

C2-91-1047

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re: Guardianship of Sharon Kowalski, Ward.

BRIEF OF AMICI CURIAE
NATIONAL ORGANIZATION FOR WOMEN, INC.,
THE CENTER FOR WOMEN POLICY STUDIES,
THE FUND FOR THE FEMINIST MAJORITY,
THE MINNESOTA FEDERATION OF
BUSINESS & PROFESSIONAL WOMEN'S CLUBS, INC.,
MINNESOTA STATE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
MINNESOTA NATIONAL ORGANIZATION FOR WOMEN, INC.,
MINNESOTA WOMEN'S LAWYERS, INC.,
NATIONAL WOMEN'S HEALTH NETWORK,
NORTHWEST WOMEN'S LAW CENTER,
NOW LEGAL DEFENSE AND EDUCATION FUND.

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INTEREST OF AMICI CURIAE

The NATIONAL ORGANIZATION FOR WOMEN, INC. ("NOW") is a national organization of women and men founded in 1966. Its purpose, as outlined in its bylaws, is to take action to bring women into full participation in the mainstream of American society. This purpose includes securing equal rights and responsibilities in all aspects of citizenship and family life, and freedom from discrimination based on, inter alia, gender, age, marital status, religion, parenthood, physical disability, or sexual preference/orientation. MINNESOTA NATIONAL ORGANIZATION FOR WOMEN, INC. ("MINNESOTA NOW"), organized under the same bylaws, represents the more than 6,000 NOW members and supporters in Minnesota.

Promoting and protecting lesbian legal rights in regard to life partners and families, and the rights of people with disabilities to make decisions about their guardians and residences, are among NOW's priority issues. The right of all women to control their bodies, lives and liberty is inextricably linked to achievement of NOW's stated purpose. In addition, NOW has long fought discrimination in the form of sex stereotyping. The District Court's decision in this case will adversely impact lesbian's rights in guardianship cases and represents a blow to women's rights.

The CENTER FOR WOMEN POLICY STUDIES, founded in 1972, was the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The

Center's current programs include a Women's Health Program, particularly focused on the health care needs of low-income women and women of color; a key concern is the potential denial of women's right to physical autonomy and control of her own health care decisions. The Center for Women Policy Studies is examining the impact of sex stereotyping and sex discrimination in the enforcement of living wills and health care proxies. The decision in In re Guardianship of Sharon Kowalski has the potential to set an important precedent that will help to protect all women who express personal choices about critical health care matters.

The FUND FOR THE FEMINIST MAJORITY is a non-profit organization with supporters nationwide and offices in Arlington, Virginia and Los Angeles, California, dedicated to eliminating sex discrimination and the promotion of equality, women's rights, and a feminist agenda including gay and lesbian rights.

The MINNESOTA FEDERATION OF BUSINESS & PROFESSIONAL WOMEN'S CLUBS, INC. promotes full participation, equity, and economic self sufficiency for America's women.

The MINNESOTA STATE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN ("AAUW") promotes equity for women, education and self-development over the life span, and positive societal change. AAUW is opposed to all forms of discrimination.

MINNESOTA WOMEN'S LAWYERS, INC. ("MWL") is a non-profit organization founded in 1972. MWL's members are committed to

enhancing the status, influence, and effectiveness of women lawyers and promoting social issues of concern to women lawyers. MWL condemns any invidious distinction, exclusion or restriction made on the basis of sex, sexual preference, disability or marital or familial status, inter alia, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by such affected persons, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any field.

The NATIONAL WOMEN'S HEALTH NETWORK (the "Network") is a national organization with individual and organizational members representing over 500,000 women. The Network advocates for women's autonomy in health-related decision-making, regardless of a woman's race, class, religious beliefs, age, disabilities, or sexual preference.

The NORTHWEST WOMEN'S LAW CENTER is a non-profit public interest organization in Seattle, Washington, that works to advance legal rights for women. It achieves this through litigation, legislative advocacy, education, and providing free legal information and referrals. The Law Center has worked actively against discrimination on the basis of sexual orientation for many years and sees this case as an important landmark in that area. Among the Law Center's past activities in this area has been participation in an adoption case involving lesbian co-parents.

The NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a non-profit civil rights organization that performs a broad

range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of NOW.

Gay and lesbian rights, particularly the right to form a legally cognizable and protected family, is a major focus of NOW LDEF's work. NOW LDEF has participated as counsel or amicus curiae in numerous cases involving the rights of lesbian or gay family members. NOW LDEF is committed to securing recognition of non-traditional relationships in all areas of the law, including family law. Securing full rights for disabled women is a high priority for NOW LDEF.

STATEMENTS OF LEGAL ISSUE AND CASE

On August 8, 1991, this Court granted leave to NOW, et al., to file an amici curiae brief in this appeal from the District Court order dated April 23, 1991, by the Honorable R. V. Campbell, District Judge, denying Karen Thompson's petition for guardianship of Sharon Kowalski. Amici incorporate by reference and adopt the statements of the legal issues and the facts filed by Appellant Karen Thompson. Factual findings are supported by record and transcript references throughout this brief.

ARGUMENT

I. THE COURT'S ORDER DENYING KAREN THOMPSON GUARDIANSHIP OF SHARON KOWALSKI WAS IMPERMISSIBLY BASED UPON SEX STEREOTYPING AND BIAS AGAINST MS. THOMPSON'S POLITICAL BELIEFS, ACTIVISM, AND LESBIAN LIFESTYLE.

A. KAREN THOMPSON IS CLEARLY AND CONVINCINGLY THE BEST QUALIFIED PERSON TO BECOME SHARON KOWALSKI'S GUARDIAN.

Minnesota law requires that guardianship decisions be based upon clear and convincing evidence as to the best interest of the ward. Minn. Stat. § 525.551, subd. 3. Clear and convincing evidence has been defined as evidence which "produces in the mind of the trier of fact, a firm belief or conviction . . . as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Matter of Jobes, 108 N.J. 394, 407, 529 A.2d 434, 441 (1987)

(citing State v. Hodge, 95 N.J. 369, 376, 471 A.2d 389, 393 (1984), et al.) Additionally, in Minnesota "clear and convincing proof" is shown where the truth of the facts asserted is highly probable. Weber v. Anderson, 269 N.W. 2d 892, 895 (Minn. 1978).

Among the relevant factors to be evaluated by the court in considering the best interests of the ward are:

- (1) the reasonable preference of the ward or conservatee, if the court determines the ward or conservatee has sufficient capacity to express a preference;
- (2) the interaction between the proposed guardian or conservator and the ward or conservatee; and
- (3) the interest and commitment of the proposed guardian or conservator in promoting the welfare of the ward or conservatee and the proposed guardian's or conservator's ability to maintain a current understanding of the ward's or conservatee's physical and mental status and needs. In the case of a ward or a conservatorship of the person, welfare includes:
 - (i) food, clothing, shelter, and appropriate medical care;
 - (ii) social, emotional, religious and recreational requirements; and
 - (iii) training, education and rehabilitation.

Kinship is not a conclusive factor in determining the best interests of the ward or conservatee but should be considered to the extent that it is relevant to the other factors contained in this subdivision.

Minn. Stat. § 525.539, subd. 7.

In addition, the court must find that the person to be appointed guardian is the most suitable and best qualified person. Minn. Stat. § 525.551, subd. 5.

The evidence presented in the guardianship hearing on November 8, 1990 in Duluth, December 5-7, 1990 in Minneapolis, and March 22, 1991 in Hibbing, was clear, convincing and uncontroverted that

appointment of Karen Thompson as Sharon Kowalski's guardian is in Sharon Kowalski's best interest. A parade of 15 health care professionals with intimate knowledge of Ms. Kowalski's medical records and treatment, all of whom were chosen by the court as the court's own experts, unanimously testified to the profound benefits which have flowed to Sharon Kowalski from Karen Thompson's devotion and care since the day of Sharon's accident.

The order being appealed recognizes Karen Thompson's energetic commitment and devotion to the welfare of Sharon Kowalski, the effort Karen Thompson has made to ensure parental involvement in Sharon Kowalski's life, her demonstrated commitment to providing for Sharon's needs, including food, clothing, shelter, appropriate health care, education, recreation, training, religious expression and rehabilitation, and Karen Thompson's extraordinary efforts to make her home accessible in order to accommodate the guardianship of Sharon Kowalski. (Appendix of Appellant, hereinafter referred to as "A," at 10-12, 18). In addition, the court recognized that Sharon has repeatedly stated her preference to live in St. Cloud with Karen Thompson. (A-9). Despite the clear and convincing evidence that Karen Thompson is the most suitable and best qualified person and that her appointment would be in Sharon Kowalski's best interests, the court denied Karen Thompson's guardianship petition.

Instead, guardianship was granted to a woman who only visited Sharon Kowalski approximately three times a year (T, p. 602, 603),

instead of to a woman who sees Sharon on almost a daily basis despite the fact that she has to drive many hours to make the trip. (T, p. 461, 501, 502). Guardianship was granted to a woman who, over the eight years that Sharon Kowalski has been institutionalized, has attended two case conferences (T, p. 609), instead of to a woman who has been intimately and consistently involved in decisions about Sharon's care. (A-11). Guardianship was granted to a woman who has testified that she is not willing to take Sharon Kowalski into her home (T, p. 620) and intends to institutionalize her, instead of to a woman who has remodeled her home in order to make it comfortable and accessible to Sharon (T, p. 470; A-10, 11). Guardianship was granted to a woman who testified that she would have a hard time finding the time to be involved with Sharon daily (T, p. 614), instead of to a woman with whom Sharon had chosen to share her life and with whom Sharon has consistently stated she would like to go home. (A-9, 17). And guardianship was granted to a woman who even agrees that aside from Sharon Kowalski's parents (who are not seeking guardianship), there is not another person who has shown more interest or commitment to Sharon Kowalski's care and rehabilitation than Ms. Thompson (T, p. 614).

Contrary to Minnesota law, this guardianship decision was not based on a consideration of the best interests of the ward. See Minn. Stat. § 525.539, subd. 7. Contrary to Minnesota law, guardianship was granted to an individual who never filed a guardianship petition. See

Minn. Stat. §§ 525.541, 525.542. Contrary to Minnesota law, guardianship was granted to an individual without a hearing on her qualifications. See Minn. Stat. § 525.55, § 525.551. Contrary to Minnesota law, guardianship was granted to an individual who testified that she was not capable of acting alone as Sharon's guardian (T, p. 601); see Minn. Stat. § 525.539, subd. 7(3). And contrary to Minnesota law, the decision to grant guardianship was primarily based on hearsay evidence of the preference of Sharon's parents who are not even parties to the action, and not upon clear and convincing evidence. See Minn. Stat. § 525.551, subd. 3.

The court has clearly ignored its mandate to appoint the most suitable and best qualified person by denying guardianship to the one person who has consistently, effectively and lovingly strived for Sharon Kowalski's best interests. Its decision to grant guardianship of Sharon Kowalski to Karen Tomberlin constituted a clear abuse of discretion.

B. THE COURT'S DENIAL OF KAREN THOMPSON'S GUARDIANSHIP PETITION WAS BASED ON SEX STEREOTYPING.

The Supreme Court has found that sex stereotyping is illegal in job discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In that case, the trial court held that "Price Waterhouse unlawfully discriminated against [a woman candidate for partner] on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." Such comments included that she was

"macho" and "overcompensated for being a woman", and that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." Id. at 235. The Supreme Court held that these were impermissible motives for an employment decision. Amici contend that such sex stereotyping is also inappropriate for a guardianship decision.

In 1986, the Minnesota legislature amended its guardianship statute to remove gender specific references. This demonstrates legislative intent that in Minnesota, guardianship laws should be applied and interpreted in a gender neutral fashion.

A further indication of legislative as well as judicial intent to eliminate gender bias from the Minnesota courts is the legislature's funding of the Minnesota Task Force for Gender Fairness in the Courts. Created by order of the Minnesota Supreme Court in 1987, the Task Force was charged with exploring the extent to which gender bias exists in the Minnesota court system, identifying and documenting gender bias where found, and recommending methods for its elimination. 15 Wm. Mitchell L. Rev. 829, 835 (1989). In its 1989 report, the Task Force reported that it found much concrete evidence of gender bias which must be addressed in order to ensure fairness in Minnesota's judicial system. Id. at 840. In response, the Minnesota Supreme Court established a committee to monitor implementation of the Task Force's recommendations designed to produce fair treatment for all of Minnesota's citizens. Id. at 947.

The intent of the legislature and judiciary to eliminate gender bias in the Minnesota courts has been frustrated in this case. The decision as to guardianship of Sharon Kowalski was tainted with gender stereotyping.

1. The court used sex stereotypes in evaluating the behavior of Karen Thompson in contrast to that of Sharon Kowalski's father.

The court order states that Karen Thompson is described "by some witnesses as possessive, authoritative, inflexible and committed to her own political agenda." (A-12). The record does not support these critical descriptions of Karen Thompson.

The health care professionals who testified at the trial consistently described Karen Thompson as helpful, cooperative, devoted, committed, and not difficult or overbearing. (See, e.g., Dr. Matthew Eckman, T, p. 26; Dr. Dorothy Rappel, T, p. 35; Rachel Komarek, T, p. 81; Mary Anne Cornell, LPN, T, p. 143; Kathy King, T, p. 159; Sue Martin, T, p. 176; Anita Johnson, T, p. 183; Jackie Nelson, T, p. 193; Jeanette Adamski, T, p. 210; Brian McKee, T, p. 237; Nancy Hinenkamp, T, p. 264; Dr. Gail Gregor; T, p. 315; Dr. Carolyn Herron, T, p. 517.) In fact, none of the 15 health care professionals who had many opportunities to observe the interaction between Karen Thompson and Sharon Kowalski had anything but positive comments about the benefits resulting to Sharon from Karen Thompson's care. It must be emphasized that not one of the doctors, physical therapists, rehabilitative therapists or

nurses found Karen Thompson's actions to be inappropriate or overbearing.

Advocating for the interests of a severely injured loved one requires strength and aggressiveness to ensure adequate medical treatment and therapy. Otherwise, medical needs may not be met. Additionally, Karen Thompson has had to overcome legal and other obstacles not faced by most in these circumstances. Karen Thompson was thus placed in an impossible Catch-22 situation: risking inferior medical treatment for Sharon if she didn't act aggressively, yet having her zealous advocacy for Sharon used as a reason to deny her guardianship. While this behavior would not be considered inappropriate for a man, it is viewed negatively in a woman because it contradicts widely accepted stereotypes of a woman's proper role.

This point is illustrated by the fact that the court nowhere berates Sharon Kowalski's father for his "inflexibility", "possessiveness", or "authoritativeness," though these adjectives describe the behavior he has exhibited. (For health reasons, Donald Kowalski has resigned guardianship and is not a party to this action.) For example, despite clear evidence that it is important for Sharon Kowalski to have both her parents and Karen Thompson involved in her life (A-14), Sharon Kowalski's father has threatened the court with his noninvolvement should Karen Thompson become Sharon's guardian (A-15). He blatantly ignores Sharon's best interest and in effect says to the court, if you don't grant my wishes and give guardianship to Karen Tomberlin, I will

drop out of my daughter's life. The undisputed testimony is that Karen Thompson has made many efforts to effect a reconciliation with the Kowalskis (T, p. 60, 458, 459) and the Kowalskis have never responded or made efforts in the other direction (T, p. 63).

Karen Thompson is punished for a mere allegation of such behavior, while Donald Kowalski's proven behavior, such as "disagreeing with everything" the medical specialists have done for Sharon (T, p. 345) and "ranting and raving" (T, p. 345), gets him what he wants: the court accedes to his desires and denies Karen Thompson's guardianship petition. Such a double standard is as patently unfair and discriminatory when applied to Karen Thompson as it was when applied to the woman partnership candidate at Price Waterhouse.

2. The court differentiated between the two women guardianship candidates, Karen Thompson and Karen Tomberlin, on the basis of sex stereotypes.

The court depicts Karen Tomberlin, a married woman with four children, as "a role model" for Sharon Kowalski and states that she enjoys "the friendship and respect of Sharon's parents." (A-18, 19). The court states that Karen Tomberlin offers "a stable, enduring relationship to Sharon." (A-19). But in fact, Karen Tomberlin offers no strong emotional involvement and no plan of care for Sharon Kowalski except to keep her institutionalized. (T, p. 607). Moreover, Karen Tomberlin never requested to be granted sole guardianship because she knew that she would be unable to meet Sharon's needs by herself. (T, p. 601).

The court describes Karen Tomberlin as a neutral third party; but this is not accurate. Karen Tomberlin is not neutral in this action: she is a very close Kowalski family friend who has testified that the court should take into major consideration the Kowalskis' refusal to visit Sharon if Karen Thompson is named guardian. In Karen Tomberlin's testimony regarding her knowledge of Sharon's medical condition, her major source of information was Sharon Kowalski's parents. The testimony of Karen Tomberlin, taken as a whole, was not the testimony of a neutral third party. And yet although the court is not offended by Karen Tomberlin's clear advocacy of Sharon Kowalski's parent's viewpoint, it criticizes Karen Thompson for being committed to "her own political agenda." (A-12). Perhaps the Kowalski family agenda is more palatable to the court because it incorporates more stereotypical feminine values.

What Karen Tomberlin does offer the court is the appearance of a "traditional" lifestyle. The court attaches more importance to this than to Sharon Kowalski's stated wishes and chosen lifestyle. It is inappropriate and discriminatory for the court to substitute its personal preference for the best interests of the ward.

C. THE ORDER PUNISHES KAREN THOMPSON
FOR POLITICAL BELIEFS AND ACTIVISM.

A primary justification for denying Karen Thompson guardianship appears to be the political activism which she has undertaken in the wake of this tragedy. (A-13, 26). The court considers Karen

Thompson's activities to be promoting a political agenda. However, Karen's response to what has happened to her and her loved one is completely appropriate.

Sometimes tragedy awakens a person's political beliefs. After the unspeakable tragedy of losing their children to drunk drivers, thousands of parents have been propelled into the political arena demanding harsher penalties for those who drive drunk. Many of these parents were not active politically until tragedy struck. If Karen Thompson had taken Sharon Kowalski to a convention of Mothers Against Drunk Driving (MADD) to receive a "Woman of Courage Award" and "utilized Sharon as her keynote," (A-12), it is unlikely that anyone would have criticized her actions. And yet although this tragedy started with a drunk driver, it was compounded by the fact that although she and Sharon were life partners, had exchanged rings and named each other life insurance policy beneficiaries (Brief of Appellant at 1), their relationship had no legal protection because they were lesbians. Surely such a realization would propel someone who had not been politically active into the same type of political activism that is so lauded in MADD.

After Jim Brady was shot and horribly injured during the assassination attempt on President Reagan's life, Sarah Brady was politically activated to the cause of handgun control. Sarah and Jim Brady have appeared at many public events; they have received much public praise and their courage has been recognized and rewarded. No

one has raised the objection that Sarah Brady is putting Jim Brady on display not in his best interest. Perhaps there is another element of sex stereotyping here: the assumption that a disabled man is stronger than a disabled woman and does not require the same level of protection.

Not only was Karen Thompson's behavior appropriate, but there is no evidence in the record that she has ever done anything that the 15 treating physicians, social workers, mental health workers, and medical experts have found detrimental to Sharon Kowalski. All those who witnessed any public event Sharon Kowalski attended testified to the benefit she derived from those appearances. (See, e.g., T, p. 157; T, p. 158-159; T, p. 311, T, p. 313.) Only four people, none of them medical professionals, testified to any harm: Becky Muotka, who had not seen Sharon for six years prior to the accident (T, p. 544); Katherine Schroeder, for whom Sharon has expressed distaste (T, p. 208, 221, 505); Deborah Kowalski, who admits to hating Karen Thompson (T, p. 742); and Karen Tomberlin herself. And yet none of these "friends" were ever at any of these events to observe the so-called harm. The court itself did not consider Sharon's attendance at a NOW conference to which she was invited to receive a "Woman of Courage Award" to be detrimental because it was the court which allowed Karen Thompson to take her to the conference upon the recommendation of her treatment team at Trevilla (A-43).

In fact, the evidence presented at the hearing clearly attested to the benefit Sharon Kowalski derived from her outings with Karen

Thompson. Dr. Gregor testified that Sharon Kowalski enjoys the events and "seems to be enriched by activities." (T, p. 313). Further, from a medical standpoint, Dr. Gregor testified that there is no reason for Sharon not to attend events or receive awards. (T, p. 312). The court's use of these activities to deny Karen Thompson's guardianship petition constituted an abuse of discretion.

D. THE ORDER IS GROUNDED IN
DISCRIMINATION BASED ON KAREN
THOMPSON'S LESBIAN LIFESTYLE.

Before the accident, Sharon Kowalski and Karen Thompson had a longstanding, committed relationship. This fact is uncontroverted. Although the court seemed troubled by Karen Thompson's revelation of this fact, it was in Sharon Kowalski's best medical interest to do so (Dr. Dorothy Rappel, T, p. 61) because it is crucial for doctors to understand who their patient was prior to their accident. The extent to which Sharon Kowalski had publicly acknowledged her sexual preference at the time of the accident is not clear, and at this point it is irrelevant. Sharon Kowalski has not shown any indication that being open about her relationship with Karen Thompson is objectionable to her, and in fact has willingly told her doctors of the nature of her relationship with Karen Thompson (See, e.g., Dr. Dorothy Rappel, T, p. 68; Dr. Rachel Komarek, T, p. 68.) She describes Karen Thompson as her lover (T, p. 210). Sharon's parents' refusal to accept this situation is irrelevant, as is their "outrage[d] and hurt by the public invasion of Sharon's privacy.

. ." (A-13). Although they may wish it otherwise, their daughter is a lesbian who although brain damaged, is perfectly capable of expressing the desire to return home with Karen, and has consistently done so. (See, e.g., T, p. 53, 206.)

The court theorizes that Karen Thompson, by engaging in another relationship, will "split her loyalty" and that this "will hobble Ms. Thompson's ability to administer to the physical, mental, social and spiritual needs of Sharon . . . resulting in detriment to Sharon." (A-18). It is highly unlikely that the court would have speculated on this matter were this couple heterosexual. Medical testimony in this case made it clear that this is a frequent issue with many couples and as Dr. Gregor testified Karen Thompson should not be disqualified for this reason:

"because people who are in a relationship, if you use a traditional marriage as a model, after a severe injury . . . the non-injured partner also needs to continue their life and make it the best they can and we commonly see divorces occurring but continued involvement with the brain-injured partner. And the non-injured person may . . . get married, but may still continue to have involvement, love and caring for the person in their life."

(T, p. 322).

The uncontroverted testimony in this case clearly shows that Karen Thompson has continued the love, involvement and caring so beneficial to Sharon Kowalski's quality of life.

II. THE ORDER IGNORES THE PREFERENCE AND CHOICE OF SHARON KOWALSKI.

There is abundant medical evidence that Sharon Kowalski is capable of expressing her preference to live with Karen Thompson (see, e.g., T, p. 18; T, p. 53; T, p. 206.) and that this preference is reliable (T, p. 323). Yet the court in its Memorandum incredibly describes Sharon as a "child of divorce" between the Kowalskis and Karen Thompson. (A-28, 29). There are many reasons why this is fallacious reasoning. First, Sharon Kowalski is not a child. She is a disabled adult who can reliably express her choice, as discussed above. Furthermore, Sharon Kowalski's parents are not parties to this proceeding and their off-the-record threats to abandon their daughter must not be given legal effect. In any case, even children in divorce are given rights to express a preference as to whom their custody is granted. Minn. Stat. § 518.17(2).

If, however, the court persists in employing the inaccurate analogy that Sharon Kowalski is like a child caught in a custody case, the decision is still flawed, since the standard to be applied in a case of contested custody is the best interest of the child. Minn. Stat. § 257.025; Palmore v. Sidoti, 466 U.S. 429 (1984). The weight of the evidence in this case clearly establishes that Karen Thompson has created emotional ties and support, the type of relationship which warrants legal protection, and that she has acted at all times to protect the rights of Sharon Kowalski. By giving effect to the Kowalski's hatred

for Karen Thompson and Sharon Kowalski's relationship with her, the court acted on an unfounded assumption that granting guardianship to Sharon's lesbian partner would be harmful. In Palmore, the court dealt with such assumptions in a custody case in a racial context and stated that "the law cannot, directly or indirectly, give . . . effect" to other people's biases and prejudices and that the Constitution "cannot control such prejudices but neither can it tolerate them". 466 U.S. at 433. Recently a federal appeals court has extended this rationale to lesbians. Pruitt v. Cheney, No. 87-5914, memorandum op. 11295, 11307 (9th Cir., Apr. 19, 1991).

Furthermore, by giving legal effect to the family's disapproval of Sharon Kowalski and Karen Thompson's relationship, the court has made kinship the decisive factor in determining Sharon's best interest, in direct contravention of Minnesota law which states clearly that "kinship is not a conclusive factor in determining the best interests of the ward." Minn. Stat. § 525.539, subd. 7. Contrary to the court's assumption that its primary objective in determining Sharon Kowalski's best interest is to give effect to Sharon Kowalski's family's wishes, Sharon's doctors have testified that if the family "dropped out" of Sharon's life it would not be a huge loss because they have not been very involved in Sharon's life since the accident (see, e.g., Dr. Gregor, T, p. 353; Dr. Rappel, T, p. 61.)

Sharon Kowalski can express her own views, but even if she couldn't, the views of Sharon's parents would not necessarily prevail

under current legal standards. In Cruzan v. Director, Missouri Dept. of Health, ___ U.S. ___, 110 S. Ct. 2841 (1990), the Supreme Court wrestled with the question of how to determine the wishes of an incompetent person. The court understood that "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." 110 S. Ct. at 2856.

No one ever asked Sharon Kowalski before the accident whom she would have wished for her guardian if she became brain damaged. However, the due process clause of the United States Constitution protects her from having imposed upon her the "substituted judgment" of close family members in the absence of substantiated proof that their view reflects hers. 110 S. Ct. at 2855.

When the court invokes substituted judgment, "courts are in accord that the greatest weight should be given to the previously expressed wishes of the patient". In Re A.C., 573 A.2d 1235, 1249-1250 (D.C.App. 1990). Courts must probe the patient's value system to discern what the patient would choose, pay special attention to the known values and goals of the incapacitated person, and strive to extrapolate the patient's decision from those goals and values. Id. at 1250. The Minnesota Supreme Court has explored this issue in In Re Torres, 357 N.W.2d 332 (Minn. 1984), a case concerning termination of a comatose man's life support systems through an exercise of substituted judgment. In accordance with other courts on this issue,

the Minnesota Supreme Court also found that a determination of the conservatee's best interests must involve consideration of the conservatee's wishes. Id. at 341.

Sharon Kowalski and Karen Thompson exchanged rings and named each other life insurance beneficiaries. Although the court might have faced a clearer legal situation if they had also signed a medical durable power of attorney, it has to be recognized that they did all that most people in their situation would have done to make a formal lifetime commitment to each other. Taking as a totality Sharon Kowalski and Karen Thompson's prior commitment to each other, Karen Thompson's commitment to caring for Sharon, and Sharon Kowalski's expressed preference to live with Karen Thompson, it was a clear abuse of discretion for the court to substitute its judgment and impose another person, Karen Tomberlin, as guardian of Sharon Kowalski.

Sharon Kowalski and Karen Thompson, before the accident, were deeply committed to each other; neither the accident nor its aftermath have lessened the commitment they have for each other. The court should have recognized how fortunate Sharon Kowalski is to have such a committed partner, who despite the many obstacles placed in her path has dedicated her life to Sharon's betterment. Instead it awarded guardianship to a woman whose main qualification appears to be that she was not a lesbian and that Sharon once smiled when she saw her.


CONCLUSION


It is apparent beyond any reasonable doubt that the court would have granted guardianship to Karen Thompson had it not been for sex stereotyping and questions of political belief and lifestyle. The order is based on an emotional reaction to Karen Thompson, her political beliefs, her lifestyle and the court's lifestyle preferences.

This guardianship decision was not based on clear and convincing evidence as required by Minnesota law but on a paternalistic effort to protect Sharon from her reliably expressed preferences, and does not protect her best interest. Therefore it must be reversed.

Respectfully submitted,

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