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Associate Justice
United States Supreme Court

Remarks for ABA Family Law Section Lunch
May 5, 2006

I am glad to be with you this afternoon and honored to receive the Family Law Section's award. When Dick Podell extended the invitation, I wondered, why me? After all, I never had a family law practice. Then it dawned on me that members of this Section provide counsel in the area that most closely touches and concerns the people law exists to serve. On reflection, I appreciated that most of the grand constitutional cases I helped to litigate in the 1970s were, in essence, family law matters.

Consider Sally Reed's case, which yielded the turning point 1971 gender discrimination decision, the first time ever that the Supreme Court held a gender-based classification unconstitutional. *Reed* v. *Reed* arose in tragic circumstances. Sally and Cecil Reed, of Boise, Idaho, were parents of a young son when the couple separated, and later divorced. Sally was given custody, for the boy was then "of tender years," and therefore needed a mother's care. But when Richard reached his teens, his father sought custody urging, successfully, that the boy then needed to be prepared to enter a man's world. Richard suffered from deep depression when in his father's care and died from a bullet shot from one of Cecil Reed's many guns. It was an apparent suicide.

Sally, grieving for the loss of her only child, applied to be appointed administrator of her son's miniscule estate. The boy's father applied for the appointment later in time. Though Sally applied first and was fully competent to serve as administrator, Idaho had a statute that settled the matter. It read: As between persons equally entitled to administer a decedent's estate, males must be preferred to females.

Sally fought her case with her own resources, and the aid of local counsel, through three levels of the Idaho court system. I became involved only when she sought review in the U.S. Supreme Court. Her case, like the others in which I served as counsel, spoke volumes about the recourse of every day people to our judicial system. Sally considered her State's law unfair, as the Supreme Court eventually held, a plain denial of the equal protection of the laws. And she had faith that the judicial process would provide redress for her grievance.

The cases following *Reed* also stemmed from the law governing families as it then was. Lt. Frontiero, for example, was the plaintiff in the pathmarking decision, *Frontiero* v. *Richardson*. She complained of federal laws that granted married men in the military a housing allowance and free medical and dental care for their spouses. Married women in the military gained neither of those benefits for their spouses. Stephen Wiesenfeld, whose wife died in childbirth, was denied child-in-care Social Security benefits then available to widowed mothers, but not to widowed fathers. He gained a unanimous judgment in *Weinberger* v. *Wiesenfeld* eliminating the gender-based differential. Even the cases involving exclusion or exemption of women from jury service, *Taylor* v. *Louisiana* and *Duren* v. *Missouri*, involved the prevailing view that women were the center of home and family life, so they could be spared from performing a prime obligation of citizenship. In short, it is no exaggeration to say that the eradication of overt, officially drawn sex-based differentials resulted from cases rooted in family law principles that have since been adjusted to reflect societal changes.

To this day, family law figures prominently on the Court's calendar. The current Term is typical in that regard. I will quickly summarize the cases we have heard since the first Monday in October that bear on family relationships.

We heard two cases involving the Act known as IDEA, which advances a "free appropriate public education" for children with disabilities. One, *Schaffer* v. *Weast*, concerned the burden of persuasion in hearings under the Act. The Court held that the parents bore the burden. In dissent along with Justice Breyer, I expressed the view that "policy considerations, convenience, and fairness" warrant placement of the burden on the school district. Still awaiting decision, *Arlington Central School District* v. *Murphy* presents the question whether IDEA's fee-shifting provision, where the parents prevail, covers not only attorneys' fees, but consultant fees as well.

Two cases decided in January made headlines. One was Justice O'Connor's last opinion for the Court. Titled *Ayotte* v. *Planned Parenthood*, the unanimous decision reaffirmed that, when a medical emergency necessitates immediate action, a State may not insist on parental notification prior to performance of an abortion on a minor. The other, *Gonzales* v. *Oregon*, upheld Oregon's Death with Dignity Act, notwithstanding the Attorney General's ruling that the Oregon Act conflicts with federal law banning distribution and possession of controlled substances.

When police officers arrive at a couple's home, is it enough that one spouse consents to their entry and subsequent search, or, when both husband and wife are on the premises, must both say yes? Dividing 5-3, the Court held in a March decision, *Georgia* v. *Randolph*, that both must consent. Justice Souter, who wrote for the Court, reassured that the decision would not provide shelter for abusive spouses. While a search for evidence requires a warrant, or consent of cohabitants,

police response to a call reporting ongoing domestic violence can and should be immediate. In that situation, no warrant is required and the police, of course, need no permission from the alleged abuser.

Just this week, the Court announced its decision in *Marshall* v. *Marshall*, sometimes known as the Anna Nicole Smith case. Did billionaire J. Howard Marshall intend to provide for his wife of 13 months when he died, or did he want everything to go to his son and heir, Pierce Marshall? That decision was not ours to make. Instead, we faced a "where" question. Did the Texas probate court have exclusive authority over the dispute between Vickie and Pierce, or was there federal jurisdiction owing to Vickie's bankruptcy? The latter, we held, in an opinion that announces tight limits on the so-called "probate exception" to the exercise of federal jurisdiction.

Still awaiting decision, *Dixon* v. *United States* concerns the proof burden for the defense of duress asserted by a woman charged with unlawfully purchasing many guns. She alleged that her abusive, live-in boyfriend threatened to beat and kill her if she did not front for him and his buddies in buying the guns.

Finally, in paired cases still to be decided, *Davis* v. *Washington* and *Hammon* v. *Indiana*, the Court confronts the 6th Amendment Confrontation Clause. In an assault trial against an alleged batterer, may the prosecution introduce the tape of an anguished 911 call for police aid when the caller refuses to testify? Suppose when the police get to the house the fight is over. Nonetheless, they tape an interview with the battered spouse and seek to introduce the tape at the husband's trial. Admissible? You will have the answers to these questions before the Court recesses.

Again, may I express my thanks for the Section's award, and wish all of you the very best in your pursuit of justice for the people you represent and the causes you plead.