

ADOPTION LAW IN MINNESOTA: A HISTORICAL PERSPECTIVE

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I. INTRODUCTION

Any understanding or review of adoption law in the United States, and in Minnesota in particular, must begin with a recognition that adoption law by its very nature is a melding of social and ethical views of society with respect to children, with prevailing legal complexities and attitudes. The legal decisions made in adoption cases and described in State and Federal statutes must, of necessity, involve consideration of “children’s best interests.”¹ That consideration of societal views of children and

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1. See source cited *infra* note 94 and accompanying text.

legal principles goes well beyond the question of legal and statutory interpretation, involving implications as well as reflections of how society decides to view its children and to create and define families. It reflects society's view of how families are created, how they are disciplined, how they are maintained, and how they are defined.

This reflection of the melding of issues involving law and society requires only the view of the attempts by various practitioners to define their role in the adoption process. These attitudes are reflected on one side by the Code of Ethics of the American Academy of Adoption Attorneys² and on the other side by the Standards issued by the Child Welfare League of America.³ By comparing these approaches, one can see the continuing struggle and simmering tension between the two worlds of law and social work.

Given the complexity of the broader societal context in which adoption practice now occurs, it is especially important to reaffirm the fundamental values that provide a framework for professional adoption services. The core values listed below form the foundation for the ethical development and delivery of adoption services.

- All children have a right to receive care, protection, and love.
- The family is the primary means by which children are provided with the essentials for their well-being.
- The birth family constitutes the preferred means of providing family life for children.
- When adoption is the plan for a child, the extended family should be supported as the first option for adoption placement, if appropriate.

2. American Academy of Adoption Attorneys, *Code of Ethics*, in FAMILIES BY LAW: AN ADOPTION READER 43, 43–44 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004), available at http://www.adoptionattorneys.org/information/ethics_code.htm.

3. Child Welfare League of America, *Adoption as a Child Welfare Service: CWLA 2000 Standards*, in FAMILIES BY LAW: AN ADOPTION READER 45, *supra* note 2, at 45–46.

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- Adoption as a child welfare service should be focused on meeting the needs of the children to become full and permanent members of families.
- All children are adoptable.
- Siblings should be placed together in adoption unless serious reasons necessitate their separation.
- Adoption is a life long experience that has a unique impact on all the parties involved.
- Adoption should validate and assist children in developing their individual, cultural, ethnic, and racial identity, and should enhance their self-esteem. All adoption services should be based on principles of respect, honesty, self-determination, informed decision-making, and open communication.
- All applicants for services should be treated in a fair and non discriminatory manner.⁴

While the above summary of the Child Welfare League of America Standards of Excellence in Adoption Services may reflect some departure from previous adoption standards, these standards nevertheless continue to state the commitment by the social service professionals as to what they determine to be in the “child’s best interests.” At the same time, approaching it from a more legalistic standpoint, and in an attempt also to provide services deemed to be in the “children’s best interests” and supportive of adoptions, the American Academy of Adoption Attorneys has established its code of ethics as follows:

The American Academy of Adoption Attorneys hereby make and establish this Code of Ethics.

1. A Member shall be duly licensed to practice law in each state in which the Member maintains a law office, shall fully comply with the Ethical and [other Rules and Canons] of Professional Conduct . . . and shall maintain the highest standards of professional and ethical conduct.

4. *Id.*

A Member shall not engage in activities which bring discredit upon the Academy.

2. (a) A Member shall assure that the Member's clients are aware of their legal rights and obligations in the adoption, and that all parties to the adoption are aware of their right to separate legal counsel. . . .

3. A Member shall not purport to represent both the prospective adopting parent(s) and one or both birth parents, where such representation is specifically prohibited. . . .

4. A Member shall actively discourage adoption fraud or misrepresentation, and shall not engage in such conduct, and shall take all reasonable measures not inconsistent with the confidentiality of the attorney/client relationship, to prevent adoption fraud or misrepresentation, withdrawing from representation where necessary to avoid participation in any such conduct.

5. (a) A Member shall assure that clients to an adoption are aware of any laws which govern permissible financial assistance to a birth parent.

(b) A Member shall not assist or cooperate in any adoption in which the Member has reason to believe that the birth parent or parents are being paid, or given anything of value, in exchange for the placement for adoption, for the consent to an adoption, for relinquishment for adoption, or for cooperation with the adoption of his or her child, without first making full disclosure to the appropriate court. This rule does not make it improper for a Member to assist or cooperate with an adoption in which the birth parent or parents are reimbursed for reasonable and necessary pregnancy-related expenses actually incurred by the birth parent, or in which such expenses are paid directly on behalf of the birth parent, provided that such payment or reimbursement is allowed under the [state] law. . . .

6. A Member shall assure that the Member's fee arrangement with each client is carefully explained and fully understood by the client. . . .

7. A Member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee . . . [and] shall not, directly or indirectly, charge a finder's fee

for locating a birth parent. . . .

8. A Member shall not possess a financial stake in the success of any adoption in which the Member is retained as counsel for any party. A financial stake in an adoption [occurs] if the Member enters into a fee agreement by which the Member is to receive a greater fee for a successful adoption than is warranted based upon the reasonable value of the services performed by the Member; or . . . a lesser fee than the reasonable value of the services performed by the Member if the attempted adoption is unsuccessful. . . .

10. A Member shall not make false or misleading claims in advertisements, nor shall a Member include client testimonials in such advertising. . . .

11. . . . (b) A Member shall not induce or encourage a birth parent to change selection of prospective adopting parents unless the Member knows or has reason to believe that the proposed adopting parents cannot obtain court approval of a placement with them.

12. A Member shall not enter into any agreement with any person which would have the effect of restricting the Member's ability to exercise independent professional judgment on behalf of the Member's clients.

13. A Member may, when appropriate and/or when requested by a client, refer parties to competent and professional medical providers, legal counsel, psychological counselors, or adoption agencies. . . .

14. A Member shall be under a duty to investigate representations made to the Member by prospective birth parents and prospective adopting parents if the Member believes or has reason to believe that such representation is false. [*E.g.*, a birth mother's claims about the whereabouts or name of the biological father.] Under all other circumstances, a Member may ethically rely⁵ upon representations made by the parties to an adoption.

"Adoption is a legal proceeding whereby the parent-child relationship is created between the person or married couple adopting . . . and the person being adopted"⁶ Despite this fact,

5. American Academy of Adoption Attorneys, *supra* note 2, at 43–44.

6. Golda Zimmerman, *What Is Adoption—Overview*, in *ADOPTION LAW: PRACTICE AND PROCEDURE IN THE 21ST CENTURY* 3, 3 (Golda Zimmerman ed., 2004).

there is an overlap in the relationship between the legal proceedings and the commitment to children through the social services that cannot be avoided.

Further, while it is true that “[a]doptions in the United States exist strictly according to statute, in derogation of common law,”⁷ it is also true that the interpretation of those statutes is usually done within the context of an attempt to do what is in the “children’s best interests.”

Despite the attempts of many to reflect, in statutory and case law determinations, the views of society,

[i]t can be said that the state of the law is often behind what is currently happening in society and science, and what are common or acceptable patterns of behavior. This belief is particularly true when one takes a current assessment of the practice and procedures of adoption law in the 21st Century. Issues such as assisted reproduction technology, adoption facilitators, adoption mediation, and gay and lesbian adoption are not adequately addressed by statute, if addressed at all.⁸

It is this constant tension between the changing attitudes and views of society toward its children and families and the strict construction of statutory law that continue to demonstrate that “[a]doption is a complicated area of the law and legal errors can result in devastating consequences.”⁹

In addition to the ongoing tension and conflict between statutory interpretation and the slowness of statutes to reflect changing societal attitudes, the reality of adoption law exists as the result of the numerous differences in the population of adopted children available. In most cases, adoption statutes in all states, including Minnesota, are consistent and do not reflect on their face a difference in the children to be adopted. Nevertheless, most statutory provisions have resulted from considerations of specific children available for adoption. In general, those populations can be divided into two groups. The first group consists of children who are infants or children under the age of two. Those children may be coming from single mothers, intact families, foreign countries, or, in some unusual cases, through the Child Welfare

7. *Id.*

8. *Id.*

9. AMY M. SILBERBERG, MINNESOTA ADOPTION LAW AND PRACTICE 1 (1999).

System.¹⁰ The second group consists of those children who have been involuntarily removed from their families of origin by the State and, as a result of the need for permanency in their lives after removal, are available for adoption. In most cases, those children have been the subject of significant abuse or neglect, have had one or more placements in foster care, and are generally older children, often involved in sibling groups.¹¹

Both of these separate categories of children have different needs and are viewed differently by society in general and adoption statutes in particular.

This article will focus on historical developments of adoption law in Minnesota and, briefly, nationally.¹² This article then offers analysis of selected areas of adoption law,¹³ and ends with descriptions of expectations for future developments in adoption law.¹⁴

II. THE GENERAL HISTORY OF ADOPTION

Adoption as a concept, and specifically as a legal concept, is in many ways a uniquely American creation. As the Progressive Movement of the late nineteenth century merged with changing views of children and families, all states eventually created adoption statutes, attempting in many ways to create better situations for families.¹⁵ As the more specific description of the history of Minnesota statutes in the next section shows,¹⁶ the statutes changed over time in their continuing attempt to reflect the ever-shifting views of society toward children and families. But at every point, there was an ongoing attempt by those involved in the various welfare societies, as well as the state, to do what they thought was in “children’s best interests.”

This often included the movement of children from what were viewed as the poverty areas of the large cities on the east coast out to the farms and rural areas in the Midwest. There were, in fact,

10. See generally MINN. STAT. § 259.47 (2006) (dealing previously with the placement of infants).

11. See generally *Id.* § 259.29, subdiv. 2 (dealing previously with the placement of older children with relatives of kin).

12. See *infra* Parts II, III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See BARBARA MELOSH, STRANGER AND KIN: THE AMERICAN WAY OF ADOPTION 15 (2002).

16. See *infra* Part III.

requests by various persons in the Midwest for children. In the early 1920s, the following notice appeared in *Outlook*, a nationally circulated magazine directed at social workers and reformers:

Desirable home is available for boy of seven or eight with superior mentality and healthy heredity. Family consists of university graduates, and child would receive skillful attention in respect to health and education, including music if desirable, also college and professional training later. Neighborhood and general environment the best.¹⁷

In 1918, the Mayor of Bogalusa, Louisiana, wrote the Children's Aid Society of New York to request

some white babies . . . a car load . . . by a car load, mean about thirty to fifty. We do not care to know anything about their antecedents or parentage. All we want to know is that they are healthy. We would be interested in about one half Protestant and one half Catholic children, both boys and girls.¹⁸

These two examples reflected a competing view of family and child placement characteristics in the early stages of adoption. This period reflected a transitional moment in the history of adoption. What has been referred to as "instrumental adoption" was a kind of adoption in which older children were far more desirable than infants, who were consequently rarely the subject of this type of adoption.¹⁹ Instrumental adoption was influenced by concepts of apprenticeship and was based on a calculus concerning the worth of a child's labor.²⁰

By the early twentieth century, however, many people began to turn to adoption in search of children to cherish, throwing away consideration of their economic value. At that point, "sentimental adoption" was developed and was predicated not on economic value but on the sense of the child's emotional value to the parents and to the family.²¹

The earlier economic view of children as essentially "chattel" is clear in the request from Louisiana:

The Mayor's letter suggests the persistence of older forms of child exchange. His letter addressed the Children's

17. MELOSH, *supra* note 15, at 12.

18. *Id.*

19. *Id.* at 12–13.

20. *Id.* at 12.

21. *Id.* at 13.

Aid Society of New York. Under the leadership of Charles Lowery Brace, that organization collected children from the city's streets to transport them to the supposedly more salubrious environs of midwestern farms. Begun in the mid-1850s, these orphan trains had fallen into disrepute by 1918. Progressive-era reformers instead turned to "home relief," that is, keeping children within their original families and caring for them in their homes. The mayor's request for a "carload" of "thirty to fifty" children was strikingly at odds with emerging new middle-class models of childhood: his casual quantification seemed to posit children as readily exchangeable surplus commodities, an affront to the sentimentality and emotion associated with childhood. Moreover, the unsavory whiff of apprenticeship clings to his letter.²²

The observation by the Mayor of a concern for the health of the children seems to imply the expectation that they will be put to work on the farms, a characteristic of the "instrumental family" that was being assaulted by reformers who agitated for child labor laws and compulsory schooling.²³ Nevertheless, in his request for "babies," there is also an indication of a desire for children too young to work, reflecting the beginnings of changes in attitudes toward adoption itself.²⁴

More strongly reflecting the changes in attitudes,

[t]he *Outlook* announcement, written just a few years later, implies a very different world of child nurture and family. In sharp contrast to the Mayor's order of a job lot of healthy children, these petitioners seek one particular child, meticulously specified by sex, age, intelligence, and inheritance. If these petitioners are far choosier about the child they seek, they are also far more concerned to present their own credentials as parents. Saying nothing about religion, they offer as inducements the material and cultural advantage of the middle-class life. The two documents reveal radically different assessments of the economy of adoption. The Mayor assumes that the Children's Aid Society has large numbers of children on hand, ready to be distributed for the asking. The *Outlook* notice, in contrast, implies an economy of scarcity. The [prospective] adopters, or whoever is writing on their

22. *Id.*

23. *Id.*

24. *Id.*

behalf, have resorted to national advertising to find a single child.²⁵

While the first adoption law was actually passed in 1851 in Massachusetts, this and earlier laws were actually directed primarily at the regulation of inheritance.²⁶ Even as they did, in fact, create a legal relationship between the adoptive parents and the children, they specifically made provisions for bequests to those outside the circle of blood kinship and also explicitly defended the rights of biological heirs.²⁷

By contrast, the evolving institution of adoption in the twentieth century made adoptive families in the United States the full legal equivalent of families formed by biology. In some times and places, adoption had established a new relationship between adults. In the United States, adoption meant *child* adoption, and by decree of adoption, biological strangers became legal and social kin.²⁸

As noted,

[a]doption was crafted in the context of Progressive reform and modernizing culture, as the religious and moral commitments of Victorianism yielded to the new understandings of social and behavioral science. The emergence of modern adoption required a radically different understanding of family, one that overturned deeply held beliefs about blood and nurture, obligation and love, choice and chance. It was no accident that the United States was the crucible of this kind of adoption: in its repudiation of the past and its confidence in social engineering, adoption is quintessentially American.²⁹

Over the next hundred years, the changing social mores and attitudes directly affected, albeit at some times in a delayed manner, the attitude toward and support for adoption. “During the 1910s and 1920s, adoption emerged as an ambitious new social transaction, a legal and cultural institution that conferred kinship on parents and children unrelated by blood.”³⁰ Additionally, “new adoptive famil[ies] reflected another change within American

25. *Id.* at 13–14.

26. *Id.* at 15.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

culture: the ongoing transformation of middle-class family life. For nearly a century, Americans had made marriage a more individual affair, as young people insisted on choosing their own partners. They added romantic love to duty in the marriage contract.”³¹

This changing view of families in marriage, along with various exposés in the 1890s and early 1900s, spurred reformers to respond to a range of social problems—from disabilities to child dependency—by building institutions, as opposed to supporting adoption or movement within the family.³²

A 1909 White House Conference on the Care of Dependent Children gathered together a new breed of child welfare workers: “The benevolent reform of charity workers and evangelical missions yielded to a new professionalization of reform, one that appealed to the expertise of social science.”³³ Institutional care was viewed now as a last resort.³⁴ A growing faith in nurture over nature by child welfare experts looking for new solutions began to have significant impact.³⁵ This, along with a new attitude toward women who were pregnant out of wedlock, again shifted the commitment toward adoption.³⁶ Development of the goal to keep the mother and child together often conflicted with the values of providing stability and security within a family setting. This conflict developed into observations of an illicit alternative to the rehabilitative agenda of keeping mothers and children together.³⁷ As reflected in a Progressive exposé entitled *The Traffic in Babies*, a 1914 report by George Walker, the results of an investigation of two Baltimore baby farms were well respected:

For a fee, they took babies off the hands of mothers looking to save themselves from the disgrace of single motherhood. Some also boarded pregnant women until their babies’ births, further helping to conceal an illicit pregnancy. The profit in such services depended on a grisly calculus: at a time when bottle feeding was not yet a reliable substitute for breast milk, most babies did not survive separation from their mothers and so did not become a financial burden for the proprietors. Only the

31. *Id.* at 16.

32. *Id.*

33. *Id.* at 17.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 18.

hadiest newborns could survive a regimen that often combined bottle feeding with poor sanitation and negligent care. Walker's investigation reported a death rate of over 80 percent of all babies admitted and gave a grim account of the mass graves to which their small bodies were consigned.³⁸

There were even attitudes among some that it was "better that [they] should die" as opined by one woman as she explained to an investigator why she referred mothers of "illegitimate" babies to such an institution.³⁹

As a result of the appalling attitudes and the exposé, views toward adoption shifted back and forth. At the same time, attitudes were shifting back and forth regarding marriage, unplanned pregnancies, illegitimate children, and adoption. "Along with Progressive reform, the developing profession of social work helped to displace the moralism of nineteenth-century evangelical reformers."⁴⁰ While "evangelical reformers had reached out to the 'fallen women' . . . the retribution for sin was the sentence of single motherhood. A new generation of secular reformers was both less concerned with punishing the sinner and more concerned about the effects of such redemption on the child."⁴¹

Later social workers would endorse adoption as another solution for children born out of wedlock.⁴² This was a way to give the sexual transgressor an additional chance and also to save the child from the consequences of the mother's mistakes.⁴³ Through the time of the Second World War, the "fallen women" of the nineteenth century had become susceptible to the intervention of experts.⁴⁴ That resulted in a significant increase in, and recommendation for, the stability of adoption.

III. SELECTED HISTORICAL ANALYSIS OF MINNESOTA STATUTES

As with national statutory developments, Minnesota statutes have been periodically revised to reflect the view of the day.

38. *Id.*

39. *Id.*

40. *Id.* at 19.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

Historically, common law adoption did not exist⁴⁵ and was created through statute.⁴⁶ The philosophical views of society are reflected in statutory change.⁴⁷ The rights of birth parents, adoptive parents, and children have shifted over time as those attitudes have shifted.

The earliest statutes in Minnesota dealing with adoption appear to have been enacted in 1876⁴⁸ and reveal the views of the time. Any inhabitant of the state could petition “the district court in the county of his residence” to adopt a child.⁴⁹ If the person petitioning was married, it was required that the husband or wife join in the adoption petition or it would not be granted.⁵⁰ An adoption would not be granted without the consent of the birth parents, if they were living.⁵¹ But if no parent was living, then the next of kin could consent to the adoption—if no next of kin was available, then the chairman of the board of the county commissioners could give consent.⁵² And if the child was “not born in lawful wedlock,” the consent only had to be given by the mother.⁵³ “But the court could find that the child had been “abandoned” (although this was not defined) and obtain consent from a guardian or the chairman of the county board so that the adoption could proceed.⁵⁴

A child of age fourteen or over had to consent to his own adoption.⁵⁵ If there were not any parents or kin around, the court was required to publish the notice of the hearing in a “paper of general circulation,”⁵⁶ published in the county where the petition was presented, for at least three successive weeks.⁵⁷ If the court found that the petitioners were of suitable nature and ability to provide for,

45. See *In re Jaren's Adoption*, 223 Minn. 561, 27 N.W.2d 656 (1947); WRIGHT S. WALLING, MINNESOTA DEPARTMENT OF HUMAN SERVICES, BLUE RIBBON COMMISSION ON ADOPTION, LEGAL COMMENTS AND CONSIDERATION A VIEW FROM THE PAST I (1993).

46. See Joseph W. Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV 605 (1927).

47. WALLING, *supra* note 45, at 1.

48. MINN. STAT. ch. 124, §§ 26–32 (1878). These sections were incorporated from an 1876 act, “An act providing for the adoption of children,” approved February 26, 1876. 1876 Minn. Laws 107.

49. MINN. STAT. ch. 124, § 26 (1878).

50. *Id.*

51. *Id.* § 27.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* § 28.

56. *Id.* § 29.

57. *Id.*

nurture, and educate the child, then a decree of adoption was issued, ordering that the “child shall be deemed and taken to be the child of the petitioner or petitioners”⁵⁸

After the adoption, the adopted child was to be deemed, as to “all legal consequences and incidents,” the natural relation of adoptive parents as if he had “been born to them in lawful wedlock.”⁵⁹ The exception to this was that, for purposes of inheritance, the adoption itself would not “constitute such child the heir of such parents or parents by adoption.”⁶⁰ Thus, despite adoption, the child would not automatically inherit from his adoptive parents. But the natural parents were deprived “of all legal rights respecting the child” and the child was “free from all obligations of maintenance and obedience respecting his natural parents.”⁶¹

In 1894, changes and additions began to occur.⁶² The court was allowed to proceed with an adoption if “either parent” was, by reason of having been declared insane, incapacitated from giving a consent.⁶³ The statutes now indicated that if a parent had lost the care and custody of the child by judgment in a divorce, then the consent of that non-custodial parent was not required in order to proceed with an adoption.⁶⁴ The courts were given specific authority, if requested by the person adopting a child, to decree that the child adopted would be the heir of the person and, in that case, that the adopted child would inherit directly from the adopted parent “in all respects as if born to said parent in lawful wedlock.”⁶⁵ But the statutes also said that “no person shall, by being adopted, lose his right to inherit from his natural parents or kindred.”⁶⁶

Additional concepts were added in 1905.⁶⁷ There was an

58. *Id.* § 30.

59. *Id.* § 31.

60. *Id.*

61. *Id.* § 32.

62. WALLING, *supra* note 45, at 3. *See also* Recent Cases, *Adoption-Adopted Child-Remainders-Trust Deeds*, 2 MINN. L. REV. 300 (1918); Recent Cases, *Adoption-Rights of Inheritance-Second Adoption*, 2 MINN. L. REV. 301 (1918); Recent Cases, *Adoption-Death of Adopted Child-Right of Natural and Adoptive Parents to Inherit*, 6 MINN. L. REV. 65 (1921); Recent Cases, *Adoption-Inheritance from Adopted Children-Rights of Heirs and Next of Kin of the Adopted Parents to Inherit*, 18 MINN. L. REV. 67 (1934); Recent Cases, *Adoption-Descent and Distribution-Effect of Second Adoption on Child's Right to Inherit from First Adoptive Parents*, 26 MINN. L. REV. 114 (1942).

63. MINN. STAT. § 8017 (1894).

64. *Id.*

65. *Id.* § 8021.

66. *Id.* § 8023.

67. WALLING, *supra* note 45, at 3-4.

indication that an adult could be adopted, where the statute said, “a person of full age may be adopted.”⁶⁸ The status of a child for inheritance purposes was further clarified, with the statute indicating that “upon adoption such child shall become the legal child of the person adopting him, and they shall become his legal parents, with all the rights and duties between them of natural parents and legitimate child.”⁶⁹ The adopted child would inherit from his adopting parents and all of the appropriate relatives.⁷⁰

Another section required that anyone bringing a child into the state for purposes of adoption had to “first obtain the consent of the state board of control, whose duty it shall be to carry out the provisions of this section, and such person shall conform to the rules of the board.”⁷¹ It further required the filing of a bond whose purpose was to guarantee that the person was not bringing in a child who was incorrigible or unsound of mind or body, and that the person agreed to remove the child from the state if the child became a public charge.⁷² The statute required anyone bringing a child into the state for purposes of adoption to enter into a “written contract” with the person adopting the child, agreeing that the adoptive parent would be responsible for the proper care and training of the child.⁷³ It also charged the person importing the child with the care and supervision of the child and with visiting the child at least once a year.⁷⁴ It was a criminal violation to not follow through with these requirements.⁷⁵

Under certain circumstances, a hospital was allowed to consent to an adoption when an illegitimate child was born in that hospital.⁷⁶ Another section of the statute allowed the court to commit to an orphan asylum any child under the age of sixteen who was “engaged in a ‘mendicant occupation’ or as a gymnast, contortionist, rider, or

68. MINN. STAT. § 3612 (1905).

69. *Id.* § 3616.

70. *Id.*

71. *Id.* § 3617.

72. *Id.*

73. *Id.*

74. *Id.* § 3617.

75. *Id.* See also Recent Cases, *Adoption-Specific Performance of and Contract to Adopt*, 16 MINN. L. REV. 578, 578 (1931) (citing *Winkelmann v. Winkelmann*, 178 N.E. 118 (Ill. 1931)); Recent Cases, *Parent and Child-Specific Performance of Pre-Adoptive Contact in Derogation of Adoptive Parents' Rights*, 15 MINN. L. REV. 700, 719 (1930).

76. MINN. STAT. § 3619 (1905).

acrobat, or in any indecent or immoral exhibition or vocation”⁷⁷

Following the shifts of societal attitudes, the 1917 statutes reflect additional changes and expansion of the statutory statements regarding adoption.⁷⁸ There was a clear indication that upon the filing of a petition for adoption, the court was required to notify the State Board of Control.⁷⁹ The State Board of Control was then required to verify all of the allegations in the petition and “to investigate the condition and antecedents of the child for purposes of ascertaining whether he [was] a proper subject for adoption; and to make appropriate inquiry to determine whether the proposed foster home [was] a suitable home for the child.”⁸⁰ (This was an early “Home Study.”) Also for the first time, there was an indication that a petition would not be granted until the child had lived in the home for a minimum of six months.⁸¹

For the first time, the law clearly gave the court the ability to waive any investigation and waive any period of residency “upon good cause shown” and when it was satisfied that the proposed home and child were suited to one another.⁸² (Notice, at least in the statutes, that Minnesota was still not using the term “best interests of the child.”) In addition to not requiring the consent of anyone who lost custody in a divorce proceeding, the statutes also stated that no consent needed be obtained from anyone who had lost custody through “the order of a juvenile court.”⁸³ But the notice provision now required (even though a consent was not required) that notice be given to all “known kindred of the child,” and also to “a parent who [had] lost custody of a child through divorce proceedings, and the father of an illegitimate child who [had] acknowledged his paternity in writing or against whom paternity has been duly adjudged”⁸⁴ The manner of service was as directed by the court.⁸⁵

For the first time, adoptive parents had the ability to “annul” a previous adoption.⁸⁶ If the child, within five years of his adoption,

77. *Id.* § 3618.

78. *See* MINN. STAT. §§ 7151–61 (1917); *see also* WALLING, *supra* note 45, at 5.

79. MINN. STAT. § 7152 (1917).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* § 7153.

84. *Id.* § 7155.

85. *Id.*

86. *Id.* § 7158.

developed feeble-mindedness, epilepsy, insanity, or venereal infection, as a result of conditions existing before the adoption, and of which the adopting parents had no knowledge or notice, then the adoption could be annulled.⁸⁷ Also for the first time, the county attorney was required to represent the interests of the child.⁸⁸ The first mention of having closed files is now seen. In this statute, the files and records of the court in these proceedings would “not be open to inspection or copy by other persons than the parties in interest and their attorneys . . . except upon order of the court expressly permitting the same.”⁸⁹

In 1941, a revised, reorganized volume of Minnesota Statutes was created, compiling previous versions of the statutes and incorporating a new decimal classification system.⁹⁰ Chapter 259 under the revision is, to this day, the chapter containing the provisions of the adoption code.⁹¹ In 1951, major changes were enacted in the adoption statutes.⁹² For the first time, definitions were included in the statutes, including definitions of child, parent, petitioner, agency, and contents of the petition.⁹³ The statutes began using the words “best interests of the child,” and, in particular, used that phrase with respect to the authority of the court to do certain things.⁹⁴ What we would consider more modern language began to appear.

There was an added requirement that consent of parents of a minor mother of an illegitimate child be obtained,⁹⁵ and that an adult being adopted also had to consent to the adoption.⁹⁶ There was an indication that after a petition had been filed and a consent had been signed, the consent to the adoption could be withdrawn only upon order of the court after written findings that such withdrawal was in “the best interests of the child.”⁹⁷

More specificity was given to the written agreement to be entered into between an agency and the biological parents regarding

87. *Id.*

88. *Id.*

89. *Id.* § 7159.

90. JOHN TESSNER ET AL., MINNESOTA LEGAL RESEARCH GUIDE 309 (2d ed. 2002).

91. Compare MINN. STAT. ch. 259 (1941), with MINN. STAT. ch. 259 (2006). See also WALLING, *supra* note 45, at 6.

92. See 1951 Minn. Laws 769–75 (codified at MINN. STAT. §§ 259.21–.32 (1953)).

93. MINN. STAT. § 259.21 (1953).

94. See, e.g., *id.* § 259.24, subdiv. 6.

95. *Id.* § 259.25, subdiv. 1.

96. *Id.* § 259.24, subdiv. 4.

97. *Id.* § 259.24, subdiv. 6.

placement of the child. This agreement was now specifically to be executed by the director or agency, or by one of their authorized agents, and all other necessary parties, and it had to be filed together with the consent.⁹⁸ This agreement also could not be revoked except upon order of the court, based on the best interests of the child.⁹⁹

There was an indication that a notice of the hearing could be waived by the person entitled to notice if that waiver was executed before two competent witnesses and duly acknowledged.¹⁰⁰ That waiver had to be filed with the court.¹⁰¹ Also for the first time, all “hearings” in adoption proceedings had to be confidential and held in closed court with only certain people authorized to be present.¹⁰²

It was clearly directed that any order, judgment, or decree of the court pursuant to the adoption provisions could be appealed.¹⁰³ Any person against whom the order was made or who was affected by it could appeal.¹⁰⁴ Appeals were to be done in the same manner as other civil appeals.¹⁰⁵

In response to the 1972 United States Supreme Court decision in *Stanley v. Illinois*,¹⁰⁶ the Minnesota Legislature passed a statute regarding retention of the rights of the illegitimate father,¹⁰⁷ colloquially known as the “60/90-day statute.” This statute recognized that an unmarried man who fathered an illegitimate child could have an interest in the child and some legal rights that had to be protected.¹⁰⁸ The statute also placed the burden upon the man to express his desire to establish a relationship by filing an affidavit within sixty days of the child’s placement for adoption or ninety days after the child’s birth.¹⁰⁹ The automatic effect of the filing of the affidavit was not to make the man the “legal father” or to be the equivalent of a finding of paternity—rather, it resulted only in notice

98. *Id.* § 259.25, subdiv. 1.

99. *Id.* § 259.25, subdiv. 2.

100. *Id.* § 259.26, subdiv. 1 (current version at MINN. STAT. § 259.49 (2006)).

101. *Id.*

102. *Id.* § 259.31 (current version at MINN. STAT. § 259.61 (2006)).

103. *Id.* § 259.32 (current version at MINN. STAT. § 259.63 (2006)).

104. *Id.*

105. *Id.*

106. 405 U.S. 645 (1972).

107. 1974 Minn. Laws 89–90 (codified at MINN. STAT. § 259.261 (1974) (current version at MINN. STAT. § 259.52 (2006))).

108. *See* MINN. STAT. § 259.261 (1974) (current version at MINN. STAT. § 259.52 (2006)).

109. *Id.*

to the other parent within seven days.¹¹⁰

If, after notice to the other parent, there was no response within sixty days, then the affidavit would constitute “conclusive evidence of parenthood” for the purpose of the adoption statute.¹¹¹ In order to challenge this affidavit, the birth mother or some other interested person could deny that the man was the parent of the child and file a petition (unspecified in nature) to challenge the notice of parenthood.¹¹²

In 1980, the statute was amended to allow for withdrawal of consent within ten working days after the consent was executed and acknowledged.¹¹³ Notification of withdrawal of consent had to be received by the agency to which the child had been surrendered no later than the tenth working day after the consent was executed or acknowledged.¹¹⁴ After that, it became irrevocable except upon a finding of fraud.¹¹⁵

While other changes occurred—changes particularly procedural in nature—the most significant addition to the statutes after 1980 and before the 1994 major revision of the statute was the Minority Child Heritage Protection Act enacted in 1983.¹¹⁶ This law stated that “[t]he policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due consideration of the child’s minority race or minority ethnic heritage in adoption placements.”¹¹⁷ International adoptions were excluded from the requirements of this provision if “the appropriate authority in the child’s country of birth [had] approved the placement.”¹¹⁸ It was therefore originally known as the Minnesota Minority Child Heritage Protection Act.¹¹⁹ Reference to minority heritage was removed during the pendency of the litigation known as *In re D.L.*¹²⁰

110. *Id.* § 259.261, subdiv. 3.

111. *Id.*

112. *Id.*

113. 1980 Minn. Laws 778 (codified at MINN. STAT. § 259.24, subdiv. 6a (1980)).

114. MINN. STAT. § 259.24, subdiv. 6a (1980).

115. *Id.*

116. 1983 Minn. Laws 1192–99 (codified at scattered sections of MINN. STAT. chs. 257, 259, 260 (1984)).

117. MINN. STAT. § 259.255 (1984).

118. *Id.*

119. *See, e.g.*, Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925, 930–31 (1993).

120. 486 N.W.2d 375 (Minn. 1992); Glynn, *supra* note 119, at 930 n.20.

The act set preferences, in the absence of good cause to the contrary, with respect to the placement of children in adoption.¹²¹ Those preferences were, in order: a relative or relatives of the child, a family with the same racial or ethnic heritage as the child, or a family of different racial or ethnic heritage from the child that was knowledgeable and appreciative of the child's racial or ethnic heritage.¹²² The child's genetic parent or parents were allowed to request that the preferences not be followed.¹²³ The child's genetic parent or parents were also allowed to express a preference for placing the child in an adoptive home of the same or similar religious background to that of the genetic parents in following the preferences listed above.¹²⁴ Interpretation of this statute and, in particular, the enforcement of this statute in non-infant adoptions has caused a great deal of litigation.¹²⁵ The statutes have been repealed in light of the Federal Multi-Ethnic Placement Act, which prohibited placement based on race.¹²⁶

IV. CURRENT LEGAL ISSUES AND ANALYSIS

Virtually all of the changes in the last twenty years to adoption statutes have been the result of the new attitude supporting the concept of "open adoption." In that context, "[a]doption is increasingly understood to be a dynamic, lifelong process that entails the acknowledgment by both adoptive and birth families of each other's existence and role in the lives of adopted children."¹²⁷ "'Openness' has become the mantra of contemporary adoption policy and practice."¹²⁸ This concept has pervaded virtually all issues in the adoption field, including the rights of birth mothers, the rights of birth fathers, the role of adoptive parents, the rights of children, and the underlying definition of adoption itself. It is also the fuel driving new and continuing discussions of further changes in adoption attitudes and statutes.

121. See 1983 Minn. Laws 1197 (codified at MINN. STAT. § 260.181, subdiv. 3 (1984)); MINN. STAT. § 259.29 (1984).

122. 1983 Minn. Laws 1197.

123. *Id.*

124. *Id.*

125. See, e.g., *In re S.T. and N.T.*, 512 N.W.2d 894 (Minn. 1994); *In re D.L.*, 486 N.W.2d 375 (Minn. 1992); *In re T.L.A.*, 677 N.W.2d 428 (Minn. Ct. App. 2004).

126. Multi-Ethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4057 (codified as amended at 42 U.S.C. § 622 (1994)).

127. FAMILIES BY LAW: AN ADOPTION READER, *supra* note 2, at 157.

128. *Id.*

Further, “[o]pen adoption may be limited to the exchange of information between the families at the time of placement and the sending of an occasional photo or letter, but may in some cases be much broader, including regular visitation by members of the birth family with the adopted child long after the adoption is final.”¹²⁹

In this same context, there has been an evolution in the consideration of enforceability or the recording of “openness” agreements. They can be informal, formal, supported by written documents or, as in Minnesota, supported by available court orders.¹³⁰ This dramatic shift in both power and attitude, resulting from the concept of “open adoption,” has, in many people’s view, resulted in a complete revolution of how we define and create families.

A. *The Changing Rights, Responsibilities, and Power of Birth Mothers*

Although often overlooked, perhaps one of the most dramatic shifts that has occurred in the last twenty years has been the way in which children are “placed” for adoption. As reflected further on, the 1994 Minnesota Legislature recognized this change with a dramatic and comprehensive revision of all adoption statutes.¹³¹ While there are many issues of significance, perhaps the most dramatic change was the specific ability of birth parents to place their children for adoption with adoptive parents they had selected, rather than requiring that “child placing agencies” place children with adoptive parents the agencies had selected. This was the first significant reflection of the critical movement toward “open adoptions” in Minnesota law.¹³²

While there are many reasons for this shift,

[a]mong the factors contributing to the prevalence of open domestic adoptions is the rarely noted shift in power from adoptive to birth parents. As the competition among would-be adoptive parents has intensified because

129. *Id.*

130. *See* MINN. STAT. § 259.58 (2006).

131. *See* 1994 Minn. Laws 1877–92 (codified at MINN. STAT. ch. 259 (1994)).

132. *See* MINN. STAT. § 259.22 (1994). Before that time, all adoption records and identifying information were confidential and only able to be released with a court order. *See* MINN. STAT. §§ 259.46, .31 (1992). Since this confidentiality extended to birth parents as well, and since before 1994 only licensed child placing agencies, and not birth parents, could place children for adoption, there was no possibility of any openness without a perceived violation of statute. *See* MINN. STAT. § 259.22 (1992).

of the steep decline since the late 1960s in the number of healthy infants who are voluntarily relinquished for adoption, a more distinctive “seller’s market” has emerged. Birth parents, and especially birth mothers, are not only choosing the individuals who will parent their children, but often expect to retain a role in the life of the new adoptive family. [Prospective parents] who harbor doubts about meeting, or maintaining contact with birth parents, may be less likely to end up with a child to adopt.¹³³

Before the recognition in the statutes of the shift in the social attitudes, no one could petition for adoption of a specific child “unless the child sought to be adopted ha[d] been placed by the Commissioner of Human Services, the Commissioner’s agent, or a licensed child placing agency.”¹³⁴ This left birth parents in a position in which the decision as to who would adopt their child would be made by a group of social workers based on their own prejudices, backgrounds, and histories. At times, those decisions were made based on race, religion, income, intellect, or financial ability.¹³⁵ In any case, some mothers described those situations as placing their child into the “black hole” of adoption agencies with no information available about them, the child, and no input into who did the adoption.¹³⁶

Notwithstanding that, since at least 1951, the statutes had specifically allowed the court to “waive the requirement” of a child’s being placed by a licensed child-placing agency or the Commissioner of Human Services.¹³⁷ During the 1980s and early 1990s, the practice became to request such a waiver from the court when a suitable adoptive family was found, particularly when the birth mother desired a particular family to adopt her child. In recognition of the reality of the changing social situation and attitude toward families, in 1994 the Minnesota Legislature made several significant changes.¹³⁸ Those changes included the creation of a process known as “Direct Adoptive Placement,” allowing a

133. Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 2, at 159.

134. MINN. STAT. § 259.22, subdiv. 2 (1994).

135. Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918–1965*, in *Adoptions in America: Historical Perspectives*, in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 2, at 67.

136. Statements by birth mother clients to Wright S. Walling, Esq.

137. MINN. STAT. § 259.22, subdiv. 1 (1994).

138. *See* source cited *supra* note 131 and accompanying text.

birth mother to select adoptive parents and get pre-birth approval of the placement of that child regardless of a lack of involvement by a licensed child placing agency or the Commissioner of Human Services.¹³⁹

Initially, in attempting to clarify the nature of “placement activities,” the Legislature defined them as follows:

- (1) placement;
- (2) arranging or providing short-term foster care pending an adoptive placement;
- (3) facilitating placement by maintaining a list in any form of birth parents or prospective adoptive parents;
- (4) collecting health and social histories of a birth family;
- (5) conducting an adoption study;
- (6) witnessing consents to an adoption; or
- (7) engaging in any activity listed in clauses (1) to (6) for the purposes of fulfilling any requirements of the interstate compact on the placement of children.¹⁴⁰

The Legislature then set out to define the process known as “Direct Adoptive Placement”¹⁴¹ and indicated that it meant “the placement of a child by a birth parent or legal guardian other than an agency under the procedures for adoption authorized by [Section] 259.47.”¹⁴²

Continuing in that direction, the Legislature authorized the filing of an adoption petition if the child had not been placed in conformity with the requirements of Minnesota Statutes Section 259.47.¹⁴³ It then went on to lay out a manner by which the court could review and verify the appropriate issues in allowing a direct placement by a birth parent.¹⁴⁴ More specifically, in reflecting its desire with respect to allowing direct placement by birth parents, the Legislature stated, “the intent of the provisions governing direct adoptive placement is to safeguard the best interest of the child by providing services and protections to the child, birth parents, and adoptive parents which are consistent to those

139. MINN. STAT. § 259.21, subdiv. 10 (1994).

140. *Id.* § 259.21, subdiv. 9.

141. *See supra* text accompanying note 139.

142. *See supra* text accompanying note 139.

143. MINN. STAT. § 259.22, subdiv. 2(f) (1994).

144. *See id.* § 259.47.

available through an agency placement.”¹⁴⁵

The Legislature went on to provide the procedure whereby the adoptive parents—in conjunction with, and upon agreement of, the birth mother—could request a court order allowing and approving the placement of the child with the prospective adoptive parents.¹⁴⁶ It allowed the court order to be requested up to sixty days before the anticipated birth of the child.¹⁴⁷ It also laid out a specific procedure of required affidavits and information from the birth mother and adoptive parents.¹⁴⁸

This emphasis on the rights and authority of the birth mother are also reflected in other statutory provisions. For example, the birth parent is entitled to receive up to thirty-five hours of adoption counseling, provided at the expense of the adoptive parent or parents.¹⁴⁹ Additionally, the birth parent is entitled to legal counsel during the direct placement process, and the adoptive parents are required to pay for such representation.¹⁵⁰

Further, the order “shall state that the prospective adoptive parent’s right to custody of the child is subject to the birth parent’s right to custody until the consents to the child’s adoption become irrevocable.”¹⁵¹ Other parts of the statute require a consent form to be signed no sooner than seventy-two hours after the birth of the subject child.¹⁵² Even after signed consent is given, the birth mother has an uncontrolled and free ability to withdraw that consent for any reason for a period of ten working days after signed consent is properly obtained,¹⁵³ illustrating that the birth mother’s rights

145. *Id.* § 259.47, subdiv. 1. It should be noted that birth mothers and fathers received disparate treatment, in terms of both biology and the applicable statute. Section 257.541, subdivision 1, of the Minnesota Statutes states that “the biological mother of a child born to a mother who is not married to the child’s father neither when the child was born nor when the child was conceived has sole custody of the child until paternity has been established under sections 257.51 to 257.74, or until custody is determined in a separate proceeding under section 518.156.” On the other hand, subdivisions 2 and 3 make it clear that at the time of birth, the birth father has no automatic legal rights to custody and must affirmatively establish both paternity and his right to visitation and custody. MINN. STAT. § 257.541, subdivs. 2–3 (1994).

146. *Id.* § 259.47, subdiv. 3.

147. *Id.*

148. *Id.*

149. *Id.* § 259.47, subdiv. 4. The statute imposes an affirmative obligation on the adoptive parent to inform the birth mother of her right to counseling. *Id.*

150. *Id.* § 259.47, subdiv. 5.

151. *Id.* § 259.47, subdiv. 3.

152. *Id.* § 259.47, subdiv. 7.

153. *Id.*

continue to be recognized and protected beyond the scope of past statutes and laws.

Accordingly, the concept of “open adoption” resulted in a shift of power from adoption agencies and adoptive parents to birth mothers, giving them complete control of the early stages of adoption. In recognizing the importance of birth parents in the decision-making process regarding who would actually “parent” the child, the Legislature reflected not only the views of society, but the reality that a child is made up as a sum of all of his or her parts, and not just those who provide the nurture.

B. Rights of Putative Fathers—An Evolution

In *Stanley v Illinois*,¹⁵⁴ the United States Supreme Court recognized, for the first time, the constitutional rights of putative fathers. This decision offered putative fathers the opportunity to be involved in the lives of their children.¹⁵⁵

In response to the *Stanley* decision, the Minnesota Legislature passed a statute¹⁵⁶ regarding retention of rights of fathers known as the “60/90-day statute.”¹⁵⁷ This statute purported to describe the criteria and process under which putative fathers could protect their rights. The Minnesota Supreme Court determined that, in the case of *In re Paternity of J.A.V.*,¹⁵⁸ failure by the putative father to follow the requirement of that statute did not prohibit him from bringing a paternity action, as long as the adoption was not completed. The fact that a child had been placed with his or her adoptive parents would not function as a bar to a paternity action.

As a result of this and other decisions, in its report of January of 1997, the Minnesota Supreme Court Foster Care and Adoption Task Force¹⁵⁹ recommended that Minnesota adopt a Putative Fathers’ Registry statute similar to that which was in existence in Illinois and

154. 405 U.S. 645 (1972).

155. *Id.*

156. 1974 Minn. Laws 89–90 (codified at MINN. STAT. § 259.261 (1974) (current version at MINN. STAT. § 259.52 (2006))).

157. See discussion *supra* Part III and accompanying text.

158. 547 N.W.2d 374 (Minn. 1996).

159. See SYKORA & SKOGLUND, HOUSE RESEARCH BILL SUMMARY (Mar. 10, 1997), <http://www.house.leg.state.mn.us/hrd/bs/97-98bs/0919a.pdf> (summarizing the task force proposals); Mary Jo Brooks Hunter, *Special Report: Minnesota Supreme Court Foster Care and Adoption Task Force*, 19 HAMLINE J. PUB. L. & POL’Y 1 (1997) (providing the complete task force report).

other states.¹⁶⁰

As with all issues relating to adoption, this and other statutes have attempted to balance the appropriate rights of putative fathers, adoptive parents, birth mothers, and children, within the context of looking toward what ultimately would be deemed by society to be in the child's "best interests."¹⁶¹ More specifically, the Legislature stated that there should be established a Fathers' Adoption Registry for "determining the identity and location of a putative father interested in a minor child who is, or expected to be, the subject of an adoption proceeding, in order to provide notice of the adoption proceeding to the putative father who is not otherwise entitled to notice"¹⁶²

In an attempt to balance all of the rights and interests of putative fathers, adoptive parents, birth mothers, and children, the legislators created a registry whereby any man interested in a particular child, or the possibility of a child of his being adopted, could register with the State of Minnesota on the Registry, thus preventing any adoption from being done without notice to him.¹⁶³ Of critical importance was the ability of the putative father, who had been with a woman and believed that pregnancy might have resulted, to register at any time before the birth of the child.¹⁶⁴ More specifically, the statute states that "a putative father may register with the Department of Health before the birth of a child but may register no later than 30 days after the birth of the child."¹⁶⁵

In a continuing attempt to balance the rights, responsibilities and "best interests," the statute indicates that the failure to register, if the father is not otherwise covered and entitled to notice under other statutes, puts the birth father in a position of being "barred thereafter from bringing or maintaining an action to assert any interest in the child during the pending adoption proceedings concerning the child."¹⁶⁶ Further, the father is "considered to have abandoned the child"¹⁶⁷ and is "considered to have waived and

160. See MINN. STAT. § 259.52 (2006) (creating the putative fathers' adoption registry). See also 750 ILL. COMP. STAT. 50/12/1 (1999); MONT. CODE ANN. § 42-2-202 (2005); OHIO REV. CODE ANN. § 3107.062 (West 2005).

161. See Brooks Hunter, *supra* note 159, at 9.

162. MINN. STAT. § 259.52, subdiv. 1(a) (2006).

163. *Id.*

164. *Id.* § 259.52, subdiv. 7.

165. *Id.*

166. *Id.* § 259.52, subdiv. 8(1).

167. *Id.* § 259.52, subdiv. 8(3).

surrendered any right to notice of any hearing in any judicial proceeding for adoption of the child, and consent of that person to the adoption of the child is not required.”¹⁶⁸

More specifically, and as noted by the Minnesota Supreme Court Foster Care and Adoption Task Force, the Minnesota Registry is based on Illinois law and, to some extent, Indiana law.¹⁶⁹

168. *Id.* § 259.52, subdiv. 8(2).

169. The Final Report of the January 1997 Minnesota Supreme Court Foster Care and Adoption Task Force, on pages 73–74, in response to *Hisgun v. Velasco*, 547 N.W.2d 374 (Minn. 1996), recommended that Minnesota adopt a registry statute similar to that which was in existence in Illinois. Minnesota Statutes section 259.52 was the result of this recommendation. See MINN. STAT. § 259.52 (2006). Other states have upheld these registries as an appropriate balancing of the rights of putative fathers, adoptive parents, mothers, and children, even where the mother intentionally hid the child’s existence or did not inform the putative father of the pregnancy.

The Indiana Court of Appeals upheld a refusal to set aside a judgment in favor of adoptive parents where the mother had not told the putative father of the child. *In re Baby Doe*, 734 N.E.2d 281 (Ind. Ct. App. 2000). The Indiana Court of Appeals concluded that “promptness is measured in terms of the baby’s life not by the onset of father’s awareness,” and if a putative father fails to timely register, then the State’s obligation to provide an adopted child with a permanent and loving family is paramount. *Id.* at 287.

Illinois upheld its Putative Father’s Registry, which is virtually identical to the Minnesota Registry. See *In re K.J.R. & D.F.R.*, 687 N.E.2d 113 (Ill. App. Ct. 1997); see also 750 ILL. COMP. STAT. ANN. 50/12.1 (2006). In *K.J.R.*, the mother told the putative father he was not the father, and another man was named on the birth certificate and consented to the adoption. *K.J.R.*, 687 N.E.2d at 116. The putative father argued that his failure to timely register should be excused due to the mother’s misrepresentations. *Id.* at 116–18. The Illinois Court of Appeals held that if a putative father has not acted within the 30 days after birth as required, the child’s right to a stable environment and finality becomes paramount, and the putative father loses all rights to intervene in or vacate adoption proceedings. See *id.* at 117.

The court reasoned that even the mother’s affirmative misrepresentation does not excuse a failure to timely register. *Id.* at 118. Since a putative father has *independent knowledge* of the facts giving rise to his duty to register—that he had intercourse with the mother—the possibility of parentage “is sufficient to invoke the registration provisions” of the registry. *Id.* Where a putative father had “substantial reason to suspect” he could be a father, this gave rise to the duty to register. *Id.* at 119. A “lack of knowledge of pregnancy or birth is not an acceptable reason for failure to register.” *Id.* at 117 (citing 750 ILL. COMP. STAT. ANN. 50/12.1(g) (West 1994)). Therefore, the statute required a “positive effort” by the putative father to pursue his rights “*notwithstanding* the silence, passivity, or miscommunication” of the mother. *Id.* at 119 (emphasis added). But the court’s reference to *In re John Doe & Jane Doe*, 638 N.E.2d 181 (Ill. 1994), is misplaced. *Id.* at 117–18. In *John Doe*, the biological mother and father planned together throughout the pregnancy, and the father provided for the mother’s expenses. *Id.* at 182. The father left the country briefly and the mother placed the child for adoption, then told the father the child was stillborn. *Id.* Upon learning, fifty-

In balancing the equities, and in conformity with other cases around the country, the statute provides a process for a putative father to show timely registration despite having registered later than thirty days after the birth of the child.¹⁷⁰ In such a case, the putative father can show timely registration by proving, by clear and convincing evidence, that: “(i) it was not possible for him to register within the period of time specified . . . ; (ii) his failure to register was through no fault of his own; and (iii) he registered within ten days after it became possible for him to file.”¹⁷¹

Thus, the responsibility for protecting the putative father’s constitutional right to notice has shifted and is clearly placed directly on his shoulders. The new statute also eliminated the problem raised in *Hisgun v. Velasco*¹⁷² in that it not only prohibits an untimely-registering putative father from exercising a claim for the child in the adoption proceeding, but also prohibits him from bringing any action to assert an interest in the child, including a paternity action.¹⁷³

While giving the putative father essentially ten months to register and exert his rights, the Minnesota courts have been consistent in strictly interpreting the statutes. For example, the thirty-day requirement has been strictly enforced against men who are living out of state and do not know the location of the mother or the date of birth of the child.¹⁷⁴

Additionally, the courts have strictly interpreted the statute to refuse to impose on the birth mother a duty to give notice to any

seven days after the birth, that the child was alive and being adopted, the father then began proceedings to contest that adoption. *Id.* Illinois law provided that a parent was “unfit,” and therefore consent to adoption was not required, if the parent had not shown a “reasonable degree of interest in the child within the first 30 days” of the child’s life. *Id.* (citing 750 ILL. COMP. STAT. ANN. 50/1 (West 1992)). The Illinois Supreme Court held that a finding that the father failed to show a reasonable degree of interest was not supported by the evidence, because he had made attempts which were “either frustrated or blocked,” and that therefore he had “*had no opportunity to discharge any familial duty.*” *Id.* (emphasis added).

The Minnesota Legislature, in enacting the Minnesota Father’s Adoption Registry, has balanced the rights of fathers, adoptive parents, children, and birth mothers, and provided a clear limit on a putative father’s ability to assert an interest in a child and disrupt a child’s placement after a certain time.

170. MINN. STAT. § 259.52, subd. 8 (2006).

171. *Id.*

172. 547 N.W.2d 374 (Minn. 1996).

173. MINN. STAT. § 259.52, subd. 8.

174. *See* *Heidbreder v. Carton*, 645 N.W.2d 355, 366–67 (Minn. 2002).

man who has not registered under the registry within the required thirty days after the birth time period.¹⁷⁵

Thus, again the “open adoption” concept has directly impacted the rights of putative fathers. Further, with respect to all of the participants, the balancing of equities in adoption statutes, as in other contexts, has tipped toward security, stability, and permanency for adopted children within a relatively short period of time. This significant difference between birth parents results from the fact that, at the time of birth, a birth mother, unmarried at the time of birth or the time of conception, is the sole legal parent and physical custodian of the child.¹⁷⁶ On the other hand, a biological father, unmarried to the biological mother at the time of conception or the time of birth, has no legal or custodial rights to the child without taking some initial action.¹⁷⁷ This has been reflected in the application of the Fathers’ Adoption Registry to putative fathers in the adoption context.

C. Open Adoption—The Logical Extension

It is clear that the nature and manner in which adoptions have occurred, the issues of placement, and the rights of birth mothers and birth fathers have been dramatically affected by the concept of “open adoption.” The prime focus of that concept has, in fact, been on what open adoption means, how it is implemented, and how it has actually shifted post-adoption contact. In looking at the question of “open adoption” more specifically, in most situations,

[a]n open adoption is one in which the birth parent(s) at least meet the adoptive parents and may even participate in selecting them [O]pen adoption includes the exchange of identifying information and the making of agreements regarding future contact and communication. The frequency and extent of this contact and communication will vary and may need to be renegotiated at different times in the lives of the individuals involved, depending upon their needs and desires and the quality of the relationship that evolves¹⁷⁸

Throughout this revolution of the last twenty-five years, many

175. *Id.* at 368.

176. *See* MINN. STAT. § 257.541, subdiv. 1 (2006).

177. *Id.* § 257.541, subdivs. 2–3.

178. ANNETTE BARAN & REUBEN PANNOR, *Perspectives on Open Adoption, in* FAMILIES BY LAW: AN ADOPTION READER, *supra* note 2, at 164–65.

discussions have occurred about the impact of adoption on all of the participants—birth parents, adoptive parents, and child (commonly called the adoption triad). In particular, during the 1970s and 1980s, a number of popular misconceptions about that impact were challenged.¹⁷⁹ Among those were perceptions that “[c]ouples will not adopt children unless they are guaranteed anonymity and secrecy,”¹⁸⁰ that “[b]irthmothers want and need anonymity to move forward in their lives and put the experience of pregnancy and relinquishment behind them,”¹⁸¹ and that “[a]doptees will be confused by contact with their birthparents and may become emotionally disturbed as a result of being aware of and dealing with two mothers during their developmental years.”¹⁸² And, while long-term studies of “open adoptions” have not been completed or conclusive, it appears fairly clear that none of those fears or misconceptions has proved either to be a barrier to adoption or to result in a significant detriment to any of the persons involved. In fact, just the opposite has turned out to be true.

Within this context, several important benefits to open adoption have been observed:

First, the birth parents assume more responsibility for the decision to relinquish, and as full participants in the placement and entrusting of the child to a known family, they are better able to cope with feelings of loss, mourning, and grief. If contact with their birthchild is permitted, they are able to further ameliorate these findings.

Next, adoptees’ feelings of rejection by the birthparents also can be greatly diminished. A realistic understanding of the problems that led to the adoptive placement permits acceptance of the situation. The continuing link with the birthparent dispels the notion that the children were abandoned and forgotten. In open adoption the need for search and reunion is eliminated. Important background information—including genetic and medical histories—is readily available.

Finally, for adoptive parents, knowing the birthparents of

179. *Id.* at 165.

180. *Id.*

181. *Id.*

182. *Id.* at 166.

their children can prevent the fears and fantasies that might otherwise have a negative effect on the relationships with their adopted children. Knowing the birthparents will enable adoptive parents to provide their children with the background information based on first-hand knowledge and direct contacts.¹⁸³

The years of experience have led most people to believe that “open adoption” is the best approach because “[i]t minimizes emotional and psychological harm and it allows all parties to meet their continuing responsibilities to each other.”¹⁸⁴

In consideration of these attitudes, the Minnesota Supreme Court Foster Care and Adoption Task Force in its final report of January 1997, after studying the issue of open adoption, made recommendations regarding creation of “Open Adoption Agreements.”¹⁸⁵ Recognizing that the agreements at that point were not enforceable, the Task Force recommended making “Open Adoption Agreements” enforceable under certain conditions. Reflecting its belief that there were several major beneficial effects, the Task Force wrote:

First, making open adoption agreements enforceable may encourage parents to voluntarily terminate their parental rights earlier, knowing they will have some contact (however, minimal) with their child. This will result in quicker permanency for children. Second, making open adoption agreements enforceable will help to protect relationships with birth parents and birth relatives when it is in the best interests of the child to do so.¹⁸⁶

Further, in making the recommendation for creating enforceable agreement, the Task Force provided for that enforceability as long as four main conditions were met:

1. the child must have emotional ties with the birth parent or birth relatives;
2. the adoptive parent(s), the birth parent(s), or birth relative(s) seeking communication, contact, or visitation and the adoption agency (if any) must enter

183. *Id.*

184. *Id.*

185. Brooks Hunter, *supra* note 159, at 116–18.

186. *Id.* at 113–14.

- into a notarized written agreement before the issuance of a final adoption decree;
3. the court must determine the agreement is in the best interests of the child; and
 4. the court must incorporate the terms of the agreement into a written order.¹⁸⁷

The Task Force went on to state that it wanted to make sure that the open adoption agreement did not become a means whereby a birth parent or birth relative could not undermine the adoptive parent(s)' authority to decide what is best for their adoptive child Among other things, the Interagency Task Force is concerned that making open adoption agreements legally binding will undermine the child's sense of security and permanence within the adoptive family. However, the Task Force's reason for recommending that open adoption agreements be made legally enforceable is to enhance the child's sense of security by providing a way to preserve the child's emotional ties with relatives and birth parents if it is in the child's best interests.¹⁸⁸

In reacting to the recommendations of the Task Force, the Minnesota Legislature passed in 1997,¹⁸⁹ and later amended in 1998, a statute on "communication or contact agreements."¹⁹⁰ This statute provided for the ability of the parties to enter into a written agreement that would be memorialized in a court order evidencing an agreement for ongoing contact between the adoptive parents, the child, and the birth parents or other relatives.¹⁹¹ The purpose of the contact agreement is to lay out the nature of contacts so that the court can determine if the contacts are in the child's best interest.¹⁹²

Several significant issues are clear under the enforceable

187. *Id.* at 114.

188. *Id.* at 114–15.

189. 1997 Minn. Laws 787–88 (codified at MINN. STAT. § 259.58 (Supp. 1997) (amended 1998, 1999, 2006)).

190. 1998 Minn. Laws 586 (codified at MINN. STAT. § 259.58 (1998) (amended 1999, 2006)).

191. MINN. STAT. § 259.58(a) (1998) (current version at MINN. STAT. § 259.58(a) (2006)).

192. *See id.*

contact agreement and contact order. The first is that the contact order is, in fact, enforceable.¹⁹³ It is enforceable in family court; even though the records in juvenile court are closed without a court order, it nevertheless can be filed in the family court for purposes of that enforcement.¹⁹⁴

Before going into court, all parties are required to participate in mediation to attempt to settle any differences that might exist as a result of the attempt to enforce the terms of the court order.¹⁹⁵

Of critical note, however, are the restrictions of the enforceability. More specifically, the statute indicates that:

Failure to comply with the terms of an agreed order regarding communication or contact that has been entered by the court under this section is not grounds for:

- (1) setting aside an adoption decree; or
- (2) revocation of a written consent to an adoption after that consent has been irrevocable.¹⁹⁶

Thus, the contact agreement does not provide the ability to question the underlying adoption.¹⁹⁷ While it will influence ongoing contact and communication, it neither intends nor operates to provide a basis for questioning the ongoing legal rights of the adoptive parents to parent the child.¹⁹⁸

With this restriction, the enforceable contact agreement and order has further reflected the change in attitudes about “family” and how families are created and defined. Notwithstanding this statute and the current attitude in favor of contact agreements, there have been questions recently raised by the Evan B. Donaldson Institute.¹⁹⁹ In a recent report, questions were raised regarding the efficacy of counseling on behalf of birth parents leading to adoption and enforceable contact agreements.²⁰⁰

193. *Id.* § 259.58(c).

194. *Id.*

195. *Id.*

196. *Id.* § 259.58(b).

197. *See id.*

198. *Id.*

199. For general information on the Evan B. Donaldson Adoption Institute, see <http://www.adoptioninstitute.org/index.php>.

200. SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 31–33 (Adam Pertman ed. 2007) (writing that states vary in the quantity, timing, and substance of counseling, which may lead to uninformed decisions in the adoption process, thereby undermining the enforceability of contact agreements).

Nevertheless, the current view held by most is that open adoption is the best option available for adoption.²⁰¹

D. Open Adoption Records—The Last Frontier

The open adoption concept, as it applies not only to adoption, but also to the creation of families and the “rights” of persons to know about their backgrounds and heritage, has swept through virtually every issue. The remaining frontier of that argument has to do with the availability of adoption records. This is a continuing controversy, which has become hotly contested and debated in a number of states, and it is currently a subject of continuing discussion at the Minnesota Legislature. From a historical perspective,

[t]he central issue igniting the Adoption Rights Movement in 1971 was the inability of adopted persons to gain access to information about their birth families contained in adoption case records. Institutional custodians of adoption records—courts, hospitals, and adoption agencies—citing state statutes, some more than a half century old, refused to divulge any family information to adopted persons or birthparents searching for their biological kin. As early as 1917 Minnesota enacted legislation closing adoption records to public inspection, and other states soon followed. By 1943, spurred on by reformers wanting to protect the child born out of wedlock from the stigma of illegitimacy, 23 states had passed similar legislation sealing adoption records. By the early 1970s, sealed records had become a standard, if not universal, feature of the adoption process, but they had also achieved a seeming immutability that belied the past from which they emerged.

Not surprisingly, adoption rights activists assume that adoption records have always been sealed and that adoption agency officials have always been uncooperative in providing members of the adoption triad—adoptive parents, birthparents, and adoptive persons—with family information But in fact, none of these assumptions is

201. See *id.* at 10–12, 39, 50 (suggesting that open adoption best facilitates growth and fairness for the child, well-being for the birthparents by reducing regret, grief, and worry, and well-being, security, and comfort for the adopting parents).

historically accurate.²⁰²

Despite historical analysis reflecting that not all adoption records have always been closed, or that all states have had closed or sealed records, the history in Minnesota and the current statutory view is for closed or confidential records.²⁰³ In fact, with the changes that have occurred in other areas of law, the sealing and confidentiality of adoption records reflect perhaps the most security of any records that are sealed. Even the adoptive parents must get a court order to open their own file once it has been sealed at the conclusion of the adoption. For this reason, as previously noted, even the contact order required and allowed by statute is filed in Family Court in a separate proceeding and not in Juvenile Court, since those files and records are closed. More specifically, Minnesota Statutes section 259.79 states as follows:

259.79 Adoption records

Subdivision 1. Content.

(a) The adoption records of the commissioner's agents and licensed child-placing agencies shall contain copies of all relevant legal documents, responsibly collected genetic, medical and social history of the child and the child's birth parents, the child's placement record, copies of all pertinent agreements, contracts, and correspondence relevant to the adoption, and copies of all reports and recommendations made to the court.

(b) The commissioner of human services shall maintain a permanent record of all adoptions granted in district court in Minnesota regarding children who are:

(1) under guardianship of the commissioner or a licensed child-placing agency according to section 260C.201, subdivision 11, or 260C.317;

(2) placed by the commissioner, commissioner's agent, or licensed child-placing agency after a consent to adopt according to section 259.24 or under an agreement conferring authority to

202. E. Wayne Carp, *The Sealed Adoption Records Controversy in Historical Perspective: The Case of the Children's Home Society of Washington, 1895-1988*, J. OF SOC. AND SOC. WELFARE vol. 19, No. 2 (1992), at 27-57 in FAMILIES BY LAW: AN ADOPTION READER, *supra* note 2, at 126.

203. MINN. STAT. § 259.79, subdiv. 1(c) (2006).

place for adoption according to section 259.25;
or

(3) adopted after a direct adoptive placement approved by the district court under section 259.47.

Each record shall contain identifying information about the child, the birth or legal parents, and adoptive parents, including race where such data is available. The record must also contain

(1) the date the child was legally free for adoption;

(2) the date of the adoptive placement;

(3) the name of the placing agency;

(4) the county where the adoptive placement occurred;

(5) the date that the petition to adopt was filed;

(6) the county where the petition to adopt was filed;

(7) the date and county where the adoption decree was granted.

(c) Identifying information contained in the adoption record shall be confidential and shall be disclosed only pursuant to section 259.61.

Subdivision 2. Use.

Each adoption record shall constitute the permanent record upon which court action is based and agency services are administered.

Subdivision 3. Retention; records made public.

All adoption records shall be retained on a permanent basis under a protected record system which ensures confidentiality and lasting preservation. All adoption records shall become public records on the 100th anniversary of the granting of the adoption decree.²⁰⁴

By way of general background, in Minnesota,

[t]here is a legal presumption that court records and records of court administrators are open to any member

204. *Id.* § 259.79.

of the public for public inspection However, court adoption records are inaccessible to the public pursuant to the limitations contained the in Rules of Public Access to Records of the Judicial Branch.²⁰⁵

Further, as noted above, by statute directly related to adoptions, “[a]ll agency adoption records are confidential and permanent and must be retained under a protected system. Adoption records become public records on the 100th anniversary of the granting of the adoption decree.”²⁰⁶

Perhaps most controversial is the issue of retroactively opening all of those records. That question has come under great scrutiny in the last few years. In arguments from Oregon to Tennessee, legislatures have retroactively opened the adoption records.²⁰⁷ Those statutory decisions have withstood numerous state and federal attacks on everything from statutory interruption to constitutional grounds.

In addition to the changing attitudes toward “open adoption” that have fueled this controversy, there are basic legal issues that have been argued as well.

The continuing controversy over the confidentiality of adoption records illustrates the inadequacy of existing constitutional law doctrine to address issues involving children and their families As they mature, adoptees often seek information about their biological families, including their original birth certificates. Constitutional law has proved to be an awkward vehicle for articulating and evaluating the claims of adoptees to information about their biological families. Courts have unsuccessfully attempted to balance the rights of adoptees against those of their biological and adoptive parents, rather than recognizing and attempting to mediate the overlapping identity issues at stake.²⁰⁸

205. SILBERBERG, *supra* note 9, at 115. *See also* Rules of Public Access to Records of the Judicial Branch, R. 2 (1988) (amended 2005).

206. SILBERBERG, *supra* note 9, at 117–18. *See also* MINN. STAT. § 259.79, subdiv. 3; *Tibitts v. Crossroads, Inc.*, 411 N.W.2d 535, 539 (Minn. Ct. App. 1987); Minnesota DHS Reg. 9560.0180(3) (2006).

207. *See, e.g.*, *Does v. State*, 993 P.2d 822 (Or. Ct. App. 1999); *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004) (indicating that the trend is toward a policy of openness in regard to public records, including adoption records).

208. Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999), in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 2, at 153.

In efforts to open sealed records without statutory change, cases have been brought claiming a violation of the constitutional rights of adoptees on various grounds.

In the most widely cited case brought by adoptees (*Alma Soc'y Inc., v. Melon*, 601 F.2d 1225 (2d Cir. 1979)), the Second Circuit rejected the adoptees' claim that their "personhood" entitled them to open birth records. The plaintiff adoptees argued that the New York statutes providing for sealed adoption records violated the Due Process Clause because the adoptees were constitutionally entitled to the information contained in the records The court noted that the adoptees' request implicated the interests of two "families," the biological family and the adoptive family. Drawing on Supreme Court cases addressing the importance of an intact family, notwithstanding the claims of a biological father, the Second Circuit recognized significant interests of the adoptive families which might be "adversely affected" through disclosure of the names of the biological parents.²⁰⁹

With the resulting failure to get records opened on court challenge, adoptees turned their efforts to the legislative arena and have worked hard to change the statutes that initially closed the files. That continues to be the effort in Minnesota. Currently,

available evidence suggest[s] that open records regimes [do not] compromise the integrity of the adoption process. Indeed, as Professor Joan Hollinger observes, more than 80% of the biological mothers who have relinquished children for adoption in Michigan since 1980 have consented to the disclosure of their identity when their children become adults Moreover, whatever constitutionally protected interests adoptive parents may have in controlling a child's access to information while the child is a minor weakens considerably once a child reaches majority.²¹⁰

In a continuing irony, adoption law increasingly mandates extensive disclosure of non-identifying genetic information, while resisting the calls for disclosure of identifying information. This practice of fully disclosing anonymous genetic

209. *Id.* at 154.

210. *Id.* at 155.

information, with corresponding secrecy of the identity of the person, seems itself to be an example of genetic essentialism. A primary rationale for requiring disclosure of non-identifying genetic information is to enable prospective adoptive parents to guard against any dangers that might be posed through “faulty” genes. By contrast, the purpose of disclosing the identity of biological relatives is to aid adoptees and parents in their personal and emotional development, though providing genetic information may be a by-product. Knowing the identity of her biological parents may help the adoptee in her identity development,²¹¹ but is certainly not the only factor in that development.

Thus, while the dam of closed records continues to be solid in Minnesota, the oncoming tidal wave sweeping across the country—including in Minnesota—is likely to break it down in the relatively near future. Legal and social arguments begin to fall, and as more study occurs regarding the whole context of openness in adoptions, it is likely that this prohibition as well as the others discussed previously will be left in the wake of the new attitude toward adoption.²¹²

V. CONCLUSION

To say that adoption has undergone a revolution in attitude and legal treatment in the last twenty-five years is in no way an exaggeration. From the days when adoption agencies had a monopoly on how children were placed and how families were formed, we now find ourselves in a much more egalitarian situation where decisions about forming families are left to the individuals, rather than agencies or the government.

No longer are we in the days when an adoption agency had birth parents coming in one door and dropping the child into a “black hole,” while a group of social workers made decisions on who the appropriate adoptive parents were, based on unannounced criteria that were constantly shifting. In what now is a much more transparent “open” process and procedure, decisions regarding children and their best interests are primarily left to

211. *Id.*

212. *See, e.g.*, H.F. 2753, 2004 Leg., 83d Sess. (Minn. 2004) (proposing to give a person who is adopted on or after August 1, 2005, and is at least 19 years old, access to the original birth record, on request, from the Department of Health).

persons concerned about individual children, rather than bureaucracy of agencies or government.

With this new “openness” come new attitudes, rights, and responsibilities of all of the participants. The ultimate question of what is in a child’s “best interests” is yet to be determined and will continually change as society’s view of children and families shifts. Nevertheless, it is axiomatic that it is difficult to envision the situation in which too many adults “love” a child and are concerned enough to contribute to that child’s “best interests.” The next fifteen to twenty years will tell us, as these children grow to maturity, what the impact of this revolution has been.