

No. 75934-I

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY *et al.*,

Appellants,

vs.

HEATHER ANDERSEN and  
LESLIE CHRISTIAN *et al.*,

Respondents.

**MOTION FOR  
PERMISSION TO FILE  
AMICI CURIAE BRIEF**

STATE OF WASHINGTON,

Appellants,

vs.

CELIA CASTLE and BRENDA  
BAUER *et al.*,

Respondents.

1. Identity of Moving Parties. Douglas P. Becker (WSBA # 14265), Lawrence R. Besk (WSBA # 12584), Mabry Chambliss DeBuys (WSBA # 10612), David Hazel (WSBA # 7833), Marijean Moschetto (WSBA # 8366), Gail B. Nunn (WSBA # 16827), Mary H. Wechsler (WSBA # 9447), J. Mark Weiss (WSBA # 17357) and Gordon W. Wilcox (WSBA # 75) (the "Family Law Practitioners"), attorneys who practice matrimonial and family law in Washington, submit this motion to file an amici curiae brief.

2. Statement of Relief Sought. The Family Law Practitioners

request leave to file the Amici Curiae Brief that accompanies this motion in accordance with RAP 10.6.

3. Statement of Interest and Familiarity. This case presents issues of significant concern to the Family Law Practitioners, because marriage is a fundamental building block for family law in Washington. Washington's denial of the right to marry to same-sex couples deprives those couples of important benefits and rights, including access to the justice system, that Washington grants to married couples, particularly in the context of the dissolution of relationships. As a result, the Family Law Practitioners regularly see the adverse effects of Washington's prohibition on same-sex marriage on same-sex couples and their families.

In addition, the Family Law Practitioners are familiar with the issues presented in this case. The Family Law Practitioners' counsel has reviewed all briefs submitted in this case and read the decisions of the trial courts. He is familiar with the issues involved in the case and the scope of the arguments presented by the parties.

4. Specific Issue to Which Amici Curiae Brief Will Be Directed. The Amici Curiae Brief that will be filed is limited to one legal issue: that certain legal rights and responsibilities inure to married couples are denied to unmarried couples and that this inequitable treatment disadvantages unmarried same-sex couples in terms of their ability to gain access to and be treated equally within the legal system.

5. Belief that Additional Argument is Necessary on this Issue. The Family Law Practitioners believe that additional authorities and

analysis contained within this Amici Curiae Brief will be of assistance to the Court. The Family Law Practitioners, because of their unique understanding of matrimonial law issues in Washington, are in a position to help to educate the Court on the rights, benefits and obligations imposed on married couples under Washington law and the effects of denying those rights, benefits and obligations to same-sex couples.

6. Conclusion. The Amici Curiae Brief that accompanies this motion offers additional analysis and argument that will assist the Court in deciding this case. The Family Law Practitioners, in accordance with RAP 10.6, therefore respectfully request leave to file the proposed Amici Curiae Brief submitted with this motion.

DATED this 7th day of February, 2005.

Respectfully submitted,

EISENHOWER & CARLSON, PLLC

By 

P. Craig Beetham, WSBA # 20139  
Attorneys for Douglas P. Becker, Lawrence  
R. Besk, Mabry Chambliss DeBuys, David  
Hazel, Marijean Moschetto, Gail B. Nunn,  
Mary H. Wechsler, J. Mark Weiss and  
Gordon W. Wilcox

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HEATHER ANDERSEN and LESLIE CHRISTIAN; PETER ILGENFRITZ and DAVID SHULL; JOHANNA BENDER and SHERRI KOKX; JANET HELSON and BETTY LUNDQUIST; DAVID SERKIN-POOLE and MICHAEL SERKIN-POOLE; VEGAVAHINI SUBRAMANIAM and VAJAYANTHIMALA NAGARAJAN, ELIZABETH REIS and BARBARA STEELE; and MICHELLE ESGUERRA and BOO TORRES DE ESGUERRA

Plaintiffs,

vs.

RON SIMS, King County Executive; DEAN LOGAN, King County Director of Records, Elections, and Licensing Services Division; and CHERYLE A. BROOM, King County Auditor,

Defendants,

and

RON SIMS, King County Executive;

NO. 04-2-04964-4SEA

DECLARATION OF ELAINE G. DUCHARME

DECLARATION OF ELAINE DUCHARME. - 1

Northwest Women's Law Center  
3161 Elliott Avenue, Suite 101  
Seattle, Washington 98121  
Phone: (206) 682-9552 Fax: (206) 682-9556

1 DEAN LOGAN, King County Director of  
2 Records, Elections and Licensing Services  
3 Division,

3 Third-Party Plaintiffs,

4 vs.

5 STATE OF WASHINGTON,

6 Third Party Defendant.

7  
8 I, Elaine G. DuCharme., declare:

9 1. I am an attorney licensed to practice in Washington state. I graduated from the University of  
10 Washington Law School in 1982 and have been in private practice since 1983. Since 1988 I have been a  
11 solo practitioner specializing in estate planning and family law.

12 2. My areas of expertise include estate planning, unmarried couples law as it relates to estate  
13 planning and after-death claims, probate, cohabitation and domestic partnership agreements, and  
14 dissolution of unmarried and married couples. The clients I represent are primarily individuals with  
15 legal issues in the above areas and include a significant number of gay and lesbian clients. I have  
16 handled over 1500 meretricious relationship dissolutions.

17 3. I have written articles on Estate Planning for Nontraditional Families and have presented at a  
18 number of CLE's on estate planning and family law issues for unmarried couples ("nontraditional  
19 families"). I have served as adjunct faculty at Seattle University Law School teaching the law as it  
20 relates to unmarried couples and in the Estate Drafting Lab. I have also served as an expert witness on  
21 attorney malpractice cases dealing with meretricious relationship dissolutions.

22 4. As part of my practice, I routinely deal with married couples dissolving relationships. As a  
23 preliminary step this process requires addressing issues such as: temporary spousal maintenance,  
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DECLARATION OF ELAINE DUCHARME. - 2

Northwest Women's Law Center  
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1 temporary use of the family home, debt allocation pending trial, entry of or agreement on routine  
2 financial restraining orders to maintain a status quo with the property of the parties (both community and  
3 separate property),and, if children are involved, temporary parenting plans and temporary child support.  
4 In marital dissolutions, if these issues cannot be resolved by agreement, a motion is filed on the King  
5 County Family Law Motions Calendar. The cost of having an attorney bring such a motion would range  
6 from \$800 to \$3,000 for most family law hearings.

7 5. Many marital dissolution cases go to mediation and are settled short of trial. In King County,  
8 the timeframe for a trial in a marital dissolution is approximately one year.

9 6. The factors for division of property in marital dissolutions are statutorily set within a body of  
10 case law that allows the practitioner to advise the client effectively regarding the parameters of potential  
11 outcomes and the risks and benefits of going to trial versus accepting a particular settlement offer.  
12 Likewise, there is a statutory framework for analyzing maintenance. The Parenting Act applies and  
13 creates a statutory framework within which to determine residential schedule, joint decision making, and  
14 dispute resolution for the children. If the matter proceeds to trial, costs will vary significantly due to the  
15 issues, but a contested custody and property distribution case is generally going to cost between \$15,000  
16 and \$20,000.

17 7. By comparison, the dissolution process for unmarried couples is very different and much more  
18 complex. The King County Case designation is under "Contract/Commercial; Meretricious  
19 Relationship" and it is on the general civil calendar with a trial date approximately two years from filing.  
20 If there are children, the practitioner can indicate "Dissolution-Children" or some other case designation  
21 to procure an earlier trial date like one would have for a marital dissolution. For cases without children,  
22 the typical two-year time frame is not conducive to nor does it facilitate early settlement.

1 8. Unlike in a marriage, where the dissolution remedy is automatically available, the parties  
2 dissolving an unmarried domestic partnership face a threshold inquiry into whether a meretricious  
3 relationship existed before they even get the inadequate and unequal remedies provided by the  
4 meretricious relationship law. This inquiry can turn on factors beyond the client's control and  
5 knowledge. For example, in a marriage, a party can have an affair, and yet the statutory framework still  
6 applies, they still have a marriage and the courts will protect them and their property interests. In an  
7 unmarried domestic partnership, an outside affair, under case law, could well result in a finding that the  
8 underlying relationship was not "meretricious." This threshold question as to whether the relationship  
9 even exists is absent in marriage cases, and is part of the reason why there is added expense and  
10 uncertainty in meretricious relationship cases. Recent case law has also raised the potential application  
11 of alternate theories of recovery that the practitioner must research, plead, and utilize at trial,  
12 specifically, implied partnership, constructive or resultant trust, and joint venture.

13 9. Even if a relationship is found to be meretricious or, as a practitioner, you can advise your client  
14 that it is likely to be found to be meretricious, the following issues and factors make the process more  
15 difficult and the ultimate outcome less predictable and less equitable: 1. no availability of attorney's  
16 fees; 2. no spousal maintenance (even if a partner has been a stay-at-home parent for years with the  
17 parties' children); 3. division of property based on pro-rata contribution instead of usual 50/50 in short  
18 term marriage has been allowed as "fair and equitable"; 4. no jurisdiction over separate property of the  
19 parties (along with an unanswered question as to whether the court can take the existence of separate  
20 property into account in making equitable distribution of joint property); 5. what community property  
21 principles will apply (this has not been resolved by case law); 6. uncertainty as to whether the court has  
22 jurisdiction to allocate debts pending trial (some judges say they have no jurisdiction over this); 7. lack  
23 of access to restraining orders that are routine in dissolutions (the general civil rules require posting of a  
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1 bond and many judges will not provide temporary restraining orders so parties are free to dissipate joint  
2 assets).

3 10. Temporary issues in meretricious relationship cases generally must be heard by the assigned  
4 Individual Calendar ("I.C.") Judge. Most family law commissioners take the position that they do not  
5 have jurisdiction over these matters. The routine restraining orders precluding the parties from  
6 dissipating assets while the case is pending are generally not available as most Ex Parte Commissioners,  
7 Family Law Commissioners and I.C. judges take the position that since this is a general civil case,  
8 restraining orders are not available as they are in family law per statute and local rule. While some I.C.  
9 judges will provide protections pending trial, it is very unpredictable whether the judge will issue such  
10 an order.

11 11. Even issues such as who will remain in the family home pending trial may be impossible to  
12 resolve on a temporary basis; many judges apply traditional contract concepts, often leaving the parties  
13 in the home together, despite a volatile break-up situation. This makes a domestic violence allegation  
14 particularly "useful" and susceptible to abuse because parties know or have been told that making such  
15 an allegation may be the only way to get the other partner out of the house. The same lack of clarity  
16 applies to debt allocation and payment of debts pending dissolution of the relationship, which often  
17 means that one person is forced to pay an unfair share of the debts or face jeopardizing his or her credit  
18 rating or having assets repossessed.

19 12. Mediation is an option, but due to the complete unpredictability of outcome, it is much more  
20 difficult to mediate these cases and many clients are forced to settle outside the range of what would be  
21 considered "fair".

22 13. In addition, because there is no possibility of recouping attorneys fees, parties are able to take  
23 unreasonable positions recognizing that, short of a Civil Rule 11 sanction, the other party cannot get his  
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1 or her fees back at trial. This process takes "nuisance value" and risk factors to a higher level in  
2 meretricious relationship cases.

3 14. The courts do not use the same standards in division of property for unmarried couples. By  
4 analogy to the dissolution statute, the court is to make a "fair and equitable" distribution of jointly  
5 acquired property only. There is no statute as there is for marital dissolutions to provide the factors for  
6 division of property in unmarried couples law. As indicated above, this can even result in just a pro-rata  
7 return based on contribution during the relationship -- an outcome which would not be accepted as fair  
8 and equitable in a marital dissolution. Because there are no clear standards, the results can vary  
9 significantly. This lack of predictability makes trial and initial hearings quite expensive and risky.

10 15. The fact that retirement benefits, IRA's and other qualified plans cannot be split between  
11 unmarried partners under federal law often makes distribution of property issues difficult when one of  
12 the parties has acquired a significant interest in such accounts during the relationship. Further, since  
13 these assets cannot be split, the risk of bankruptcy after trial is significant and there is no federal ruling  
14 on the dischargeability of this award. The practitioner must be extremely careful about drafting any  
15 final documents to avoid this problem, which would not exist in a marital dissolution as you would  
16 simply use a Qualified Domestic Relations Order to divide the asset. The right to receive Social  
17 Security disability or retirement benefits may have been acquired by one partner and not the other during  
18 a long term relationship and this disparity is difficult to adjust for, but must be taken into consideration.  
19 It is not clear what the courts will do to make this "fair and equitable" since the Social Security rights  
20 available to a ten-year married couple do not apply to a similarly-situated unmarried couple where a  
21 party may have been out of the work force raising the children.

22 16. I recently had a case involving an unmarried couple which, although the issues were relatively  
23 straightforward, resulted in almost \$30,000 in attorney's fees. Without the complexities and uncertainty  
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1 of unmarried couples law, the case would have cost closer to \$10,000 and most likely would have settled  
2 because the absurd position --that a 19-year intimate domestic relationship was not meretricious-- could  
3 not have been asserted by the other party.

4 17. Although the processes are different and significantly more burdensome to unmarried couples  
5 (which necessarily includes all same-sex couples), it is my experience that King County judges have  
6 attempted to adopt procedures and practices that protect unmarried couples, gay and straight, with regard  
7 to financial issues. In fact, many judges in King County had been applying meretricious relationship  
8 doctrine to gay and lesbian couples before the *Vasquez* and *Gormley* cases were decided. However,  
9 even the most progressive and fair-minded judges have their hands tied when it comes to jurisdiction in  
10 family law, routine restraining orders, and other such matters that are statutorily-based.

11 18. During the time I have been practicing in this area, I have seen significant changes in the law,  
12 as meretricious relationship law is certainly more protective than the old legal fictions that I used to have  
13 to rely on such as implied partnership, joint venture, constructive trust, etc. However, in comparison to  
14 the statutory protections for dissolution of marriage, the risk factors, the cost, the unpredictability, and  
15 the different civil procedures available leave unmarried gay couples with few real legal protections in  
16 practice. This is even more true for people with limited assets to expend on legal representation. And  
17 while it is possible and even common for people to file *pro se* for a dissolution of marriage, it is virtually  
18 impossible to file a meretricious relationship case *pro se*.

19 19. While I have focused above on the financial issues related to dissolution of a meretricious  
20 relationship, the disparity of treatment of children when these relationships are dissolved can be even  
21 more significant. I am aware that other expert declarations are addressing the need for and cost of  
22 second parent adoptions. For those gay and lesbian families who cannot afford to undertake a second  
23 parent adoption or are not aware of the importance of doing so, the impact on the children can be

1 nothing short of tragic. Children can lose their relationship with, and the financial and emotional  
2 support of, someone whom they have known as a parent for all of their lives. Although the recently  
3 decided Division I case, *In re Parentage of L.B.*, offers hope that there is now a common law remedy for  
4 these *de facto* parents, the process of obtaining that remedy, like the process of dissolving a meretricious  
5 relationship, is likely to be far more complex, costly and uncertain than the process available to married  
6 parents.

7 20. What happens to the surviving partner of a meretricious relationship case after the death of one  
8 of the partners is even less predictable and fraught with more difficulties than the dissolution process. If  
9 the surviving partner of a marital couple is left without the decedent having executed a will, a plethora  
10 of protections ensue, including but not limited to the right to inherit all of the community property, the  
11 right to inherit a portion of separate property depending upon survival status of other related individuals  
12 to the decedent, the right to petition for a family allowance which has priority over other claims, the  
13 right to stay in the family home pending probate completion, the right to administer community property  
14 even if the decedent named a different Personal Representative in his/her will, and the right to survivor  
15 benefits under Social Security. The surviving partner of a same sex couple cannot take advantage of any  
16 of these laws. Likewise, the surviving children where a second parent adoption has not been completed  
17 will be treated as legal strangers to the decedent if s/he is not the biological parent.


18 21. There are also significant statutory protections to relational rights during marriage when a party  
19 becomes injured or incapacitated. None of these statutory protections are available to unmarried  
20 couples, who must be proactive in procuring legal counsel to create wills, powers of attorney for health  
21 care, powers of attorney for finances, burial and cremation instructions/directive.

22 22. The evolving family of our current society takes many different forms. Gay and lesbian couples  
23 and their families face significant, costly, and unfair differences based upon the inability to marry and be  
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1 protected by statutory protections available to "acceptable families." In addition to the adult partners,  
2 many of these families include children who are also put at risk by these profound inequities. As a  
3 practitioner, I try daily to procure fairness for these children, families, and clients trying to navigate the  
4 abyss of the current law.

5 I declare under the penalty of perjury under the laws of the State of Washington that the  
6 foregoing is true and correct.

7 Executed this 7th day of May, 2004 at Seattle, Washington.

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Elaine G. DuCharme

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