

Adoption, foster ruling appealed

Limit to married couples doesn't violate constitution, filings argue

JOHN LYNCH
ARKANSAS DEMOCRAT-GAZETTE

Five months after a Pulaski County Circuit judge struck down a voter-approved ban on allowing unmarried couples to foster or adopt children, an appeal of the ruling began in earnest Tuesday, with state attorneys and lawyers for a conservative Christian group filing arguments with the Arkansas Supreme Court supporting the restrictions.

In April, Judge Chris Piazza found Initiated Act 1 of 2008 violated a right to sexual privacy under the Arkansas Constitution as defined by the high court in a 2002 decision that overturned the state's sodomy laws. Arkansas voters had approved the prohibition, in the 2008 general election, against allowing couples who lived together without being married to adopt or foster children. The act received 57 percent of the vote.

But a coalition of 16 grandparents, parents, unmarried couples and children — some of them homosexual — organized by the American Civil Liberties Union, immediately sued, arguing the law would deprive children of good homes, discriminate against unmarried couples and limit the ability of parents to choose who could adopt their children.

After a 16-month court fight, Piazza ruled in favor of the ACLU group, but narrowly. He threw out 13 of the ACLU's other challenges, finding the law does not contradict the U.S. Constitution and mostly doesn't violate the Arkansas Constitution. His ruling endorsed only one of the ACLU arguments, that the law is a breach of the state Constitution because it restricts adoption and foster applicants based on their sexual relationships.

"Our Arkansas Supreme Court has ruled that there is a fundamental right to privacy in the Arkansas Constitution that protects 'all private consensual noncommercial acts of sexual intimacy between adults,'" Piazza wrote, quoting the 2002

opinion written by now-retired Justice Annabelle Clinton Imber.

The law is invalid, according to Piazza's ruling, because, while it doesn't differentiate between homosexual and heterosexual unmarried cohabitating couples, the ban "significantly burdens nonmarital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage. This infringes upon a fundamental right to privacy guaranteed to all citizens of Arkansas."

Piazza criticized the law as an attempt to marginalize homosexuals, a politically unpopular group, writing that they are due the same protections of law as anyone else.

In challenging Piazza's ruling to the high court, the lawyers for the state attorney general's office argue in Tuesday's filing, among other things, that the measure doesn't violate the constitution because it doesn't force people to give up intimate relationships. ACLU attorneys now have a month to respond to the arguments before the Supreme Court.

"Not a single word of Act 1 even remotely suggests that individuals who have sex, whether with persons of the same or opposite gender, may not adopt or foster children in Arkansas. Act 1 merely prohibits individuals who cohabit with a sexual partner out of wedlock from adopting or fostering children," the brief by assistant attorneys general Joe Cordi and Colin Jorgensen states.

The state attorneys also challenge the contention that the Arkansas Constitution offers a fundamental right for residents to reside unmarried with a sexual partner.

"Neither this court nor the United States Supreme Court has held, or even suggested, that either the United States or Arkansas Constitutions include a fundamental right to cohabit with a sexual partner,"

the brief states.

Piazza's interpretation of the 2002 Supreme Court precedent regarding sodomy is flawed, argues the Arkansas Family Action Committee in a separate filing. Act 1 is about the welfare of children, according to the committee's brief by attorney Martha Adcock.

"The intended beneficiary of adoption is the adopted child, not the adopting adult," the filing states. "What appellees are seeking is not the right to be left alone in their private bedrooms but a public stamp of approval in the form of a child entrusted to them by the state. But just because the state may not ban acts of sexual intimacy does not mean it must provide official recognition and support for people who choose to engage in sexual intimacy through a cohabiting relationship."

The group's brief contends that Piazza's ruling is unenforceable and illegal because it could be used to give unmarried couples living together all the benefits of marriage, which

is defined in the state constitution. The conservative Christian group shepherded the proposal onto the ballot and then helped the attorney general's office defend it in court. The filing calls Piazza's contention that the law was passed to target homosexuals an insult to voters.

"The legislative body that enacted Act 1 was the people of Arkansas, and their motivation — protecting children — was clearly stated," the filing says. "Thus, the circuit court's insinuation that Act 1 was no more than a 'bare desire to harm a politically unpopular group' is an entirely unsubstantiated insult to over half a million Arkansas voters."