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COURT OF APPEALS

STATE OF MINNESOTA

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In Re: The Matter of Guardianship of  
SHARON KOWALSKI, Ward.

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BRIEF *AMICI CURIAE* OF  
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., and  
ALL GOD'S CHILDREN METROPOLITAN COMMUNITY CHURCH; FRIENDS OF AIDS  
MINISTRY; GAY AND LESBIAN ADVOCATES AND DEFENDERS; GAY AND LESBIAN  
COMMUNITY ACTION COUNCIL; MINNESOTA AFFIRMATION/UNITED METHODISTS;  
MINNESOTA ALLIANCE FOR PROGRESSIVE ACTION; MINNESOTA DEMOCRATIC FARM  
LABOR LESBIAN & GAY CAUCUS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL  
GAY AND LESBIAN TASK FORCE; NATIONAL LESBIAN AND GAY HEALTH FOUNDATION;  
NATIONAL LESBIAN AND GAY LAW ASSOCIATION; P-FLAG (PARENTS AND FRIENDS OF  
LESBIANS AND GAYS); SPIRIT OF THE LAKES UNITED CHURCH OF CHRIST; WINGSPAN  
MINISTRY OF ST. PAUL/REFORMATION LUTHERAN CHURCH

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INTEREST OF AMICI CURIAE

Lambda Legal Defense and Education Fund, Inc. (hereafter "Lambda") is a not-for-profit corporation based in New York which engages in impact litigation in all substantive areas affecting the rights of lesbians and gay men. Founded in 1973, Lambda is the oldest and largest national legal organization devoted to these concerns and has appeared as counsel or amicus curiae in hundreds of cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation. Through its litigation and community education in many states, Lambda has challenged and helped broaden notions of the terms "family" and "domestic partner." Lambda is committed to gaining legal recognition for lesbian and gay couples and families, and eradicating the injustices that result from the lack of such recognition. Lambda's expertise would assist this court in reaching a just determination on the important issues in this case. For these reasons, Lambda is well-qualified to appear as an amicus curiae before this court.

ALL GOD'S CHILDREN METROPOLITAN COMMUNITY CHURCH

All God's Children Metropolitan Community Church is a local congregation of the Universal Fellowship of Metropolitan Community Churches. As such, we believe in and promote the human rights of all individuals without regard to race, color, creed, gender, or sexual orientation. We believe in and affirm committed relationships without regard to sexual preference, and we believe

in and promote the human rights of individuals within those relationships.

The court's denial of guardianship to Karen Thompson of Sharon Kowalski, we feel is a denial of their basic right to rely on one another for care much as other couples do. We urge the court to overturn the decision and uphold the human rights of all Minnesota citizens regardless of race, gender, age, disability or sexual orientation.

#### FRIENDS OF AIDS MINISTRY

Friends of AIDS Ministry provides services to friends and family caregivers of people with HIV/AIDS and for people who are working for the advocacy of those with HIV/AIDS. We desire to network for the good of the community by providing education about HIV/AIDS and its prevention. We facilitate support groups for men and women affected by this disease, for family and friends who are caring for people with AIDS and we also facilitate grief groups. Our ministry involves one-to-one counselling and support of people living with AIDS and with their partners.

We at Friends of AIDS Ministry understand how crucial it is for those suffering from debilitating illness or injury to have their partner involved in their care. We are concerned that the court's holding in the Kowalski case sets a dangerous precedent by ignoring Karen Thompson's important role in Sharon's care and in seeing that Sharon live the fullest life possible to her now. We urge the court to overturn this opinion and recognize the rights

of everyone to play active, loving roles in the care of their partners.

GAY AND LESBIAN ADVOCATES AND DEFENDERS (GLAD)

Gay and Lesbian Advocates and Defenders (GLAD), incorporated in Massachusetts as Park Square Advocates, Inc., is a non-profit corporation which works to vindicate and expand the civil rights of lesbians and gay men. GLAD conducts litigation on lesbian and gay civil rights matters, including probate and family cases, some of which concern guardianship proceedings.

GAY AND LESBIAN COMMUNITY ACTION COUNCIL

The Gay and Lesbian Community Action Council (GLCAC) is a non-profit, community based organization dedicated to eliminating heterosexism and homophobia in Minnesota. The Action Council supports pride, individual growth, and community awareness for all gay, lesbian, bisexual and transgender individuals and their families and friends.

Through its legal advocacy program, GLCAC plays an integral part in assuring that gay, lesbian, bisexual and transgender individuals receive appropriate and equitable treatment in the legal system. As part of its commitment to advance these principles, GLCAC supports the efforts of Karen Thompson in seeking the guardianship of Sharon Kowalski as well as Sharon's right to determine who should be her guardian.



In its decision, the lower court seemingly acknowledges that Sharon and Karen "share an intimate, lifetime, domestic partnership" and further recognizes that "sexual orientation lies at the core of human existence, an indispensable strand of one's human fiber," yet completely discounts these principles in the appointment of a guardian. Equally as disturbing is the court's complete disregard for Sharon's "reliable expression of her desire" to live with her domestic partner. The court's treatment of these issues and the imposition of its own will, demonstrates a complete disregard for the recognition of same gender relationships as well as the rights of dignity and self-determination for people with disabilities.

The Gay and Lesbian Community Action Center is pleased to lend its support to the amicus brief in an effort to help protect the rights of lesbian, gay, bisexual, and transgender individuals in our struggle to protect our intimate relationships from senseless state intrusion.

#### MINNESOTA AFFIRMATION - UNITED METHODISTS

Minnesota Affirmation - United Methodists is a support organization for lesbian, gay and bisexual United Methodists, their friends and family members. Affirmation is working to change negative church policies towards lesbian, gay and bisexual United Methodists.

Through our ministries to the lesbian and gay community, especially our work with those who are ill or in need of support,

have found it vitally important for partners to be a part of the care giving team. The court's denial of guardianship to Karen Thompson of Sharon Kowalski ignored the evidence which shows that the contact Sharon has with Karen has enormous positive impact on her quality of life. We urge the Court to overrule the denial, thereby giving Sharon the chance to live a full and happy life. Loving, caring relationships should be supported without regard to sexual orientation.

MINNESOTA ALLIANCE FOR PROGRESSIVE ACTION

The Minnesota Alliance for Progressive Action, MAPA, is a coalition of community and labor organizations who work together for progressive social change in Minnesota. Through MAPA, member organizations endeavor to understand their common concerns, organize around these concerns and bring about systematic change.

MAPA's interest in the case involving Karen Thompson and Sharon Kowalski stems from an organizational belief in the rights of gays and lesbians as an integral part of a larger philosophy of social justice. In its statement of principles, MAPA specifically commits itself to the struggle for a just world in which all individuals have equal access to opportunities and can live with dignity and security, to support the right of self-determination for individuals and to fight to remove barriers that keep people politically or economically disenfranchised, including those of race, gender, age, disability, sexual identity, culture, class and status.

In accordance with these principles, MAPA affirms both the existence and dignity of Karen and Sharon's relationship, and Sharon's right to self-determination in basic life decisions regardless of sexual orientation and disability. The lower court's blatant disregard of Sharon's desire to reside with Karen represents a direct affront to both their integrity and humanity. MAPA believes that the lower court decision sanctions a degree of prejudice which has dangerous implications for the justice anyone can expect before the law. It is because of these beliefs that MAPA chooses to sign this amicus brief.

#### MINNESOTA DEMOCRATIC FARM LABOR LESBIAN/GAY CAUCUS

We are a caucus within the Minnesota Democratic-Farmer-Labor Party. Our membership is comprised of DFL lesbians, gay men and their friends. We are concerned with the development of equal rights for lesbians and gay men in Minnesota and work within the party to accomplish this, as well as lobbying state legislators and office holders.

#### NATIONAL CENTER FOR LESBIAN RIGHTS

The National Center for Lesbian Rights ("NCLR", formerly the Lesbian Rights Project) is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer amicus assistance to this court in this matter. NCLR attorneys litigate

extensively in the area of family law as it applies to lesbians and gay men. They have also written numerous works on the rights of lesbians and gay men to preserve and protect the integrity of their chosen families free from unwarranted intrusions based on bias and stereotype. NCLR attorneys have written Preserving and Protecting the Families of Lesbians and Gay Men (NCLR 1986), Recognizing Lesbian and Gay Families: Strategies for Extending Employment Benefit Coverage (NCLR 1985), Sexual Orientation and the Law (Clark Boardman 1985, 1987, 1989), Lesbian and Gay Parents: A Legal and Psychological Perspective, (NCLR 1987), A Lesbian and Gay Parents' Legal Guide to Child Custody (NCLR 1989), and the Lesbian Mother Litigation Manual (NCLR 1982, 1990).

#### NATIONAL LESBIAN AND GAY HEALTH FOUNDATION

The National Lesbian and Gay Health Foundation is composed of health professionals and are sponsors of the annual National Lesbian and Gay Health Conference and AIDS Forum. The Foundation is deeply concerned that Karen Thompson was denied guardianship of Sharon Kowalski. We were shocked at the judge's total disregard of the testimony of court-appointed health professionals. The court's ruling was homophobic and showed a lack of respect for all lesbian and gay relationships, as well as denied Ms. Kowalski her rights as a patient.

### NATIONAL LESBIAN AND GAY LAW ASSOCIATION

The National Lesbian and Gay Law Association (NLGLA) is a national bar association consisting of lawyers, law students, judges, other legal professionals, and individuals and organizations whose interests are related to the legal profession. The primary goal of the organization is to serve as a national voice for lesbians and gay men in the legal profession on all issues of concern to our diverse community; to promote the cause of lesbian and gay rights and the elimination of all types of discrimination against lesbians and gay men; and to provide opportunities for legal professionals committed to lesbian and gay rights to meet in a professional setting throughout the country.

### NATIONAL GAY AND LESBIAN TASK FORCE

We are a national organization dedicated to building a movement to promote freedom and full equality for lesbians and gay men. The organization serves 17,000 members and exists to eradicate prejudice, discrimination, and violence based on sexual orientation and HIV status. The organization engages in lobbying, community organizing, public education, research and policy analysis.

### P-FLAG OF MINNESOTA (PARENTS AND FRIENDS OF LESBIANS AND GAYS)

As parents and friends of lesbians and gay men, we, as an organization, are committed to educating society about homosexuality in an effort to eliminate prejudice, to change

attitudes, and to support the civil and human rights of all persons.

P-FLAG feels that the court's denial of guardianship of Sharon by Karen ignored the importance of having a loving and committed partner involved in care giving. We feel the opinion should be overturned in that it expresses a homophobic attitude toward Sharon and Karen's commitment to one another and represents a serious setback for lesbians and gays, our children, in the state of Minnesota.

SPIRIT OF THE LAKES UNITED CHURCH OF CHRIST

Spirit of the Lakes is a congregation of gay-lesbian Christians with full standing in the United Church of Christ, which is in the tradition of the Pilgrims. Like our fore-mothers and fore-fathers, we have a spiritual commitment to work for "liberty and justice for all" and "equal protection under the law." The denial of guardianship to Karen Thompson denies the reality of the loving commitment and spiritual relationship between Sharon Kowalski and Karen Thompson. We urge the court to support this healing relationship without regard to the prejudice against lesbian women.

WINGSPAN MINISTRY OF ST. PAUL-REFORMATION LUTHERAN CHURCH (ELCA)

Wingspan is a ministry of St. Paul-Reformation Lutheran Church, with and on behalf of lesbians, gay men, bisexual individuals, and their families. Throughout its ten year history,

Wingspan has worked to improve the quality of life for gay, lesbian and bisexual people, in both the institutional church and broader society, especially in the area of human rights and support for couples and their relationships.

It is our belief that Karen Thompson should be appointed guardian for Sharon Kowalski, in part because Sharon herself has requested this and Karen has consistently demonstrated her commitment, her competency to be appointed guardian and to adequately fulfill all the responsibilities entailed in such an appointment.

## STATEMENT OF FACTS

Sharon Kowalski and Karen Thompson are a committed, lesbian couple. They began their relationship as many couples do, by building on a friendship until each came to the realization that they were in love and wished to commit their lives to one another. As a symbol of their commitment and love, the two women exchanged rings. They shared a home, finances and friends. When Sharon experienced employment ups and downs, Karen was the sole provider, patiently working with Sharon to find the next job or chart out a career path.

One weekend in November of 1983, Sharon and Karen agreed to care for the children of Sharon's sister, while she worked through some personal difficulties. As Sharon bundled up the children to return them to their mother, she turned to Karen and said, "We haven't had much time together lately - save Monday night for me."

Several hours later, Karen received a call that there had been a terrible accident. She rushed to the hospital only to spend several excruciating hours trying to get someone, somewhere in the hospital, to tell her if Sharon was dead or alive, what her condition was, and whether she could be with her. Because Karen was not considered "family" - even though she was the only loved one to check on Sharon's condition while Sharon's parents rushed to the bedside of their grandson - she met resistance at every turn.

For the weeks after the accident, Karen spent every free moment at the hospital waiting for news and assisting Sharon's



parents with accommodations. Sharon's parents became increasingly uneasy about Karen's devotion to Sharon, and by January 1984 talked of moving Sharon to a facility closer to their home and forbidding Karen from ever seeing Sharon again. Even more painful was Karen's realization that the Kowalskis planned to move Sharon to a nursing home which offered no rehabilitative care, thus abandoning any chance that Sharon could recover many of her abilities. Frantically, Karen consulted with a hospital psychologist who helped her make the difficult decision to tell the Kowalskis of her deep and committed love for their daughter. Karen told the Kowalskis of her relationship with Sharon in an effort to get them to understand how Karen's presence and support would be crucial to Sharon's recovery.

After receiving Karen's letter, the Kowalski family responded by calling Karen crazy and sick. They totally prevented Karen from seeing Sharon. Several years later, when the court finally gave effect to Sharon's wish to see Karen, the Kowalskis virtually abandoned their relationship with their daughter rather than accept Sharon for who she is.

#### ARGUMENT

##### I. SOCIETY'S CONCEPT OF FAMILY AND KINSHIP WHICH INCLUDES LESBIAN AND GAY COUPLES

The quality and nature of Karen Thompson's and Sharon Kowalski's relationship would lead many to consider them to be a family or to share a kinship like that between blood or marital family members. At best, the lower court in this case failed to

take their relationship seriously, exhibiting a tendency to keep Sharon away from anything that might confirm the fact that she is a lesbian and shares a life commitment with Karen. At worst, the court was hostile toward their relationship and consistently held them to a double standard. It is inconceivable that a court would deny guardianship to a spouse or any other family member who showed even half of the resolve and commitment shown by Karen Thompson. It should be equally distressing that the court would bypass Karen Thompson for a "neutral third party" who shares almost no current relationship with Sharon. Minnesota law states that kinship should be considered when relevant to the best interest determination in a guardianship proceeding. In current parlance, Karen and Sharon were a family; the court's failure to consider their relationship was erroneous.

As we move closer to the 21st century, our concept of what constitutes family has begun to shift dramatically. No longer is the traditional nuclear family the mainstay. In fact, only 15-30% of American families consist of a breadwinner father, housewife mother, and dependent children.<sup>1</sup> The increased divorce rate, the choice to wait longer before marrying, and increased acceptance of non-marital cohabitation are all critical contributors to this

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<sup>1</sup> See Cox, Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining, 2 Wisc. Women's L.J. 1 (Spring 1986) (less than 30%); Gutis, What Is a Family?: Traditional Limits Are Being Redrawn, N.Y. Times, August 31, 1989, at C1, Col. 2 (approximately 25%); Mintz & Kellogg, Domestic Revolutions 203 (1988) (15%).

phenomenon.<sup>2</sup> In addition, some of this shift to a broader concept of family is the result of the increasing visibility and acceptance of lesbian and gay relationships as legitimate and healthy families.<sup>3</sup>

Approximately ten percent of the population of this country, or twenty-five million men and women, are lesbian and gay.<sup>4</sup> Although lesbians and gay men in the United States are generally prohibited from formalizing their family relationships through marriage or other means, millions of couples, like Sharon Kowalski and Karen Thompson, live in families that are functionally indistinguishable from heterosexual families. Nearly 75% of all lesbians live with a partner in a committed, long-term relationship.<sup>5</sup> Lesbian and gay couples love and care for each other, share the economic, social, and emotional necessities of

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<sup>2</sup> Even the 1990 U.S. Census counted, for the first time, "unmarried partners." This category will reflect both same gender and opposite gender couples.

<sup>3</sup> See Horn, To Love and to Cherish: Gays and Lesbians Lead the Way in Redefining the Family, Dollars and Sense, June 1990 at 9; Monaghan, One Family, Two Moms, Minneapolis Star Tribune, April 10, 1988, Magazine, at 9.

<sup>4</sup> See Bell, Weinberg & Hammersmith, Sexual Preference: Its Development in Men and Women (Indiana University Press 1981).

<sup>5</sup> See Harry, Gay Male and Lesbian Relationships in Contemporary Families and Alternative Lifestyles (E. Macklin ed. 1983); Cotton, Social and Sexual Relationships of Lesbians, 11 J of Sex Research 139 (1975) (stating that lesbians over the age of thirty are as likely as heterosexuals to form long-lasting relationships).

life, and regard one another as family.<sup>6</sup> Many couples, following religious and cultural influences, celebrate their relationships with ceremonies and celebrations whereby they make a lifetime commitment as is made in marriage ceremonies.<sup>7</sup> In all ways, lesbian and gay couples are capable of sharing and do share "significant characteristics of traditional marriage: intimacy and stability."<sup>8</sup> Recent studies have found that not only do many unmarried cohabiting gay couples exist, but that gay relationships form for very much the same reasons as heterosexual relationships. "Couplehood, either as a reality or as an aspiration, is as strong among gay people as among heterosexuals."<sup>9</sup> Moreover, priority of character traits sought in a life-partner are the same for gay and non-gay people.<sup>10</sup>

Once formed, the "married life" behavior patterns of both heterosexual and same-sex couples are essentially the same. Long-term studies have shown that gay couples:

form family units just as stable, dependable and contributing to the commonwealth as a traditional nuclear

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<sup>6</sup> K. Weston, Families We Choose: Lesbians, Gays, Kinship (Columbia Univ. Press 1991).

<sup>7</sup> B. Butler (Ed.), Ceremonies of the Heart: Celebrating Lesbian Unions (The Seal Press 1990).

<sup>8</sup> See Developments in the Law - The Constitution and the Family, 93 Harv. L. Rev. 1156, 1285 (1980); Peplau and Amaro, Understanding Lesbian Relationships in Homosexuality: Social, Psychological & Biological Issues 233 (Paul et al., eds. Sage 1982).

<sup>9</sup> Blumstein and Schwartz, American Couples, 45 (Morrow 1983).

<sup>10</sup> Laner, Permanent Partner Priorities: Gay and Straight, J. of Homosexuality 27 (Fall 1977).

family. Many participate actively in civic, church, neighborhood, and political life, most often alongside their non-gay neighbors and friends, who accept and embrace them as the individuals and couples they are.<sup>11</sup>

Similarly, it has been noted that

Perhaps because of a more open acknowledgement of [same] sex unions, a new family structure seems to be emerging.... [I]t would appear that at least some of them are functional marriages in all major respects and therefore are deserving of the legal and economic amenities of the marital status, if that status is desired.... [N]ot allowing [the status] violates the spirit of the law's own equation, between marriage and family.<sup>12</sup>

The media and the general public have responded in unprecedented ways to the fact that lesbian and gay relationships exist as another part of the vastly pluralistic society in which we live.<sup>13</sup> Increasingly, when families are discussed in the media, lesbian and gay families are part of that discussion.<sup>14</sup>

Courts and legislatures have begun to respond to the overwhelming evidence that the majority do not live in traditional families and that our family structure is changing. They have

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<sup>11</sup> McWhirter and Mattison, The Male Couple 286 (1984).

<sup>12</sup> O'Donnell and Jones, The Law of Marriage and Marital Alternatives 49 (1982).

<sup>13</sup> See, e.g. Kastor, The Marriage Proposal: Two Men and Their Crusade for the Right to a Legal Union, Wash. Post, January 28, 1991, at B4; Gutis, Small Steps Toward Acceptance Renew Debate on Gay Marriage, N.Y. Times, November 5, 1989, §E, at 24, Col. 1; Lewin, California Lets Nontraditional Families Register, N.Y. Times, December 17, 1990, at A15, Col. 1.; Roderick, State Issues Range From Growth to Gay 'Marriage', L. A. Times, November 5, 1990, at A3.

<sup>14</sup> Seligmann, Variations on a Theme, Newsweek, Special Ed. Winter/Spring 1990 at 30; Przybys, Lifting the Ban: Is it Time to Redefine the Legal and Cultural Meaning of a Family?, Las Vegas Review - Journal (February 8, 1990).

begun to address the obvious inequities of treating some families differently from those known to be "traditional." Some cities have adopted laws allowing unmarried partners to register their relationships. Some city employees, upon registering their relationships, are provided the same employment benefits, such as health insurance and family sick leave, for their domestic partners that are routinely provided to married employees.<sup>15</sup> In order to better understand the population it serves, the Los Angeles City Council took the unprecedented step of commissioning a Task Force on Family Diversity to study the many existing forms of family and to make recommendations for legislation that could better address their needs and concerns. The Task Force recognized lesbian and gay couples and, through its final recommendations, addressed some of the obstacles faced by lesbian and gay families.<sup>16</sup>

In several important contexts, courts have also recognized that narrow definitions of family can result in extreme hardship, injustice, and in some cases, absurdity. The most striking example of the effort to recognize broader forms of functional families is found in Braschi v. Stahl Associates, 74 N.Y. 2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989). There, New York's highest court held that rent control laws that allow apartments to succeed to "family"

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<sup>15</sup> See "Domestic Partnership: Issues and Legislation", a publication of Lambda Legal Defense and Education Fund, Inc. (1990), which lists all cities that have passed domestic partnership laws.

<sup>16</sup> See Strengthening Families: A Model for Community Action, Los Angeles Task Force on Family Diversity Final Report (1988).

members should be interpreted to include a gay couple in the definition of family. In ruling that the surviving gay partner may remain in the apartment after the death of the named tenant, the court stated that the term "family" should "not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order." *Id.* at 211. According to the court, "a more realistic, and certainly equally valid, view of family includes two adult lifetime partners whose relationship is long-term and is characterized by emotional and financial commitment and interdependence." *Id.* at 211.

Just recently a trial court upheld the claims of lesbian and gay teachers in the New York City school system for health insurance benefits for their domestic partners. In Gay Teachers Association v. New York City Board of Education, Case No. 43069/88 (N. Y. Co. Sup. Ct., August 16, 1991) the court ruled that the teachers had stated a claim for discrimination against the school board for providing benefits for spouses of married employees while refusing to provide them for the partners of unmarried employees. The court cited the "need to go beyond the label's 'spouse', 'husband', and 'wife'." If it were to adhere to these labels, the court "would be rejecting 'the reality of family life' in this day and age." (Slip op. at 9).

In a similar vein, the Michigan Court of Appeals struck down a hospital policy that only a husband or immediate family member of the mother giving birth be permitted into the delivery room.

Whitman v. Mercy - Memorial Hospital, 128 Mich. App. 155, 339 N.W. 2d 730 (1983). The hospital had excluded the unmarried father of the child to be born even though the father resided with the mother "and her son from a prior marriage and supported them, and the plaintiffs considered themselves 'a family unit.'" 339 N.W. 2d at 731.

Other courts, too, have employed a more enlightened and realistic view of family by accepting functional definitions of family and rejecting biology and marriage as the only valid definitions.

In Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980), the Wisconsin Superior Court interpreted a deed with a covenant restricting use to single-family dwellings as including functional families who live as a single housekeeping unit, and not limited only to a group related by consanguinity or marriage. The Michigan Supreme Court also held that a zoning ordinance limiting occupancy to people related by blood, marriage or adoption and not more than one other unrelated person violated the state due process clause. In this decision, Charter Township of Delta v. Dinalfo 419 Mich. 253, 351 N.W. 2d 831 (1984), the court found that the state has no business keeping a group of unrelated persons apart absent a valid reason for doing so. See also, McMinn v. Town of Oyster Bay, 66 N.Y. 2d 544, 498 N.Y.S.2d 128 (1985).

The California Unemployment Insurance Appeals Board found that a gay man who left his job to care for his "family partner" who was dying from AIDS was entitled to unemployment benefits even though



a blood or marital relationship did not exist. In the Matter of Dillion, Case No. SF-24774 (September 13, 1985). The Appeals Board overturned the administrative law judge's denial of benefits, stating that "it is recognized that non-blood, non-legal relationships may be established which are as meaningful, if not more meaningful than relationships created by blood or the bonds of marriage." Under the circumstances, the claimant "did not act unreasonably in leaving his employment in order to care for his family partner." Id. See also Donovan v. Workers' Comp. App. Bd., 138 Cal. App. 3d 323, 187 Cal. Rptr. 869, (1982). (Case remanded to determine dependency of surviving gay partner).

Legal scholars and commentators grow increasingly unhappy with a view of family that is rigid, unresponsive to societal realities, and harmful to the human interests of parties involved.<sup>17</sup> Businesses and universities have broadened their recognition of families and spouses by providing healthcare coverage and other employment benefits for domestic partners and allowing unmarried students access to so-called "married student housing".<sup>18</sup> Even the

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<sup>17</sup> See e.g., Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet The Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 729 (1990); Florescue, Visitation Rights of Nonbiological Parents, N.Y.L.J., March 29, 1990, at 3; Glass, In Further Support of the Dissenting Opinion in the Case of Allison (sic) D. and Virginia M., 22 Fam. L. Rev. No. 3, 76 (1990).

<sup>18</sup> "Domestic Partnership: Issues and Legislation," a publication of Lambda Legal Defense and Education Fund, Inc. (1990); Barron, Bronx Hospital Gives Gay Couple Spouse Benefits, N.Y. Times, March 27, 1991; at A1, Col. 2. (Stanford University approved a domestic partners policy extending to unmarried partners of Stanford's students whether same-sex or opposite-sex, equal  
(continued to Page 11)

Minneapolis Star Tribune took a leap forward by publishing the announcement of a lesbian domestic partnership on its wedding page.<sup>19</sup>

All of this points to society's growing acceptance of the love, commitment and devotion that may exist between two women or two men. As lesbian and gay relationships gain greater prominence and acceptance, the law, too, must take them seriously. Insofar as Karen Thompson and Sharon Kowalski function as a family and share a kinship relationship, the significance of their relationship should be considered by the court as it would, under the guardianship statute, consider any other relationship.

II. BY THE GUIDELINES ESTABLISHED IN MINNESOTA GUARDIANSHIP LAW, KAREN THOMPSON IS; WITHOUT QUESTION, THE BEST SUITED TO CARE FOR SHARON KOWALSKI AND SEE TO HER BEST INTEREST

Under Minn. Stat. Sec. 525.539, et al., the court is charged with the duty to appoint a guardian who will further Sharon Kowalski's best interests. In making its determination, the court must consider testimony regarding Sharon's own preference for guardian, the interactions between Sharon and Karen, and Karen's commitment to being Sharon's guardian. The kinship relationship between the two women though not conclusive, should be considered

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access to Stanford's married student's housing, health clinic's services, libraries and athletic facilities.)

<sup>19</sup> Paper Includes Gay Couples on What Was Wedding Page, N.Y. Times, March 22, 1991.

if relevant to other factors to be considered. The courts denial of guardianship to Karen Thompson was erroneous in three respects: 1) the court's decision went directly against the great weight of the evidence that Karen Thompson is the single best person to be Sharon Kowalski's guardian; 2) the court failed to consider the significance of the women's family relationship which is directly relevant to a best interests determination; and 3) the court held Karen Thompson to a double standard that, one would hope, no court would require of any other family member, spouse or petitioner. For these reasons, the court's decision must be reversed and Karen Thompson named the guardian of Sharon Kowalski.

A. The Appointment of Karen Thompson As Guardian Is In Sharon Kowalski's Best Interests

The lower court's decision denying guardianship to Karen Thompson ignores the clear expert testimony that Sharon Kowalski has reliably stated a preference as to where she wants to live. Further, the court totally disregarded Sharon's actual stated preference: to return home to St. Cloud with Karen Thompson.

Numerous experts who have treated Sharon and/or worked with her on her rehabilitation consistently testified that Sharon is able to make life decisions and does so reliably. Dr. Eckman, who evaluated Ms. Kowalski twice to determine her function and abilities and make recommendations to the court, stated that "[w]e 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." (T. at 14, 18). Dr. Rappel, a licensed consulting psychologist, testified that she asked Sharon where she would want to live if she could go anywhere at all and Sharon always said that she wanted to move home to St. Cloud with Karen Thompson. (T. at 52-54). Dr. Carolyn Herron, a licensed consulting psychologist, testified that consistency in responses would be a determining factor in her assessment of Sharon's ability to express desires. (T. at 521). With consistency as a measure, by any analysis Sharon has been consistent in expressing a desire to live in St. Cloud with Karen Thompson.

Sharon Kowalski has been deemed by those medical experts who treat her as able to reliably determine where she wants to live. Again and again she has stated that she wants to return home to St. Cloud to live with Karen Thompson. The Court trivializes Sharon's abilities to express wishes stating that she is only able to express her desire for visitation, and speculates that her consistently expressed desire for return home is not "tantamount to a preference of who should be her guardian." The court incomprehensively dismisses Sharon's reasons for wanting to live in St. Cloud with Karen as being merely "a reference to her memory of her pre-accident relationship and living situation." Would the court have been so dismissive if Sharon said she wanted to return to a male partner or her parents? Presumably, these would have been sound choices. But, according to the court, Sharon is not

entitled to her choice of returning to her life partner, Karen Thompson.

Nowhere is the evidence more compellingly in favor of granting Ms. Thompson's petition than that which supports the positive, loving interactions between Karen Thompson and Sharon Kowalski. This is, of course, no surprise since lesbian relationships are as fulfilling and satisfying as other adult relationships, a fact which eluded the lower court. Fifteen of the experts who testified had personally witnessed the interactions between Ms. Thompson and Ms. Kowalski and stated that Ms. Kowalski responded better when Ms. Thompson was present. The remaining experts did not witness Sharon Kowalski's interactions with Karen Thompson because Ms. Thompson was barred from visiting during the times they cared for Sharon.

Dr. Eckman testified that "it was apparent that she [Sharon] responded well and interacted with Ms. Thompson regularly ...and that Ms. Thompson was able to get her to do things and respond generally more than others that we observed working with her and some of the team members." (T. at 19). The relationship between Kowalski and Thompson was a "positive relationship" and given the level of participation Thompson could elicit it was to Sharon's advantage to continue it. (T. at 20, 22). As Dr. Gregor observed, "Karen is the key to her past self and the window to who she is now and her current interactions with the world." (T. at 308). Sharon "communicates with Karen in a way that she doesn't with any other person." (T. at 308).

Sharon's interaction with Karen is not only important to Sharon's emotional well-being, but is crucial to Sharon's physical well-being.

The court blatantly refused to acknowledge the overwhelming thrust of evidence before it, that Karen Thompson not only interacted well but was the only one who could consistently get Sharon Kowalski to respond to her surroundings and to her therapy. Indeed, as culled from the testimony, Sharon's response to Karen was characterized as overwhelmingly positive, extraordinary, and incredible. Gregor (T. at 307).

As the record illustrates, there is simply nobody in Sharon's personal life who better understands Sharon's physical and mental needs, who has taken the time to work with her in therapy, and who has maintained a regular ongoing relationship with Sharon, than Karen Thompson. It was a tragic error for the court to deny guardianship to Karen Thompson.

In his factual findings, Judge Campbell recognized that "Karen has demonstrated a constant commitment and ability and devotion to the welfare of Sharon Kowalski". The record in this case is replete with testimony showing that Karen is actively and knowledgeably involved in Sharon's day to day progress and in her projected progress. Karen was shown to be understanding of Sharon's condition, fully committed to continuing Sharon's progress and had the ability, training and knowledge to do so. Both Drs. Eckman and Rappel testified that Karen has been instrumental in

assisting in Sharon's recovery. Eckman (T. at 19-26). Rappel (T. at 56).

Karen has also been extremely attentive to Sharon's spiritual and emotional needs. As she testified she is committed to taking Sharon to whatever church she desires and in facilitating visits with family and friends. (T at 457-458, 489-491). It is difficult to imagine someone more responsive, knowledgeable and caring towards Sharon Kowalski than her life partner, Karen Thompson.

B. Karen and Sharon Share a Family Relationship That Is Highly Relevant To The Determination Of Sharon's Best Interests

The Minnesota guardianship statute, Section 525.539, subd. 7 (Supp. 1991) states that though kinship is not a conclusive factor it "should be considered to the extent it is relevant" to the best interest determination.

The term "kinship" is not defined by the legislature, however, kinship is commonly held to mean family. Indeed, courts increasingly define family in functional terms rather than hold to "rigid" definitions based solely on blood or legal relationships where to do so would be consistent with statutory purpose or public policy.<sup>20</sup> While kinship is not a conclusive factor, the statute, and public policy mandate that the relationship be considered among other relevant factors in the determination of guardianship.

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<sup>20</sup> See also, Braschi v. Stahl Associates, supra., at 211. Crowley v. Knapp, supra., at 241. (family not restricted to blood or marriage where it was not defined as such and to do so would conflict with public policy in favor of unrestricted use of property).

In this case, the court correctly found that Karen is Sharon's "family of affinity" but went on to conclude that the family relationship they shared was not sufficient to permit more than Karen's existence as a mere visitor in Sharon's life. The family relationship shared by this couple is not relevant only to visitation, since this is not a visitation proceeding, but must be considered relevant by law to this guardianship proceeding.

The court made the correct finding but came to the wrong result. The court failed to consider their acknowledged family relationship as relevant to Karen's guardianship petition, just as the court refused to accept Sharon's stated preference to return home with Karen as being anything more than a preference for visitation. This determination reflects a consistent hostility to giving full effect to the relationship between these two women. Their relationship coupled with the overwhelming evidence that Karen would be the best guardian, mandates reversal of the lower court's decision denying Karen Thompson's guardianship petition.

C. The Court Inappropriately Held  
Karen Thompson To A Double Standard

The court is so driven to deny Karen Thompson's petition that it engages in grossly inconsistent analysis, holds Karen Thompson to an impossible double standard, and accepts vicious, insupportable attacks on Karen's character as fact. Though the deficiencies in the court's opinion are too numerous to mention and are well presented in petitioner's brief, a few aspects of the Court's opinion greatly concern these Amici.



First, and most egregious, is the court's "finding" that Karen's "other domestic partnerships" render her unable to care for Sharon and will split her loyalties. Putting aside the obvious fact that the appointed guardian, Karen Tomberlin, has a husband and family, but will presumably not have split loyalties where Sharon is concerned, the court's reference is insulting and invasive. As Dr. Gail Gregor testified, families deal with the crisis of a brain-injured family member in their own way. (T. at 318-319). It is not uncommon, according to Dr. Gregor, for spouses to make some changes in their personal lives but to maintain their commitment to the injured person. (T. at 321-322). These decisions are private matters between the parties and have no bearing on one's ability to be guardian. In this case, there is absolutely no evidence that anything or anyone in Karen's life have kept her from her commitment to Sharon. Furthermore, it is highly unlikely that a court would have intruded into the personal life or a legal spouse seeking guardianship, much less deny the petition based upon pure speculation.

Second, the court consistently blames Karen Thompson for the Kowalski family's inability to accept the fact -- revealed repeatedly by Sharon herself -- that Sharon is a lesbian. When faced with the very real threat of being prevented by the Kowalskis from ever seeing Sharon again, Karen did what any reasonable person in her situation would do: she explained that she loved Sharon, that they had made a commitment to one another, and that it would be important to Sharon's recovery to have Karen there when she came

out of the coma. As the history of this case shows, Karen's influence is Sharon's well-being has been substantial. But Karen would not have had the same legitimacy to fight on Sharon's behalf if she did not reveal the nature of her relationship. Oddly enough, the lower court most likely would never have considered them a "family of affinity" without knowing of their lesbian relationship. By using the very inflammatory reference to "outing" in order to describe Karen's revelation of her sexual orientation and her relationship with Sharon, the court once again exhibits its bias against an expression of one's sexual orientation. Though it is not uncommon for family members to react negatively to the news of a daughter's lesbian sexual orientation, it is not Karen's fault that they cannot accept their daughter for who she is.

Finally, the court takes issue with the fact that Karen takes Sharon to public events, including Gay Pride Days and events where Karen and Sharon are featured guests. The court by its own order authorized Sharon to travel with Karen to the annual convention of the National Organization for Women. The medical personnel who work with Sharon testified that it is healthy for her to engage in such activities that get her out of the institution. Furthermore, even before the accident, Sharon expressed a strong desire to attend more lesbian-related events and to come out more within a broader community. Yet, the court responds to these facts as if the mere public mention of lesbianism is shameful and should be silenced. The court failed to fully accept the fact that Sharon is a grown woman who firmly identifies as a lesbian and who still

views Karen Thompson as her lover and partner. Sharon has a right to continue the life she started with Karen over a decade ago. She has a right to the private choices she and Karen might make for their lives. This right can only be fully realized by the appointment of Karen Thompson as her guardian.

### III. CONCLUSION

Therefore, for the reasons stated above, we respectfully urge the Court to reverse the lower court's decision and appoint Karen Thompson guardianship over the person and estate of Sharon Kowalski.

Dated: August 23, 1991

Respectfully submitted,

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