

**FILED**  
San Francisco County Superior Court

AUG 09 2001

  
GORDON PARK LI  
Clerk

CALIFORNIA SUPERIOR COURT, UNLIMITED JURISDICTION  
CITY AND COUNTY OF SAN FRANCISCO  
LAW AND MOTION DEPARTMENT

SHARON SMITH,

Plaintiff,

vs.

MARJORIE KNOLLER, et al.,

Defendants.

No. 319532

**ORDER OVERRULING  
DEFENDANTS' DEMURRER AND  
DENYING DEFENDANTS' MOTION  
TO STRIKE**

Defendants' (KNOLLER and NOEL) Demurrer to and Motion to Strike Amended Complaint came on for hearing on July 27, 2001, before the Honorable A. James Robertson II. Upon considering the moving, opposing, and *amici curiae* papers, and the arguments raised at the hearing, the court OVERRULES the Demurrer and DENIES the Motion to Strike.

Cal. Code of Civil Procedure sec. 377.60 ("the wrongful death statute") provides that a "surviving spouse" may bring a cause of action for wrongful death. Plaintiff contends that the term "spouse" applies to same-sex couples or at the very least, the word is ambiguous and must be construed in a manner which effectuates the underlying purposes of the wrongful death statute. The court rejects plaintiff's argument as inconsistent with the plain meaning of

**ORDER OVERRULING DEMURRER AND DENYING MOTION TO STRIKE**

1 the word "spouse." See Ballentine's Law Dictionary, 3<sup>rd</sup> Ed., 1969 (defining "spouse" as "[a]  
2 husband or wife"); Cal. Family Code sec. 301 and 308.5; Elden v. Sheldon, (1988) 46 Cal.3d  
3 267; Nieto v. City of Los Angeles, (1982) 138 Cal.App.3d 464 (unmarried heterosexual  
4 cohabitants are not "spouses" under the wrongful death statute). Plaintiff also asserts that  
5 reading the wrongful death statute to exclude her claim denies her equal protection based  
6 upon her sexual orientation in violation of Cal. Const., art. I, sec. 7. The court agrees.<sup>1</sup>

7 This court has the responsibility to construe the legislation in such a manner as to  
8 save its constitutionality. An interpretation of the wrongful death statute which would  
9 exclude such persons as plaintiff would require the court to strike down the statute as a denial  
10 of equal protection of the law; whereas to include her within the term "surviving spouse"  
11 would not, and neither would it be contrary to legislative intent nor policy. See Kopp v. Fair  
12 Pol. Practices Comm., (1995) 11 Cal.4<sup>th</sup> 607, 632-637; Hayes v. Superior Court, (1971) 6  
13 Cal.3d 216, 224 ("In light of the purposes and history of a particular statute or an overall  
14 statutory scheme a reviewing court may correct a discriminatory classification by  
15 invalidating the invidious exemption and thus extending statutory benefits to those whom the  
16 Legislature unconstitutionally excluded.").

17 Under the California Constitution, homosexuals are entitled to equal protection of the  
18 laws. See Gay Law Students Assn. v. Pacific Tel. & Tel. Co., (1979) 24 Cal.3d 458; Citizens  
19 for Responsible Behavior v. Superior Court, (1991) 1 Cal.App.4<sup>th</sup> 1013, 1025. "It is well  
20 established that equal protection of the laws requires only that persons similarly situated  
21 receive like treatment..." Nieto, 138 Cal.App.3d at 469. A statute, which appears facially  
22 valid, may have a discriminatory effect in its application thereby denying equal protection of  
23 the law. See Yick Wo v. Hopkins, (1885) 118 U.S. 356, 373. In addition, courts have not

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<sup>1</sup> Because the court concludes that interpreting the wrongful death statute to exclude homosexuals violates the rational basis test, the court need not decide whether to employ "strict scrutiny," "heightened scrutiny," or "the exacting rational basis test." It is noteworthy, however, that rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution, see Cal. Const., art. I, sec. 24 and Gay Law Students Assn. v. Pacific Tel. & Tel. Co., (1979) 24 Cal.3d 458, 469. Moreover, "the courts of this state traditionally extend strict scrutiny to a broader range of classifications than are so rigorously reviewed under identical provisions of the federal constitution." King v. McMahon, (1986) 185 Cal.App.3d 648, 656.

1 hesitated to strike down an invidious classification even though it had history and tradition on  
2 its side. See Brown v. Board of Education, (1954) 347 U.S. 483; Harper v. Virginia State  
3 Board of Elections, (1966) 383 U.S. 663.

4 In Levy v. Louisiana, (1968) 391 U.S. 68, the United States Supreme Court held that a  
5 Louisiana statute which denied illegitimate as distinguished from legitimate children the right  
6 to sue for the wrongful death of a natural mother created an unlawful classification. Justice  
7 Douglas explained that "[w]hen the child's claim of damage for loss of his mother is in issue,  
8 why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is  
9 illegitimate?" Levy, 391 U.S. at 71. In Labine v. Vincent, (1971) 401 U.S. 532, the court  
10 addressed a Louisiana statute which barred an illegitimate child, who had nevertheless been  
11 acknowledged, from sharing equally with legitimate issue in the father's estate. The high  
12 court held that there was no equal protection violation and distinguished Levy. The Labine  
13 court observed that the statute in Levy created "an insurmountable barrier" to the illegitimate  
14 child's participation while the illegitimate child in Labine encountered no such barrier (she  
15 could have inherited through a will or other means). Labine, 401 U.S. at 539. In Steed v.  
16 Imperial Airlines, (1974) 12 Cal.3d 115, the California Supreme Court held that the  
17 deceased's stepchild, who deceased never adopted, could not recover under the wrongful  
18 death statute as an "heir." The court noted that since the deceased could have adopted the  
19 plaintiff "the Levy-Labine 'insurmountable barrier' test of constitutional denial is thus  
20 satisfied." Steed, 12 Cal.3d at 125.

1 In this case, when one reads the wrongful death statute in conjunction with Cal.  
2 Family Code sec. 308.5 ("Only marriage between a man and a woman is valid or recognized  
3 in California."), there exists an insurmountable barrier to the right of a homosexual to bring  
4 an action for the wrongful death of his or her partner. This barrier is not reasonably related  
5 to any legitimate public purpose.

6 "The purpose behind the wrongful death statute is to provide compensation for the  
7 loss of companionship and other losses resulting from decedent's death." Marks v. Lysteria

1 (1991) 1 Cal.App.4<sup>th</sup> 556. Here, plaintiff's sexuality has no relation to the nature of the  
2 wrong allegedly inflicted upon her and denying recovery would be a windfall for the  
3 tortfeasor. The Legislature reasonably could confine wrongful death recovery to a surviving  
4 spouse to encourage marriage. See Elden, 46 Cal.3d at 274-275; Nieto, 138 Cal.App.3d at  
5 472. However, precluding same sex partners from recovery under the wrongful death statute  
6 does not further the state's interest in promoting marriage because Cal. Family Code sec.  
7 308.5 expressly forbids same sex marriages. Obviously, allowing plaintiff a cause of action  
8 will impose a burden on the court and intrude into plaintiff's private life. The court will need  
9 to inquire into the character of her relationship to determine whether it is sufficiently similar  
10 to the relationship between a husband and wife. Nevertheless, courts (as opposed to insurers  
11 and administrative agencies) are uniquely situated to make such a determination. Indeed,  
12 other sections of the wrongful death statute require a thorough factual analysis. See Cal.  
13 Code of Civil Procedure sec. 377.60(b). Most importantly, administrative ease cannot "be  
14 made into an impenetrable barrier that works to shield otherwise invidious discrimination."  
15 Gomez v. Perez, (1973) 409 U.S. 535, 538.

6 To ascertain whether plaintiff can in fact recover under the wrongful death statute, the  
7 court must make a factually intensive analysis. Such an analysis is not suitable for resolution  
8 on demurrer. Some of the factors which the court should weigh include whether the plaintiff  
9 and decedent are registered domestic partners under Cal. Family code sec. 297 or if not  
0 registered, their relationship otherwise meets the standards set forth in that statute. For  
1 example, the court should examine whether a common residence exists, the degree of  
2 economic cooperation, fidelity, and the stability and duration of the relationship. While such  
3 an inquiry is intrusive, it is plaintiff's decision to bring the action. It would be untenable to  
4 deny plaintiff's claim merely because the court may need to examine her private life.

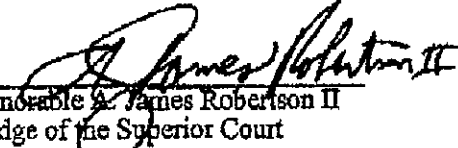
5 In Hinman v. Department of Personnel Admin., (1985) 167 Cal.App.3d 516, the court  
5 held that denying state dental insurance coverage to a cohabitant in a homosexual  
7 relationship did not offend the equal protection clause of the state Constitution. That case is

1 distinguishable, however. First, the cohabitant in Hinman could still obtain dental insurance.  
2 In the instant action, there exists an *insurmountable barrier* to plaintiff's recovery. Second,  
3 Hinman implicated different policy considerations, including the state coffers and a public  
4 service. Here, if the court bars plaintiff's suit, then individual tortfeasors may obtain a  
5 windfall. Third, the right to petition the court to recover for the loss of a loved one because  
6 of the misfeasance of another implicates a right and a loss far distinct from the ability to  
7 receive dental coverage.

8 Reading the wrongful death statute to exclude plaintiff would unduly punish her for  
9 her sexual orientation. Such a reading has no place in our system of government, which has  
10 as one of its basic tenets equal protection for all.

11 Defendants have thirty (30) days from the date of execution of this order to answer.

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15 Dated: August 9, 2001

16 By:   
17 The Honorable A. James Robertson II  
18 Judge of the Superior Court

California Superior Court  
City and County of San Francisco  
Law & Motion Department • Room 302

SHARON SMITH,

Plaintiff,

vs.

MARJORIE KNOLLER, et al.,

Defendants.

No. 319532

Certificate of Service by Mail  
(CCP § 1013a(4))

I, Gordon Park-Li, Clerk of the Superior Court of the City and County of San Francisco, certify that:

1) I am not a party to the within action;

2) On AUG 09 2001, I served the attached:

**ORDER OVERRULING DEMURRER AND DENYING MOTION TO STRIKE**

by placing a copy thereof in a sealed envelope, addressed to the following:

Michael Cardoza, Esq.  
700 Montgomery St.  
San Francisco, CA 94111

Shannon Minter, Esq.  
National Center for Lesbian Rights  
870 Market St., Suite 570  
San Francisco, CA 94102


Robert Noel  
425 7<sup>th</sup> St.  
San Francisco, CA 94086  
and.

Marjorie Knoeller  
425 7<sup>th</sup> St.  
San Francisco, CA 94086

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister St., San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practice.

Dated: AUG 09 2001

GORDON PARK-LI, Clerk

By:   
deputy