# No. C2-91-1047

## State of Minnesota
# In Court of Appeals

In Re: The Matter of the Guardianship of:

SHARON KOWALSKI, Ward.

## REPLY BRIEF AND APPENDIX OF APPELLANT KAREN THOMPSON


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## INTRODUCTION

Appellant submits this reply brief to reply to the brief submitted by respondent, Karen Tomberlin, and in response to the brief submitted by Fred Friedman, attorney for Sharon Kowalski.

Subsequent to the appellant's filing of the Notice of Appeal in this case, Mr. Friedman wrote to this court inquiring as to whether, in the process of this appeal, he was to represent his client, or defend the court's Order. (A-1). It is apparent from reading Mr. Friedman's brief that he has chosen to represent the court's position and not that of his client. Therefore, all references in this reply brief to arguments in Mr. Friedman's brief will refer to Mr. Friedman himself, since Mr. Friedman's position is directly contrary to the consistently-stated wishes of his client, Sharon Kowalski.

This court is being asked to determine if the evidence adduced at trial supports the trial court's Findings of Fact and Conclusions of Law. Both Mr. Friedman and respondent Tomberlin correctly point out that the trial court's Order will not be disturbed on appeal absent a clear abuse of discretion. While giving lip service to this standard, both Mr. Friedman and respondent Tomberlin imply that the trial court's discretion in this case is absolute. That is an incorrect statement of the law. The trial court's discretion is abused if the Findings and related Conclusions of Law are clearly erroneous. The Findings are clearly erroneous if they are contrary to the weight of the evidence or are not reasonably supported by the evidence as a

whole. Northern States Power Co. v. Lyon Food Products, Inc., 304 Minn. 196, 229 N.W.2d 521 (1975), Estate of Serbus v. Serbus, 324 N.W.2d 381, 385 (Minn. 1982).

In this proceeding, crucial issues of fact, such as Sharon's capacity to reliably express a preference, the effect of various activities on her emotional and mental health, and her ability to live outside of an institution, all required the expertise of medical professionals who are familiar with the capabilities and limitations of individuals with Sharon's injuries, and who had extensive contact with Sharon. All of those experts were appointed by the court. Their function was to assist the trier of fact in reaching a correct conclusion based upon their superior knowledge concerning the subject matter covered by their opinions. Smith v. Twin City Motor Company, 228 Minn. 22, 36 N.W.2d 22 (1949). Experts are permitted to express an opinion because they are dealing with a field of knowledge unfamiliar to others, particularly to the finder of fact. Sanchez v. Waldrup, 271 Minn 491, 736 N.W.2d 61 (1965).

Ms. Thompson called sixteen expert witnesses, most of whom had professional expertise on the issues before the court and all of whom were the court's own court-appointed experts. The only testimony which supported the court's Findings of Fact and Conclusions of Law came from four "lay" witnesses called by Mr. Friedman. Those witnesses all admitted to having had only very limited contact with Sharon since her accident. Those witnesses were also not medical professionals. Testimony about the Kowalskis alleged intent not to visit Sharon if Karen was

appointed guardian came in as hearsay testimony over petitioner's counsel's objection and after the court itself agreed that it was hearsay testimony. (Appellant's brief, p. 36). It was error for the court to give more weight to hearsay testimony and to the testimony of lay witnesses on issues requiring medical expertise than to its own medical experts. A brief analysis of each point raised by Mr. Friedman and respondent Tomberlin shows that the court's Order is not supported by the weight of the evidence.

## I.
## SHARON KOWALSKI CAN RELIABLY STATE A PREFERENCE THAT SHE WANTS TO LIVE WITH KAREN THOMPSON.

Mr. Friedman claims that it is still "an open question" if Sharon can reliably state a preference that she wants to live with Karen Thompson. (Friedman brief at p. 5).

The following individuals, all of whom had extensive therapeutic contact with Sharon, testified that Sharon could reliably state a preference:

1) Dr. Matthew Eckman, Board Certified Specialist in Physical Medicine and Rehabilitation; (T. Vol. I, p. 17, 18); (appointed by the court to determine if Sharon could state a reliable preference);

2) Dr. Dorothy Rappel, Licensed Consulting Psychologist (T. Vol. I, p. 53);

3) Janette Adamski, Speech Pathologist (T. Vol. 1, p. 206-207);

4) Dr. Gail Gregor, Board Certified Rehabilitation Physician (T. Vol. II, p. 323); and

5) Dr. Carolyn Herron, Licensed Consulting Psychologist (T. Vol. II, p. 521-522).

One wonders how many other medical experts would have to have been called to testify before Mr. Friedman and the court would have been convinced that Sharon's preference was reliably expressed. No medical experts testified that Sharon could not state a reliable preference.

The only testimony which supports the court's Finding about the reliability of Sharon's stated preference came from one individual: Kathryn Schroeder, who, admittedly had minimal involvement with Sharon since the accident (T. Vol. II, p. 559-559) and who is someone Sharon does not like. (T. Vol. II p. 422). Even Karen Tomberlin and Debra Kowalski, Mr. Friedman's other witnesses, agreed that if Sharon could reliably state a preference, she should have what she wants. (T. Vo. III, p. 752) (T. Vol. II, p. 612).

It was an abuse of discretion for the trial court to ignore all of the evidence presented by the five medical experts it appointed, all of whom stated unequivocally that Sharon Kowalski can reliably state a preference as to where she wishes to live (which is with Karen Thompson) and to rely instead on the testimony of one lay witness who has had minimal contact with Sharon and who is not a medical expert. The weight of the evidence is so overwhelming that it appears that the court's finding on this issue must have been based on something other than the evidence before it. If courts are allowed to rule on matters in total disregard of the evidence, our system of justice fails.

## II.
## SHARON KOWALSKI SHOULD NOT AND NEED NOT REMAIN INSTITUTIONALIZED.

Mr. Friedman and respondent Tomberlin both claim that Sharon's medical condition requires her to remain institutionalized. Mr. Friedman points out that the court's Order does not rule out the possibility of some kind of community living arrangement in the future. (Friedman brief at p. 7). Mr. Friedman forgets that the only person who has expressed any willingness or ability to provide Sharon with a community living arrangement is Karen Thompson. The net effect of the court's Order is that Sharon will remain institutionalized.

Again, this result is contrary to the weight of the evidence presented at trial. The court's own medical experts testified that Sharon could be returned to a community living arrangement and that it was in her best interests to be allowed to go home:

1) Dr. Matthew Eckman (T. Vol. I, p. 24);

2) Dr. Gail Gregor (T. Vol. II, p. 325-326);

3) Dr. Rappel (T. Vo. I, p. 61);

4) Nancy Heinenkamp (physical therapist - physical therapy can be done at home (T. Vol. I, p. 267).

No experts testified that Sharon could not be cared for at home, or that such was not in her best interests. Again, the only evidence that contradicts the experts came from Karen Tomberlin and Debra Kowalski, who have no medical training and therefore would have no way of knowing if it is medically possible for Sharon to be cared for at home or if it would be medically necessary for her to remain in an institution. The weight of the

evidence does not support the court's finding. In fact, there is no credible evidence supporting the court's finding, since only medical testimony could logically outweigh the testimony of medical experts on a clearly medical issue. Absent any medical testimony that Sharon could not be cared for outside of an institution, or that such would not be in her best interests, we again have a situation where the court obviously decided this issue on something other than the evidence before it. While trial courts are given broad discretion to rule on guardianship matters, that discretion is not boundless. The court simply cannot disregard the statute, disregard all of the medical evidence, and do whatever it wants. If that were the case, why would we have statutes? Why would we have evidentiary hearings?

While the trial court is not just an administrative functionary doing the legislature's bidding in a heartless, autonomous fashion, on the other extreme, the court does not have the "right of Kings" to act as it wishes in total disregard of legislative strictures and the rules of evidence.

## III.
## KAREN THOMPSON HAS NOT VIOLATED SHARON'S RIGHT TO PRIVACY.

Mr. Friedman and respondent Tomberlin argue that, by disclosing the fact that she and Sharon have a lesbian relationship and by participating in various political and fundraising activities, Karen Thompson has violated Sharon's right to privacy. Mr. Friedman argues that it was Karen's disclosure of her lesbian relationship with Sharon to the Kowalskis that caused all of the resulting conflict with the

Kowalskis. Mr. Friedman also argues that by making this disclosure, Karen failed to understand the Kowalski family's Minnesota Iron Range cultural background. Mr. Friedman's argument supports the testimony presented at trial that the Iron Range is homophobic -- i.e., that disclosure of the truth about one's lesbianism is something one should not do on the Iron Range. But what is most disturbing about Mr. Friedman's argument is its total lack of understanding of the depth of the commitment Sharon and Karen have for each other. Mr. Friedman suggests that Karen should simply have kept quiet, and she would probably still have had visitation, albeit limited visitation and at a great distance.

Assume for a moment that Karen is a black male, married to Sharon without Sharon's parent's knowledge, and that the Kowalskis are racist. Under those circumstances, would anyone truly expect the husband to remain silent about the nature of his relationship with Sharon? If he spoke out, would anyone blame him for the resulting unhappiness to the Kowalski family or accuse him of failing to understand Sharon's Iron Range cultural background? For that matter, all other factors being equal, would anyone claim that he should not be Sharon's guardian, even if it were contrary to Sharon's parent's wishes?

For Mr. Friedman to couch his argument in terms of a violation of Sharon's desire for confidentiality is disingenuous. The testimony at trial was conflicting about whether or not Sharon wanted anyone to know that she was a lesbian prior to the accident. The testimony was undisputed that she is presently

open about the fact that she is a lesbian and about the nature of her relationship with Karen Thompson. (Appellant's brief p. 23-24). If Sharon is open about her sexuality at the present time, then it makes no sense to deny her the right to live with the woman she loves because she might have been "closeted" in the past.

Similarly, can anyone really argue that if Sharon had known that her choice was between telling her parents that she is a lesbian or never seeing Karen or living with her again, that she would have chosen not to tell her parents?

Mr. Friedman and respondent Tomberlin also argue that the public appearances and fundraising activities are a violation of Sharon's right to privacy and are harmful to Sharon. Again the weight of the evidence contradicts this argument. The following medical professionals, who are in a better position than anyone else to know what is best for Sharon, testified that these events are not harmful to Sharon and that, in fact, they are beneficial:

1) Dr. Gail Gregor (T. Vol. II, p. 311, 312, 313);

2) Kathy King, R.N. (T. Vol. I, p. 157-159).

The court also must agree that attendance at some events is beneficial to Sharon, since it allowed Sharon to attend the NOW conference on the recommendation of her caregivers. Again, the only testimony that contradicts these experts came from lay witnesses who were not present at any of these events and who have no way of knowing if the appearances are in Sharon's best interests.

Just how "private" Sharon was before the accident is speculative. What is important is that she is now open about her sexuality, enjoys attending the "political" and "fundraising" events, and that all the medical providers who were asked testified that attending those events was not harmful and, in fact, was in Sharon's best interests. (Appellant's brief at p. 25-28). Presumably, if Karen were Sharon's mother and were taking her to MADD (Mothers Against Drunk Driving) events, or using her name in MADD fundraising activities, no one would consider it exploitive or an invasion of Sharon's privacy. The crucial question is whether it is harmful to Sharon for her to participate in these activities. The undisputed medical testimony at trial was that it is not harmful and that it is, in fact beneficial. Mr. Friedman, respondent Tomerlin and the court's Order are really reflective of a value judgment about the kind of activities (i.e., lesbian) in which Karen is involved. Courts of law are prohibited from imposing their own value judgments in matters before them. In fact, in guardianship matters, courts are mandated to substitute the value judgments of the ward herself in making decisions.

## IV.
## THE "CONFLICT" BETWEEN KAREN THOMPSON AND THE KOWALSKIS IS NOT A REASON TO DENY KAREN'S PETITION.

It seems obvious from reading the transcript, the court's Order, Mr. Friedman's brief and respondent Tomberlin's brief that this entire decision has been motivated by the court's mistaken belief that it has an obligation to promote and perhaps protect

the relationship Sharon has with the Kowalskis, even if such is at the expense of what Sharon wants and what the medical professionals agree would be in her best interests.

The following medical professionals testified that the Kowalskis decision to never visit again should not be a factor in deciding whether Karen's Petition should be granted:

1) Dr. Gail Gregor (T. Vol. II, p. 353);

2) Dr. Dorothy Rappel (T. Vol. I, p. 61).

The only evidence before the court regarding the Kowalskis' decision never to visit again was uncross-examined hearsay testimony admitted over objection. It was an abuse of discretion for the court to give any weight to this hearsay testimony. It was an even greater abuse of discretion for the court to rely on it to the total exclusion of the medical testimony.

Mr. Friedman argues that the court used the wisdom of Solomon in appointing a neutral third party where both sides of this dispute are intransigent and inflexible. The undisputed testimony at trial was that Karen has expressed a desire to reconcile with the Kowalskis, to mediate or do whatever else is necessary to resolve this dispute. (Appellant's brief at p. 24, 28). The Kowalskis are the ones who are intransigent and, by the court's Order, are being rewarded for their intransigence. They are minimally involved with Sharon, and it is speculative if they will become more involved if Karen Tomberlin remains Sharon's guardian.

There is no question that it would be helpful to Sharon to have as much involvement from her family and friends as is

possible. But in the final analysis, this court must decide whether it is better to deny Sharon's wishes and keep her in an institution in the hope that her family might become more involved in her life, or let her live the fullest and most complete life possible with the person with whom she chooses to live.

Finally, this court must decide if family members are to be given an absolute veto over the appointment of a guardian, which is the net effect of the court's Order. Under the trial court's holding, if Karen Thompson announced that she would never visit Sharon again if Karen Tomberlin were appointed guardian, some other person would have to be appointed. And what if the Kowalskis vetoed that person? By deciding the case in this manner, the trial court has abdicated its role of determining what is in the best interests of the ward based upon the evidence before it. The trial court's role is not to give undue deference to the wishes of family members who are unwilling to act in the best interests of the ward. The weight of the evidence and of all the expert testimony adduced at trial was that Karen Thompson should be appointed Sharon Kowalski's guardian.

## V.
## EVEN IF KAREN TOMBERLIN'S APPOINTMENT IS AS A "SUCCESSOR" GUARDIAN, THE TRIAL COURT MUST STILL ACT IN SHARON'S BEST INTERESTS.

Mr. Friedman and respondent Tomberlin argue that Minn. Stat. Sec. 525.551 does not apply to the appointment of Karen Tomberlin as Sharon's guardian because Karen Tomberlin was appointed as a successor guardian under Minn. Stat. Sec. 525.59. While Minn.

Stat. Sec. 525.59 does not specifically state that a hearing must be held when appointing a successor guardian, it is obvious that a hearing is intended. The statute does require the court to give fourteen days notice before appointing the successor. Presumably, notice is required in order to give anyone who has an objection an opportunity to raise that objection. If there was an objection, it is not unreasonable to assume that the probate court would hold a hearing. In this case, the trial court did not even give the requisite fourteen day notice required by Minn. Stat. Sec. 525.59 before appointing Ms. Tomberlin.

Minn. Stat. Sec. 525.59 also allows the ward, if he or she has a capacity to do so, to nominate a successor guardian. The court is mandated to appoint the person chosen by the ward unless the court finds such is not in the ward's best interest. As previously discussed, Sharon has reliably stated her preference for a guardian. As previously argued, under the definition of best interests contained in Minn. Stat. Sec. 525.539, subd. 7, it is in Sharon's best interest to have Karen Thompson appointed as Sharon's guardian.

Further, even though not specifically mandated by Minn. Stat. Sec. 525.59, it is logical, given the legislative intent to protect the best interests of the ward, that the court must consider the best interests of the ward in appointing a <u>successor</u> guardian just as the court must consider those factors in the original appointment. It is also logical to assume that the court must have a hearing on the qualifications of the successor guardian if there is a dispute about her qualifications or

concerns raised by interested parties. The legislature has told the court how to determine the best interests of the ward (Minn. Stat. Sec. 525.539, subd. 7), and it is truly difficult to believe that the ward's best interests in the appointment of a successor guardian are different from the ward's best interests in the appointment of the original guardian.

Finally, it is important to remember that it was Karen Thompson, not Karen Tomberlin, who petitioned the court to be named successor guardian. The trial court required that an evidentiary hearing be held on Ms. Thompson's petition. There is no logical basis for requiring a hearing on Karen Thompson's petition to be named successor guardian, and then unilaterally appointing another successor guardian with no notice to anyone, let alone an evidentiary hearing.

## VI.
## THE MINNESOTA CIVIL LIBERTIES UNION'S CONSTITUTIONAL ARGUMENTS ARE PROPERLY BEFORE THIS COURT.

Respondent Tomberlin states that the Minnesota Civil Liberties Union arguments should be disregarded because "an amicus curie cannot raise constitutional issues in its brief which have not been raised by the parties themselves." (Respondent Tomberlin's brief at p. 13). Respondent Tomberlin claims that this is the holding in City of Minneapolis v. Church Universal and Triumphant, 339 N.W.2d 880, 882 (footnote 3) (Minn. 1983). In fact the footnote cited by respondent Tomberlin states:

> But the rule in Minnesota is that the amicus curie may not raise issues as to the constitutionality of a statutory provision when such issue is not raised by the parties to the action. (emphasis added).

There is obviously a significant distinction between challenging the constitutionality of a statute and raising constitutional issues arising from a court Order. In Minnesota, statutes are presumed to be constitutional. A challenge to the constitutionality of a statute requires notification to the state Attorney General's office. (Rule 144 of the Minnesota Rules of Civil Appellate Procedure). If a constitutional challenge to a statute is not made until the filing of the amicus brief, the attorney general would be prevented from defending the statute.

There are no cases in Minnesota which prohibit an amicus from challenging the constitutionality of a court's Order when the constitutionality of the Order has not been raised by the parties. The arguments in the MCLU amicus brief are properly before this court.

## CONCLUSION

As is hopefully apparent from the reading of the transcript, the Order, and the respective briefs in this matter, something very shocking has occurred in this case. It appears that a 35 year-old handicapped lesbian woman, who can reliably express her wishes about where and with whom she wants to live, who wants to live her life in a community setting and not in an institution, and who is medically capable of doing so, is being denied what she wants and what she needs because the trial court wants to please her parents. The fact that her parents did not testify as

to what would please them does not matter, since their "wishes" were admitted by the court's own solicitation of hearsay testimony over objection. All one can hope is that the truth of this case has finally come to light, and that this court will act in a way which will restore Sharon Kowalski to the dignity which has been taken away from her over the last eight years. Why not give her what she wants?

Respectfully submitted,

WILSON & BINDER

Dated: September 20, 1991

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# APPENDIX

RECEIVED JUL 2 3 1991

July 2, 1991

Honorable Donald D. Wozniak
Chief Judge, Court of Appeals
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: Guardianship of Sharon Kowalski

Dear Judge Wozniak:

I am the court appointed attorney for the above named ward, Sharon Kowalski. Prior to August 5, 1991 a brief will be filed upon me appealing Judge Robert V. Campbell's Order of Guardianship in this matter.

While I made recommendations in this matter, Judge Campbell accepted some of my recommendations and rejected others. The guardian he appointed (Karen Tomberlin) did not formally apply for guardianship. She does not have an attorney, and I do not expect her to file a brief. I expect the Minnesota Appellate Court to receive at least five Amicus briefs on this matter on behalf of the petitioner, Karen Thompson. Ms. Thompson is attempting to raise $25,000 to $30,000, which is advertised by Thompson as the cost of the appeal.

My questions are as follow:

1. I have yet to be paid on this matter despite constant formal requests under Minnesota Statute 525.5501, Subd. 3. In addition to 124.6 hours, I have considerable out of pocket expenses that have not been paid.

2. Who is going to pay the various filing fees, printing costs, etc.?

3. Am I expected to write a brief supporting my recommendations to the court on behalf of my client, or am I supposed to defend the court's order?

4. I am not opposed to a little pro-bono work, but this has gotten completely out of hand, and my very reasonable bill at $80 per hour, which now totals $9,201.23 plus substantial expenses, continues to be ignored despite formal motion.

I am writing this letter now, because once the brief is served on me I will only have 30 days to respond. Frankly, I will do whatever you direct and wish, but I need some direction. Thank you.

Sincerely,

FRED T. FRIEDMAN

FTF:b
cc: M. Sue Wilson