

Supreme Court No. 75934-1

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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HEATHER ANDERSEN and LESLIE CHRISTIAN *et al.*, Respondents,

v.

KING COUNTY *et al.*, Appellants.

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Appeal from the Superior Court of King County  
The Honorable William L. Downing

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CELIA CASTLE and BRENDA BAUER *et al.*, Respondents,

v.

STATE OF WASHINGTON, Appellant.

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Appeal from the Superior Court of Thurston County  
The Honorable Richard D. Hicks

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**AMICI CURIAE BRIEF OF DOUGLAS P. BECKER, LAWRENCE  
R. BESK, MABRY CHAMBLISS DEBUYS, DAVID HAZEL,  
MARIJEAN MOSCHETTO, GAIL B. NUNN, MARY H.  
WECHSLER, J. MARK WEISS AND GORDON W. WILCOX**

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## **I. INTRODUCTION AND INTEREST OF AMICI**

Douglas P. Becker (WSBA # 14265), Lawrence R. Besk (WSBA # 12584), Mabry Chambliss DeBuys (WSBA # 10612), David Hazel (WSBA # 7833), Marijean Moschetto (WSBA # 8366), Gail B. Nunn (WSBA # 16827), Mary H. Wechsler (WSBA # 9447), J. Mark Weiss (WSBA # 17357) and Gordon W. Wilcox (WSBA # 75) (the “Family Law Practitioners”) are attorneys who practice matrimonial and family law in Washington. This case presents issues of significant concern to the Family Law Practitioners because marriage is a fundamental building block for family law in Washington. Washington’s denial of the right to marry to same-sex couples deprives those couples of important benefits and rights granted to married couples as well as access to the justice system, particularly in the context of the dissolution of relationships. As a result, the Family Law Practitioners regularly see the adverse effects of Washington’s same-sex marriage prohibition on same-sex couples and their families.

Same-sex couples, without access to the protection provided by Washington to married couples through its dissolution and community property statutes, are denied equal access to Washington’s court system. This is inequitable and unjust. The Family Law Practitioners believe that Washington should not deny these benefits and rights to same-sex couples who are willing to undertake marriage and its underlying obligations.

The Family Law Practitioners, therefore, respectfully submit this Brief of Amici Curiae, and join the Respondents in urging this Court to affirm the decisions below.

## **II. STATEMENT OF CASE**

The facts of these consolidated cases demonstrate the need and benefits of extending the right of marriage to same-sex couples and how extending these benefits will protect the welfare of the family and society. The Family Law Practitioners generally rely on the Statements of the Case set out the by the Respondents, although a brief summary of key facts underlying the specific issues addressed by this brief are presented here.

Each of these couples stands before the Court at a different stage of their relationship, but each is alike in that they wish to begin the formal relationship of civil marriage and assume the legal status associated with it. Some have incurred costs to secure inheritance and survival rights for each other and their children, as well as otherwise to protect their family against misfortune. In similar situations, married couples do not have to take any action to receive a least a minimum level of legal protection for their family. This protection is perhaps not ideal for all married couples in all situations, but it is a safety-net of protection that is not available to same-sex couples. For example, intestacy and community property rights automatically protect one spouse in the event of the death of the other.

And, while no couple standing before this Court wishes to end their relationship, this will happen to same-sex couples too, just as it does for different sex couples. But same-sex couples do not have access to the

protections and procedures of Washington’s dissolution act, Chap. 26.09 RCW. They cannot use the specialized court system set up to handle the issues that occur at the end of a married couple’s relationship. Same-sex couples, because they cannot marry, are not protected by Washington’s community property statute, Chap. 26.16 RCW. And, while Washington courts have developed the common law doctrine of meretricious relationships to deal with the end of an unmarried couple’s relationship, it is not certain that this doctrine applies to same-sex couples. Even if it does, the results of its application can be unpredictable. As a result, these couples, without access to the protection provided by Washington through its dissolution and community property statutes, unfairly face uncertainty and inequity because Washington law is not fully equipped to deal with the end of same-sex couples’ relationships.

### III. ARGUMENT

#### A. Washington Confers Specific Protections, Benefits, and Obligations on Married Couples.<sup>1</sup>

Washington regulates civil marriage from beginning to end. *See* Chap. 26.04 RCW (Marriage); Chap 26.09 RCW (Dissolution of Marriage – Legal Separation). The State creates the civil marriage contract and “the rights, duties and obligations incident to the relationship are governed by statute.” *Washington Statewide Organization of Stepparents v. Smith*, 85 Wn.2d 564, 568, 536 P.2d 1202 (1975). Washington respectfully

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<sup>1</sup> The Family Law Practitioners understand that issues related to children and end of life issues will be addressed in other amicus briefs. As a result, this brief will not address those issues in detail.

recognizes marriages “solemnized before or in any religious organization or congregation.” RCW 26.04.120. However, “RCW 26.04.010 declares that marriage is ‘a civil contract.’ It is apparent that the purpose of this statute was to make it clear that marriage is governed by civil law rather than by ecclesiastical law.” *Washington Statewide Organization of Stepparents*, 85 Wn.2d at 569.

Marriage changes the legal relationship between two people. Spouses have a fiduciary duty to each other. *See In re Marriage of Chumbley*, 150 Wn.2d 1, 9, 74 P.3d 129 (2003); *see also* 19 Kenneth W. Weber, *Washington Practice, Family and Community Property Law* § 5.2, at 78 (1997 & Supp. 2004) (extended discussion of fiduciary duty in 2004 supplement) [hereinafter “Weber I”]. Spouses must maintain each other financially. *See Weber I*, § 5.4, at 79-80. The State regulates the financial relationship between spouses, as well as the financial relationship between the marital community and the rest of the world. *See* Chap. 26.16 RCW (Community Property). The State grants spouses a privilege in legal proceedings, RCW 5.60.060(1), inheritance rights, Chap. 11.04 RCW and Chap. 11.28 RCW, and the right to bring wrongful death actions, Chap. 4.20 RCW, as well as many other rights based on the existence of a marriage. The State provides the right to dissolve the marital relationship and distribute the marital assets using a specialized court system. Chap. 26.09 RCW (Dissolution of Marriage – Legal Separation). In fact, over



400 Washington statutes grant rights or impose obligations that depend on marital status.<sup>2</sup>

B. Same-Sex Couples are Harmed in Concrete and Practical Ways by Not Having Access to Marriage and its Associated Rights and Benefits, including the Dissolution Statutes and the Specialized Family Law Court System.

One of the most important benefits that Washington provides to married couples is a prescribed legal mechanism for the end of a relationship. Washington's dissolution statute provides a court with legal authority to address many of the issues that arise at the end of a relationship. *See In re Marriage of Moody*, 137 Wn.2d 979, 987, 976 P.2d 1240 (1999) ("Marriage dissolution is a statutory proceeding and the jurisdiction and authority of the courts is prescribed by the applicable statute, the dissolution of marriage act, RCW 26.09," additional citations omitted).

Under RCW 26.09.030, a resident of Washington, a member of the armed forces stationed in the State, the spouse of a resident of Washington or the spouse of a member of the armed forces stationed in the State may petition for a decree of dissolution. Washington's dissolution statute is a "no fault" statute: the only ground for dissolution is that one spouse believes that the marriage is "irretrievably broken." *See id.* If both parties agree that the marriage is irretrievably broken and to all other matters,

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<sup>2</sup> For more information about the Washington statutes that depend on marital status, see Jamie D. Pedersen, *The RCW Project 2004: An Analysis of the Benefits and Burdens of Marriage Contained in the Revised Code of Washington* (2004), at [http://www.lmaw.org/rcw\\_project.htm](http://www.lmaw.org/rcw_project.htm).

such as property distribution and a parenting plan, the court may enter a decree of dissolution once ninety days have elapsed since the filing and service of the petition for dissolution. *Id.* If the parties do not agree to all issues, Chap. 26.09 RCW sets out detailed procedures for dealing with these issues and allows a court to transfer the matter to family court or refer the couple to counseling. RCW 26.09.030(3)(b). Mediation is also available to resolve issues between the parties. RCW 26.09.015.

While the dissolution is pending, the court may enter temporary orders for matters such as spousal maintenance and child support, use of the family home, maintenance of the financial status quo, debt allocation and a parenting plan. RCW 26.09.060.

RCW 26.09.080 requires a court “without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable....” The statute sets out a non-exclusive list of factors for the court to consider when it makes the property disposition. *Id.* Spousal maintenance is likewise authorized by statute and is awarded “without regard for marital misconduct.” RCW 26.09.090. The court may also, under some circumstances, award attorney fees. RCW 26.09.140. This statutory framework, as interpreted by case law, allows married couples to take advantage of set ground rules and provides a degree of certainty for the distribution of property and other matters associated with their dissolution.

Same-sex couples, because they cannot be married, have no access to the protections and procedures of the state dissolution act, Chap. 26.09 RCW. The difficulties faced by same-sex couples in this matter begin early in the process of dissolving a same-sex relationship. Where RCW 26.09.060 provides a court with a legal mechanism to impose orders related to temporary spousal maintenance, debt allocation pending trial, dissipation of assets and occupation of family home, these normally routine orders may not be available outside of the dissolution proceeding. CP 65. As a result, the more onerous general laws related to temporary restraining orders and preliminary injunctions will instead apply, including a requirement to post security. *See* 21 Kenneth W. Weber, *Washington Practice, Family and Community Property Law* § 57.21, at 354 (1997 & Supp. 2004) [hereinafter “Weber III”]. In practice, this means that many issues will remain unresolved prior to trial, including who will remain in the family home, debt allocation and payment of debts. CP 65. In the case of the right to remain in the family home, “many judges apply traditional contract concepts, often leaving the parties in the home together, despite a volatile break-up situation.” *Id.* This situation “makes a domestic violence allegation particularly ‘useful’ and susceptible to abuse because parties know or have been told that making such an allegation may be the only way to get the other partner out of the house.” *Id.*; *see also* Weber III § 57.21, at 354-55 n.16.

Based on the certainty provided by the dissolution act and its setting within an extensive body of case law, an experienced practitioner

can advise a client about the relative risks and benefits associated with a marital dissolution settlement offer. CP 64. This certainty adds to the effectiveness of alternative processes such as mediation for marital dissolution; on the other hand, this certainty does not exist for the break up of an unmarried couple and this fact significantly undercuts the value of mediation for those couples. CP 66. Another reason that settlement may be more difficult is the inability of a court to award attorney fees in the context of unmarried couple breakups, a fact that may raise the risk of taking unreasonable positions. CP 66-67.

In King County, the timeframe for a trial in a typical contested dissolution action is about one year. CP 64. This is not true for actions to end the relationships of unmarried couples, which are general civil actions with a typical two year time frame (although unmarried partners with children can get an earlier trial date). *Id.* The costs of the dissolution of a same-sex relationship are likely to substantially exceed that of the dissolution of a marriage. *See* CP 64, 67-68 (an estimated \$15,000 to \$20,000 for a contested custody and property distribution case in King County compared to over \$30,000 for a “relatively straightforward” case related to an unmarried couple).

And while dissolution is automatically available to married couples, unmarried couples, including same-sex couples, must face a threshold question of whether and when a meretricious relationship existed before the court may apply the limited remedies set out in Washington’s case law applicable to meretricious relationships. CP 65;

*Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) (applying the meretricious relationship doctrine to a same-sex couple).

Furthermore, even where a meretricious relationship is found to exist, the division of property is more difficult and complex for unmarried couples, thus increasing the costs and complexity of the legal action. CP 65. In *Connell v. Francisco*, this Court approved the application of “a community-property-like presumption” to the property acquired by an unmarried couple during a meretricious relationship. 127 Wn.2d 339, 350, 898 P.2d 831 (1995). However, the Court also held that RCW 26.09.080 is applicable to the property division by analogy only, but that it is not directly applicable. 127 Wn.2d at 349. In addition, a court cannot distribute either party’s separate property. *Id.* at 349-50. Nor is a court authorized to award spousal maintenance or attorney fees. CP 65. The issue is further complicated by evolving case law, which suggests that several additional theories of recovery may apply to property division between unmarried couples, including theories based in the law applicable to partnerships, trusts and joint ventures. *Id.* As a result of these facts, the results of property division in a meretricious relationship are unpredictable and may be quite different than what would be “fair and equitable” in the context of a marital dissolution. *See* CP 67. Moreover, it is not yet entirely settled that the limited protection of Washington’s meretricious relationship law applies to the end of a same-sex couple’s relationship. *Compare Gormley*, 120 Wn. App. at 38 (holding “that the meretricious relationship doctrine should be extended to same-sex couples”), *with*

*Vasquez v. Hawthorne*, 99 Wn. App. 363, 369, 994 P.2d 240 (2000) (holding “that a same-sex relationship cannot be a meretricious relationship because such persons do not have a ‘quasi-marital’ relationship”), *rev’d*, 145 Wn.2d 103, 33 P.2d 735 (2001) (holding only “that trial court erred in resolving this case on summary judgment” and not reaching the issue of whether a relationship between a same-sex couple may constitute a meretricious relationship, although stating in dicta that “[e]quitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties”).

C. Same-Sex Couples are Harmed in Concrete and Practical Ways by Not Having Access to Other Rights and Benefits that Arise as a Result of the Legal Status of Married Couples.

Nine states, including Washington, have community property systems, in which spouses hold much of the property acquired during their marriage in common, with each spouse holding a one-half interest in the community property. *See Black’s Law Dictionary* (7th ed. 1999). Only married couples can possess community property. *See Connell*, 127 Wn.2d at 350 (“When no marriage exists there is, by definition, no community property”).

The community property statutes specifically define the property that is separate. RCW 26.16.010; RCW 26.16.020. The property that remains – everything that is not separate – belongs to the community. RCW 26.16.030. The statutes give each spouse equal authority to manage

and control the community property. *Id.* However, this authority is bounded by an obligation to act in “good faith” and “in the community interest.” See *In re Marriage of Chumbley*, 150 Wn.2d at 9 (additional citations omitted). Furthermore, both spouses are required to participate in some transactions, such as transactions in community real estate or community businesses, gifts of community property and transactions in community household goods. RCW 26.16.030. Moreover, one spouse cannot “devise or bequeath by will more than one-half of the community property.” RCW 26.16.030(1). Finally, in Washington there is a strong presumption in favor of determining property is community property. *In re Marriage of Chumbley*, 150 Wn.2d at 5. The result of Washington’s community property law is the protection of each partner’s investment in the relationship both during and at the end of a marriage.

While Washington courts do apply a “community-property-like” presumption to property acquired during a meretricious relationship, the law in this area is unsettled, particularly with respect to the application of meretricious relationship principles to same-sex couples. See *supra* pp. 8-9 (discussion of property division at the end of a relationship). It is not clear whether a court would apply a similar presumption to the property rights of same-sex couples during the relationship or when one partner dies. See *e.g.*, *Vasquez*, 145 Wn.2d 103.

RCW 5.60.060(1), subject to several exceptions, makes each spouse incompetent to testify against the other. It also protects confidential communications between the spouses during marriage. The

underlying purpose of RCW 5.60.060(1) is to protect the relationship between spouses. *See State v. Burden*, 120 Wn.2d 371, 375, 841 P.2d 758 (1992). Same-sex couples do not enjoy and cannot achieve such protection.

A surviving spouse is a primary beneficiary of the wrongful death statute, RCW 4.20.020. RCW 4.20.020 also limits those who can maintain a wrongful death action to spouses and children (including stepchildren), and in the absence of a spouse or children, the parents and siblings of the deceased person. No other person can maintain a wrongful death action. The surviving spouse may authorize or refuse an autopsy, RCW 68.50.100, RCW 68.50.101, control the disposition of the deceased spouse's body, RCW 68.50.160(3)(a), and has a vested right to be buried with the deceased spouse when space is available. RCW 68.32.020.

Washington provides retirement, pension and other benefits to the spouses of many types of public employees. *See e.g.*, RCW 2.10.140 (surviving spouse of judge receives pension benefits); RCW 28B.10.400(3) (surviving spouse is the default beneficiary of higher education employee's pension unless consents in writing to another beneficiary's designation); RCW 41.05.080(1)(c) (surviving spouses of emergency service personnel killed in the line of duty may participate in state insurance plans and contracts); RCW 41.18.100 (surviving spouse has right to receive firefighter's pension); RCW 41.20.085 (surviving spouse has right to receive police pension). In addition, a surviving spouse of a worker covered by Washington's industrial insurance program



receives that worker's death benefit. RCW 51.32.050(2). Some of these benefits terminate on remarriage. *See e.g.*, RCW 41.18.100; RCW 41.20.085; RCW 51.32.050(2)(c).

In order to protect a family business, the spouse of some franchise or license holders will automatically receive that franchise or license on the death or disability of the holder. For example, RCW 19.120.040 provides that on the death of a gas station franchisee, the franchise passes automatically to a designated successor. The franchisee may select only his or her surviving spouse, an adult child or an adult stepchild as the designated successor. *Id.* In addition, the franchise will pass to the surviving spouse if there is no designated successor. *Id.*

Other statutes allow one spouse to carry on the business activities for his or her deceased or disabled spouse. RCW 48.17.510(1) allows the Insurance Commissioner to issue a temporary insurance agent or broker's license to the spouse of a deceased or disabled licensed agent or broker. RCW 66.24.025(1) allows the Washington Liquor Control Board to transfer a liquor license without charge to the surviving spouse of a deceased license holder.

Some limited license fisheries have provisions for transfer only to immediate family members, including the spouse. *See* RCW 77.70.140 (may transfer whiting-Puget Sound fishing license only to "members of the license holder's immediate family which shall be limited to spouse, children, or stepchildren"). Other licenses may be transferred to family members, including spouses, under special terms. *See* RCW 77.70.150(5)

(may transfer sea urchin dive fishery license to spouse or child without surcharge); RCW 77.70.190(5) (may transfer sea cucumber dive fishery license to spouse or child without surcharge).

Couples in same-sex relationships do not have access to these benefits, rights and obligations that arise as a result of the legal status of married couples. Their property is not community property and the protections inherent in the community property statutes may not apply to them. Same-sex couples cannot assert the spousal privilege provided in RCW 5.60.060(1). A surviving partner in a same-sex relationship cannot assert a wrongful death claim under RCW 4.20.020. The state law provisions that provide retirement, pension and insurance benefit protections to the spouses of public employees do not apply to the same-sex partners of public employees. A surviving same-sex partner cannot recover the death benefit provided under RCW 51.32.050 for a partner covered by the State's industrial insurance program. Some of the state law business, franchise and licensing provisions that operate to protect family businesses will be ineffective in the case of same-sex couples: a family's gas station franchise cannot automatically transfer to a same-sex partner, a same-sex partner cannot receive a temporary insurance agent or broker's license in the event of the death or disability of his or her partner and a family's whiting-Puget Sound license may be lost because the license holder cannot transfer it to a same-sex partner. And while same-sex couples are free to contract between themselves concerning property

rights, a private contract cannot grant a right that the State predicates on marital status.

#### **IV. CONCLUSION**

It is clear that Washington law confers many specific and valuable protections, benefits and obligations on married couples. Because same-sex couples cannot marry they are denied access to the protection and benefits of Washington's laws applicable to married couples, even when they are willing to undertake the obligations associated with marriage. As a result, same-sex couples are harmed in concrete and practical ways by not having access to marriage and its associated rights and benefits. The denial of marriage to same-sex couples cannot be justified under Washington law.

For these reasons, the Family Law Practitioners respectfully request the Court to affirm the decisions below.

DATED this 7th day of February, 2005.

Respectfully submitted,

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