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## **Online Extra: Friends of the Court: Family lawyers and doctors examine marriage case**

**written by: Molly McKay; edited by: Pamela Brown**

"It was so cool," said 13-year-old Gabriel Damast, who served as ring bearer for his two moms when they married in San Francisco. "I always accepted that 'Yeah, they're my moms,' but they were actually getting married. I felt thick inside with happiness."

Professor Joan Hollinger was struck by Gabriel's enthusiasm as she read his quote in a March 2004 *New York Times* article, "For Children of Gays, Marriage Brings Joy."

"The inability of their parents to marry one another leaves a child with a sense of social stigma," stated Hollinger, a leading American scholar on adoption law and practice. "We have long since rejected the use of legal terms like 'illegitimacy,' 'miscegenation' and 'bastard,' but we are now at risk of perpetuating the similarly irrational and harmful system of separate and unequal 'domestic partnership' while barring same-sex couples from marriage."

More than 4,000 same-sex couples were married that year in San Francisco, and this *New York Times* article illustrates that the impact of these ceremonies was not only felt by the couples who were married, but they were also immensely important for the children they are raising.

Twenty-three family law professors, including Professor Hollinger and her two co-authors, Professor Herma Hill Kay and Professor Michael Wald, joined together to file an amicus brief highlighting the importance of civil marriage for all families and their children, and its benefits to all of society.

Marriage Equality USA (MEUSA) is partnering with the *Bay Area Reporter* to highlight each of the 30 amicus "friend of the court" briefs submitted by hundreds of supportive organizations, professional associations, and religious institutions filed before the California Supreme Court in favor of the freedom to marry.

In addition to covering this story on the Family Law Professors' amicus brief, this article includes a summary of the amicus brief written by the American Academy of Matrimonial Lawyers (AAML), including the Northern California Chapter, and California District of the American Academy of Pediatrics (AAP-CA).

Together, these organizations find the consensus that ending the exclusion of marriage for same-sex couples will not only benefit these couples, but the children they raise.

"Michael [Wald] and I thought that perhaps the California Supreme Court would be interested in hearing from California family law professors on this important family law issue," said Herma Hill Kay, the Barbara Nachtrieb Armstrong Professor of Law, formerly dean of the University of California School of Law at Berkeley, and a preeminent family law scholar. "So, we approached every full-time family law professor at every accredited law school in California, and of the twenty-six professors we approached, twenty-three professors signed on to the brief."

"As a lifetime child advocate, the driving force for me in writing this brief was to highlight to the Court the implications that this case has on the well-being of same-sex families and their children," said Michael Wald, Jackson Eli Reynolds Professor of Law Emeritus at Stanford Law School. "There is no substantial equivalency – marriage is the only thing that makes sense."

This Family Law Professor amicus brief points out that California created the legal status of civil marriage because it benefits all of society by encouraging stable family relationships. The brief notes that "for the vast majority of individuals in our society, marriage is probably the single most important social, as well as legal institution. More than 90 percent of Americans rate having a happy marriage as a very important life goal, generally the most important goal in life. . . [n]o other institution provides a comparable opportunity for the personal expression of mutual commitment."

Furthermore, the choice of one's marriage partner has traditionally been a critical aspect of marriage, and for that reason, there are almost no restrictions (e.g., race, color, national origin, religion, income, education, health, fertility, may not be considered). Any restrictions that once existed have been struck down by prior court decisions, except the right to marry a person of the same-sex.

As stated in the Family Law Professors amicus brief, "having created the institution of civil marriage, the State is bound under the Equal Protection Clause of the California Constitution to refrain from unjustifiable discrimination in restricting an individual's choice of partner."

All the authors agreed that children of same-sex couples are harmed by the inability of their parents to marry.

"Making same-sex families and their children real to people is critical to the public education component of moving forward on this issue," said Wald.

Also cited in the March 2004 *New York Times* article was the experience of 11-year-old Alex Morris, who described his mothers getting married.

"The atmosphere was just springing with life. I just couldn't hold myself in. It was oh my god oh my god oh my god. I felt so happy I wanted to scream," said Morris. "It's something I felt I needed to experience. I think people who think it's terrible have no heart whatsoever."

Professor Kay recalls referring her then student, Donna Hitchens, to her former student, Nancy Davis, who was working at Equal Rights Advocates in the mid 1970s. After meeting one another, they became the first couple to have a second parent adoption recognized in California and both later went on to serve as San Francisco Superior Court judges.

"The very idea that this wonderful long-term couple who have made such a valuable contribution to our community could in any way undermine marriage by entering into it together is just unfathomable," said Kay.

The Family Law Professors amicus brief states that the Legislature and courts have already determined that there is no meaningful difference between committed same-sex and opposite-sex couples and have therefore extended recognition and legal protections to their partners and children.

"In California, the Legislature has already found and declared that same-sex and opposite-sex intimate, committed consensual relationships are functionally equivalent with respect to all the purposes that underlie marriage law," said Hollinger. "No Court has approached this issue in a Legislative landscape where this determination has been so clearly established."

So the Family Law Professors amicus brief goes on to question what the Attorney General seeks to preserve through his claim of the need to preserve the "traditional meaning of marriage;" when the only tradition he would be preserving is the exclusion of gay and lesbian couples whom the Legislature and Court have already deemed comparable to opposite sex couples.

As stated in this amicus brief, "by denying same-sex couples the opportunity to marry, the State devalues their unions both symbolically and practically."

In addition, "marriage combines legal privileges and duties with an extralegal, socially understood set of conventions" which impact how couples are treated.

"From a legal, as well as a social, perspective, the surest way to provide same-sex couples with the status and benefits of marriage is to allow to them to marry. Any other approach will necessarily make their legal status subject to a range of uncertainties ... and the State signals their relationships are inferior and less worthy."

"There are thousands and thousands of children (over 70,000) in California being raised by same-sex parents," explains Diana Richmond, a Certified Family Law Specialist. "After 34 years practicing family law and representing these families, I know from experience that denying marriage to same-sex couples creates real harm to these families and domestic partnerships are inadequate. I chaired the AAML's Same-Sex Marriage Committee where we came up with two resolutions supporting the legalization of marriage for same-sex couples. I remember, it was the day after the November 2004 election (where 11 states passed constitutional amendments against marriage equality) when these resolutions were up for a vote by the Committee, and to their credit, the AAML stood in support of both resolutions."

Both the AAML and the AAP-CA have adopted resolutions in favor of civil marriage for same-sex couples.

The AAML/AAP-CA amicus brief states "many family lawyers shy away from representing domestic partners for the reasons that the law is too new, too complex, and too confusing.

"Furthermore, neither the State of California nor the Governor nor the Court of Appeal refers to the welfare of children as part of their justification for marriage. They do not do so because, if they did, they would have to acknowledge that the welfare of children would be served by allowing their parents to marry – and disserved by preserving the existing prohibition."

Richmond hopes that, after having read her brief, the Supreme Court Justices will understand that "their decision will affect thousands and thousands of children being raised by gay couples. I hope they can see the similarity of these children to their own.

"Not only should children of same-sex parents have the same protections as other children, but they should also be able to grow up with the same sense of confidence that their families are equally recognized in society today, instead the sense of injustice that currently exists," added Richmond. "This Court can serve one of the historic highest functions of a high court in reminding everyone that the protections of the Constitution must be upheld, even when it may be unpopular to do so."

Although the Family Law Professors' brief urges the court to eliminate the historic tradition of excluding same-sex couples from marriage, they reaffirm the enduring tradition of "mutual commitment and interdependence of two consenting adults" which remains "critical to our contemporary and ongoing veneration of marriage. Being excluded from this tradition limits the ability of same sex couples to participate fully in the cultural fabric of our society."

The complete amicus briefs for the Family Law Professors and the AAML/AAP-CA can be found via the web: ([Download Lambda Legal PDF here](#)) and here: ([Lambda Legal PDF 2](#))

**Herma Hill Kay** was law clerk to Justice Roger Traynor of the California Supreme Court. She joined the UC School of Law at Berkeley's faculty in 1960 and received the UC Berkeley Distinguished Teaching Award in 1962. Currently, she is the Barbara Nachtrieb Armstrong Professor of Law and formerly served as Dean.

In 1998, Kay was named one of the 50 most influential female lawyers in the country and one of the eight most influential lawyers in Northern California by the National Law Journal. In 2003, the Boalt Hall Alumni Association presented her with its first Faculty Lifetime Achievement Award at the annual Citation Award Dinner. For more information on Kay, [www.law.berkeley.edu](http://www.law.berkeley.edu)

**Joan Heifetz Hollinger** is a leading American scholar on adoption law and practice, as well as on the psychosocial aspects of adoptive family relationships. She is centrally involved in efforts to overhaul the laws governing American and inter-country adoptions, and is an outspoken advocate in the courts and in the media on behalf of children who are at risk of being neglected, abused, or abandoned.

Hollinger is the principal author and editor of the three-volume treatise *Adoption Law and Practice*. Her most recent book is *Families by Law: An Adoption Reader* (NYU, 2004). Since moving to the Bay Area from Ann Arbor, Michigan, she and her Boalt students have served as amicus curiae on behalf of children in a number of precedent-setting adoption and parentage cases in state and federal courts. For more information on Hollinger, go to [www.law.berkeley.edu](http://www.law.berkeley.edu)

The *New York Times* article mentioned by Hollinger can be found [Here](#)

**Michael S. Wald** is devoted to the cause of children's rights and welfare, and a frequent expert adviser on youth and children's legal issues nationwide. Wald has had a distinguished career as an academic researcher and teacher. He is one of the leading national authorities on legal policy towards children, and drafted the American Bar Association's Standards Related to Child Abuse and Neglect, as well as major federal and state legislation regarding child welfare.

Wald has served as deputy general counsel for the U.S. Department of Health and Human Services during the Clinton Administration, executive director of the San Francisco Department of Human Services, and senior adviser to the president of the William and Flora Hewlett Foundation.

He has been a Guggenheim Fellow and is a board member of Legal Services for Children in San

Francisco. He has been a member of the Stanford Law School faculty since 1967. For more information on Wald, go to [www.law.stanford.edu](http://www.law.stanford.edu)

**The American Academy of Matrimonial Lawyers (AAML)** was founded in 1962, by highly regarded domestic relations attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." In 2004, the AAML approved two resolutions: (1) be it resolved that the AAML supports the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all the legal rights and obligations of spouses and children of spouses and (2) be it resolved that the AAML encourage the US Congress and the legislatures of all states to achieve the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all the legal rights and obligations of spouses and children of spouses. There are currently almost 1600 Fellows in 50 states and the **Northern California Chapter** consists of 68 Fellows of the AAML.

For more information on this organization, go to [www.aaml.org](http://www.aaml.org) and for the Northern California Chapter, go to [www.aamlnocal.com](http://www.aamlnocal.com)

In 2007, the **California District of the American Academy of Pediatrics** passed a resolution that "the Academy support[s] legislation that would permit nondiscriminatory, gender neutral civil marriage, as this is the only way that guarantees the equal protection for the safety and security of children being raised by same-gender parents." In California, there are four chapters with over 5,000 board-certified members. Chapter 1 includes all 48 Northern California counties (the dividing line being the southern borders of Monterey, Kings, Tulare and Inyo counties). Chapter 2 includes Kern, Los Angeles, Riverside; San Bernardino, San Luis Obispo, Santa Barbara and Ventura counties. Chapter 3 includes Imperial and San Diego counties; and Chapter 4, Orange County. For more information on each chapter, go to their respective website at [www.aapca1.org](http://www.aapca1.org), [www.aapca2.org](http://www.aapca2.org), [www.aapca3.org](http://www.aapca3.org) or [www.aapca4.org](http://www.aapca4.org)

**Marriage Equality USA (MEUSA)** is a national, non-profit organization created to secure legally recognized civil marriage equality without regard to gender identity or sexual orientation at the federal and state level. For more information, go to [www.marriageequality.org](http://www.marriageequality.org)

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