January 31, 2002

The Honorable Chief Justice Ronald M. George
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Sharon S. v. Superior Court* (2001) 93 Cal.App.4th 218 [113 Cal.Rptr.2d 107], opn. mod. 2001 Cal.App.LEXIS 2199 (Supreme Court No. S 102671)
Letter Requesting Depublication of Decision (Rule 979)

To the Chief Justice and the Associate Justices of the California Supreme Court:

In accordance with Rule 979 of the California Rules of Court, Lambda Legal Defense and Education Fund respectfully requests depublication of the divided opinion of the Court of Appeal, Fourth Appellate District, in the above-referenced case.

The Court of Appeal's decision, even as modified, should not be published because the decision creates unwarranted confusion in an area of the law that was settled and was serving the needs of California's families well. The decision has inspired alarm in countless California households due to its arguable impact on completed adoptions. Beyond this, the decision has created troubling uncertainty regarding the core questions of whether California's adoption laws are to be construed liberally or strictly, and whether or not California will continue to place paramount focus, in considering a proposed adoption, on whether it will serve the needs of a given child.

Adding even greater force to the need for depublication is the fact that the majority creates all this confusion without providing an adequate rationale that would limit its anomalous analysis to the type of adoption at issue here. Consequently, the decision provides a vexatious basis for calling into question a decade's worth of joint adoptions, kinship adoptions and other types of adoptions granted under Part Two of Division 13 of the Family Code, premised only on a conclusion that the Legislature was insufficiently specific in its approval of a particular family configuration.

California's adoption laws are not meant to be applied so narrowly. (*See* Civil Code §4, applicable here because California's adoption statutes previously were in the Civil Code.) This need for liberal interpretation is even more compelling today because, as the U.S. Supreme Court has observed, "[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." (*Troxel v. Granville* (2000) ___ U.S. ___ [120 S.Ct. 2054, 2059].)

The needs of children likewise vary, calling for flexibility rather than formalism in this area of the law. This Court should eliminate the confusion and distress caused below by depublishing the Court of Appeal's opinion.

I. The Nature of Lambda's Interest

Lambda Legal Defense and Education Fund ("Lambda Legal") is the nation's oldest and largest legal organization working to secure the civil rights of lesbians and gay men. Lambda Legal has appeared as counsel or as *amicus curiae* in scores of cases involving the protection of parent-child bonds in families established by lesbians or gay men. Many of these cases have addressed whether the adoption laws of particular states permit second-parent (also known as limited consent) adoptions. Such adoptions can strengthen families that consist of two parents who have loved and cared for a child since birth, both functioning in every way as parents, but where only one has a recognized legal bond with the child. Children in this situation become more secure when their ties with both parents are legally recognized because both adults then are able to make medical and other important decisions on the children's behalf; both have a legal duty to provide financial support; both can be a source of health insurance, social security, inheritance and other important benefits; determinations of custody and visitation can be made properly if the parents' relationship dissolves; and the death of one parent does not leave the child an orphan.

This letter asks the Court to order depublication to eliminate the important conflicts that the Court of Appeal's decision has created regarding statutory interpretation in adoption cases. But, Lambda Legal also asks the Court to appreciate the real world importance of whether this decision remains as precedent or not for innumerable children and families in California. This state's adoption laws have been interpreted liberally in the past to further California's goal of protecting children. As in many other states, second-parent adoptions have afforded enormous practical and emotional stability for California's children, to the benefit of the state as a whole. These adoptions should not be eliminated based on reasoning that conflicts in so many key respects with settled law, that is irreconcilable with precedent, and that rests on the atypical facts of this case.

II. The Court of Appeal's Decision Should Be Depublished Because It Creates Unwarranted Confusion In An Area Of Law That Was Settled And Was Serving The Needs Of California's Children Admirably.

Lambda Legal believes the Court of Appeal below erred in holding that California's adoption laws do not permit second-parent adoptions and in casting doubt over adoption decrees granted in thousands of cases over the past decade-and-a-half. In reaching this ill-advised conclusion, the Court of Appeal departed from long-settled authority, and created inconsistency in a field that had been operating well. Without any real attempt to reconcile its new approach with this Court's jurisprudence, the majority stripped trial courts of the ability to apply the law flexibly in service of the needs of children, and instead employed a primary focus on the status of would-be parents. Because the decision has created unexplained and unwarranted confusion, and may place a great many families in jeopardy for no good reason, it should be ordered depublished.

A. Despite The Appellate Ruling Below, California Law Has Supported Second-Parent Adoptions For Decades.

As Real Party Annette F. correctly points out, the appellate majority was able to foreclose second-parent adoptions only by ignoring directly relevant precedent. According to the reasoning of this Court, California's adoption laws permit courts to create a second parent-child bond without severing the pre-existing one if the parents so intend and doing so will serve the child's interests. (*Marshall v. Marshall* (1925) 196 Cal. 761 [239 P. 36].) Indeed, placing the child at the center of the inquiry, and construing the statutes liberally to allow adoptions that will benefit individual children, are core principles that create consistency in the governing case law. (*Dept. of Social Welfare v. Superior Court* (1969) 1 Cal.3d 1, 6 [81 Cal.Rptr. 45, 459 P.2d 897]; *Adoption of Barnett* (1960) 54 Cal.2d 370, 377 [6 Cal.Rptr. 563, 354 P.2d 18]; *Reeves v. Bailey* (1975) 53 Cal.App.3d 1019, 1022 [126 Cal.Rptr. 51].)

This approach has been in keeping with the standard rule of construction in California that "[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335 n.7 [283 Cal.Rptr. 893, 813 P.2d 240].) As this Court explained over a century ago:

> "[i]n determining what provisions of the [adoption] law are essential, and therefore mandatory, the statute is to receive a sensible construction, and its intention is to be ascertained, not

> from the literal meaning of any particular word or single section, but from a consideration of the entire statute, its spirit and purpose."

(*In re Johnson's Estate* (1893) 98 Cal. 531, 536 [33 P. 460].) This rule is in full force today. (*Dowling v. Zimmerman* (4th App.Dist. 2001) 85 Cal.App.4th 1400, 1427 [103 Cal.Rptr.2d 174].)

It should not be surprising, then, that trial courts have been considering second-parent adoption petitions on their merits for many years now, and granting them when they serve the needs of children. And, when considering whether or not to apply Family Code Section 8617 in a reflexive manner, these courts have followed *Marshall* and its mandate that the statute be interpreted to avoid absurd results. For certainly it would be absurd to require a birth parent to relinquish her parental relationship when the goal of the adoption was to obtain for the child legally binding relationships with both of the parents who are responsible for her welfare. It likewise would be absurd to read the Family Code to make it impossible for the child's second parent to formalize a relationship that all parties agree is desirable and in the child's best interests.

B. The Majority's Departure From Settled Law Is Not Limited To Second-Parent Adoptions, But Could Affect All Adoptions Of Unmarried Minors.

In order to conclude that second-parent adoptions cannot be approved, the majority construes numerous provisions of Division 13 of the Family Code. It considers definitions found in Part One, and various provisions found in Part Two (which encompasses agency, independent, intercountry and stepparent adoptions). Part Two also contains "general provisions" that apply to all adoptions of unmarried minors, such as the termination of rights provision in Section 8617, as well as Sections 9100-02, pertaining to when orders of adoption of minor children may be set aside or challenged.

1. When is the adoption statute to be applied literally?

As the dissent observes, second-parent adoptions are not the only adoptions that rely on flexible application of the "general provision" regarding automatic termination of parental rights. All these years after *Marshall*'s codification, there still is no explicit exemption from Section 8617 for stepparent adoptions. (Dissent at 5.) The majority does not explain how one is to know when literal application of this section is required, and when not.

2. What about retroactivity?

A similar concern exists with respect to the need for finality of adoption decrees. On the motion for rehearing, the majority refused the entreaties of Real Party and *amici* to impose its holding prospectively only. Instead, the Court of Appeal's modification order leaves the question open in a confusing and threatening manner for adoptive families. The modified opinion's rebuke of second-parent adoptions remains forceful, and the decision seems to leave at least some finalized adoptions (such as ones completed within the past year and thus not yet protected by Section 9102) in plain jeopardy of third party challenges. Those who care about adopted children also must worry that parents wishing to shed duties to children (such as paying child support, providing insurance benefits, sharing an inheritance, or facilitating visitation with a former partner), may seize the opinion below as a weapon for attacking the validity of a final judgment of adoption, even one entered long ago. (*Accord* Dissent at 8.) Although such attacks may be unlikely to succeed, even the possibility of such disputes creates profound anxiety for adoptive parents, as well as the possibility of expensive litigation that will be harmful to the children involved.

3. Has California shifted from individualized inquiries about children to per se exclusions based on parents' marital status or other personal characteristics?

One of the most startling aspects of the Court of Appeal's decision is its failure to pay attention to the best interests of the child. Were California courts to follow this aspect of *Sharon S.*, it would represent a profound shift from previously settled law requiring primary attention to individualized, fact-based determinations of whether a particular parental relationship is beneficial for a particular child. (See generally the cases cited in the Dissent at 4, n. 1; *see also* Section 8612; *Adoption of Baby Girl B.* (App. 4th Dist. 1999) 74 Cal.App.4th 43 [87 Cal.Rptr.2d 569].)

Moreover, Sharon S. takes the view that Annette F. cannot rely on *Marshall* or the other relevant precedents, and that ignoring the child's best interests is appropriate here, due to her and her ex-partner's marital status and sexual orientation. (Answer to Petition for Review, at 22.)[1] Such an approach (which the Majority seems to support at pages 8, 13), would represent

---

[1] *See also* Reply to Opposition to Motion to Dismiss Adoption Petition, Exh. 47, at 4 ("there is no precedent case law in California that allows the adoption statutes to apply to same-sex partners in a homosexual relationship."); Memorandum in Support of Petition for Writ of Mandate and/or Prohibition, at 41 (citing Family Code § 308.5, which concerns recognition of non-California

a clear departure not only from California's established rule requiring individualized, child-focused assessments, but also from long-settled law and policy rejecting per se exclusions of or discrimination against parents or aspiring parents based on these personal characteristics.[2]

This suggestion that marital status and sexual orientation justify a more rigid application of the adoption law is stranger still in light of the fact that all three branches of government in California have expressed approval of adoptions by unmarried lesbian or gay couples, when such an adoption is in the best interests of individual children: the courts have been granting second-parent adoptions for roughly fifteen years; the Department of Social Services has prepared forms to facilitate such adoptions (*see* August 13, 2001 Letter of the Attorney General); and the Legislature expressly ratified the practice by passing AB25.[3]

---

marriages of same-sex couples).

[2] California courts do not base decisions about the legal relationships between parents and their children upon the parents' sexual orientation. *See, e.g., Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [63 Cal.Rptr. 352] (homosexuality not grounds per se to deny primary parent custody of children); *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [243 Cal.Rptr. 287] (fact that father was gay was not grounds for restricting visitation rights). *Accord In re Brian R* (1991) 2 Cal.App.4th 904 [3 Cal.Rptr.2d 768, 774] (lesbian couple was not in any way disqualified by their sexual orientation from adopting the foster child in their care); *see also Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 841 n.8 [279 Cal.Rptr. 212] (citing *Marshall*, 196 Cal. at 766-67, and explaining that "[w]e see nothing in these provisions that would preclude a child from being jointly adopted by someone of the same sex as the natural parent.").

Discrimination based on marital status likewise is inappropriate, as explained in the informational letter of the California Attorney General's Office's to the Court of Appeal. Letter of the California Attorney General to Presiding Justice Kremer (August 13, 2001), at 2, 8-9. The State's position is supported by the plain language of the Family Code. Section 8600 provides that "[a]n unmarried minor may be adopted by an adult." Section 8542 defines "prospective adoptive parent" simply as "a person who intends to file a petition to adopt a child who has been placed in that person's physical care," without any mention of the prospective parent's marital status. In addition, Section 10 states that the singular includes the plural, and vice versa. In other words, the statute similarly permits a single adult, or two unmarried adults, to adopt a child in one proceeding. *See* Dissent at 5, n. 4 and accompanying text.

[3] Highlighting the point still further, Real Party has pointed out that, in 1996, former Governor Pete Wilson proposed a regulation to create a per se ban on adoptions by unmarried couples. Of course, such a ban would have excluded all lesbian and gay couples. Register 96, No. 29 (July 19, 1996) p. 446, *cited in* Real Party's Petition For Review, at 17 n. 2; *see also* Real Party's Petition For

Here again, it is troubling that the majority below neither explains nor states any limiting principles for its conclusion that adults seeking adoption of children can be disfavored or excluded based on personal characteristics that have nothing to do with their individual fitness to raise particular children. The Court of Appeal's decision raises the worrisome question of whether judges are now free to create other per se rules based on parental characteristics or status.

C. There Is A Continuing Need For Second-Parent Adoption, Despite AB25's Authorization Of Stepparent Adoption By Registered Domestic Partners.

Despite passage of AB25, a need for second-parent adoption remains. In appropriate cases, children can benefit from adoption by a functional parent who is not the legal spouse or registered domestic partner of the child's existing legal parent. Adoption by a blood relative – such as an aunt, uncle or grandparent who takes on parental responsibility together with a birth parent who is young, disabled or terminally ill – is a common example. In addition, the California domestic partner registry is available only to same-sex couples. Therefore, unmarried heterosexual couples are unable to pursue adoption under AB25, no matter how beneficial the adoption may be to a particular child.

The domestic partner law also requires that a couple share a common residence in order

---

Rehearing, at 21-25, and Request For Judicial Notice, at Tab 1. That proposal was abandoned after it encountered vigorous public criticism from child welfare advocates and others. A brief survey of the major news coverage reveals the proposal's dismal failure. Reyes, *Adoption Proposal Sparks Sharp Debate; O.C.'s Rev. Lou Sheldon Supports Move To Keep Unmarried Couples From Adopting; Others Attack Measure*, Los Angeles Times (Sept. 6, 1996) section A, page 3; Gross, *Gays, Singles Also Targets Of Adoption Rule; Regulation Would Specifically Exclude Unmarried Couples. After Initial Denials, Wilson Administration Acknowledges Plan Is Part Of Attempt To Influence Social Agenda*, Los Angeles Times (Sept. 8, 1996) section A, page 3; Goldberg, *Adoption Proposal Causes an Uproar*, New York Times (Sept. 30, 1996) section A, page 15, col. 1; Editorial, *Wrongheaded adoption rule; A new rule on adoptions from Gov. Pete Wilson would work against the interests of children who desperately need homes*, Fresno Bee (Oct. 12, 1996) Metro section, page B6; Ellis, *Bitterly Opposed Adoption Rule Died Quiet Death*, Los Angeles Times (Nov. 29, 1998) section A, part 1, page 1.

Many of these articles report the concerns of child welfare advocates that the proposed restriction would limit the already inadequate pool of potential parents for children in need of adoptive homes, including special needs and other hard-to-place children. *Accord* Assoc. Press, *Lesbian Couple Allowed To Adopt Boy With AIDS*, The Record (Nov. 16, 1989) page A28.

to register. Whatever a couple's sexual orientation, a second-parent adoption may be a desirable way to secure the relationship between a child and a functional parent even though the parents are not living together for any number of reasons, such as dissolution of their relationship. Indeed, where the parents' separation has been reasonably amicable, they may appreciate the value to the child of legally securing both important parental relationships as a safeguard that allows the non-birth parent to act on the child's behalf when needed. This may be especially important if the legal parent has a disabling condition, travels extensively or for other reasons wishes the non-legal parent to have physical custody of the child for regular or extended periods. The Court of Appeal's decision therefore also should be ordered depublished in order not to foreclose second-parent adoptions that are in particular children's best interests when stepparent adoption is not available.

III. The Court of Appeal Decision Should Be Depublished Because The Case's Peculiar Facts Make It Inappropriate For Making Substantial Changes To California Adoption Law.

Such dramatic changes in the adoption law of the entire state should not spring from a case with atypical facts, like the present one. In the usual case, adoption petitions are not contested. Generally, in independent adoptions, the legal parent and the aspiring adoptive parent, as well as a disinterested social worker, all agree that the proposed adoption will be in the child's interest. In this unusual case, by contrast, a threshold issue exists: whether the birth mother may withdraw her consent or whether an adoption may be granted over her objection. If she has the legal right to withdraw her consent in this case, there was no reason for the court below to reach the far broader question of whether the statutes permit second-parent adoptions at all. Therefore, unless it was decided that Sharon S. cannot withdraw her consent, the Court of Appeal should have left the broader policy question, which received essentially no briefing nor any argument in the Superior Court, for another day. Depublication will allow California law and practice in this area – which have been meeting the needs of California families for many years – to continue doing so in harmony with Supreme Court precedents, until a future case presents the broader question more appropriately for decision.

IV. Conclusion

For the foregoing reasons, Lambda Legal requests that the decision in *Sharon S.* be ordered depublished, as provided by CRC 979. This Court should issue such a depublication order because the Court of Appeal's decision creates conflict and confusion in a context where security and finality are critical to children's well-being. Depublication is especially warranted here because the Court of Appeal has rushed unnecessarily to terminate the

availability of adoptions that all three branches of government in California have believed, and individual parents continue to believe, are in particular children's best interests, which should continue to be the guide for interpretation and application of California's Family Code in this context.

Respectfully submitted,

Jennifer C. Pizer
SENIOR STAFF ATTORNEY
LAMBDA LEGAL DEFENSE AND EDUCATION FUND