically prohibiting same-sex marriages and declaring void any otherwise valid same-sex marriages performed elsewhere.³⁶ Within forty-eight hours of the November 2003 decision in *Goodridge v. Department of Public Health*,³⁷ which secured marriage equality in Massachusetts effective the following spring, some Minnesota legislators announced an effort to amend the state constitution to prevent either the judicial or legislative process from ending marriage discrimination.³⁸ In 2004 and 2005, the Minnesota House voted to place the proposal on the next general-election ballot, but the bill was defeated in successive sessions of the Minnesota Senate and has never gone to the voters.³⁹

The post-*Baker* political environment for same-sex couples in Minnesota has not been completely negative. In 2001, the Ventura Administration unilaterally offered dependent benefits, such as health coverage and tuition discounts, to same-sex domestic partners of state workers.⁴⁰ This was possible only because the Legislative Coordinating Commission, headed by then-Representative Carol Molnau, deadlocked in a vote over whether to permit the state to contract with employee unions over this issue. The benefits only continued until the summer of 2003, after the legislature approved new contracts that removed the domestic-partner provisions and after the advent of the Pawlenty-Molnau Administration and its refusal to countenance their extension in any form. After significant changes in leadership in the Minnesota House following the 2006 elections, however, the legislature began voting to reinstate these benefits and to

its “essentialist” construction of marriage (perhaps without the Old Testament references) and then apply the Minnesota Constitution to achieve the same result as in *Baker*, the 1971 decision also played a role in the Minnesota Court of Appeals ruling in *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 115-16 (Minn. Ct. App. 1995), holding that the City of Minneapolis could not extend dependent benefits to employees’ domestic partners.

³³ Minn. Stat. § 517.01 (2008).

³⁴ Minn. Stat. § 363A (2008).

³⁵ See Minn. Stat. § 363A.27 (2008).

³⁶ See Act of June 2, 1997, art. 10, 1997 Minn. Laws 1857 (codified at Minn. Stat. §§ 517.01, .03, .08, .20 (2008)). Ever vigilant in its zeal to protect Minnesotans from foreign threats, the legislature prohibited recognition of same-sex marriages from elsewhere at a time when no same-sex marriages existed *anywhere*.

³⁷ 798 N.E.2d 941 (Mass. 2003).

³⁸ See 2004 Minn. Sess. Law Serv. 3110 (West) (A bill for an act proposing a constitutional amendment that would restrict the interpretation of marriage to the judicial branch.).

³⁹ See *Minnesota Public Radio News, House approves marriage definition bill* (MPR radio broadcast Apr. 1, 2005), available at http://news.minnesota.publicradio.org/features/2005/03/31_khoom_marriage/.

⁴⁰ See Pauline Oo, *Preliminary Health Plan Task Force (HPTF) recommendations*, Brief, vol. 30, no. 35, Oct. 25, 2000.

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overturn the *Lilly* decision by permitting local governments to offer partner benefits.⁴¹ However, these and all other bills purporting to recognize “domestic partners” in any concrete fashion have been vetoed by Governor Pawlenty, and the exceedingly credible threat of veto has tended to discourage some legislators from bringing forth bills on related matters.⁴² Nonetheless, the Minnesota Legislature is likely to take up more bills regarding the rights of same-sex couples, including marriage equality, in the fairly near future. In 2009, separate bills were introduced that propose to: end discrimination in marriage,⁴³ extend recognition of same-sex marriages from other jurisdictions while leaving the ban on same-sex marriages in Minnesota,⁴⁴ end legal marriage for heterosexuals and replace it with civil unions for all,⁴⁵ or study the issue further.⁴⁶ While none of these proposals, including the re-introduced constitutional marriage-discrimination amendment, had hearings or votes, the remarkable set of votes in legislative bodies elsewhere in 2009 tending to expand the legal rights of same-sex couples may encourage the Minnesota Legislature to act in future sessions.⁴⁷ The legislative climate may also change in 2011 following the election of a new governor in 2010; clearly, this depends on the philosophical leanings of the winner.

Of intense interest in legal circles is the possible involvement in the marriage-equality debate of Minnesota’s judicial branch. As noted earlier, some marriage-equality supporters, weary of limited legislative progress and inspired by litigation successes elsewhere, support filing a marriage-equality lawsuit in Minnesota based on the state constitution.^{[48} On the other hand, three local GLBT-advocacy organizations, OutFront Minnesota, Project 515, and Rainbow Families (the St. Paul-based Midwest Office of the Family Equality Council), joined together to issue a statement in August 2008 specifically

⁴¹ See *supra* note 32. Because of its unique constitutional status, the University of Minnesota has been providing domestic-partner benefits for years. See Office of Human Resources Domestic Partnership Benefits Explanation, <http://www.umn.edu/ohr/benefits/domesticpartner>.

⁴² See Derek Wehrwein, *Same sex benefits memo reignites debate*, Faribault Daily News, June 21, 2009, available at <http://www.faribault.com/news.php?viewStory=92458>.

⁴³ See 2009 Minn. Sess. Law Serv. 78 (West) (calling for gender neutral marriage laws).

⁴⁴ See 2009 Minn. Sess. Law Serv. 899 (West) (calling for the state to recognize same sex marriages performed in other states but still continuing the ban in Minnesota).

⁴⁵ See 2009 Minn. Sess. Law Serv. 442 (West) (calling for the state to amend marriage laws so that there are only civil unions).

⁴⁶ See 2009 Minn. Sess. Law Serv. 1240 (West) (calling for the Minnesota Senate to study the issue of gay marriage further).

⁴⁷ As of mid-June 2009, marriage-equality legislation has been enacted in Vermont, New Hampshire, Connecticut (implementing a 2008 court ruling), and Maine; the New York Assembly passed a marriage-equality bill; Nevada overrode a gubernatorial veto to create statewide domestic partnerships; Washington significantly expanded its domestic-partnership structure; the District of Columbia voted to recognize same-sex marriages from elsewhere; Wisconsin is widely expected to create a limited domestic-partnership structure this summer; and New Jersey may enact marriage-equality legislation by year’s end. See Peterson, *supra* note 2. Additionally, marriage equality came to Iowa in April 2009 as a result of litigation. See *id.* On a separate but related legislative note, the City of Duluth approved a domestic-partner registry ordinance in May 2009 and the City of St. Paul introduced a similar ordinance in June 2009. See Duluth City Code ch. 29D (2009); see Chris Havens, *St. Paul Ponders Domestic Partner Registry*, Minneapolis Star Tribune, Jul. 19, 2009, available at http://www.startribune.com/local/stpaul/48628017.html?elr=KArks:DCiUoaW_eEO7UiacyKUnaciaec8O7EyUr.

⁴⁸ See, e.g., OutFront Minnesota, Project 515, and Rainbow Families, Joint Statement Regarding Legal Strategies to Achieve Marriage Equality (Sept. 10, 2008), *supra* note 11.

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discouraging marriage-equality litigation in Minnesota.⁴⁹ The groups argued that given the *Baker* precedent, Minnesota faced particularly challenging terrain for advancing such arguments and that a loss would be a setback as lengthy as that of *Baker* itself.⁵⁰ The organizations instead advocated pursuing a legislative route to equality.⁵¹

While many GLBT advocates agree that the current court tends to be more conservative and unlikely to rule in favor of marriage equality, the Minnesota judicial branch, as an institution, embraces policies which have the effect of recognizing unmarried couples or domestic partners, though not necessarily labeled as such.⁵² For example, the judiciary recognizes a judge's domestic partner for the purposes of enforcing compliance with the Minnesota Code of Judicial Conduct.⁵³

The Code of Judicial Conduct defines a “member of the judge’s family” as “a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship”⁵⁴ The Code further defines a “member of the judge’s family residing in the judge’s household” as “any relative of a judge by blood or marriage, *or a person treated by a judge as a member of the judge's family, who resides in the judge's household*”⁵⁵ These provisions arguably recognize that a domestic partner is a member of a judge's family for the purposes of the Code of Judicial Conduct.

Additionally, the Minnesota judicial branch as an employer recognizes and accommodates the existence of “co-habitors” in the lives of its employees.⁵⁶ For example, Minnesota Judicial Council Policy 3.13, titled “Employment of Relatives,” provides that “no appointing authority may appoint, transfer, or promote to any position a member of his or her immediate family.”⁵⁷ The policy defines “immediate family” to include “co-habitors,” which presumably would include domestic partners.⁵⁸ Similarly, Human Resource Rule 3.14 states that an employee may use their sick leave for “illness or disability of an employee’s spouse or co-habitor”⁵⁹ Rule 3.14(h) also permits an employee to use sick leave “to attend the funeral” upon “the death of the employee’s spouse [or] co-habitor”⁶⁰

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See infra* notes 53-55.

⁵³ Minnesota Code of Judicial Conduct, Canon 2, Rule 2.11 (2009) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child, or any other member of the judge's family residing in the judge's household, a person with whom the judge has an intimate relationship, or any other member of the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding.”).

⁵⁴ *See id.*

⁵⁵ *See id.* (emphasis added).

⁵⁶ *See infra* notes 9-12.

⁵⁷ Minnesota Judicial Council Policy 3.13.

⁵⁸ *See id.*

⁵⁹ Minnesota Judicial Branch’s Human Resources Rule 3.14(f).

⁶⁰ *Id.* at subdiv. (h).

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Observers should naturally not attempt to extrapolate from these examples to predict how the courts might rule on cases involving marital or other rights of same-sex couples, but it is nonetheless worth noting that Minnesota's judicial branch has among the most progressive policies in place within State government regarding what others might call domestic partners or same-sex spouses.

Case Studies: *Perry v. Auto-Owners Insurance*, *Monson v. Rochester Athletic Club*

While the judicial branch's human-resource policies regarding "co-habitors" are interesting and potentially relevant to the broad conversation about the legal "place" of unmarried or same-sex couples, most will focus on the branch's actual resolution of disputed questions involving them. Two recent examples, while fairly narrow, do not leave those who advocate for full equality for same-sex couples optimistic about prospects for litigating the issue.

In 2008, the Minnesota Supreme Court ruled against an insurance claimant in *Auto-Owners Ins. Co. v. Perry*.⁶¹ Chong Suk Perry was the unmarried, heterosexual surviving partner of a man who had been killed in an auto accident.⁶² Although the terms of the policy restricted eligibility for economic-loss benefits to surviving spouses and children, Perry asserted that state law actually imposed a higher standard, one which would allow her to proceed with a claim.⁶³ In fact, in a prior case the Minnesota Supreme Court expounded on the vagueness of the relevant provisions.⁶⁴ Perry lost on summary judgment in district court; this was affirmed by the Minnesota Court of Appeals.⁶⁵ The Minnesota Supreme Court, in a divided opinion, held that despite explicit language in the insurance statute stating that the goal was to compensate "all loss" and that "all persons" who experience loss have a right to file a claim, Chong Suk Perry was not a person whose loss entitled her to seek compensation because she was not married to the decedent.⁶⁶ Examining the statute, the court determined that a surviving spouse's eligibility for benefits would terminate upon his or her remarriage, and a child's upon reaching the age of majority.⁶⁷ There was no provision for bringing a surviving partner's eligibility to an end, theoretically leaving a partner perpetually eligible for benefits.⁶⁸ Ignoring without comment or analysis the "all loss" and "all persons" language, the court concluded that the law could not possibly be read to include surviving partners as persons whose loss needed to be compensated.⁶⁹ While the couple in *Perry* was heterosexual, the situation is one that any same-sex couple could also face, with the additional barrier that unlike Perry and her partner, the same-sex couple has no

⁶¹ See *Auto-Owners Ins. Co. v. Perry*, 749 N.W.2d 324 (Minn. 2008).

⁶² See *id.* at 325.

⁶³ See *id.* at 326.

⁶⁴ See *Peevy v. Mutual Services Casualty Ins. Co.*, 346 N.W.2d 120, 123 (Minn. 1984) (There was no attempt by the Minnesota Supreme Court to interpret the statute, because the insurance policy at issue in *Peevy* was clear. The Minnesota Supreme Court does commend the statute to the legislature for clarification.).

⁶⁵ See *Auto-Owners Ins. Co. v. Perry*, 2006 WL 5866545 Apr. 30 2006 Minnesota District Court; *Auto-Owners Ins. Co. v. Perry*, 730 N.W.2d 282, 283 (Minn. Ct. App. 2007).

⁶⁶ See *Auto-Owners Ins. Co.*, 749 N.W.2d at 334.

⁶⁷ See *id.*

⁶⁸ See *id.* at 328-35.

⁶⁹ See *id.* at 328-29.

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choice as to their marital status in Minnesota.⁷⁰ *Perry* reinforces the privileged status of marriage, and asserts that it is the public policy of Minnesota that unmarried partners' painful losses are unworthy of recognition in our state's insurance law as requiring compensation.

A second recent case that worked its way through Minnesota's appellate courts touching on the legal rights of same-sex couples is *Monson v. Rochester Athletic Club*.⁷¹ In *Monson*, the Rochester Athletic Club (RAC) offered family memberships strictly to married couples and their children.⁷² Amy and Sarah Monson had been together several years and were raising a daughter, but were not married.⁷³ RAC staff at first "erroneously" sold them a family membership before management realized what had happened, whereupon they rescinded the Monsons' membership and offered to sell them multiple individual memberships which would cost about \$500 more per year than the family membership.⁷⁴ Dissatisfied, the Monsons persisted, and though the RAC relented in part and offered to charge them a "family" initiation fee instead of individual fees, the parties were unable to resolve their differences.⁷⁵

The Monsons filed a claim against the RAC under the MHRA, arguing that the RAC engaged in indirect ("disparate impact") sexual-orientation discrimination in the areas of public accommodations and business contracting.⁷⁶ As the Monsons pointed out, if a business will provide a good or service only to married people, given the current state of Minnesota law, that good or service will by definition be provided only to heterosexuals; put differently, a married-only policy excludes gay and lesbian people at a rate of 100%.⁷⁷ The outcome of such an approach, therefore, is indistinguishable from direct, or "disparate treatment" discrimination, e.g., a policy *explicitly* stating that a good or service is available only to heterosexuals and denied to gays and lesbians.⁷⁸ Moreover, considering the general prevalence of "household memberships," "dual memberships," and broadly-defined "family memberships," including within the health-club industry, it is difficult if not impossible to conceive of a legitimate, non-discriminatory rationale for maintaining such a policy.

A significant challenge to the Monsons' argument was the unsettled question of whether one could bring a

⁷⁰ See *Auto-Owners Ins. Co.*, 749 N.W.2d at 324.

⁷¹ See *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. Ct. App. 2009).

⁷² See *id.* at 62.

⁷³ See *id.*

⁷⁴ See Brian Davidson, *Health Club Sued for Discrimination*, Fitness Business News, May 5, 2007, <http://www.fitnessbusinessnews.com/index.php?p=article&id=fb200705tEQO5t>.

⁷⁵ See Jon Tevlin, *Who Qualifies for Family Gym Rate? Rochester Bias Lawsuit May Tell*, Star Tribune, <http://www.startribune.com/local/11588496.html>.

⁷⁶ *Supra* note 71.

⁷⁷ See Jon Tevlin, *Who Qualifies for Family Gym Rate? Rochester Bias Lawsuit May Tell*, Star Tribune, <http://www.startribune.com/local/11588496.html>.

⁷⁸ See, e.g., Nan D. Hunter, *Sexuality and Civil Rights: Re-imagining Anti-Discrimination Laws*, 17 n.y.l. sch. j. hum. rts. 565, 579 (2000) ("Since the limitation is based on marriage rather than sexual orientation, it is not disparate treatment discrimination based on sexual orientation. [...] But, because there is a much greater impact on persons who cannot marry their life partners, such policies have a disparate impact based on sexual orientation.").

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disparate-impact claim in these areas (public accommodations, business contracting) of the MHRA.⁷⁹ The only explicit mention of disparate-impact analysis is found in a general section of the MHRA referring to “claims,” and in connection with employment matters.⁸⁰ So did this language restrict disparate-impact claims to employment cases, or did it merely set out a particular test for employment cases while leaving non-employment cases to a more general test?

The case law was not entirely helpful in clarifying the question. In 1986, the Minnesota Court of Appeals had held in *Khalifa v. State* that Khalifa had stated a viable claim under the MHRA when he charged the State with disparate-impact discrimination in the area of public services.⁸¹ However, the “claims” language referred to above did not yet exist in the MHRA.⁸² Nonetheless, *Khalifa* established that one could pursue disparate-impact claims in public-services contexts.⁸³

Four years later, the Minnesota Court of Appeals ruled in *Paper v. Rent-a-Wreck* that the defendant did not violate the plaintiff’s rights under the Minneapolis Civil Rights Ordinance (MCRO) by employing a credit-check procedure that could have a disparate impact on low-income people or on communities of color, whom such a procedure might disproportionately exclude.⁸⁴ Paper had brought her claims on a disparate-impact theory in the area of public accommodations.⁸⁵ While affirming the district court decision against Paper, the court of appeals did specifically exhort providers of public accommodations to refrain from policies which would have disparate impacts in violation of the MCRO “or similar laws.”⁸⁶ The court’s entire analysis was based on MHRA language and precedent; therefore it is reasonable to infer that the court included the MHRA itself as a “similar law.” Moreover, the “claims” language referred to above was incorporated into the MHRA, yet, nearly contemporaneously, the court of appeals did not see this as a restriction on the application of disparate-impact analysis only to employment cases.⁸⁷

On the other hand, in an unpublished ruling in *Babcock v. BBY Chestnut Ltd. P’ship*, the Minnesota Court of Appeals upheld a district court ruling against a pro se litigant who argued that the defendant property company had engaged in disparate-impact discrimination in the area of real property.⁸⁸ The court’s analysis was focused on other issues, but in resolving the case, it held that under the MHRA, disparate-impact analysis could only be used in employment matters.⁸⁹ The holding in *Babcock* contradicts the holdings in

⁷⁹ See *Monson*, 759 N.W.2d at 65-67.

⁸⁰ See Minn. Stat. § 363A.08, subdiv. 2 (2008).

⁸¹ See *Khalifa v. State*, 397 N.W.2d 383, 388 (Minn. Ct. App. 1986).

⁸² See Minn. Stat. § 363.03, subdiv. 4 (1980), quoted in *Khalifa*, 397 N.W.2d 383 at 386.

⁸³ See *Khalifa*, 397 N.W.2d at 387-88.

⁸⁴ See *Paper v. Rent-A-Wreck*, 463 N.W.2d 298 (Minn. Ct. App. 1990).

⁸⁵ See *id.* at 299-300.

⁸⁶ *Id.* at 300.

⁸⁷ See *id.* at 299-300.

⁸⁸ See *Babcock v. BBY Chestnut Ltd. P’ship*, No. CX-03-90, 2003 Minn. App. LEXIS 899 (Minn. Ct. App. July 29, 2003).

⁸⁹ See *id.* at *5.

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Paper and *Khalifa*, which appear to affirm the viability of disparate-impact analysis outside of the employment context.⁹⁰

Unfortunately, *Monson* only compounds the tension. The court did not synthesize its previous rulings (the *Monson* court seemed to ignore them, and spent little time analyzing the importance, if any, of the “claims” language).⁹¹ Instead, the court examined the public-accommodations language of the MHRA⁹² and held that the structure of this particular provision meant it applied solely to direct, disparate-treatment, discrimination, and not indirect, disparate-impact, discrimination.⁹³ Having concluded that a disparate-impact claim in public accommodations was not viable, the court left open the question of whether disparate-impact claims could be pursued in other non-employment areas of the MHRA.⁹⁴ This would appear to be an implicit rejection of *Babcock’s* ruling against disparate-impact claims anywhere but in employment cases, as well as a challenge to *Paper’s* direction that providers of public accommodations avoid impermissible disparate impacts. It is, however, theoretically consistent with *Khalifa*.

By declining review, the Minnesota Supreme Court leaves unresolved the inconsistent rulings of the Minnesota Court of Appeals regarding disparate-impact analysis. That matter may be resolved at some point down the road. But in leaving *Monson* undisturbed, the court also leaves in place an obstacle to equality for same-sex couples, namely the viability of policies restricting goods or services to married couples only. More broadly, *Monson* keeps the door open to restrictive, arbitrary definitions of “family” based on marriage, where the (non-)existence of a marriage is irrelevant to the underlying transaction, and where, of course, couples like the Monsons cannot marry in Minnesota even though they function exactly as a family. *Monson* was never about money, and fundamentally, it was not even about a gym membership. It was about respecting the dignity of the Monson family, so that two parents and their child would not have to endure being told by a health club that they were not a family. Gay and lesbian couples will continue for the foreseeable future to be denied access to goods and services because they have not satisfied an arbitrary criterion, which they are prohibited from fulfilling in the first place. If marriage remains a heterosexuals-only institution in Minnesota, sexual-orientation discrimination will flourish despite the legislature’s determination within the MHRA itself that such discrimination harms society and undermines democracy.⁹⁵

It should also be noted that gay and lesbian couples in Minnesota are, in fact, marrying elsewhere – Iowa and Canada included. Arguably, a couple who is married and *still* denied, e.g., a “family” membership that would be offered to a heterosexual couple who had married in the same jurisdiction, would be able to argue direct discrimination based on sexual orientation by showing the business caters to straight couples who married in Iowa, but not to gay ones. Unfortunately, the legislature appears to have precluded such a claim by inserting language into the MHRA which makes it inapplicable to claims seeking the recognition of a same-sex marriage.⁹⁶

⁹⁰ See *Paper*, 463 N.W.2d at 300; see *Khalifa*, 397 N.W.2d at 387-89.

⁹¹ See *Monson*, 759 N.W.2d at 65-67.

⁹² See *id.* at 66-67.

⁹³ See *id.* at 67.

⁹⁴ See *id.*

⁹⁵ See Minn. Stat. § 363A.02, subdiv. 1(a)(5) (2008).

⁹⁶ See Minn. Stat. § 363A.04 (2008).

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Eventually, marriage equality will come to Minnesota, so that couples like the Monsons need not leave the state to marry. Businesses will recognize all marriages in their transactions, or will continue to sell “group” memberships and benefits in ways not solely tied to marriage, and the indignities visited upon couples like the Monsons will become puzzling relics of the past. Recent experience suggests that Minnesota’s courts may not be the most viable route for seeking these outcomes. At this particular crossroads, progress may best be achieved by following the route marked to the legislature.