FAMILY LAW NEWS

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Message from the Chair

George N. Seide, Chair

This year, FLEXCOM has been especially busy, with our lobbying of the California Legislature and now preparing the presentation of the Family Law Seminars offered at the State Bar Conference to be held in beautiful Monterey, California. Section Education Chair Staci Simonton, Assistant Chair Christopher Melcher, and Sherry Peterson and Peter Walzer, mentors to the Education Chair, have put together an excellent variety of Family Law programs for the State Bar Conference September 25-28, 2008, for which MCLE credit, as well as legal specialization credit, will be available. FLEXCOM's programs are:

- **Recent Developments in Family Law:** Garrett C. Dailey, Honorable Michael J. Naughton, Christopher C. Melcher, and Lulu L. Wong.

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Message from the Editor

Lynette Berg Robe, Editor

When historical events coalesce, I am always intrigued. For example, what were the odds of John Adams and Thomas Jefferson, those two great statesmen and architects of the Declaration of Independence, both dying on the same day, Independence Day, July 4, 1826, fifty years to the day from the official signing? Perhaps it is just a desperate mind seeking order in the chaos, but I enjoy finding these kinds of connections. So, I was intrigued in May to read of the deaths of two women, Mildred Loving and Zelma Henderson. (I confess also to being an inveterate reader

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Family Law News

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- **Protecting Privacy Interests in Family Law Proceedings: Post-Burke:** Ronald Granberg, Peter Walzer, Comm. Marjorie Slabach, and Staci Simonton.
- **Tips for Preparing Family Law Disclosure Documents After Feldman:** Commissioner John Chemeleski, Charlene Baron, and Lynette Berg Robe.
- **Family Law Mediation: Practice Tips for the Consulting Attorney:** Jessica M. Notini, Katherine Shlaudeman, and Sarah C. Killingsworth.
- **Effective Advocacy in Family Law Motion Practice:** Sherry J. Peterson, Judge Alice Vilardi, and Shane Ford.
- **Law Office Management: Wrapping Up the Family Law Case:** James Preston and Kathleen Robertson.

As always, the 2008 Annual Meeting will have a number of special events, including the annual Fun Run/Power Walk, the art show, the State Bar dinner dance, and special luncheon speakers. The area is perfect for a family trip.

FLEXCOM is excited about a new benefit for section members. Judge Jeffrey Burke of the San Luis Obispo Superior Court prepares a monthly analysis of all family law appellate cases. Commencing in June, his analysis will be distributed by email to all family law section members. Make certain your email address is listed in the section for private CA Bar usage in your address on the State Bar website. We are extremely grateful to Judge Burke for his hard work and generosity.

FLEXCOM members and our Legislative Standing Committees and Regional Committees have worked overtime this spring vetting legislation introduced in the California Legislature. The Standing Committee and the Regional Committee chairs are listed on the inside of the last page of this issue of the *Family Law News*. FLEXCOM members and Standing Committee and Regional Committee Chairs spent a full weekend in March and another full weekend in April discussing legislation affecting the practice of family law. Not only do we submit position letters on each bill to the State Assembly and Senate policy committees, but assigned FLEXCOM members work directly with bill sponsors to create amendments satisfactory to FLEXCOM. FLEXCOM members actually testify, generally in the Judiciary Committees of each house, against legislation FLEXCOM believes will have a negative impact on our practice of family law. Over the past four years, FLEXCOM has been over 80% effective in defeating or securing amendments to legislation which we opposed. Your membership dues help to finance our legislative efforts on behalf of the Family Law Bar.

Our Standing Committees need your help. There are committees that review all legislation and others that limit themselves to particular subject areas: children's issues, financial issues, mediation, adoption, and children's dependency court. FLEXCOM seeks new Standing Committee members to assist us by vetting and providing valuable comments and insight to help the committee form an opinion as to each piece of legislation. Most of the committees have either face-to-face meetings or toll-free conference calls. You may participate, regardless of where you live. Not only attorneys participate. We are fortunate to have the input from psychologists, accountants, and others involved in Family Law. We especially seek those with some experience or expertise in adoptions and dependency court issues. Again, the committee chairs and their contact information are set forth on the inside of the last page.

Finally, your section dues wholly support FLEXCOM. Local Bar Associations are important, but the local association and the State Bar committees serve different functions. So, you need to belong to both. If you are a Family Law Section member, great! If not, please join. The annual cost is roughly equal to one large Starbucks coffee a month. CEB will credit your section dues against one of its live program fees, so your membership essentially will be free, and you gain CLE credit to boot. The Family Law Section also offers other discounts to section members: 30% off ABA publications, 10% off Rutter publications, and more. Check the Section website for details. Invite a firm member or other Family Law attorney to try section membership for a year. They won't be disappointed. See you in Monterey! ■

Message from the Editor

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of obituaries, a form of history.) And, of course, May 15, 2008, also brought the milestone California Supreme Court decision in *In re Marriage Cases* (2008) 43 Cal.4th 757, allowing same-sex couples in California the right to marry. The connections among these three converging events are worth examining.

Mildred Loving, who died on May 7, 2008, was the

brave black woman who, with her white husband, challenged the anti-miscegenation statutes of Virginia and took their case to the U.S. Supreme Court, which held unanimously, 9-0, in 1967 in *Loving v. Virginia (1967)* 388 U.S. 1, that anti-miscegenation laws (laws against interracial marriage) violated both the Equal Protection Clause and the Due Process Clause of the 14th Amendment to the U.S. Constitution. Mildred Jeter and Richard Loving knew when they married in 1958 that Virginia's ban on interracial marriage was longstanding (since 1691), so they went to Washington, D.C., to get married and returned to Virginia to live with Mildred's parents. Word quickly spread to the Commonwealth's Attorney (Virginia's equivalent of District Attorney), who issued an arrest warrant, and, at 2:00 a.m. in the morning, the sheriff and deputies surrounded the Loving's bed and told them to get up and get dressed. They were taken to jail. The Lovings were indicted by a county grand jury for the felony of miscegenation, and they pleaded guilty to violating the 1924 "Racial Integrity Act." They were sentenced to a year in jail, with the sentence being suspended for 25 years on the condition that they leave the state and not return together during that time. Quoted by the Supreme Court, the Virginia trial judge's logic today offends on so many levels, yet at the time sixteen states still had such statutes:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

After their conviction, the Lovings moved to Washington, D.C. and lived there for nine years in exile until the 1967 ruling. The Supreme Court's opinion, written by Chief Justice Earl Warren (former Governor of California, appointed to the court by President Dwight D. Eisenhower), applied for the first time the level of "strict scrutiny," holding that "…racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination." The *Loving* decision also stated:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law…Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

The couple returned to Virginia, and sadly, Richard Loving was killed only a few years later in a car accident in 1975. Mildred never remarried, and died one month before what would have been their 50th anniversary. The 41st anniversary of the *Loving v. Virginia* decision was June 12, 2008. Mildred is survived by eight grandchildren and 11 great-grandchildren.

Zelma Henderson, though less well known than Mildred Loving, was another brave black woman who was the last surviving plaintiff of 13 in *Brown vs. Board of Education of Topeka, Kansas* (1954) 347 U.S. 483, the U.S. Supreme Court case that held that segregation in public schools violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, a rare complete overturning of Supreme Court precedent. The *Brown* court rejected on equal protection grounds the formerly accepted doctrine that racial discrimination in schools was acceptable so long as public school facilities were "separate but equal," the doctrine articulated in the 1896 *Plessey vs. Ferguson*, 163 U.S. 537, decision. Zelma Henderson had been raised in a tiny town in western Kansas, and, as the school was very small, she had experienced racially integrated education as a child. But, when she moved to Topeka and her own children entered school, she found that they were denied the right to that experience. Plus, there were fewer black schools, and, in most cases, the white schools were closer to the black children's homes. Kansas law permitted racially segregated public elementary schools in certain cities based on population. Zelma and the other twelve plaintiffs, one man, the Reverend Oliver Brown, and twelve mothers, were ordinary people, a minister, teachers, secretaries, and students who simply wanted to be treated equally under the law. Each parent had to go to the nearest white public school, seek to enroll his/her children there, and be denied in order to become a plaintiff. There were five cases combined, with a total of 200 plaintiffs, that went to the U.S. Supreme Court in 1952, from South Carolina, Virginia, Delaware, and the District of Columbia, as well as Kansas. The *Oliver Brown vs. Board of Education of Topeka, Kansas*, case was chosen as the lead case, and all were consolidated under that name because Topeka had the *best* conditions of any of the schools. The white school and the black school buildings were identical, the books and supplies were identical, and many of the teachers at the black schools, all of whom were black, had master degrees and Ph.D.'s. (The educational accomplishments of the black

teachers surpassed that of most of the white teachers, ironically, because, based on race, the black teachers could not secure employment at white educational institutions.)

On May 17, 1954, the U.S. Supreme Court, in an opinion also written by Chief Justice Earl Warren (prior to *Loving v. Virginia),* rendered its unanimous nine-zero decision, holding that separate public educational facilities were "inherently" unequal, even if the conditions were identical. Monroe Elementary School, one of the black schools, now has been made into a National Historical Monument. While we all wish that the state of our public schools were better today, no one can deny the impact of *Brown v. Board of Education* on American society. Zelma Henderson stayed in Topeka and raised her family, and she died at 88 in Topeka, Kansas, May 22, 2008, 54 years after the *Brown v. Board of Education* decision. At the funeral, Donald Henderson remembered his mother for being "a great mom." "She was," he said, "a normal woman who didn't seek out a place in history but stepped forward and did something extraordinary when asked."

The *Brown* decision galvanized civil rights struggles across the country and established the precedent for all of the equal protection and due process cases that came after it. It led to decisions like the later *Loving v. Virginia* case, and a year after *Loving*, in 1968, to two Supreme Court decisions heard at the same time that established rights for children "born out of wedlock": *Levy v. Louisiana* (1968) 391 U.S. 68 and *Glona v. American Guar. & Liab. Ins. Co*., 391 U.S. 73 (1968). Both of these cases, decided May 20, 1968, involved "illegitimate" children. Louise Levy had five children born outside of marriage. When she died as a result of a doctor failing to correctly diagnose her with uremia, her children could not sue the physician. Louisiana law specifically blocked a child who was born outside of marriage from filing a lawsuit for the death of a parent. Under Louisiana law, a child born outside of marriage was *fillius nullius*, "the child of no one." In the companion *Glona* case, Minnie Glona was not allowed to sue for recovery for the death of her 19 year-old son, who had been killed in a car accident, because he was born out of wedlock. In both cases, the Supreme Court held that the Louisiana laws violated the Equal Protection Clause and that "illegitimate" children are "persons" under the 14th Amendment and entitled to equal protection of the laws. In the same vein, in 1972, in *Stanley v. Illinois* (1972) 405 U.S. 645, the Supreme Court upheld the rights of unmarried fathers to have a relationship with their children. Joan and Peter Stanley had three children together but never married. Joan died, and Illinois sought to take the children away from their father Peter Stanley because he was not married to their mother. The Supreme Court held on equal protection grounds that "all fathers," not just married ones, had a constitutional right to a relationship with their children and that right could not be taken away without due process of law.

Today, looking back, it is difficult to think that any such laws ever existed in our democracy.

Of course, almost 19 years before *Loving*, and six years before *Brown*, California had its own case overturning California's anti-miscegenation laws in *Perez v. Sharp* (1948) 32 Cal.2d 711, on the grounds of violation of the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution. The case was decided, not on California law, but on federal constitutional law, again, *19 years* before the U.S. Supreme Court acted. In fact, *Perez v. Sharp* was cited in footnote five in the *Loving* decision to be the *first* state to overturn its anti-miscegenation laws and is thought to have been very influential on Chief Justice Warren, who wrote the *Loving* majority opinion. *Perez v. Sharp, supra,* 32 Cal.2d at p. 714, states:

> "Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social object and by reasonable means....No law within the broad areas of state interest may be unreasonably discriminatory or arbitrary."

Further, "Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the law." *Perez v. Sharp, supra*, 32 Cal.2d at p. 715.

Andrea Perez was a young Mexican American woman and Sylvester Davis was a young black man; they met while working in the defense industry in Los Angeles. Their romance was approved by both sets of parents, and marriage was anticipated. Perez and Davis applied for a marriage license with the Los Angeles County Clerk. On the application, Perez listed her race as "White," as that was how persons of Mexican ancestry were classified. Sylvester identified himself as "Negro." The Clerk refused to issue a license because California Civil Code section 60 at that time, discomfiting to quote today, specified: "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void," and section 69 prohibited any license to issue authorizing such a marriage. Perez petitioned the California Supreme Court for an original writ of mandate to compel the issuance of the license by the County Clerk. The court held that both sections 60 and 69 "…violate the equal protection of the law clause of the

United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups," and the peremptory writ was issued. *Perez v. Sharp, supra,* 32 Cal.2d at p. 725.

Chief Justice George, in the majority opinion for the *In re Marriage Cases* (2008) 43 Cal.4th 757 cited *Perez v. Sharp* several times. Chief Justice George noted that the *Perez v. Sharp* opinion discussed the fact that the anti-miscegenation statues had existed since the founding of the State of California. But, making the same historical observation about marriage, Chief Justice George wrote in the *In re Marriage Cases* opinion that "…history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee. The decision in *Perez,* although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." *In re Marriage Cases*, *supra,* 43 Cal.4th at p. 781. In *In re Marriage Cases*, the California Supreme Court held that California's laws limiting marriage to opposite-sex couples violates the constitutional rights of same-sex couples to marry and to equal protection of the laws as guaranteed by the California Constitution. The majority opinion applied the standard of strict scrutiny, as in *Loving v. Virginia,* because it found that "...the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment," and because California's "...differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple." (*In re Marriage Cases, supra,* 43 Cal.4th at p.784.) Further, the majority opinion held that the differential treatment does not serve a compelling state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.

Whether California will lead the nation again in establishing same-sex marriage rights as it did in striking down the anti-miscegenation laws on the grounds of equal protection and due process remains to be seen. The initiative that would amend the California Constitution to limit marriage to opposite-sex couples has qualified for the ballot in November. It is this author's opinion and hope, a personal opinion and not being offered on behalf of either FLEXCOM or the State Bar, that the California Supreme Court's extraordinary, sagacious decision survives that challenge and that it is allowed to stand. It is also this author's hope that California will lead the nation again, along with Massachusetts this time, as it did in *Perez v. Sharp*, even if it takes 19 years, in guaranteeing to all persons the equal protection and due process of the laws, including the right to marry the person of one's choice.

Perhaps one day in the future, too, we will learn (not necessarily by obituary), the stories of these plaintiffs in the *In re Marriage Cases*, who, like Mildred Loving and Zelma Henderson; the Levy children; Minnie Glona; Peter Stanley; and Andrea Perez and Sylvester Davis, were courageous enough to stand up against governmental laws that discriminated against them and who said to their government that it had no right to impose arbitrary restrictions against them because they belong to a "certain class of people"…that they are persons equal under the law and that "separate but equal" is not equal at all.

Introduction to the Articles in this Issue: As the article submissions came in, a number related to child custody issues, so we decided to include them all in one issue as follows:

- Diane Wasnicky has written an informative and helpful article explaining the new Rules of Court concerning Minor's Counsel that went into effect January 1, 2008.
- Angus Strachan, Ph.D., Mary Lund, Ph.D., Judge Robert A. Schneider & Lynette Berg Robe, Esq., provide a retrospective article on Parenting Plan Coordinators after Los Angeles County's revision of its 10 year-old Parenting Plan Coordinator stipulation.
- Sidney J. Brown, a psychologist, and Fern Topas Salka, an attorney and mediator, each write articles about the difficulties of litigants suffering from personality disorders and who tend to be involved in high conflict divorces.
- Wendy Landes, an attorney and mediator and co-chair of FLEXCOM's Alternative Dispute Resolution Standing Committee–South, tells about a program involving adults who were children of divorce and who tell of their experiences.
- Steve R. Liss, a La Jolla Family Law attorney, discusses Adult Adoptions and their uses.
- George N. Seide, FLEXCOM chair, discusses the newly appointed Elkins Task Force. ■