Supreme Court No. 75934-1
Consolidated with No. 75956-1

SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al., Respondents,

v.

KING COUNTY, et al., Appellants,

Appeal from the Superior Court of King County
The Honorable William L. Downing

CELIA CASTLE and BRENDA BAUER, et al., Plaintiffs,

v.

STATE OF WASHINGTON, Defendant.

Appeal from the Superior Court of Thurston County
The Honorable Richard D. Hicks

AMICUS CURIAE BRIEF OF END OF LIFE ORGANIZATIONS IN SUPPORT OF RESPONDENTS/PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

LAW REVIEW ARTICLES OR NOTES

OTHER AUTHORITIES

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Compassion In Dying of Washington ("CID WA")[1] is a non-profit organization in Washington State, founded in 1993, that provides advocacy, counseling, and emotional support to individuals who desire a peaceful, humane death. Through education, advance planning, consultation with caregivers, case management services, and patient advocacy and empowerment, CID WA upholds patients' rights to excellent end-of-life care, effective pain and symptom management, and, for qualified, terminally ill adults, information and counseling about the many ways to avoid needless, intolerable suffering.

In 1997, CID WA generated a national umbrella organization, Compassion In Dying Federation, which recently merged with another national end-of-life organization, End of Life Choices, to become Compassion & Choices ("C&C"). *Amicus curiae* C&C provides national leadership for client service, legal advocacy, and public education to improve pain and symptom management, increase patient empowerment and self-determination and expand end-of-life choices to include aid-in-dying for terminally-ill, mentally-competent adults. C&C currently oversees six

[1] www.compassionindying.org

Compassion In Dying affiliates and 90 End of Life Choices chapters in 35 states.

The two primary concerns of CID WA and C&C are that *no one dies in pain* and *no one dies alone*. In working with the terminally-ill over the years, CID WA and C&C have learned that a key ingredient to a good death is for the terminally-ill to have the support and presence of loved ones at the time of death. CID WA and C&C work with many same-sex couples where one of the partners is dying.

Amicus curiae Rosehedge AIDS Housing and Health Care operates three adult family homes in Seattle to provide high quality, cost-effective compassionate healthcare to persons living with HIV/AIDS and other chronic terminal illnesses. Rosehedge opened in 1998 and was the first 24-hour housing and healthcare housing program in Washington State and has served more than 450 people since its opening. Rosehedge serves numerous same-sex couples where one or both of the partners had AIDS.

Amicus curiae Lifelong AIDS Alliance is committed to preventing the spread of HIV, providing practicial support services and advocating for those whose lives are affected by HIV and AIDS. Lifelong AIDS Alliance is the largest provider of HIV/AIDS services in the Pacific Northwest. Lifelong provides food support to more than 500 people every month in King County.

Lifelong administers a statewide insurance continuation program making health care accessible for more than 900 low-income people in Washington every month.

Highly active anti-retroviral therapy has prolonged life for people with HIV and AIDS, but AIDS is still a fatal disease. Death comes after prolonged struggles with opportunistic infections. The course of AIDS includes multiple hospitalizations and multiple points of care decision-making over years. In Washington State, the majority of known cases of HIV and AIDS occur in gay men. Lifelong AIDS Alliance serves many same-sex couples where one or both of the couples has HIV or AIDS.

Amici believe that it is important that long-term, committed partners, whether straight or gay, have the right to visit dying loved ones and make appropriate healthcare decisions for their dying partners. Additionally, decisions about property disposition after death and disposition of remains are important components for the peace of mind desired by the terminally-ill and their partners. The rights and privileges concerning these issues given by Washington statutes now to only opposite-sex couples can be truly equal to the rights given to same-sex couples only if the same-sex couples are permitted by law to marry.

II. WASHINGTON LAW DISADVANTAGES SAME-SEX PARTNERS IN TIME OF MEDICAL CRISIS

When families face medical emergencies or end-of-life medical decisions for loved ones, most people hope that their personal wishes will be carried out. Most of us wish to be near our loved ones and to empower our closest loved ones to make medical decisions for us when we are not capable of making these decisions ourselves. Unfortunately, Washington law places same-sex partners at a severe disadvantage in managing medical decisions when their partners are incapacitated. Washington's unequal treatment impacts same-sex partners in time of medical crisis in terms of the right to designate a proxy-decision maker and the right of access to a patient in a health care facility.

A. The Right to Make Medical Decisions for an Incapacitated Partner.

RCW 7.70.065 provides that if a person is mentally incompetent and unable to give informed consent to medical treatment, a prioritized list of proxy decision-makers is authorized to give consent to medical treatment. The designated individuals are:

> (1) The appointed guardian of the patient, if any;
> (2) The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;
> (3) The patient's spouse;

(4) Children of the patient who are at least eighteen years of age;
(5) Parents of the patient; and
(6) Adult brothers and sisters of the patient.

Most incompetent individuals have neither a court-appointed guardian nor a durable power of attorney.[2] Accordingly, for most people, the statutory list of proxy decision-makers applies by default. In the absence of a spouse, the patient's children, parents, and siblings, in that order, have the statutory right to make medical decisions for the incompetent patient. The statute is rigid and does not make allowances for any other classes of persons. The statute does not recognize same-sex partners. It does not take into consideration factors such as who resided with the patient in the past, who maintained the most contact with the patient, who might best know of the patient's expressed wishes, who shared an intimate relationship with the patient, or who has previously cared for the patient.[3]

Of particular concern is the situation where an adult child with a same-sex partner has become estranged from her parents or has concealed her primary relationship from her parents. When a medical emergency occurs

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[2] Robert A. Pearlman et al., Advance Care Planning: Eliciting Patent Preferences for Life-Sustaining Treatment, 26 Patient Educ & Counseling 353, 355 (1996) (estimating only between 9% and 23% of U.S. citizens have executed a formal written advance directive), cited in Adrienne E. Quinn, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 Seattle U. L. Rev. 573, 574 (1997).

[3] Adrienne E. Quinn, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 Seattle U. L. Rev. 573, 606 (1997).

and the patient becomes unable to give consent to medical treatment, the health-care provider is obligated to follow the statute in seeking a proxy-decision maker, or risk assault or negligence charges for providing medical treatment without informed consent.[4] The parents may learn of their child's relationship for the first time during a medical emergency. They may exclude their child's same-sex partner from participating in medical treatment, to the grief and detriment of both partners.

It is not sufficient to say that Washington law allows any individual the right to designate a proxy decision maker by executing a durable health care power of attorney. Although same-sex partners may sign durable powers of attorney in favor of their partners, a durable power of attorney does not provide the same security or peace of mind that opposite-sex spouses enjoy.

For example, several of the plaintiffs in both cases below found that hospitals did not respect their rights to serve as proxy decision makers even though they had duly executed a durable power of attorney:

> Recently, when Vega agreed to donate bone marrow to help someone with cancer, which requires surgery and general anesthesia, we again paid hundreds of dollars to an attorney, this time to prepare durable power of attorney documents. But because the hospital staff expressed objections initially when Vega presented her document and identified me as her authorized next-of-kin, I worried continuously until she was safely back home that my designated role might be

[4] *Id.* at 576-578.

> disregarded if anything were to go wrong while she was in the hospital.[5]

In an emergency, a same-sex partner, who did not have the document in hand at a critical moment, could not act to save his partner until the incapacitated partner's mother, the next available relative in the informed consent statute, spoke up on his behalf:

> In the early hours of the morning the hospital hesitated to let Curtis make health care decisions on my behalf since I was in the emergency room incapable of making decisions and signing releases. In a near-life-or-death drama my partner and spouse was nearly prevented from authorizing my emergency surgery, without having copies of our medical powers of attorney at hand. Fortunately, my Mother was able to intervene and vouch for Curtis' right to make decisions on my behalf.[6]

Other plaintiffs were also concerned that they could not find the power of attorney in an emergency. Husbands and wives do not need to produce their marriage certificates to speak for their spouses at a hospital. In the words of the plaintiffs:

> At the time, I was very distressed at the thought that here I was, gravely ill, with a newborn child and no way to protect my family. As I was taken away, I worried that Celia might have trouble finding another copy of medical power of attorney, when all I wanted was for her to quickly follow the medic van in our car with the baby. I wondered if the power of attorney would be honored and worried about what would happen to the two of them in the event of a tragedy. These

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[5] Declaration of Mala Nagarajan, *Andersen*, CP 154, lines 13-19.
[6] Declaration of Kevin L. Chestnut, *Castle*, CP 60, lines 3-13.

> issues became paramount at a time they should not have been adding to our concerns.[7]
>
> Recently, I had to be airlifted out of Friday Harbor, where we live, to a hospital in Bellingham. Valerie had to charter a flight to get to the hospital. We keep a copy of each of our Durable Powers of Attorney in one of our cars. Valerie was understandably shaken because I was experiencing a medical emergency and she could not find our legal documents.[8]

Other plaintiffs encountered disrespect from medical providers when they were already coping with the stress of a medical emergency:

> When our 13-year old granddaughter was born three months premature, Beth was nearly denied access to the Neonatal Intensive Care Unit by a nurse who thought there "were too many grandmothers." At times of crisis you are sometimes least able to speak up on your own behalf.[9]
>
> I needed surgery last year and, as they were preparing me, the hospital staff asked who was my next-of-kin. I introduced Mala and explained that she is my life partner and has my medical power of attorney. The staff responded gently but patronizingly, as if I was a bit slow and did not understand something simple and obvious, saying, "No. Who's your ***legal*** next-of-kin." It required firm negotiation to convince them to accept that Mala was the person authorized to speak for me and be at my side no matter what.[10]

Creating relationships with sympathetic medical providers in advance can help to alleviate some of these concerns. However, emergencies can

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[7] Declaration of Brenda Bauer, *Castle*, CP 87, lines 12-19.
[8] Declaration of Pamela Coffey, *Castle*, CP 83, lines 13-17.
[9] Declarations of Elizabeth "Beth" Reis/Barbara Steele, *Andersen*, CP 114, lines 10-13.
[10] Declaration of Vegavahini Subramaniam, *Andersen*, CP 276, lines 4-9.

occur far from home and one of the plaintiffs worried about what would happen if one of them became ill while traveling:

> I worry about what could happen if either of us had a medical emergency while traveling. Would the hospital know who to call? Would they take instruction from us? Having been in the health care profession, I know that unfortunately, the care a patient receives often has some correlation with the way the medical staff regards the patient or those advocating for her. I worry that Leslie or I might receive a different level of care if the medical staff, or a particular provider, knew about our relationship and didn't approve. I hate to think that at a time of medical crisis, we would have to deal with managing an issue like that.[11]

B. The Right to Visitation with a Partner.

The Washington informed consent statute does not address who has the right of access to a dying or incompetent partner. Neither Washington statutory nor case law specifies whether a same-sex partner has the right to visit his or her loved one when the partner is hospitalized and unable to express his or her wishes.

Although the American Medical Association ("AMA") has adopted a policy statement supporting visitation rights of same-sex partners,[12] hospitals and caregivers can and do exclude access when they do not approve of the same-sex relationship. For example, the conflict between an incompetent's parents and a same-sex partner led to guardianship proceedings in *In re*

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[11] Declaration of Heather Andersen, *Andersen*, CP 260, lines 16-22.

Guardianship of Kowalski, 382 N.W. 2d 861 (Minn. Ct. App. 1986). The court appointed Sharon Kowalski's father as guardian despite testimony from the treating nurses who said that Sharon wanted her same-sex partner to care for her. The father, empowered as a guardian, and prejudiced against gays and lesbians, barred Sharon's same-sex partner from seeing her.

In 2000, Robb Miller, Executive Director of *amicus curiae* Compassion In Dying of Washington, counseled a gay man whose partner of 17 years was suffering from multiple opportunistic infections, had AIDS-related dementia, and was dying. Prior to the onset of dementia, the dying partner had discussed his end-of-life wishes which included dying at home, a secular funeral service, and cremation. Mr. Miller provided information about hospice resources. After hospice services got involved, the dying partner received palliative care in his own home, and was kept calm and comfortable. He stopped eating and drinking, his condition deteriorated, and he was progressing towards a peaceful death in accordance with the wishes he had expressed while still competent.

The dying man's parents disapproved of their son's sexual orientation and had been out of touch with him ever since he had come out as a gay man decades earlier. Unfortunately, a younger sister informed the dying man's

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[12] AMA, Policy No. H-140.901.

parents of their son's condition and they rapidly intervened. While the caregiver partner was at work, the parents had an ambulance service remove the dying man from his home and transfer him to a faith-based nursing home. The caregiver partner found the location and attempted to visit his dying partner. But the nursing home forbade entry, saying that only biological family members or spouses were permitted to enter and that the dying man's parents had expressly forbidden any of their son's gay friends from visiting. When the death occurred, the parents held a private religious service and buried their son in the family plot in contravention of all of his wishes. Mr. Miller was in touch with the surviving partner who recounted his ordeal and remained devastated by his inability to fulfill his promise to enable his partner to die at home, in the company of friends, and to have a secular funeral service and cremation following his death.[13]

Legal recognition of marriages between same-sex partners would minimize the tragic exclusion of long-term partners from the bedsides of their infirm loved ones by unfriendly and prejudiced staff in hospitals, nursing homes, and other health care facilities, and by unaccepting family members.

[13] Certified Statement of Robb Miller on file in the law offices of undersigned attorneys

III. WASHINGTON LAW DISADVANTAGES SAME-SEX PARTNERS REGARDING DECISION-MAKING ABOUT DISPOSITION OF REMAINS

Individuals who know they are dying almost always want to be involved in deciding whether they are buried or cremated and what type of funeral or memorial service will follow their death.[14] It is Compassion In Dying of Washington's experience that the dying want their closest loved ones to carry out their decisions about what happens following their death. The committed partners of the dying are also interested in being involved in post-death arrangements.[15] Unfortunately, Washington law seriously disadvantages same-sex partners regarding decision-making in this regard by giving authority to relatives over the disposition of remains and ignoring same-sex partners.

Washington statutory law explicitly gives the decedent the power to control the disposition of his or her own remains, so long as the intent is expressed in a signed and witnessed instrument (including a valid will executed in Washington).[16] The decedent can also control disposition of his or her remains by prepaying for a plan at a licensed funeral home or cemetery.

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at MacDonald Hoague & Bayless.

[14] Mark E. Wojcik, *Discrimination After Death*, 53 Okla. L. Rev. 389 at 399-400 (2000) ("...persons facing a terminal illness may often gain emotional comfort by having a say in the planning of their own funeral arrangements.").

[15] Declaration of Plaintiff Judith Fleissner, *Castle*, CP 65, lines 20-24.

[16] RCW 68.50.160.

When the intent is not sufficiently formalized by the above means, power devolves to a hierarchy of statutorily defined individuals based on their relationship to the decedent, starting with the spouse and ending with a person acting as representative based on a signed authorization by the decedent.[17]

Some courts interpreting state statutes outside of Washington have given rights to unmarried partners who attempt to present evidence of the intent of the decedent,[18] but there are no reported Washington cases which discuss this issue.

Although Washington law explicitly states that the wishes of the decedent should be given priority, it also clearly relegates "a person acting as a representative of the decedent under the signed authorization of the decedent" to the last rung of the decision hierarchy. RCW 68.50.160(3)(e). Thus, even if a long-time unmarried partner has been granted written

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[17] The common law and statutes are based on the assumption, often incorrect for gay couples, that a deceased's immediate relatives know best what the decedent's wishes were. Michael L. Closen & Joan E. Maloney, *The Health Care Surrogate Act in Illinois: Another Rejection of Domestic Partners' Rights*, 19 S. Ill. U. L.J. 479, 507 (1995) (discussing the Illinois statute and justifications for the statutory hierarchy). As of 1999, fifteen other states have codified similar codified hierarchies. Jennifer E. Horan, Note, *"When Sleep At Last Has Come": Controlling the Disposition of Dead Bodies for Same-sex Couples*, 2 J. Gender Race & Just. 423, n.143 (1999).

[18] *Matter of Estate of Nicastro*, 1990 WL 105620 (Del.Ch.) (1990) (It is the role of the Court to determine which of the disputed plans best match the evidence of intent of the decedent, rather than deferring strictly to blood relatives over unmarried partners); *Steward v. Schwartz Brothers-Jeffer Memorial Chapel, Inc*, 159 Misc.2d 884, 606 N.Y.S.2d 965 (1993); "...the close, spousal-like relationship... and the strained nature of the relationship between Stanton and his family ... support the Plaintiff's standing as a representative of

decision-making power over disposition of remains, adult children or a long-separated spouse or parents or siblings all trump a written authorization to the unmarried same-sex partner. Moreover, few dying people prepare written authorizations, or have enforceable powers of attorney or wills to govern the issue of disposition of remains.[19]

Lyn Basset is a long-term resident of Seattle[20]. When Lyn's partner of 22 years, Valerie Hausmann, died at Swedish Hospital in Seattle in 2002, Lyn thought matters were taken care of because she had a durable power of attorney for Valerie. Before Valerie died, Lyn's role in Valerie's healthcare was respected by the hospital. However, when Lyn requested that Valerie's body be released from the hospital morgue to a funeral home, the hospital refused because Lyn was not a blood relative. The hospital staff informed Lyn that the power of attorney was no longer valid since Valerie was deceased. Because Valerie had no adult surviving next of kin, no one else could authorize transfer of Valerie's remains.

Valerie and Lyn thought they had protected themselves by obtaining powers of attorney, never imagining that if one of them died, the problem of gaining access to the partner's remains would be an issue. Had they been a

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Stanton's wishes." *Id.* at 888.

[19] Footnote 2, *supra*, and footnote 21, *infra*.

[20] Certified Statement of Lyn Basset on file in law offices of undersigned attorneys of MacDonald Hoague & Bayless.

legally married couple, Lyn and the minor children would not have had to endure this torment that caused a delay in planning and holding the funeral.

It is not sufficient to say that same-sex couples should execute proper written documents to govern disposition of remains or should pay in advance for burial or cremation. Only by recognizing the right of same-sex couples to marry will those couples have equal rights to opposite-sex couples over the disposition of remains.

IV. WASHINGTON LAW DISADVANTAGES SAME-SEX PARTNERS REGARDING DISPOSITION OF PROPERTY AFTER DEATH

An important aspect of a peaceful, humane death is the peace of mind provided by statutes which protect the interests of loved ones in the property of ill, dying loved ones. In anticipation of death, individuals may of course plan for the disposition of their property privately, irrespective of statutory protections, by executing wills or trusts. However, the majority of people die without even a basic will and, in recognition of the need for some means of conclusively distributing the assets of decedents, the Washington Legislature has adopted several statutes allowing transfer of title after death absent a will.[21]

[21] LexisNexis Martindale Hubble published survey results from lawyers.com concluding 58% of adult Americans lack a basic will. "The Carlson-Ledger" (Jackson, MS) June 20, 2004 Sunday, Copyright 2004.

Washington law affords married couples a protected interest in each other's property at death, providing peace of mind to the dying spouse as to a dependable disposition of property after death. The Descent and Distribution Statute, RCW 11.04.015, provides a substitute for a will, assuring a spouse dying without a will that the surviving spouse will receive all of the decedent's share of the net community estate, and either one-half, three-quarters, or all of the net separate estate depending upon the existence of other surviving heirs.[22]

Unlike RCW 11.04.015, providing for at least half distribution of *net separate property* to a surviving spouse and all of the decedent's *net community property* when his or her spouse dies intestate, Washington statutory law provides no such protection for same-sex partners when their same-sex partners die intestate.

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[22] RCW 11.04.015 specifically provides:

The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:

(1) Share of surviving spouse. The surviving spouse shall receive the following share:
   (a) All of the decedent's share of the net community estate; and
   (b) One-half of the net separate estate if the intestate is survived by issue; or
   (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or
   (d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent.

Community property is defined as "property, not acquired or owned as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both." RCW 26.16.030. The theory of community property is that it is property obtained by the efforts of husband, or wife, or both for the benefit of the community. *Togliatti v. Robertson*, 29 Wn.2d 844, 852, 190 P.2d 575 (1948). Community property law was designed to make husbands and wives equally responsible for the necessary expenses of their families and the education of their children. *Harmon v. Department of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770, 773 (1998). While it is clear that the legislature intended community property to support the family, the statute relies on the legislative definition of marriage, codified in RCW 26.04.010, which defines marriage as "a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable." RCW 26.04.010(1). The statutorily defined community property protections of support for families is thus completely unavailable to families of same-sex couples.

In addition to the intestate descent and distribution rights Washington law affords married couples concerning both community property and separate property, Washington statutory law allows married couples the additional ability to enter into community property agreements. These

agreements provide a simple and certain way of disposing of community property upon the death of either spouse. *Harris v. Harris*, 60 Wn. App. 389, 394, 804 P.2d 1277 (1991). A husband and wife may jointly enter into "any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either." RCW 26.16.120. Community property agreements allow the married couple to jointly agree to modify the characterization of their property and to simply and efficiently dispose of community property at death. *See Hesseltine v. First Methodist Church*, 23 Wn.2d 315, 322, 161 P.2d 157, (1945). Community property agreements are unique in that they cannot be revoked by one party, but must be modified or revoked by both parties. *In re Estate of Yiatchos*, 60 Wn.2d 179, 182, 373 P.2d 125, 127 (1962). Additionally, the statute allows the community property agreement to transfer the community property to a surviving spouse notwithstanding contrary provisions in a will or contrary beneficiary designations. Upon the death of one spouse, the entire community property vests in the surviving spouse in fee simple. *Hesseltine*, 23 Wn.2d at 322, 151 P.2d at 161. Dying married persons are afforded peace of mind, knowing the surviving married person is allowed by statute an efficient transfer of title to property after death without the need for probate.

Washington statutory law does not offer same-sex partners alternatives to the protection offered married couples by the community property and intestate statutes. Both RCW 26.16.030 and RCW 26.16.120 use the RCW 26.04.010 terms: husband/male, and wife/female. The statutory protections for married couples simply do not exist for same-sex couples.

A dying, unmarried same-sex partner cannot alternatively have any peace of mind or confidence in the survivor's potential claim for equitable relief. Even when the Washington courts allow potential recognition of equitable rights to same-sex partners, as recognized by the Washington Supreme Court in *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107 (2001), the lack of specific statutory protections undermines the ultimate goal of a reliable right, a basic requirement of a humane, peaceful death. As the Court explained in *Vasquez*, "in a situation where the relationship between the parties is both complicated and contested, a determination of which equitable theories apply should seldom be decided by the court on summary judgment." *Vasquez*, 145 Wn.2d at 108. Full evidentiary hearings and trials as a requisite to proof of equitable rights for a surviving same-sex partner is not a real means of providing marriage equality.

V. CONCLUSION

Terminally ill and dying individuals should not be faced with disputes and conflict over healthcare decisions, hospital visitation, disposition of remains, and decisions about property after death. It is important to provide the right to a peaceful, humane death for Washington residents in same-sex relationships. This can occur only by granting the right to marry to same-sex couples.

RESPECTFULLY submitted this 2nd day of February, 2005.

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