No. C2-91-1047

State of Minnesota

In Court of Appeals

In Re: The Matter of the Guardianship of:

SHARON KOWALSKI, Ward.

BRIEF AND APPENDIX OF APPELLANT KAREN THOMPSON

WILSON & BINDER
M. Sue Wilson (#117742)
Christine N. Howard (#47521)
2400 Centre Village
431 South Seventh Street
Minneapolis, Minnesota 55415
(612) 340-1405

Attorney for Appellant Karen Thompson

FILLENWORTH & SWEETLAND, LTD.
Thomas Sjogren
Suite 309
Board of Trade Building
301 West First Street
Duluth, Minnesota 55802
(218) 727-5844

Attorney for Karen Tomberlin

Fred Friedman (#3213X)
306 West Superior Street
Suite 1600
Duluth, Minnesota 55802
(218) 722-4911

Attorney for Sharon Kowalski, Ward

1991 — BACHMAN LEGAL PRINTING, 835 Second Avenue South, Minneapolis, MN 55402 — (612) 339-9518 ■ FAX 612-337-8053

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGAL ISSUES

I. DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO GRANT KAREN THOMPSON'S PETITION FOR THE GUARDIANSHIP OF SHARON KOWALSKI?

The trial court held: In the negative.

II. IS THE TRIAL COURT'S ORDER REQUIRING THAT SHARON KOWALSKI REMAIN INSTITUTIONALIZED CONTRARY TO SHARON'S BEST INTERESTS?

The trial court held: In the negative.

III. WERE THE TRIAL COURT'S REASONS FOR REFUSING TO GRANT KAREN THOMPSON'S PETITION INSUFFICIENT AND CONTRADICTED BY THE TESTIMONY OF THE COURT'S OWN EXPERTS?

The trial court held: In the negative.

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT APPOINTED KAREN TOMBERLIN AS SHARON KOWALSKI'S GUARDIAN?

The trial court held: In the negative.

D37.25

STATEMENT OF THE FACTS

Sharon Kowalski is a 35-year-old woman who was seriously injured in an automobile accident on November 13, 1983. At the time of her accident, Sharon was living with Karen Thompson near St. Cloud, Minnesota. She and Karen Thompson had been living together for over four years. They had exchanged rings with each other, named each other as beneficiaries on their life insurance policies, and each considered the other to be her life partner.

As a result of the accident, Sharon suffered severe brain injuries, which have left her in a wheelchair, which have impaired her ability to speak, and which have left her with severe deficits in short-term memory. Sharon appears to have more access to her long term memory.

The legal dispute over Sharon's guardianship began on March 1, 1984 when Karen Thompson filed a Petition for Guardianship in Sherburne County, the county of Sharon's residence at the time of the accident. Donald Kowalski, Sharon's father, cross-petitioned for guardianship.

On April 25, 1984, the probate court issued an order which acknowledged that Karen Thompson had agreed to the appointment of Donald Kowalski as Sharon's guardian, provided that Karen had certain rights of visitation. Subsequent to that order, Donald Kowalski made various attempts to remove Karen Thompson's rights to see and visit with Sharon, culminating in an Order of the court dated July 25, 1985. That Order gave Donald Kowalski the sole authority to determine who would or would not visit his daughter, Sharon Kowalski. Within 24 hours after the Order was issued, Donald Kowalski ordered Sharon moved from a nursing home

in Duluth, Minnesota, to the Leisure Hills Nursing Home in Hibbing, Minnesota. At the same time, Donald Kowalski advised the Hibbing nursing home that Karen Thompson was never again to be allowed to visit with Sharon. Thereafter followed a series of court proceedings in which Karen attempted to overturn the probate court Order, or to otherwise be allowed to visit with Sharon. There were numerous proceedings brought in the Minnesota Court of Appeals, various Petitions for Review to the Minnesota Supreme Court, and a Petition for Writ of Certiorari to the United States Supreme Court.

The outcome of all of the appellate proceedings which followed the July 25, 1985 Order was that, for a period of 3 1/2 years, Karen Thompson was not allowed to see, contact, telephone, write to, or visit with her long-time friend and companion.

In November, 1987, Karen Thompson made a motion in St. Louis County District Court (where venue had been transferred) requesting that Sharon Kowalski be restored to capacity. In so doing, Karen also requested that the court assess whether or not Sharon could reliably express her wishes as to visitation. The guardian had been mandated by the July 25, 1985 Order to consider such wishes in determining who could visit Sharon.

Seven months after the motion was brought, the Honorable Robert V. Campbell, Judge of District Court, ordered that Dr. Matthew Eckman and two other specialists be appointed to examine Sharon Kowalski, to determine her level of functioning, to give recommendations for her rehabilitation, and to determine whether Sharon could reliably express her wishes as to visitation.

Although he verbally requested that the court remove him as guardian of his daughter in 1988, Donald Kowalski did not formally withdraw as guardian until May of 1990. In the interim, a report was issued by Dr. Eckman dated March 10, 1989. (A-50). Because Dr. Eckman and the team at Miller-Dwan Medical Center had ascertained in the fall of 1988 that Sharon Kowalski very much wished to see Karen Thompson, and that those wishes were reliably expressed, Karen Thompson was once again allowed access to visit with Sharon beginning in January of 1989. After observing those visits, and after undertaking a very thorough and in-depth evaluation of Sharon, Dr. Eckman stated that he believed that Sharon Kowalski had consistently and reliably expressed her desire to return home, and that by "home" she meant to St. Cloud, to live with Karen Thompson again.

On August 7, 1989, Karen Thompson filed a Petition for Appointment of Successor Guardian. By that time, at the request and on the recommendation of Dr. Eckman and the team at Miller-Dwan, Sharon had been moved to Caroline Ebenezer Center in Minneapolis for a brief time, and then to Trevilla of Robbinsdale, where she has resided continuously for over two years. Although Karen Thompson's petition was filed in August of 1989, the court did not actually have a hearing on her petition until August of 1990, one year later. It was determined at the initial hearing on August 2, 1990, that an evidentiary hearing was needed, and evidence was taken in Duluth, Minnesota, on November 8, 1990 and in Minneapolis on December 5, 6 and 7, 1990 (where Sharon herself attended most of the hearing). Additional evidence was taken by the court in Hibbing, Minnesota

on March 22, 1991.

Thereafter, on April 23, 1991, the court issued its Order denying the appointment of Karen Thompson as guardian. The court appointed Karen Tomberlin, someone who had never petitioned for guardianship, to be Sharon's guardian. On May 29, 1991, Karen Thompson brought a motion requesting a new trial, on the grounds that the court erroneously solicited hearsay testimony from witnesses, the court relied on that hearsay testimony, the court unnecessarily limited impeachment evidence, and other evidentiary matters. Her motion was denied.

The voluminous transcript of the hearing on Karen Thompson's petition includes testimony of numerous court-appointed experts. All of the court-appointed experts who testified, whether Dr. Eckman himself; other members of his team at Miller-Dwan Medical Center including Dorothy Rappel, the team's psychologist; physical therapists; speech pathologists; nurses; nursing aides; Dr. Gail Gregor, Rehabilitation Medicine Specialist and Sharon's current treating physician; Sharon's psychologist for the last two years; her physical therapist, speech therapist, and occupational therapist at Trevilla of Robbinsdale; testified exactly the same way. In that testimony, <u>all</u> of the court-appointed experts stated that the following are consistently and reliably true:

> 1) That Sharon Kowalski responds in a more affirmative and responsive way to Karen Thompson than to any other individual;
>
> 2) That Karen Thompson has consistently shown the highest degree of commitment and concern for Sharon's welfare, and that her concern has been unfailing;
>
> 3) That Karen Thompson has always acted with Sharon's best interests at heart, and has never undertaken any

actions or behaviors which would in any way harm Sharon; and

4) That Sharon consistently and reliably expresses a desire to live once again with Karen Thompson in St. Cloud, Minnesota.

Despite this overwhelming, unanimous evidence provided by the court's own chosen expert witnesses, the court nonetheless found that Sharon could not reliably express her wishes about where she wanted to live and with whom she wanted to live. Further, the court took the extraordinary step of appointing a guardian for Sharon Kowalski who had never filed a petition, who had never notified anyone of her intention to be guardian, and who had not met any of the requirements of Minn. Stat. Sec. 525.55 and 525.551 with regard to appointment of a guardian. No hearing was ever held on Ms. Tomberlin's qualifications; in fact, Ms. Tomberlin stated at the hearings on Ms. Thompson's petition that she was not able to serve as guardian of Sharon. (T. Vol. II, p. 601).

ARGUMENT

I.
THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT KAREN THOMPSON'S PETITION FOR THE GUARDIANSHIP OF SHARON KOWALSKI

Guardianship proceedings are governed by Minn. Stat. Sec. 525.539 - 525.6197. These statutes were extensively revised in 1980 as a result of news stories which detailed abuses under the old statutes, which gave wide discretion to the courts in the appointment of guardians, and then gave the guardians almost unlimited power over wards. In re Guardianship of Mikulanec, 356 N.W.2d 683 (Minn. 1984). The revised statutes were designed to require that trial courts hold hearings and make specific findings detailing the qualifications of the proposed guardian.

findings detailing the qualifications of the proposed guardian. They require specific delineation of the powers of the guardian. The statutes are intended to protect the best interests and the rights of the proposed ward.

Minnesota Statute Section 525.551, subd. 5, (Supp. 1991), provides that, after a hearing on a petition for guardianship:

> ... The court shall make a finding that appointment of the person chosen as guardian or conservator is in the best interests of the ward or conservatee.

Minnesota Statute Section 525.539, subd. 7, (Supp. 1991), defines best interests of the ward or conservatee as follows:

> 'Best interests of the ward or conservatee' means all relevant factors to be considered or evaluated by the court in nominating a guardian or conservator, including but not limited to:
>
> (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 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.

The appointment of a guardian is within the discretion of the appointing court. Schmidt v. Hebeisen, 347 N.W.2d 62 (Minn. Ct. App. 1984). In the instant case, the trial court abused that discretion because it failed to act in Sharon Kowalski's best interests when it refused to appoint Karen Thompson as her guardian. Karen Thompson is the most qualified person, under the terms of the statute, to act as Sharon's guardian. Her petition should have been granted.

A. SHARON KOWALSKI RELIABLY EXPRESSED A PREFERENCE TO RETURN HOME WITH KAREN THOMPSON

As part of these proceedings, the trial court ordered that, for purposes of an evaluation, Sharon Kowalski be moved from Leisure Hills Nursing Home in Hibbing to Miller-Dwan Medical Center in Duluth, Minnesota. (A-51). The court-ordered evaluation was performed by Dr. Matthew Eckman, a board certified specialist in physical medicine and rehabilitation. As part of the court-ordered evaluation, Dr. Eckman was to determine if Sharon could reliably express her wishes as to visitation. (T. Vol. 1, p. 16).

Dr. Eckman testified that in order to determine if Sharon could reliably express her visitation wishes, she was seen regularly on the rehabilitation unit at Miller-Dwan by consistently-assigned personnel in all areas of rehabilitation including physical therapy, occupational therapy, speech and language pathology, social work, psychology and nursing. Sharon was seen by a member of each of these disciplines twice a day.

The assigned personnel would meet as a team to assess Sharon's capabilities, including her ability to communicate reliably and consistently, and to observe her informally and with visitors. (T. Vol. I, p. 16-17). After this extensive evaluation, the team and Dr. Eckman concluded that Sharon was able to reliably indicate whom she wanted to see. (T. Vol. I, p. 17). Dr. Eckman submitted the following recommendation to the court:

> We believe Sharon Kowalski has shown areas of potential and ability to make rational choices in many areas of her life and she has consistently indicated a desire to return home. And by that, she means to St. Cloud to live with Karen Thompson again. Whether that is possible is still uncertain as her care will be difficult and burdensome. We think she deserves the opportunity to try.

(T. Vol. 1, p. 18; A-50).

Dr. Eckman concluded that Sharon's expressed desire to return home to St. Cloud to live with Karen was reliably expressed and that Sharon should have the right to have her wishes fulfilled. (T. Vol. 1, p. 18). After completing his evaluation, Dr. Eckman recommended that Sharon be transferred to Trevilla of Robbinsdale so that she could be observed, and so that she would be able to go on passes which would eventually allow her to return home. (T. Vol. I, p. 23).

The reliability of Sharon's preference was tested in a variety of ways by the various professionals involved in her care. Dr. Dorothy Rappel, a Licensed Consulting Psychologist from Polensky Medical Rehabilitation Center was careful not to use leading questions when asking Sharon where she wanted to live. Dr. Rappel testified that, in response to non-leading questions, Sharon stated that if she could go anywhere at all to

live, it would be to St. Cloud with Karen. (T. Vol. I, p. 53). Jeanette Adamski, the speech pathologist, testified that she is certain that Sharon understood the questions she was being asked. Ms. Adamski took care to make sure that she asked questions about Sharon's preference outside of Karen's presence. (T. Vol. I, p. 212-213). Sharon always responded that she wants to live in St. Cloud with Karen. (T. Vol. I, p. 206-207).

Sharon's ability to reliably express her preference has continued after her placement at Trevilla. Dr. Gail Gregor is a board certified rehabilitation physician at the Sister Kinney Institute. She is a consultant at Trevilla of Robbinsdale and is Sharon's treating physician. Dr. Gregor testified that Sharon always says that she wants to be with Karen and to be home. Dr. Gregor testified that this expression of preference is reliable. (T. Vol. II, p. 323).

Dr. Carolyn Herron, Licensed Consulting Psychologist, testified that an indication of the reliability of Sharon's expressed preference to live with Karen is her consistency and the fact that Sharon is able to give a range of responses and does not just answer yes to every question. (T. Vol. II, p. 521-522).

Despite all of this testimony and despite the careful and thorough evaluation performed by the court's own experts, the trial court reached the remarkable conclusion that Sharon could not reliably express her preference about where she wants to live and with whom she wants to live. The only evidence before the court that directly contradicted the medical experts came from Katherine Schroeder, a "friend" of Sharon's. Ms. Schroeder

testified that she did not think that Sharon was capable of making decisions because her responses are inconsistent. (T. Vol. II, p. 558-559). Ms. Schroeder's testimony is not reliable. She admitted that her involvement in Sharon's treatment has been minimal. (T. Vol. II, p. 567-568). Further, she has no medical qualifications which would give her opinion greater weight than that of the psychologists and physicians trained in the care and treatment of brain-injured individuals who have had extensive contact with Sharon.

It is apparent from reading the trial court's opinion that it also based its decision on its own observations. (A-2-3, 7,9). Presumably the trial judge is not a trained physical medicine and rehabilitation physician. Trial judges are called upon to judge the credibility of witnesses, not to act as witnesses themselves on crucial issues of fact. It was presumptuous of the trial court to give more weight to its own observations during its limited contact with Sharon in a very artificial environment than it gave to the testimony of trained medical professionals whom it appointed, and who worked with and observed Sharon on a daily basis.

The trial court found that Sharon's preference was unreliable because the trial court could not determine the basis for her preference: "It is unknown whether Sharon's statements regarding living in St. Cloud with Karen are based on long constant contact, lack of constant contact with other visitors or a reference to her pre-accident relationship and living situation." (A-9).

If Sharon stated her reliable preference, as all the medical

professionals testified, and if her preferred living situation would make her the happiest, it seems superfluous to question the reasons for her preference. Any one of us could have any variety of reasons for choosing our present living arrangements. The reasons for our choice are irrelevant; it is the right to choose that is important to our psychological well-being. It is extremely important to Sharon's psychological well-being that she be allowed to do what she wants. (T. Vol. I, p. 56). Should it be a surprise that Sharon chooses to return to the living situation she had chosen for the four years prior to the accident? Why does the court have the right to tell this adult woman that she cannot return to the environment which she feels and states is "home" to her? For the court to give her preference no weight is degrading and dehumanizing to Sharon. Sharon has a right to choose, can choose and should have that choice respected.

The court's finding that Sharon's consistently stated preference is not reliable is also contradicted by its own previous orders, and its own findings in this case. Based upon the recommendations of some of the same medical professionals that testified in this proceeding, the trial court previously found that Sharon could reliably express a preference as to with whom she wished to visit. (A-4, 7). The trial court also found in this proceeding that Sharon could reliably express that she did not want her family to know that she is a lesbian. (A-12). There is no logical basis for distinguishing between the reliability of an expression of preference for living arrangement and the reliability of expressed wishes concerning visitation or

disclosure of sexual orientation.

The only conclusion which can be drawn from these contradictions is that the court simply does not approve of Sharon's stated preference. Sharon wants to live with the woman whom she chose to be her lesbian partner. Had it been given a choice, the court may not have approved of this choice in 1978, when Sharon made it. However, because she was a fully functioning adult when she made that decision, the choice then was Sharon's, and Sharon's alone. The choice now is also Sharon's, and the court must not be allowed to abuse its power by substituting its own values and attitudes for Sharon's.

B. KAREN THOMPSON'S INTERACTIONS WITH SHARON KOWALSKI IS ONE OF THE MOST IMPORTANT FACTORS IN PROMOTING SHARON'S CONTINUED PHYSICAL HEALTH AND EMOTIONAL WELL-BEING

The trial court concluded that the interaction between Sharon and Karen Thompson is beneficial to Sharon. (A-17). The conclusion is correct, but the trial court does not include findings which describe just how important and beneficial Karen's involvement with Sharon is to Sharon.

If Sharon's condition or quality of life is to improve, it is important that she be actively involved in her physical therapy, speech therapy, and the various other rehabilitative disciplines. The undisputed testimony introduced at trial was that Sharon was much more actively involved in her own care when Karen was present. Dr. Eckman testified that Karen is able to obtain a higher level of participation and cooperation from Sharon than can anyone else. (T. Vol. I, p. 22). Dr. Rappel; Rachel Komarek, the manager of adult rehabilitation at Polinski Medical

Rehabilitation Center; and Joseph Jeanetta, director of physical therapy; all testified that Sharon was more responsive and that she participated more fully in rehabilitation when Karen was present. (T. Vol. I, p. 54, 79, 83, 108).

The medical professionals from Trevilla of Robbinsdale also testified that Sharon's cooperation in her own care was better when Karen was present. Karen can coax Sharon to open her mouth so that she can receive oral care; Sharon's muscle looseness is better after visits with Karen; Sharon eats when Karen is present; when Karen is not present, Sharon refuses to eat and is fed by a tube; Sharon's range-of-motion testing and physical therapy are greatly enhanced when Karen is present; and Sharon is more responsive in her psychological therapy when Karen is present. (T. Vol. I, p. 181, 192, 262-263; T. Vol. II, p. 516-517).

As an example of the positive impact Karen has had on Sharon's physical well-being, pictures were introduced into evidence showing Sharon eating food while on outings with Karen. Jeannette Adamski testified that, as a result of constant tube feeding, Sharon's mouth has become hypersensitive to hot, cold, texture, taste, sweet and salt. (T. Vol. I, p. 225). Because of this sensitivity, Sharon has been resistant to eating foods on her own. Ms. Adamski testified that eating food as Sharon was doing in the pictures was a very positive development. (T. Vol. I, p. 226-227). She also testified that if Sharon eats more, she will talk more, her quality of life will improve and she will feel better about herself. (T. Vol. I, p. 227).

Not only does Karen's involvement with Sharon help improve

Sharon's physical condition, Karen's involvement is also important to Sharon's psychological well-being and happiness. Kathy King, staff development coordinator at Trevilla, testified that when Karen is not present, Sharon is more withdrawn and refuses to initiate interactions with others. (T. Vol. I, p. 154). Ms. King testified that, unlike other care providers, Karen does not have to work hard in order to get Sharon to respond. She testified that Karen focuses her energy on Sharon and is attentive to Sharon. (T. Vol. I, p. 159-160). Anita Johnson, LPN, testified that, when Karen comes into the room, Sharon is a different person. Sharon responds more to Karen than others, and Karen shows a great deal of concern for Sharon. (T. Vol. I, p. 180, 181, 183). Jeannette Adamski testified that it is very obvious that Karen and Sharon care deeply about each other. She said that Sharon does not take her eyes off Karen when Karen is present and that she glows when she is with Karen. (T. Vol. I, p. 211). Nancy Hinenkamp, Sharon's current physical therapist, testified that Sharon and Karen are very close. She stated that Sharon holds her head up more when Karen is present, watches her constantly, and listens when Karen talks. (T. Vol. I, p. 264). Dr. Carolyn Herron, Sharon's current treating psychologist, stated that daily contact between Karen and Sharon is extremely important for Sharon's recovery. She said, "It is not just the contact with Karen that I think is important for Sharon. I think it's the degree of interest and understanding and respect and dignity that Karen gives to Sharon." (T. Vol. II, p. 519).

Dr. Gail Gregor testified that Sharon clearly has a special

relationship with Karen. She stated: "...Karen is the key to her past self and the window to who she is now and her current interactions with the world." (T. Vol. II, p. 308-309). Dr. Gregor stated that Sharon communicates with Karen in a way that she does not with any other person. She stated that Karen is Sharon's world and Sharon chooses not to interact unless Karen is with her. (T. Vol. II, p. 309).

Even though the trial court concluded that Karen's interaction with Sharon is beneficial to Sharon, it qualified that conclusion by finding that: "Ms. Thompson is described by some witnesses as possessive, authoritarian, inflexible, and committed to her own political agenda." (A-12). Those witnesses, notably Deborah Kowalski and Katherine Schroeder, testified out of their own admitted "hatred" and dislike for Karen Thompson. Because their contact with Sharon since the accident has been extremely limited, they have no way of knowing if these alleged traits, if true, have any impact on Sharon. Their testimony about Karen is also contradicted by the court-appointed medical experts. Without exception, the medical professionals testified that Karen is positive, caring, committed, devoted, helpful, cooperative, not controlling, not disrespectful, not difficult or overbearing, and provides quality care. They stated, without exception, that there is no negative effect of Karen's visits with Sharon. (Dr. Matthew Eckman, T. Vol. I, p. 26; Dr. Dorothy Rappel, T. Vol. I, p. 56; Rachel Komarek, T. Vol. I, p. 81-82; Maryanne Connell, LPN, T. Vol. I, p. 143-144; Kathy King, T. Vol. I, p. 159; Sue Martin, T. Vol. I, p. 176; Anita Johnson, T. Vol. I, p. 183; Jackie Nelson, T. Vol.

I, p. 193; Jeannette Adamski, T. Vol. I, p. 210; Brian McKee, T. Vol. I, p. 237; Nancy Hinenkamp, T. Vol. I, p. 264; Dr. Gail Gregor, T. Vol. II, p. 315; Dr. Carolyn Herron, T. Vol. II, p. 519). Dr. Nancy Brennan, a professor of social work at St. Cloud State University, and a personal friend of Karen's, testified that Karen is petitioning for guardianship of Sharon out of total and complete love for Sharon, and not for personal aggrandizement or to build her own ego. (T. Vol. II, p. 424-425). Mary Wild, Sharon's best friend at the time of the accident, testified that the relationship between Karen and Sharon is not domineering and controlling, and is, indeed, a very loving relationship. (T. Vol. II, p. 672).

It is strikingly obvious from the huge volume of this essentially undisputed evidence that these two woman truly love each other. It is the presence of this love that motivates Sharon; it is obviously only in the presence of this love that Sharon will reach her highest and best level of recovery. It is truly astonishing that any court would ignore the obvious positive and healing power of Karen in Sharon's life. Even more astonishing is the fact that the court would issue an order which will surely have the effect of limiting Sharon's contact with Karen, and the love Karen feels for her. In what moral framework, in what system of justice, could such an order conceivably be in Sharon's best interest?

C. KAREN THOMPSONS HIGH LEVEL OF INTEREST IN AND COMMITMENT TO SHARON'S CARE AND WELL-BEING RENDERS HER THE ONLY INDIVIDUAL QUALIFIED TO BE SHARON KOWALSKI'S GUARDIAN

The trial court concluded that: "Karen Thompson has displayed

a superior, current understanding of Sharon's physical and mental status and needs" and that "[Karen] has demonstrated a clear commitment to providing for Sharon's needs of food, clothing, shelter, appropriate health care, education, recreation, training, religious expression and rehabilitation." (A-17). Once again, the trial court's conclusion is correct. However, the trial court's Order does not even hint at the level of Karen's commitment to Sharon's care and well-being.

Consistently from the time of Sharon's accident, Karen Thompson has demonstrated her care and commitment to Sharon Kowalski. Even when the trial court denied Karen any contact with Sharon for three-and-a-half years, Karen continued to fight for Sharon's rights, and for Sharon's rehabilitation. Karen testified that she and Sharon had made a lifetime commitment to each other. (T. Vol. II, p. 395). Her perseverance in these proceedings, even when faced with what most would consider to be insurmountable odds, is evidence of that commitment.

Now that she has been allowed to be re-involved in Sharon's life, Karen's commitment to Sharon and involvement in her care has accelerated. Karen sees Sharon on an almost daily basis, despite the fact that she has to drive hundreds of miles each month to be with Sharon. Karen testified that when Sharon was in Duluth, she would travel to Duluth to be with Sharon on either Monday, Tuesday or Wednesday and then spend Thursday through Sunday with her. (T. Vol. II, p. 466). She is now involved in Sharon's daily care, and also takes her home every other weekend. (T. Vol. II, p. 467, 470).

Karen has been more involved than any other person in

Sharon's care. (T. Vol. I, p. 144, 183, 265, 282; T. Vol. II, p. 614). Karen attends Sharon's case care conferences, physical therapy sessions, speech therapy sessions, psychological therapy sessions, occupational therapy sessions, and recreational activities, all in an effort to better understand Sharon's needs and to help Sharon increase her potential and abilities. (T. Vol. I, p. 20, 81-82, 108, 143, 168, 235, 236, 262, 263, 265, 281-282; T. Vol. II, p. 322, 466, 516).

Karen has also demonstrated her commitment to Sharon by building a handicapped-accessible home. Karen stated that she built the home with the hope that, if Sharon came to live with her, she could be as independent as possible. (T. Vol. II, p. 469). The house has ramps on the outside, to the front door, and through the garage. The doorways and hallways are wide enough to accommodate a wheelchair. The bathroom is handicapped-accessible. The light switches have been lowered and the outlets raised so they can be reached from a wheelchair. (T. Vol. II, p. 470). Karen has purchased a hospital bed to make it easier to provide for Sharon's nightly care. (T. Vol. II, p. 471). She has purchased a special van for transferring Sharon, a Hoyer lift to assist in moving Sharon from her wheelchair to the bed, and a speech synthesizer to allow Sharon to communicate more fully. (T. Vol. II, p. 452).

Margaret Grahek, Sharon's social worker from St. Louis County, testified that Karen Thompson has been and will be a very forceful advocate for Sharon's rehabilitation. (T. Vol. 1, p. 283). Karen has done everything conceivable to further and enhance Sharon's recovery. No other individual, whether family

or friend, has come close to expressing the same level of commitment.

II.
THE TRIAL COURT'S ORDER REQUIRING THAT SHARON KOWALSKI REMAIN INSTITUTIONALIZED IS CONTRARY TO SHARON'S BEST INTERESTS

The trial court's order states that it is best for Sharon to remain in a long-term care nursing home. (A-16). Rather than grant Karen's Petition for Guardianship, and allow Sharon to return to her home, the trial court chose to continue Sharon's placement in an institution; a placement which is contrary to Sharon's desires and to the recommendations of all the medical experts appointed by the court. Therefore, this placement is obviously not in Sharon's interest.

Dr. Eckman testified that it is a desirable goal for individuals with injuries like Sharon's to live outside of an institution. (T. Vol. I, p. 24). He testified that Sharon would be better off in someone's home, preferably her own. When asked why, he explained:

> ... I think it's part of our human nature that they would like to get home and resume as much of their previous life as they can, which is the goal of rehabilitation to return to your prior environment and lifestyle and activities and function as best you can. And so we try to enable people to do that.

(T. Vol. I, p. 32).

Dr. Gregor also testified that a community living situation would be better for Sharon than an institution. She stated:

> It's more desirable than institutionalized care. It's a more enriched environment, more opportunities, more personal opportunities. It's a more homey and more pleasant environment for a person with severe disability to be living in.

(T. Vol. II, p. 325).

Dr. Gregor testified that if the standard is the best interests of Sharon Kowalski, Sharon would be happier living in a home situation with Karen than in an institution such as Trevilla. (T. Vol. II, p. 325-326).

It is tragic that the court would prefer to unnecessarily institutionalize Sharon rather than allow her to have the most complete life possible. Sharon has lost the use of her limbs. She has been brain damaged and relegated to a wheelchair. She can no longer participate in sports, ride her motorcycle, or communicate easily with the ones she loves. She has lost her independence and is dependent on others for her care. But she knows who she loves and what she wants. She loves Karen, and wants to live with her again. It can be nothing but an abuse of discretion for the court to deny Sharon that which every medical professional testified she needs, wants and deserves; and that is a life with Karen Thompson and the right to go home. During a recent visit with Karen, Sharon typed out: "Help me, get me out of here. . . Take me home with you." (T. Vol. II, p. 497).

Why can't Sharon go home with Karen? As will be seen below, the court's reasons for refusing to grant Sharon's wishes to go home, thereby unnecessarily sentencing her to life in an institution, are not even remotely adequate to justify such a seemingly inhumane outcome.

III.
THE TRIAL COURT'S REASONS FOR REFUSING TO GRANT KAREN THOMPSON'S PETITION ARE INSUFFICIENT AND ARE CONTRADICTED BY THE TESTIMONY OF THE COURT'S OWN EXPERTS

In its Conclusions of Law and supporting Memorandum, the trial court lists several reasons for denying Karen's petition.

What else could Karen then do but tell them about her relationship to their daughter, with the hope that they would understand and allow Karen to continue to be involved in Sharon's life? Karen testified that she did not make this revelation lightly. (T. Vol. II, p. 414-415). She consulted with the hospital psychologist and sought professional help in making her decision. (T. Vol. II, p. 412). But, in the final analysis, she had no choice. If she did not disclose their relationship, Karen would have been out of Sharon's life forever. Karen decided that, given these choices, Sharon would have wanted her to do whatever was necessary to remain in Sharon's life.

What if Karen had not come forward? What if Karen had not struggled for all of these years on Sharon's behalf? Sharon would still be in Leisure Hills Nursing Home, an institution for elderly, dying patients. (T. Vol. III, p. 711). She would still be receiving the substandard care which has resulted in the deterioration in her condition. (T. Vol. II, p. 302-303). She would not have access to technical advances such as her speech synthesizer, which enables her to communicate and interact with others. She would not be going on the outings which give her so much happiness. But, most importantly, she would not be seeing the one person she loves and wants to be with.

The expert testimony at trial, all of which came from the court's own experts, supported Karen's choice to inform the Kowalskis of her relationship with Sharon. Dr. Gail Gregor testified that if the rehabilitative process is to be effective, it is important to understand the patient's sexuality. It is impossible to make decisions about what environment to return the

brain-impaired person to without knowledge of her sexuality. As Dr. Gregor stated:

> It always is an automatic part of the rehabilitative process of figuring out who this person is, what they want, what they were like and what they would choose. We all have to do some substitution of decisions if the person themselves is not able to fully make all of those desires, wishes and needs known.

(T. Vol. II, p. 382).

Dr. Gregor stated that, from a medical standpoint, it was necessary for Karen to reveal her relationship with Sharon, in order to help Sharon's parents cope with the tragedy of the accident and in order to permit Karen's continued involvement. (T. Vol. II, p. 383). If medical necessity directly confronts the court's own belief that having one's parents find out that one is a lesbian is a truly horrendous event, which should prevail?

It is also clear from the testimony at trial that Sharon was not as "closeted" before the accident as the court finds. Before the accident, Sharon was asking Karen to be open about their relationship with more of their friends. Sharon wanted to be more involved in the gay/lesbian community. Very shortly before the accident, they went to a "lesbian concert" and after the concert Sharon wanted to go to a gay bar. (T. Vol. II, p. 397, 398). Since the accident, Sharon has been unabashed in revealing her sexual orientation. She willingly told Dr. Rappel that her relationship with Karen is a lesbian relationship. (T. Vol. I, p. 68). Dr. Gregor testified that whenever Sharon is asked what her relationship with Karen is she says: "Lover." (T. Vol. II, p. 368). Jeannette Adamski testified that, when asked about her

relationship to Karen, Sharon consistently types out: "I love her." (T. Vol. I, p. 210). Rachel Komarek testified that Sharon volunteered that if she could do anything in the world, she would want to make love to Karen. Ms. Komarek stated that Sharon was not shy or embarrassed about her statement, and she smiled when she said it. (T. Vol. I, p. 80). Sharon has chosen to make her relationship with Karen known to others. To use the court's terminology, since the accident, Sharon has "outed" herself.

There is no testimony to support the court's conclusion that the revelation of Sharon's sexual orientation and the resulting schism with her family has caused Sharon any emotional harm. The schism, in fact, is because Sharon's parents refuse to acknowledge their daughter's lesbianism, and instead choose to view Karen as the epitome of evil in the world. It is they who have consistently refused counseling and Karen's overtures to mediate and/or reconcile. (T. Vol. I, p. 60, 238; T. Vol. II, p. 458-459). Most importantly, however, the testimony at trial was that there is no evidence that Sharon understands that there is a conflict between Karen and her parents. (T. Vol. II, p. 341-342). Without any evidence on this issue, the court is not free to make unfounded assumptions, treat them as objective fact, and then rule accordingly.

The trial court has chosen to ignore the unanimous testimony of the professionals; instead, it is, in effect, punishing Karen for an excruciating decision made seven years ago, a decision which was made after careful thought and consultation with medical experts, a decision now supported by <u>all</u> of the court's own experts, and a decision which should have no bearing on

Karen's petition to be Sharon's guardian.

B. KAREN THOMPSON DOES NOT PUT SHARON KOWALSKI ON DISPLAY BY HAVING HER ATTEND PUBLIC MEETINGS AND POLITICAL EVENTS

The trial court found that several witnesses testified that "Sharon's appearances at public meetings and political events are not what Sharon would want, are contrary to her personality and not in her best interest." (A-13). In its Memorandum, the court states that: ". . . public appearances by Sharon, accompanied by the petitioner, at gay and lesbian pride and related political events, do not serve Sharon's social and emotional welfare." (A-26).

The only witnesses who testified that Sharon is somehow harmed by her appearances at public meetings and political events were Sharon's high school friend, Becky Muotka, who had not seen Sharon for six years before the accident (T. Vol. II, p. 544); Katherine Schroeder, whom Sharon considers to be a "negative friend" (T. Vol. I. p. 207-208, 221); Karen Tomberlin; and Deborah Kowalski, who "hates" Karen Thompson. None of these witnesses was present when Sharon was at the "political events;" none of them had an opportunity to observe whether attendance at the events was detrimental to Sharon; and none of them are medically trained or qualified to testify about whether or not attendance at such events is ultimately in Sharon's best interest.

The overwhelming testimony at trial directly contradicts the court's findings. Dr. Gail Gregor was present at the Chrysalis event attended by Sharon and Karen. Dr. Gregor described Sharon's condition that night:

> Sharon was very alert. She talked with many of the guests who were at that event. Using her pointing system to answer questions, yes and no nods. She was smiling, laughing. She was very sociable with Karen and other people at that event. Karen gave an acceptance speech and Sharon was very emotional. Very alert. Head and shoulders, body posture. It was a thrill to see her at that event.

(T. Vol. II, p. 311).

Kathy King, staff development coordinator at Trevilla, attended the Chrysalis event and a Gay Pride march at Loring Park with Karen and Sharon, at a time when Sharon and Karen's visits were required by the trial court to be "supervised." Kathy testified that, at the Chrysalis event, Sharon wrote out the name tags for Sharon and Karen. She said that while Karen gave the keynote address, Sharon maintained eye contact with Karen and laughed several times. (T. Vol. I, p. 157). She testified that Sharon enjoyed herself very much at the Gay Pride march, and that they "just kind of melted into the crowd." (T. Vol. I, p. 158-159). Both Dr. Gregor and Kathy King testified that Karen did not put Sharon on display at these events. (T. Vol. I, p. 159; Vol. II, p. 311).

Dr. Gregor testified that, from a medical standpoint, there is no reason for Sharon not to receive awards or attend events where Karen is giving speeches. (T. Vol. II, p. 312). She stated that Sharon enjoys the events, and that it was acceptable for her to be the focus of the event. She said: "I wouldn't have a concern about her being in public, in the world, in the community, in as fulfilling and as frequent a way as she can. She seems to be enriched by activities." (T. Vol. II, p. 313).

The court's Finding and Order are disrespectful of Sharon

because they assume that she cannot decide what events she wishes to attend. This assumption is not supported by the testimony at trial. Dr. Gregor testified that Sharon should have the opportunity to decide in which activities she wants to participate. (T. Vol. II, p. 313). She also testified that Karen facilitates Sharon's involvement with her own decision-making, and that this involvement is a positive influence. (T. Vol. II, p. 315). Kathy King testified that Sharon herself chose to attend the Gay Pride march. (T. Vol. I, p. 158). Karen testified that she personally asked Sharon if Sharon wanted to receive the "Woman of Courage" award at the NOW convention and that Sharon said she did. Karen stated that she would never take Sharon to a function where she is being used or put on display. (T. Vol. II, p. 486). Was the court itself uncomfortable with the types of activities Sharon is choosing to attend? All of these activities are legal, and while the speech expressed may not be the most palatable to the court, it is free speech nonetheless. The court is not free to favor some legal expressions of free speech over others.

It is further important to note that the trial court separately approved, in advance, Sharon's attendance at the NOW convention. (A-43). Apparently, at that time, the court did not feel that attendance at such events would, by their nature, be placing Sharon on display. The trial court's change of position here can only be a reflection of its own effort to justify its decision.

The trial court's Findings and Memorandum also reinforce common misconceptions about individuals with disabilities. The

time is long past since we felt the need, as a society, to lock disabled people away because their presence made us uncomfortable. Disabled people eat in restaurants, teach school, practice law and medicine, and run marathons. Sharon's severe disabilities should not result in her exclusion from events which honor and affirm people in her circumstances. The standard for her presence at events should be whether she wants to attend, and whether the attendance gives her joy. The content of the event, if legal, should and must be totally irrelevant.

C. KAREN THOMPSON DOES NOT DEMONSTRATE A LACK OF UNDERSTANDING OF SHARON'S CONSANGUINEOUS FAMILY AND THE FAMILY'S MINNESOTA IRON RANGE CULTURAL BACKGROUND

There are no facts to support the trial court's Conclusion of Law No. 13, which states:

> Karen Thompson has demonstrated a lack of understanding of Sharon's consanguineous family and the family's Minnesota Iron Range cultural background. This lack of understanding is injurious to Sharon's social and emotional well-being.

(A-18).

There was no evidence presented at trial that Karen does not understand Sharon's family. Although there was evidence that Sharon never felt safe telling her parents about her chosen lifestyle, the undisputed testimony was that Karen wants a reconciliation with the Kowalskis and has made every effort to mend the breach. (T. Vol. I, p. 60, 238; T. Vol. II, p. 458-459). The Kowalskis have chosen not to come to a "civil accommodation" with Karen. (T. Vol. I, p. 62-63).

There also was no testimony that Karen does not understand Sharon's Minnesota Iron Range cultural background or that Karen's

alleged lack of understanding caused Sharon emotional harm. Instead, the testimony was about Sharon's love/hate relationship with the Iron Range (T. Vol. II, p. 403); her need to break away from the Iron Range for her own survival (T. Vol. II, p. 404); her bitterness about the way women are treated on the Iron Range (T. Vol. II, p. 404); and the degree of homophobia and chauvinism that she felt is present on the Iron Range. (T. Vol. II, p. 426, 428). Sharon had clearly stated, many times before the accident, that she did not want to live on the Iron Range. (T. Vol. I, p. 208). The trial court in Duluth may have disapproved of Sharon's stated criticism of the Iron Range, but that hardly justifies a finding that Karen does not understand the Iron Range. But, more importantly, how can such a rationale justify the court's decision when the court itself ordered Sharon moved, first to Duluth, and then to the Twin Cities? Sharon chose to remove herself from the Iron Range culture years before the accident. Is it now a requirement that guardians have some sort of innate anthropological knowledge of a ward's former culture, even when the ward rejected that culture? If Sharon has been raised a Catholic, but became a Protestant in 1978, must Karen then by analogy exhibit an innate knowledge of Catholicism in order to be named guardian? Conclusion of Law No. 13 is perhaps the most absurd, least-justified by the evidence, and most result-driven conclusion in the court's Order.

D. KAREN THOMPSON IS CAPABLE OF PROVIDING FOR SHARON'S CARE AT HER HOME IN ST. CLOUD, MINNESOTA

The trial court concludes that Karen's petition should be denied because Karen would be unable to care for Sharon in her

home. It is not clear why this should be a factor in denying Karen Thompson's petition, but not a factor in the court's decision to appoint Karen Tomberlin. Karen Tomberlin says that she cannot care for Sharon in her home. In fact, because of the distance involved between Karen Tomberlin's home in Coleraine, Minnesota, and Trevilla of Robbinsdale, Karen Tomberlin's contact with Sharon will be limited.

In Findings of Fact 37-44, the court lists Sharon's care requirements. (A-9-10). The undisputed testimony at trial from all of the court's own experts was that those care requirements could be provided outside of an institution and in Karen's home.

Nancy Hinenkamp, Sharon's physical therapist, testified that Sharon's therapy could be done at home. (T. Vol. I, p. 267). Brian McGee, Sharon's recreational specialist, testified that only one person is needed to take Sharon on outings. (T. Vol. I, p. 245). Dr. Gregor, Sharon's physician, testified at some length about the possibility of care for Sharon outside of an institution. Dr. Gregor testified that there are home health care programs that assist the caregiver. She stated that there are hired attendants who could assist in a Sharon's care. (T. Vol. II, p. 324-325).

Karen Thompson testified that she plans to do as much as possible to return Sharon to a community-living situation, which the experts agree would be in Sharon's best interest. Karen stated that she had met with Dr. Gregor and discussed an interim step in Sharon's care, which would be to move Sharon to an institution in the St. Cloud area, from which Karen could bring Sharon home daily and on weekends. The eventual goal would be to

have Sharon home with Karen full-time. (T. Vol. II, p. 510). Karen testified that she had talked to the Independent Living Center in St. Cloud and that the Center could provide as much attendant care as was needed. She testified that if additional therapies were needed, they were available at St. Cloud Hospital. (T. Vol. II, p. 510). Karen also testified that it was a possible option for her to move Sharon directly home. (T. Vol. II, p. 510).

All of the medical experts testified that Sharon's best interests demand that she be returned to as much as of a community living arrangement as possible, as soon as possible. Yet, with literally no evidence to support it's conclusion, the court found that Sharon's condition requires that she remain institutionalized. This conclusion is a classic example of an abuse of judicial discretion -- i.e., the court found facts not in evidence, and which were actually contradicted by all of the evidence.

What if the court had found what is obvious from the record -- that Sharon can live outside of an institution, that such would be in her best interests, and that Karen is willing and able to provide such a living arrangement? If the court had made findings from the evidence, it would have been forced to reach the conclusion it studiously avoided.

E. KAREN THOMPSON'S RELATIONSHIP WITH OTHER INDIVIDUALS SHOULD NOT BE A FACTOR IN DENYING HER GUARDIANSHIP PETITION

In Conclusion of Law No. 18, the court stated:

> The petitioner's other domestic partnerships will afect [sic] her fiduciary relationship with Sharon. Split loyalties to her past domestic partner and other present domestic

> partners will diminish time the petitioner may devote to Sharon and will have an uncertain effect upon Sharon that cannot be considered completely beneficial to Sharon. This split loyalty hobbles the [sic] Ms. Thompson's ability to minister to the physical, mental, social, and spiritual needs of Sharon at her home, resulting in detriment to Sharon's social and emotional welfare.

(A-18).

While the trial court finds that this factor prevents Karen Thompson from acting as Sharon's guardian, the trial court had no qualms about appointing Karen Tomberlin, a married mother of four children, who teaches full-time, as Sharon's guardian. Because Ms. Tomberlin has a "present domestic partner," and children as well, the time she can devote to Sharon will be limited and will, by definition, produce the split loyalty the trial court is allegedly concerned about. Since the trial court did not have the same concerns about Karen Tomberlin, it is obvious that this conclusion was also result-driven, and outside of the record. As such, it is a clear abuse of discretion.

Conclusion of Law No. 18 also reflects a lack of understanding of the dynamics of how committed relationships change in the face of serious permanent injury to one of the partners. Obviously, because of Sharon's injuries, her relationship with Karen has to change. As Dr. Rappell testified, whether or not the lesbian sexual relationship remains, the friendship between these two women would still remain, and it is the love of her friend that is important to Sharon. (T. Vol. I, p. 93).

Dr. Gregor also testified that if Karen were involved in another relationship, it should not disqualify her as a guardian.

Dr. Gregor stated that this issue comes up frequently when dealing with brain-injured people. She stated that there is no one way that people deal with this situation.

> The individual solutions and the creative ways in which people choose to relate to each other and deal with major catastrophic injuries like brain injury, social support systems and relationships is very individual and unique. There is no one right way.

(T. Vol. II, p.318-319). Dr. Gregor testified that it does not make sense to disqualify Karen for this reason:

> ...because people who are in a relationship, if you use a traditional marriage as a model, after a severe injury, disability such as a brain injury, the noninjured 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 that other - the noninjured person may continue on and change and date and get married but many still continue to have involvement, love and caring for that person in their life. That's a common thing that we see in more traditional relationships.

(T. Vol. II, p. 321-322). Dr. Gregor testified that the most important consideration is Karen's "consistent, devoted, committed relationship to Sharon" and the fact that over the years Karen has "creatively included Sharon in her own growth and development and life." (T. Vol. II, p. 320). Dr. Gregor stated that Karen is "phenomenally involved" and committed to Sharon. She stated that Karen would not harm Sharon and acts with extreme sensitivity to Sharon's needs. (T. Vol. II, p. 322). Dr. Gregor testified that she did not know of any harmful effects on Sharon if Karen were to start dating someone else, even if Sharon knew about it. She testified it should be a "very private and personal thing and for them to choose. Certainly, not for me as

a doctor or the courts to decide that." (T. Vol. II, p. 355-356).

One suspects that if this were a traditional heterosexual relationship, this issue would have remained private and would not have been one of the factors the court would have used to justify its denial of a guardianship petition. It is disturbing that the court would insert itself into this private aspect of Sharon and Karen's relationship. All of the professionals emphasized Karen's constant care and commitment to Sharon and all agreed that Karen would never do anything to hurt Sharon. That testimony must outweigh any hypothetical harm to Sharon if she finds out that Karen is dating someone else.

The court attempts to justify this Conclusion of Law by citing Hanson v. Hanson, 284 Minn. 321, 170 N.W.2d 213 (1969) in its Memorandum: ". . . the presence of Ms. Thompson's other domestic partners will have an uncertain detrimental effect upon Sharon that has merited consideration under Hanson v. Hanson." (A-27). Hanson has no relevance to this case. Hanson is a 1969 marriage dissolution case involving a child custody dispute. In Hanson, the mother was having an extramarital relationship and that factor was one factor the court used in justifying its award of custody of the minor children to the father. The Hanson court also held that, standing alone, the extramarital affair was not sufficient grounds for an award of custody of the children to the father.

Hanson has no applicability to the instant case. In fact, Hanson is not now even applicable in custody cases under Minn. Stat. Sec. 518.17. In any event, a custody analogy, even to current case law, is inappropriate when determining guardianship

of an adult. Guardianship proceedings are unique, statutory proceedings, which have their own unique factors which the court must consider. To interject child custody standards into an already complicated analysis not only adds an irrelevant consideration, but it also muddies the waters. Such an analysis is even more irrelevant when the one custody case the court cites has been superceded by the enactment of a no-fault marriage dissolution statute.

F. KAREN THOMPSON'S SOLICITATION OF DEFENSE FUND DOES NOT PRESENT A CONFLICT OF INTEREST IF SHE WERE TO BE SHARON'S GUARDIAN

In Conclusion of Law No. 17, the court states that:

> Karen Thompson [sic] methods of solicitation of 'defense' funds and utilization of the same raise questions of possible conflicts of interest if she were to act in a fiduciary capacity.

(A-18).

Karen Thompson started the Karen Thompson Legal Fund for the sole purpose of raising money to pay her legal fees. Any funds raised in excess of her legal fees were used for Sharon's benefit. Nancy Brennan, a personal friend of Karen's and a professor at St. Cloud State University, testified that this undertaking has not been profitable for Karen. (T. Vol. II, p. 425). Chandra Asken, who formerly managed the fund, testified that all the money Karen raised from speaking went into the fund. Karen does not receive any money from the fund, and any excess funds are used to purchase such items as Sharon's speech synthesizer, ramps for her wheelchair, a Hoyer lift, and so on. (T. Vol. II, p. 452). The court ignores the fact that if Karen is named Sharon's guardian, the fund will no longer be necessary

because Karen will no longer have the legal expenses which required the initiation of the fund in the first place.

The only testimony that could possibly support the court's conclusion that the defense fund creates a conflict of interest came from Deborah Kowalski, who speculated that Karen might be using these funds to purchase her new house or her new car. (T. Vol. III, p. 740). On cross-examination, Ms. Kowalski admitted that she does not know anything about the fund and that she has not made any effort to find out about the fund. (T. Vol. III, p. 757). There is, therefore, no evidence that the existence of the Karen Thompson Legal Fund presents any conflict of interest. In fact, the sole purpose of the fund is to help Karen Thompson afford the legal expenses necessary to petition for guardianship of Sharon -- which is what Sharon wants and which is in Sharon's best interest.

G. SHARON KOWALSKI'S FAMILY AND "FRIENDS" SHOULD NOT BE ALLOWED TO VETO KAREN THOMPSONS'S GUARDIANSHIP PETITION

1. It was error for the trial court to rely on hearsay testimony in reaching its decision to appoint a neutral third party as guardian.

The trial court's entire order is premised on the fact that Sharon's parents, Donald and Della Kowalski, will not visit Sharon if Karen Thompson is appointed guardian. The Kowalskis chose not to attend the hearing and were not represented by counsel at the hearing. The only way the court knew of the Kowalskis' position was through the solicitation of hearsay testimony -- testimony that was solicited both by the court and by Sharon's counsel, Fred Friedman, over objection from Karen Thompson's attorney. (T. Vol. I, p. 276; T. Vol. II, p. 617).

Minn. Stat. Sec. 525.551, subd. 3 states that the Rules of Evidence apply in a guardianship proceeding. Hearsay is an out-of-court statement that is used in court to prove the truth of the matter stated. Rule 802 of the Minnesota Rules of Evidence states that hearsay is not admissible. Hearsay statements are not reliable because the statements are not made under oath, and are not subject to cross-examination. It is an unquestionable abuse of discretion for a trial court to solicit hearsay testimony and then use that testimony as the entire basis for its order.

In the Memorandum attached to its May 31, 1991 Order denying Karen Thompson's Motion for a New Trial (A-31-33), the trial court attempts to justify its admission of hearsay testimony by citing Minn. R. Evid. 804(b)(5). Rule 804(b)(5) is the "other exceptions" provision of the hearsay exceptions, applicable when the declarant is unavailable. It is only applicable, however, when the proponent notifies the adverse party, before the trial, what hearsay statements the proponent intends to introduce. It is also only applicable when the court determines: a) the statement is evidence of a material fact; b) the statement is more probative than other evidence the proponent can procure; and c) the general purposes of the Rules of Evidence and the interests of justice will be served by admitting the statement into evidence. Minn. R. Evid. 804(b)(5).

In the instant case, the trial court stated: "Petitioner had notice that Mr. Donald Kowalski, the declarant, would be unavailable because of his poor health." (A-32). There is no evidence to support this conclusory statement. All petitioner

knew was that Mr. Kowalski would not be attending the trial. There was no showing, in fact, there was not even an assertion, that he was unavailable to attend the trial.

Further, the rule requires, in addition to the declarant's unavailability, advance notice of the proponent's intention to offer the hearsay statement, "and the particulars of it," in order "to provide the adverse party with a fair opportunity to prepare to meet it." Minn. R. Evid. 804 (b)(5). No such notice was given in the instant case, by either Karen Tomberlin, Fred Friedman, or the court.

In any event, the trial court solicited much of the hearsay testimony. For the trial court judge to elicit hearsay testimony and then be the determining authority as to whether the hearsay meets the requirements of Rule 804(b)(5) renders the Rules of Evidence meaningless. Under these circumstances, it is no surprise that Karen Thompson's counsel's objections to the trial court's solicitation of hearsay were overruled. It is for this reason that, when trial courts examine witnesses, the Rules of Evidence should be strictly followed by the court, not flagrantly disregarded, as in the instant case. The Rules of Evidence were enacted to define the parameters of admissible evidence. When a trial court itself refuses to comply with the Rules of Evidence, our system of justice fails. For these reasons, Rule 804(b)(5) does not apply to the hearsay statements admitted, solicited, and relied upon by the trial court. Their admission was improper under the Rules of Evidence and Karen Thompson's Motion for a New Trial should have been granted.

2. Sharon Kowalski is not the child of a divorce.

In its Memorandum, the trial court described Sharon as the child of a divorce between the Kowalskis and Karen Thompson. This description is degrading to Sharon. Sharon is not a child. She is an adult woman who was involved in a tragic accident. She is still capable of making decisions about her life.

If the court must compare Sharon to a child of a divorce, then it must also recognize that children of divorce have a right to state a preference for a custodial parent. Minn. Stat. Sec. 518.17, subd. 1(a)(2). See also Petersen v. Petersen, 394 N.W.2d 586 (Minn. Ct. App. 1986) (in which an eight-year-old child was found to be old enough to state a preference.) Sharon Kowalski has clearly stated a preference to live with Karen. She has just as clearly stated that she does not want to return to the Iron Range to live with her parents. (T. Vol. I, p. 208). By disregarding that preference, the trial court is saying that Sharon Kowalski has less rights than an eight-year-old child.

Sharon is also not a child in a dispute between two parents who presumably have an equal claim to her custody. She is an adult in a dispute with her parents over her relationship to her lifetime, committed partner. Sharon, as an adult, left her parent's home and chose to live with and be in a relationship with Karen Thompson. Nancy Brennan, a professor of social work at St. Cloud State University, testified that the relationship between two adults who have committed themselves to each other for life becomes the adult's primary relationship. (T. Vol. II, p. 438). She testified that the relationship between Karen and Sharon should be treated as a primary relationship in the same way that a husband and wife in a heterosexual relationship would

be treated. (T. Vol. II, p. 439). When an adult makes a commitment to another adult, that relationship, in our culture, assumes primacy, and the relationship between parent and child loses its primary legal status. (T. Vol. II, p. 440). Accordingly, the Kowalskis and Karen Thompson do not enter these proceedings with equal status. The presumption should be that the primary relationship of an adult ward be maintained. Children in a divorce have not formed primary adult relationships, by definition, and therefore, a different standard applies.

3. The Kowalskis have chosen not to be involved in Sharon's care and treatment and are not willing to act in Sharon's best interest.

By allowing the Kowalskis to, in effect, veto Karen's Petition for Guardianship, the court is allowing its own preference for Sharon's continued contact with her family of origin to outweigh the factors set forth in Minn. Stat. Sec. 525.539, subd. 7. The trial court has made kinship the conclusive factor in determining Sharon's best interests when the statute itself states that "kinship is not a conclusive factor in determining the best interests of the ward." Minn. Stat. Sec. 525.539, subd. 7.

Kinship certainly should not be a consideration when, as here, the relatives have chosen not to be actively involved in the ward's treatment and care, and when they have chosen to act in a way that is not in the ward's best interest. When Sharon's father was appointed guardian, he immediately cut off all contact between Karen and Sharon and moved her to Leisure Hills Nursing Home in Hibbing. Dr. Gregor testified that Sharon did not

receive adequate and proper care while she was at Leisure Hills and that Sharon suffered greatly and regressed because she was denied contact with Karen for over three years. (T. Vol. II, p. 296, 310).

Although invited to participate, the Kowalskis have been minimally involved in Sharon's care and treatment since she was removed from Leisure Hills. (T. Vol. I, p. 58, 89, 109, 183-184, 265). Dr. Gregor testified that the Kowalskis were invited to the family conference. She stated that:

> Everything was declined, any involvement. I know they visited a couple of times. The staff at Caroline Center and Trevilla said that they visited short periods of time. There was at least one visit when Sharon was at Caroline Center. But, generally, the messages that I have gotten, as a treating physician, are that they are not interested in being involved.

(T. Vol. II, p. 346). There is also no evidence that the parents would be any more involved as a result of Karen Tomberlin's appointment as guardian.

There was agreement of the experts, and Karen herself, that contact between Sharon and her family should be encouraged, but not to the point of denying Karen's Petition for Guardianship. The experts agree that the fact that Sharon's parents would refuse to visit Sharon if Karen were her guardian should not be a reason to deny Karen's petition. Dr. Gregor testified that it would probably not be a huge loss for Sharon to see her parents less often, because the parents have choose not to be very involved with Sharon. (T. Vol. II, p. 353). Dr. Rappel testified that if the parents choose not to visit, that is their decision. She stated that it would be unfair to make Sharon live somewhere

other than where she wants to live as the result of her parents' unilateral decision. (T. Vol. I, p. 61).

The Kowalskis' unwillingness to come to some resolution of their feelings about Karen is also not in Sharon's best interest. As Deborah Kowalski testified, it is their "hatred" of Karen Thompson that is preventing a reconciliation. (T. Vol. III, p. 742). This hatred is derived in part from their own unwillingness to accept Sharon's sexuality. Perhaps this hatred is fueled by their own anger at the tragedy of Sharon's disability. While we may comprehend and even sympathize with their pain, we cannot sympathize with their unwillingness to set aside their hatred and act in Sharon's best interest. It is tragic that they would rather see Sharon institutionalized than living in the community. It is incomprehensible that they would choose to never see their sister and daughter again if Karen were made guardian. By making these kinds of statements, they are clearly choosing not to act in Sharon's best interest. It was an abuse of discretion for the court to allow them to veto Karen's petition.

IV.
THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT APPOINTED KAREN TOMBERLIN AS SHARON KOWALSKI'S GUARDIAN

Minn. Stat. Sec. 525.551 requires the trial court to appoint the person who is most suitable and best qualified to act as guardian. The trial court chose to ignore Sharon's reliably stated preference to live with Karen Thompson. It refused to grant Karen Thompson's petition, even though under the terms of Minn. Stat. Sec. 525.539, subd. 7, she is the most suitable and

best qualified person to act in Sharon's best interest.

Instead, the court bypassed the statute, a statute enacted to protect the best interests of wards like Sharon Kowalski, and selected Karen Tomberlin as Sharon's guardian. Karen Tomberlin never filed a guardianship petition as is required by Minn. Stat. Sec. 525.541 and 525.542. A hearing on her qualifications to act as guardian was never held, as is required by Minn. Stat. Sec. 525.55 and 525.551. In fact, Karen Tomberlin testified that she would not be capable of acting alone as Sharon's guardian. (T. Vol. II, p. 601). Based solely on hearsay testimony that Sharon's parents would not visit Sharon if Karen Thompson were appointed guardian, the trial court decided to ignore the very statute which gave it authority to act in this proceeding, and appointed a guardian who stated that she was not capable of doing the job.

The trial court mistakenly relies on Schmidt, supra, to support its decision. In Schmidt, the ward's son petitioned the court to appoint his sister as Matilda Schmidt's guardian. The petition was contested by the grandchildren who claimed that the proposed guardian was misappropriating the ward's assets. The court selected a neutral third party to act as guardian because of the conflict between family members. The court selected a trust officer who was familiar with and who consented to be guardian. The court made the selection after advising the attorneys and giving them an opportunity to object. There is nothing in the decision to indicate whether or not Matilda Schmidt could reliably state a preference for a guardian.

Schmidt can be distinquished from this case for several

reasons. The instant case does not involve a conflict between family members. Although the Kowalskis may verbalize that their conflict is with Karen Thompson, their conflict is really with Sharon, the ward. They do not want her to be able to exercise her choice to live with Karen Thompson, but would rather have her institutionalized. When a conflict is between a ward and a family member, Schmidt is inapplicable. The court is mandated by statute to act in Sharon's best interest. The undisputed medical testimony was that it was in Sharon's best interest to return home with Karen Thompson. In addition, if a ward has reliably stated a preference, that preference should be the final word in any family conflict, particularly when the conflit is one-sided and being fostered by the side of the family which opposes the ward's wishes.

Schmidt is also inapplicable because the guardian in the instant case did not agree to act as guardian, and, in fact, said that she could not do the job. The guardian here is also not a neutral third party. She testified that her major source of information about Sharon came from the Kowalskis and that she talked to the Kowalskis about once a week. (T. Vol. II, p. 603, 606). She also testified that the Kowalskis' decision not to visit Sharon if Karen were appointed guardian should be a major consideration in the court's decision. (T. Vol. II, p. 621-622). This is not the testimony of a neutral third party. It is the testimony of an advocate for the Kowalskis.

Schmidt also required that testimony regarding the fitness and qualifications of the "neutral" guardian must be taken if a party formally objects. Karen Thompson was not given the

opportunity to object, as the attorneys in Schmidt were, because she did not know the court was considering the appointment of a "neutral third party" until she received the court's order.

Minn. Stat. Sec. 525.551 requires that the trial court make specific written findings of fact in support of its order. General conclusory findings are not sufficient. In re Conservatorship of Lundgaard, 453 N.W 2d 58 (Minn. App. 1990). In the instant case, the trial court made conclusory findings in support of its order appointing Karen Tomberlin as guardian. The court stated: "Ms. Tomberlin has demonstrated a current understanding of Sharon's physical, mental, and psychological condition." (A-15). This finding simply is a restatement of Minn. Stat. Sec. 525.539, subd. 7 (3) and is not supported by the record. Ms. Tomberlin has only visited Sharon approximately 27 times in the past eight years. (T. Vol. II, p. 602-603). Over that eight year period, Ms. Tomberlin only attended two case care conferences about Sharon. (T. Vol. II, p. 609). She had no knowledge about whether or not Sharon could reliably state a preference. (T. Vol. II, p. 610-611). She stated that she would move Sharon back to Leisure Hills in Hibbing and testified that she did not know anything about Sharon's condition when she was moved out of Leisure Hills. (T. Vol. II, p. 606-607, 608). She testified that she would want Dr. William Wilson to be Sharon's care provider, even though under Dr. Wilson's care Sharon received substandard care. (T. Vol. II, p. 295, 296, 302, 607). Ms. Tomberlin is obviously not a person who has a current understanding of Sharon's mental and psychological condition.

The other findings the court makes in support of its

appointment of Ms. Tomberlin are not factors listed in Minn. Stat. Sec. 525.539, subd. 7. For example, the trial court makes the finding that Ms. Tomberlin is welcome in Sharon's parents' home and that Ms. Tomberlin is in good mental and physical condition. (A-15).

What is most disturbing about these findings is the court's attempt to "create" a better quality relationship between Karen Tomberlin and Sharon than actually exists. For example, the court finds that: "Sharon responded favorably to Ms. Tomberlin's presence and attention in court in December, 1990." (A-15). The court also states that its "own observation at both Trevilla and at the hearing in Minneapolis was that Sharon responded more favorably to Karen Tomberlin than to Karen Thompson." (A-9). The trial court bases these findings on its own observations in court. During the trial, the court says the following:

> Well, I am going to let the record show right now, that [Sharon] did, 90 percent of the time during your testimony, focus her attention on Karen Tomberlin, who was seated next to her.

(T. Vol. II, p. 526). Later on in the proceedings, the court notes the following:

> I think we should note for the purposes of the record, at this time, that counsel have switched positions at the table and whereas, previously, Ms. Thompson was sitting on Sharon's right. She is now sitting on her left, and that Ms. Tomberlin is now sitting on her right. And I want to make that note for the purpose of the record because Sharon does have a head rest on the right side of her chair, which may limit her ability to turn her head to the right, okay. All right.

(T. Vol. II, p. 588-589). Quite simply, Sharon was initially looking more at Karen Tomberlin because her headrest was

preventing her from turning her head to look at Karen Thompson.

Karen Tomberlin's contact with Sharon has been limited to an average of less than four times a year. Her relationship with Sharon is not of the same nature, intensity, or depth as Karen Thompson's relationship with Sharon. The court's attempt to equalize the relationship by manufacturing evidence on the record and then using that manufactured evidence as a finding of fact is a clear abuse of the court's discretion.

It is apparent from the court's decision that it felt called upon to protect the Kowalskis' interests, even where those interests conflicted with Sharon's best interests. The court ignored expert witness after expert witness who testified that Sharon could reliably express a preference to return home with Karen Thompson, and that returning home would be in her best interests. It ignored testimony of witnesses who reported that Sharon responded better to Karen than to anyone else, including Sharon's parents and Karen Tomberlin (T. Vol. I, p. 193); that Sharon did not want to return home to the Iron Range to live with her parents (T. Vol. I, p. 208); and that Sharon's parents have been minimally involved in Sharon's care and treatment. (T. Vol. I, p. 58, 109, 183-84, 265). The trial court based its entire decision on hearsay testimony that Sharon's parents would not visit unless a neutral person is appointed guardian. It has allowed that single factor to outweigh the mandates of Minn. Stat. Sec. 525.539 - 525.6197, the overwelming testimony in favor of Karen Thompson's petition and, of greatest concern, Sharon Kowalski's best interests. The Order is clear abuse of the court's discretion and the court's decision should be reversed.

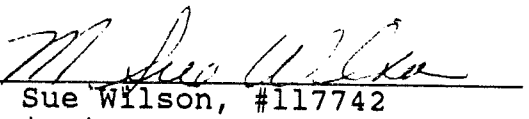
CONCLUSION

Based on the foregoing, Karen Thompson respectfully requests that this court reverse the trial court's Order dated April 23, 1991, and issue an Order appointing Karen Thompson as guardian for Sharon Kowalski. In the alternative, Karen Thompson respectfully requests that this court direct the trial court to hold a new trial, with instructions to the trial court to apply Minn. Stat. Sec. 525.539-525.6197 and the Minnesota Rules of Evidence.

Respectfully submitted,

WILSON & BINDER

Dated: Aug 5, 1991

By 

M. Sue Wilson, #117742
Christine N. Howard, 47521
2400 Centre Village
431 South Seventh Street
Minneapolis, MN 55415
(612) 340-1405
ATTORNEY FOR APPELLANT,
KAREN THOMPSON

J.2.10