

The WLALA Amicus Briefs Committee: Advocating for Equality in the California Supreme Court

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The Amicus Committee evaluates pending cases raising legal and public policy issues affecting women, and, in those cases in which WLALA agrees to participate, prepares or edits amicus briefs on behalf of WLALA. This year WLALA made its first foray into the international arena, joining an amicus brief in *Jessica Gonzales v. U.S.*, in which the Inter-American Commission on Human Rights will decide whether the United States is obligated to enforce, or provide a remedy for lack of enforcement, of domestic violence restraining orders under the Organization of American States (of which US is a member). Over the past eight years, WLALA has also participated as an amicus in three precedent-setting cases before the United States Supreme Court: *Davis v. Monroe County*, in which the Court held that school districts may be held liable for their own deliberate indifference of student-on-student sexual harassment; *United States v. Morrison*, in which the Court declared the civil rights remedy of the Violence against Women Act unconstitutional; and *Nguyen v. INS*, in which the Court refused to declare unconstitutional a federal statute imposing different standards on citizen fathers than on citizen mothers for conferring citizenship on their foreign-born nonmarital children.

In recent years, WLALA has turned its amicus activities to the California Supreme Court, helping to achieve major victories in three landmark cases, most recently *In re Marriage Cases*, in which the court held that the state Constitution prohibits the state from adopting two different statutory rubrics for the union of opposite-sex and same-sex couples, and that the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution. We summarize this important victory and explain how the *Marriage Cases* decision built on a prior victory in *Sharon S. v. Superior Court* (in which WLALA also participated as an amicus), below.

In re Marriage Cases: Establishing the Right of Same-Sex Couples to Marry

In *In re Marriage Cases*, the Supreme Court considered six consolidated cases arising from the issuance of marriage licenses by the City and County of San Francisco to same-sex couples. The Court made clear that it was not being asked to decide “whether we believe, as a matter of policy, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships violates the California Constitution.”

A majority of the court concluded that the current statutory distinction did violate the state Constitution, asserting that “[i]n light of the fundamental nature of the substantive rights embodied in the right to marry – and their central importance to an individual’s opportunity to live a happy, meaningful, and satisfying life as a full member of society – the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.” The court reviewed the domestic partnership statutes and concluded: “The current statutes – by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership – poses a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.” The court analogized to its earlier decision allowing interracial marriages: “just as this court recognized ... that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior . . . we now similarly recognize that an individual’s homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual’s legal rights.” Finally, the majority concluded that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution’s equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision.

The court’s decision echoed many of the points made in the bar association amicus brief authored by Cindy Tobiasman of Greines, Martin, Stein & Richland, in which WLALA joined. The amicus brief highlighted the benefits and importance of marriage. The brief also pointed out that the stated public policies underlying the Domestic Partnership Act actually supported recognizing marriage between same-sex couples (a point which was a pivotal aspect of the majority opinion) and that the historical, traditional treatment of marriage is not a sufficient justification in itself for differential treatment and denial of a fundamental constitutional right (a point also specifically made in the majority opinion).

The court’s decision also built on its 2004 decision affirming second-parent adoptions, *Sharon S. v. Superior Court*, in which WLALA also participated as an amicus.

Sharon S. v. Superior Court: Reaffirming Second-Parent Adoptions

California statutorily authorizes three methods of adoption: (1) an agency adoption, by which a birth parent relinquishes a child to a licensed adoption agency for adoption; (2) independent adoption, through which the birth parent places the child directly with the adoptive parent; or (3) stepparent adoption, which applies only where the birth parent’s

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spouse, or, as of January 1, 2002, the birth parent's registered domestic partner, seeks to adopt the spouse's or partner's child. California adoption law also provides, under Family Code section 8616, that "[a]fter adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship." Conversely, Family Code section 8617 provides that, from the time of adoption, the birth parents are "relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child." In *Sharon S. v. Superior Court*, the Supreme Court agreed to determine "whether the birth and adoptive parent in agency and independent adoptions can agree section 8617 shall not apply," i.e., whether the Family Code allows the birth parent and adoptive parent to agree that the birth parent will retain his or her parental rights, while simultaneously granting co-extensive parental rights to the adoptive parent.

The broader implications of the case, both for the stability of established family relationships and the concept of what a family looks like, are illustrated by its factual context:

Sharon S. (Sharon) and Annette F. (Annette) agreed Sharon would conceive a child and they would raise the child as coparents. Joshua S. was conceived and born. Sharon and Annette entered into a written agreement for independent adoption by which they would become full legal coparents. Thousands of similar adoptions have been completed under the authority of *Marshall [v. Marshall] (1925) 196 Cal. 761*, dictum in three decisions of the Court of Appeal, and the California Department of Social Services (Social Services), which developed forms for these adoptions. Independent adoptions like Joshua's are called "second parent adoptions" or "limited consent adoptions" because the birth parent retains her parental rights and duties.

Sharon and Annette petitioned for Annette to adopt Joshua, with Sharon retaining her parental rights and duties as agreed. Sharon and Annette terminated their relationship, and Sharon sought to terminate the adoption proceeding for alleged violation of various Family Code provisions. The superior court held the proceeding should carry on to the phase of determining Joshua's best interest. A majority of a panel of the Court of Appeal, however, granted Sharon's writ petition and directed the superior court to terminate the proceeding on the sole ground [Family Code] section 8617 precluded adoptions in which a birth parent retains parental rights and responsibilities.

As the United States Supreme Court observed in *Troxel v. Granville*, 530 U.S. 57, 64 (2000), "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." The wide use of the second-parent adoption procedure at issue in *Sharon S.* highlights the array of familial and parental relationships in California today: in addition to those in same-sex partner arrangements like Sharon and Annette, the procedure has been used by unmarried heterosexual couples and blood relatives (such as an aunt, uncle or grandparent who takes on parental responsibility together with a birth parent who is young, disabled, or terminally ill), and "is regularly used to compose full families for special needs children in the foster care system . . . [who] are often adopted first by a single person, after which that person's partner becomes a second parent by using the limited consent process."

The Supreme Court lent stability to all these relationships when it affirmed, in a 4 to 3 decision, the use of the second parent adoption procedure in *Sharon S.* The court determined that "section 8617 neither prohibits a birth parent and another qualified adult from jointly waiving application of the statute in order to coparent an adoptable child, nor prohibits a court under such circumstances from ordering an otherwise valid adoption." The court reasoned that declaring the second-parent adoption procedure invalid would call into question the legitimacy of an array of existing families, whereas reaffirming second parent adoptions had the salutary effect of legally recognizing parentage for a child of a nonbiological parent who otherwise must remain a legal stranger, and provided a clear framework for resolving any disputes that may arise over custody or visitation.

WLALA is obviously thrilled at the outcome of these landmark cases, in which amicus briefs played an important role in the outcome. In *In re Marriage Cases*, for example, the Supreme Court explicitly acknowledged the helpfulness of the amicus briefs presented to it, and reiterated that "[a]micus curiae presentations assist the court by broadening its perspective on the issues raised by the parties . . . [and] facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." WLALA's Amicus Committee will continue to be on the front lines, evaluating pending cases that raise legal and public policy issues affecting women, and, in those cutting edge cases in which WLALA agrees to participate, preparing or editing amicus briefs on behalf of WLALA.

If you are interested in participating in the Amicus Brief Committee's work, please contact the chair, M.C. Sungaila, at msungaila@horvitzlevy.com.