

FILED

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
SIXTH DIVISION 2004 DEC 29 PM 1:35

CARDLYN STALEY  
CIRCUIT-COUNTY CLERK

MATTHEW LEE HOWARD, CRAIG STOOPS,  
ANNE SHELLEY, and WILLIAM WAGNER

PLAINTIFFS

VS.

CASE NO. CV 1999-9881

THE CHILD WELFARE AGENCY  
REVIEW BOARD and THE ARKANSAS  
DEPARTMENT OF HUMAN SERVICES

DEFENDANTS

JUDGMENT

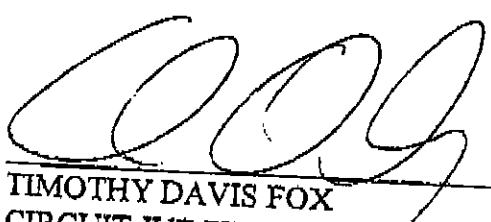
In accordance with the *Memorandum Opinion and Findings of Fact and Conclusions of Law* issued on even date herewith, the court declares that:

1. The Arkansas General Assembly legislatively delegated to the defendant Child Welfare Agency Review Board the authority to promulgate rules and regulations that "promote the health, safety, and welfare of children."
2. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards, promulgated by the defendant Board, is not a rule or regulation that "promotes the health, safety, or welfare of children."
3. Section 200.3.2 of the Minimum Licensing Standards is unconstitutional as being violative of the Separation of Powers Doctrine.

4. Section 200.3.2 of the Minimum Licensing Standards does not violate the Equal Protection provisions of the United States Constitution or the Arkansas Constitution.

5. Section 200.3.2 of the Minimum Licensing Standards does not violate the plaintiffs' constitutional rights to privacy or intimate association under either the United States Constitution or the Arkansas Constitution.

IT IS ACCORDINGLY ADJUDGED AND DECREED THAT Section 200.3.2 of the Minimum Licensing Standards is unconstitutional under the Separation of Powers Doctrine and the defendants are enjoined from enforcement of such regulation.



TIMOTHY DAVIS FOX  
CIRCUIT JUDGE

12/29/04  
DATE

cc: counsel of record

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court issues the following findings of fact and conclusions of law pursuant to Rule 52 of the Arkansas Rules of Civil Procedure:

*FINDINGS OF FACT*

1. Act No. 1041 of 1997, commonly referred to as "The Child Welfare Agency Licensing Act" is codified as A.C.A. §9-28-401, *et seq.*
2. The defendant Child Welfare Agency Review Board was created pursuant to A.C.A. §9-28-403(a)(1).
3. A.C.A. §9-28-402(13) defines "foster home" as follows:

(13) "Foster Home" means a private residence of one (1) or more family members that receives from a child placement agency any minor child who is unattended by a parent or guardian in order to provide care, training, education, custody, or supervision on a twenty-four hour basis, not to include adoptive homes.

4. When the Child Welfare Agency regulations were first promulgated in 1997 there was no provision excluding lesbians, gay men, or persons living with such individuals because the Child Welfare Agency saw no need for such exclusion (*Stipulated Facts*, #6).
5. In 1999, the Child Welfare Agency Review Board enacted section 200.3.2 of the Minimum Licensing Standards, which states:  

No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent (*Stipulated Facts*, #7).
6. The Board's attorney advised the Board that there was no need to enact the exclusionary provision because the preexisting regulations already gave the Board the enforcement power to take care of any concerns and to adequately protect the interests of children (*Stipulated Facts*, #14).
7. Lesbians and gay men are not excluded from adopting children in Arkansas (*Stipulated Facts*, #23).
8. Lesbians and gay applicants seeking to adopt are subjected to the same screening process as every other applicant (*Stipulated Facts*, #25).
9. Prior to 1999, there was no prohibition under any Arkansas law or regulation excluding lesbians or gay men or those living with them from being foster parents (*Stipulated Facts*, #26).
10. The defendants are aware of "homosexuals," as defined, who have served as foster parents in Arkansas (*Stipulated Facts*, #27).
11. The defendants are not aware of any child whose health, safety, and/or welfare has been endangered by the fact that such child's foster parent, or other household member, was "homosexual", as defined. (*Stipulated Facts*, #28).
12. The State has no statistics indicating that gays are more prone to violence than heterosexuals or that gay households are more unhealthy than heterosexual households (*Stipulated Facts*, #30).
13. Based on its foster care statistics the defendants do not know of any reason that lesbians and gay men would be unsuitable to be foster parents (*Stipulated Facts*, #31).

14. The regulations in place prior to enactment of the "homosexual" exclusion ensured that only individuals capable of providing stable, nurturing, safe, healthy homes would be approved to be foster parents (*Stipulated Facts*, #33).
15. The plaintiff, Anne Shelley, is a lesbian, applied to be a foster parent and was advised that she could not be a foster parent because a law was passed prohibiting homosexuals and lesbians from fostering.
16. The plaintiff, William Wagner, has been married for over 30 years and is ineligible to be a foster parent because his adult gay son sometimes lives with Mr. Wagner and his wife.
17. The plaintiff, Matthew Howard, is an ordained minister, is gay, has been with his partner in a sexually monogamous relationship for 19 years, has two children of his own that he is co-parenting with a lesbian couple, and was rejected as a foster parent applicant because he is gay.
18. Section 210.1 of the Minimum Licensing Standards provides that:  
The agency shall select the home that is in the best interest of the child, the least restrictive possible, and is matched to the child's physical and emotional needs. The placement decision shall be based on an individual assessment of the child's needs.
19. Arkansas needs more qualified foster parents.
20. Categorical exclusions eliminate from consideration people who would otherwise be good foster parents.
21. The child welfare system struggles with having a large enough pool of well-qualified foster parents to make good reasonable matches.
22. When the system doesn't have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple foster home placements which are not good for the children.
23. The blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents.
24. Determination of the foster home that is most appropriate for each child should be based on a careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement.
25. The Child Welfare League of America has a standard that says that applicants for foster

parenting should not be denied solely on the basis of age, marital status, income, sexual orientation, race, physical condition, handicap, or location.

26. The National Association of Social Workers has policy statements regarding best practices in the field of social work. One of the policy statements states that barriers to foster parenting that are unsupported by evidence need to be removed, the three examples of unsupported barriers being fostering by single parents, fostering by parents who want to adopt, and fostering by non-traditional families, including gay and lesbian parents.
27. There are four well known predictors of healthy child adjustment: (i) the quality of the child's relationship with the parent primarily responsible for his or her care; (ii) the relationship the child has with another parent figure; (iii) the quality of the relationships between the adults; and (iv) the resources available to the child.
28. The traditional family form is now the minority family form in this country.
29. Being raised by gay parents does not increase the risk of problems in adjustment for children.
30. Being raised by gay parents does not increase the risk of psychological problems for children.
31. Being raised by gay parents does not increase the risk of behavioral problems.
32. Being raised by gay parents does not prevent children from forming healthy relationships with their peers and others.
33. Being raised by gay parents does not cause academic problems.
34. Being raised by gay parents does not cause gender identity problems.
35. Both men and women have the capacity to be good parents and there is nothing about gender, per se, that affects one's ability to be a good parent.
36. There are benefits to children's adjustment in having two parents as opposed to one parent and children in single parent families are more likely to have adjustment difficulties than children in two parent families.
37. Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.
38. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents.
39. There is no factual basis for making the statement that the sexual orientation of a parent or

- foster parent can predict children's adjustment.
40. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment.
  41. There is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.
  42. Homosexuality is not a mental disorder.
  43. Pedophilia is a mental disorder in which an adult is sexually attracted to children.
  44. Pedophilia may be exclusive pedophilia or non-exclusive pedophilia. Exclusive pedophilia refers to situations in which there is no sexual attraction to adults. Non-exclusive pedophilia refers to situations in which there is some degree of attraction to adults but a stronger degree of attraction to children.
  45. Conventional use of the words heterosexual, bisexual, and homosexual only relate to the gender of an age appropriate adult to which the individual is attracted.
  46. There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals.
  47. There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals.
  48. The best predictors for whether a person will meet the criteria for drug or alcohol abuse and/or dependency are age, gender, and employment status.
  49. There are a number of demographic factors correlating with the number of sexual partners of an individual; age and cohort difference, ethnicity, religiosity, and gender being some of the variables.
  50. The determination of relationship durability requires a multi-variable approach, a prediction about relationship stability can't be made using only sexual orientation.
  51. If Regulation section 200.2, subsection 4, which requires every member of a foster family to have a physical exam within 6 months before the initial approval of the foster home, requires HIV testing as part of the routine physical examination, such 6 month physical should adequately test for HIV.
  52. A.C.A. §9-28-409(a)(1)(C) requires that prior to the approval of an individual as a foster

parent, that such individual and any foster parent household member over the age of ten (10) years be checked with the child maltreatment central registry in Arkansas and any state in which such individual has resided for the previous six (6) year period. Such check is to be repeated every two (2) years.


53. A.C.A. §9-28-409(b)(1)(C) requires that prior to the approval of an individual who has lived continuously in Arkansas for six (6) years as a foster parent, that such individual and any foster parent household member over the age of sixteen (16) years, shall be checked with the Arkansas State Police, in accordance with agency policies, for convictions of certain offenses. Such check is to be repeated every five (5) years.
54. A.C.A. §9-28-409(c)(1)(C) requires that prior to the approval of an individual who has not lived continuously in Arkansas for six (6) years as a foster parent, that such individual and any foster parent household member over the age of sixteen (16) years, shall be checked with the Federal Bureau of Investigations, in accordance with agency policies, for convictions of certain offenses.

#### *CONCLUSIONS OF LAW*

1. The State of Arkansas stands *in loco parentis* to foster children in Arkansas.
2. The General Assembly legislatively delegated to the defendant Board the authority to promulgate rules and regulations to "promote the health, safety, and welfare of children."
3. The health, safety, and welfare of foster children are legitimate state interests.
4. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the health of foster children.
5. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the welfare of foster children.
6. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the safety of foster children.
7. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is contrary to the statutory obligation of the defendant Board set forth in A.C.A. §9-28-405(c).

8. Preservation of public morality is a legitimate state interest, either in conjunction with health, safety, and welfare and/or separate and apart from such legitimate state interests.
9. The General Assembly did not legislatively delegate to the defendant Board the authority to promulgate rules and regulations determining issues of "public morality".
10. The General Assembly has not legislatively defined the policy of the State of Arkansas concerning the preservation of "public morality" with respect to foster children and foster parents.
11. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not unconstitutional under a rational basis equal protection analysis because it may be rationally related to the legitimate state interest of preservation of "public morality."

IT IS SO ORDERED.

  
\_\_\_\_\_  
TIMOTHY DAVIS FOX  
CIRCUIT JUDGE

12/29/04  
DATE

cc: counsel of record

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MEMORANDUM OPINION

On March 23, 2004, October 5, 2004, and December 20, 2004, this matter came on for trial. Testimony was taken from plaintiff Matthew Howard, plaintiff Anne Shelley, plaintiff William Wagner, Robin Woodruff, James Balcom, Dr. Cheralyn Powers, Dr. Rebecca Martin, Judith Faust, Dr. Michael Lamb, Dr. Frederick Berlin, Dr. George Rekers, Dr. Susan Cochran, and Dr. Pepper Schwartz. In addition to the testimony and evidence, the parties filed *Stipulated Facts* on March 17, 2004.

*STATEMENT OF THE CASE*

This action is a challenge to an administrative regulation promulgated subsequent to the enactment of Act No. 1041 of 1997. Act No. 1041, commonly referred to as "The Child Welfare Agency Licensing Act," is codified as A.C.A. §9-28-401, *et seq.* A.C.A. §9-28-402 contains the legislative definitions relating to "The Child Welfare Agency Licensing Act." A.C.A. §9-28-402(13)

defines "foster home" as follows:

(13) "Foster Home" means a private residence of one (1) or more family members that receives from a child placement agency any minor child who is unattended by a parent or guardian in order to provide care, training, education, custody, or supervision on a twenty-four hour basis, not to include adoptive homes.

The defendant Child Welfare Agency Review Board was created pursuant to A.C.A. §9-28-403(a)(1). The General Assembly legislatively delegated the authority, pursuant to A.C.A. §9-28-403(a)(2), to the Child Welfare Review Board to "promulgate rules and regulations to enforce the provisions of this subchapter."

In 1999, the Child Welfare Agency Review Board enacted section 200.3.2 of the Minimum Licensing Standards, which states:

No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent.

The *First Amended Complaint* alleges seven causes of action: first, that the subject regulation is outside the scope of the areas of authority granted to the defendant Board; second, that the subject regulation is in violation of the Board's statutory responsibilities; third, the enactment of the subject regulation was violative of the Administrative Procedure Act because there was not substantial evidence before the Board for it to conclude that the subject regulation was within its' statutory authority; fourth, that the subject regulation is violative of the Equal Protection Clause of the United States Constitution and of 42 U.S.C. §1983; fifth, that the subject regulation is violative of the plaintiffs' rights to equal protection under Article 2, sections 2, 3 and 18 of the Arkansas Constitution; sixth, that the subject regulation is violative of the plaintiffs' rights to privacy and

intimate association under the United States Constitution and 42 U.S.C. §1983; and seventh, that the subject regulation is violative of the plaintiffs' rights to privacy and intimate association under the Arkansas Constitution. During the course of the proceedings, the plaintiffs dismissed Count III, the cause of action under the Administrative Procedure Act.

***TESTIMONY - ANNE SHELLEY***

Anne Shelley testified that she is a lesbian, has been in an intimate sexual relationship with a partner since 1999, applied to be a foster parent, and was advised that she could not be a foster parent because a law was passed prohibiting homosexuals and lesbians from fostering.

***TESTIMONY - WILLIAM WAGNER***

William Wagner testified that he was a 50 year old optical lab technician, married for over 30 years with two children, a daughter and a son. He and his wife founded "Fulfill a Dream" when they lived in Fort Smith. After moving to Fayetteville, he and his wife volunteered at "Camp Rainbow," an oncology camp for children with catastrophic illness and cancer and Mr. Wagner was a counselor there for seven years. Over the years Mr. Wagner and his wife have taken care of about eighty children who were not in their legal custody, most for only a day or two. Their son, who is over eighteen, is gay. Some of the children that stayed with the Wagners who were kicked out of their homes were kicked out because of their actual or perceived sexual orientation. One girl that stayed with them was beaten by a log chain because her father perceived her to be a lesbian. The Wagners have never been licensed as foster parents by the State of Arkansas. They called and went through the questionnaire and answered the questions truthfully. When they got to the question "do you have gays or lesbians living in the household?" they answered yes because their son sometimes lives with them.

*TESTIMONY - MATTHEW HOWARD*

Matthew Howard testified that he is forty-four years old and lives in Little Rock. He has a masters degree in theology, two years of seminary, and is an ordained minister with the Fellowship of Metropolitan Community Churches, a denomination that has an outreach primarily to the gay and lesbian community. He works at Easter Seals of Arkansas as a case manager dealing with families who have children with developmental disabilities. Mr. Howard has been together with his partner, a librarian, for 19 years in a sexually monogamous committed relationship. He has two children of his own, three years old and two years old, who he is co-parenting with a lesbian couple. His children are with him a minimum of two and a half days a week and his extended family is very involved with his children. Mr. Howard was interested in becoming a foster parent and was rejected because he was gay.

*TESTIMONY - ROBIN WOODRUFF*

Robin Woodruff testified that she was a member of the Child Welfare Agency Review Board in 1999 when the regulation was passed and that she made the initial proposal for the regulation. Her initial proposal was for a heterosexual married couple qualification for foster care. She noticed in looking through the regulations that there was an absence of an absolute for role modeling and stability as in a home with both a mom and dad. The Board didn't agree with her regulation as originally proposed and a lawyer for the Board advised the Board that it couldn't limit fostering to married couples because it would be inconsistent with state law. Ms. Woodruff stated that she does not object to a celibate gay person who is otherwise qualified from serving as a foster parent, that she believes that same sex relationships are wrong, that homosexual behavior is a sin just like she has issues in her life that are sins, and that homosexuality violates her biblical convictions. She

further testified that she believes that adults who have same sex orientation should remain celibate and that she would not be a proponent of her children spending time with openly gay couples.

*TESTIMONY - JAMES BALCOM*

Mr. James Balcom testified that he has been employed for thirty years at a residential foster care adoption agency and that he was a member of the Child Welfare Agency Review Board. He stated that if there was a determination that the child would be best served in a home with a homosexual individual or homosexual couple that were actively engaged in homosexual conduct that there are provisions in the regulations that would permit placement with such individuals under "alternative compliance." Mr. Balcom stated that there were three components to his decision, scientific evidence, his personal beliefs including his religious beliefs, and societal mores. He also testified that he personally believed that gay relationships are immoral, that people with homosexual orientation should remain celibate, and that he has a moral objection to people being in a household where there is a same sex relationship going on. He stated that the Board had received a position statement from the Child Welfare League of America stating its opposition to restrictions on gay parents; a statement from the National Association of Social Workers opposing restrictions on parenting by gay people; and a position statement from the American Psychological Association opposing restrictions on placements with gay parents. Mr. Balcom believes people choose to be gay, that gay people recruit others to become gay, that gay recruitment is done by "gay militants," and that "gay militants" have people who act as coaches to teach other people how to practice homosexual acts and bring them into the lifestyle. He also believes that the process of gay recruitment is a gradual one like religious proselytizing, and he believes that "militant gays are recruiting in schools in Massachusetts." One of such militant gay organizations active in recruiting in the schools is a

group called "Parents and Friends of Lesbians and Gays," an organization in which the members are not gay but are parents and friends of gay people.

Mr. Balcom also testified that a "gay foster parent might be a good placement for a gay identified teen," depending upon the specific child and that placement could be accessed through alternative compliance. He stated that individual applicants can't utilize the alternative compliance procedure because they have no standing before the Board as an individual. Agencies have to make the request to the Child Welfare Agency Review Board.

*TESTIMONY - DR. CHERALYN POWERS*

Dr. Cheralyn Powers has a Ph.D. in clinical psychology and began working in 1979 with adults and children in general clinical work, therapy, and assessment. She is a past president of the Arkansas Psychological Association and is affiliated with the American Psychological Association. She was authorized by the Arkansas Psychological Association to testify about the proposed regulation before the Child Welfare Agency Review Board. She testified that in matters that are so personal and so emotional that extra care needs to be taken in evaluating the basis for making decisions. She further testified that after conducting a "meta-analysis" of the results of many studies, the conclusions she drew were that:

the sexual orientation of the parents did not negatively affect the development of the child, result in any kind of pathology, was not contraindicated for child health. That, in fact, when studies looked at both heterosexual parents and homosexual parents, the differences were not related. The differences in child development were not related to gender identity of the parents.

Dr. Powers concluded that with regard to good outcomes for the child, differentiating foster parents on the basis of sexual orientation was not a meaningful way to distinguish foster parents.

*TESTIMONY- DR. REBECCA MARTIN*

Dr. Rebecca Martin received her M.D. in 1980 and completed an internship and residency in internal medicine, followed by a fellowship at University of Arkansas Medical School in infectious diseases. She has served as both a teacher and a clinician at the VA and at UAMS. She has treated 350-400 HIV patients over her career, published articles in academic journals, and is a frequent lecturer on HIV. According to Dr. Martin, the latest data on new HIV infections was that 31% of new infections were from men having sex with men, women having sex with women is not generally thought to be a risk. Fifty percent (50%) of the new infections are in people less than 25 years of age with almost half of those being heterosexual transmissions. People of color are disproportionately affected, with African-Americans making up twelve percent (12%) of the population, but over half of the new HIV infections. She further testified that someone who lives in a household with someone who is HIV positive is not at risk unless they are having sexual activity with them. Dr. Martin also testified that with the advent of new treatments starting in 1996 she considers HIV to be a chronic disease and treats it as such, much as she would treat diabetes or heart disease. With respect to agency regulation section 200.2, subsection 4, which requires every member of a foster family to have a physical exam within 6 months before the initial approval of the foster home, if such regulation required HIV testing as part of the routine physical examination then the six month window should adequately test for HIV.

*TESTIMONY- JUDITH FAUST*

Judith Faust received a masters degree in social work in 1971 and has worked in child welfare and was Director of the Division of Children and Family Services in Arkansas from 1991-1993. She is currently employed as a faculty member at the University of Arkansas at Little Rock

School of Social Work, teaching full time in the Masters of Social Work program. Ms. Faust stated that when a child can't stay with his or her family there are a range of placement options such as kinship care, foster-family care, and residential group care with the determination of which type of setting is most appropriate for a particular child being a determination that "needs to be based on careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement." She testified that blanket exclusions of groups of people from fostering really only enter the picture with respect to child abuse and violent crime convictions and that during her career there used to be blanket exclusions for single people, for couples who applied as foster parents but said they wanted to adopt, and it was also common practice to not make trans-racial placements. All of such blanket exclusions have changed. Ms. Faust stated that blanket exclusions don't make sense for two reasons. First, categorical exclusions eliminate from consideration people who would otherwise be good foster parents. Second, the child welfare system struggles with having a large enough pool of well-qualified foster parents to make good reasonable matches. When the system doesn't have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple foster home placements which are not good for the children. She also testified that there are situations in which a gay foster parent might be the "placement of choice." Ms. Faust's opinion was that the importance of individual evaluations of both the needs of the child as well as the strengths of the applicant was a well established principal in the child welfare field and that such principal was at the "heart of all social case work practice and certainly at the heart of child welfare practice." She further testified that the chief professional organization that guides child welfare practice across the country is the Child Welfare League of America (CWLA) and that such organization publishes standards of excellence for foster family