

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT KANSAS CITY

LISA JOHNSTON, )  
 )  
Address: )  
 )  
 )  
Petitioner, )  
 )  
v. )  
 )  
MISSOURI DEPARTMENT OF SOCIAL )  
SERVICES, CHILDREN'S DIVISION, and )  
FRED SIMMENS, in his official capacity as )  
Director, Missouri Department of Social )  
Services, Children's Division, )  
 )  
Address: 221 West High Street, )  
P.O. Box 1527, )  
Jefferson City, MO 65102, )  
 )  
Respondents. )  
 )  
\_\_\_\_\_ )

Case No. \_\_\_\_\_  
Division No. \_\_\_\_\_

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FILED-CIRCUIT COURT  
JACKSON CO. MO-KC  
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PETITION FOR JUDICIAL REVIEW OF  
AGENCY DECISION AND ORDER

Petitioner Lisa Johnston, for her Petition for Judicial Review of Agency Decision and Order, states as follows:

NATURE OF THE ACTION

1. Pursuant to the Missouri Administrative Procedure and Review Act, RSMo § 536.010, et seq., Ms. Johnston petitions for judicial review of the final decision and order of Respondent Missouri Department of Social Services, Children's Division, and Respondent Fred Simmens, in his official capacity as Director, Missouri Department of Social Services, Children's Division, (collectively, "DSS") denying her application for a Missouri foster parent license (copy attached as Exhibit A).

2. DSS denied Ms. Johnston's application for a Missouri foster parent license despite its concession that she and her partner Dawn Roginski have exceptional qualifications to be foster parents. DSS would not have done so but for the fact that Ms. Johnston is in a lesbian relationship.

3. DSS's final decision and order is arbitrary, capricious, and unreasonable; an abuse of discretion; unsupported by substantial and competent evidence upon the whole record; and in violation of state and federal constitutional provisions.

4. Ms. Johnston has exhausted all administrative remedies.

#### JURISDICTION AND VENUE

5. This Court has jurisdiction over Ms. Johnston's claim for relief pursuant to RSMo § 210.526(1) and RSMo § 536.100.

6. Venue in the Circuit Court of Jackson County, Missouri, at Kansas City, is proper pursuant to RSMo § 536.110(3).

#### PARTIES

7. Petitioner Lisa Johnston is a resident of Kansas City, Jackson County, Missouri.

8. Respondent Missouri Department of Social Services, Children's Division (DSS) is the agency authorized to issue Missouri foster parent licenses, pursuant to RSMo § 210.481, et seq.

9. Respondent Fred Simmens is the Director of the Children's Division of the Department of Social Services of the State of Missouri.

## GENERAL ALLEGATIONS

### Lisa Johnston and Dawn Roginski

10. Ms. Johnston is 40 years old.
11. Ms. Johnston holds a bachelor's degree in Human Development and Family from the University of Kansas, with a special emphasis on child development.
12. Ms. Johnston works for KCMC Child Development Corporation, where she consults with child care homes on developmentally appropriate curricula. Prior to joining KCMC, Ms. Johnston worked for The Children's Place, a facility that provides services to children who have been neglected or abused. Among other services, The Children's Place conducts home studies and trains foster parent applicants on behalf of DSS. At The Children's Place, Ms. Johnston worked as a lead teacher, providing supervision and care to infants in the day treatment program. Ms. Johnston has also worked with Head Start, a program that helps underprivileged children prepare to enter school.
13. Ms. Johnston has been in a loving and committed lesbian relationship with her partner Ms. Roginski for over four years. Ms. Johnston and Ms. Roginski have celebrated their union in a commitment ceremony.
14. Ms. Roginski is 39 years old.
15. Ms. Roginski holds a master's degree in counseling from St. Mary's University and a master's degree in divinity from Luther Seminary. She also holds a bachelor's degree in psychology from the University of Minnesota.
16. Ms. Roginski serves as both a therapist and a chaplain at Marillac, a psychiatric treatment center for children and adolescents with emotional and behavioral

disorders. In addition to working with children assigned to Marillac by juvenile courts, Ms. Roginski works with children who have had difficulty with prior foster care placements. Many of these children have been neglected or exposed to drugs. Ms. Roginski has also worked in a domestic violence shelter and, as a result, understands the effects of domestic violence on children.

17. Ms. Johnston and Ms. Roginski are active in their church, which includes as its members both same-sex and opposite-sex couples with children. Ms. Johnston and Ms. Roginski assist with Sunday school classes and church services. Ms. Johnston serves on the church council, and has volunteered for the “Parents Day Out” program, where she provided day care for children of other members of the congregation. Ms. Johnston and Ms. Roginski are close to, and rely on the support of, many fellow church members, as well as the pastor.

18. Ms. Johnston feels a personal calling to help children with developmental challenges. She has pursued this calling in both educational and professional settings and seeks to do so as a foster parent as well. Petitioner Johnson and Ms. Roginski recognize the great need for foster parents who not only have their professional experience caring for children with developmental delays, but who also share their dedication to these children. They believe that a child with developmental challenges would benefit significantly from the love, support, knowledge, and skills that they would bring as caretakers.

#### Application Denial and Administrative Appeal

19. On August 20, 2003, Ms. Johnston completed and submitted an application for a Missouri foster parent license. Ms. Johnston listed Ms. Roginski as a

member of the household. Ms. Johnston expressed interest in fostering children with developmental delays, such as those experienced by children with pre-natal drug exposure. Ms. Johnston also expressed openness to children of any racial, ethnic, or religious background.

20. Thereafter, DSS employee Tricia Rothweiler conducted a home study to ensure that Ms. Johnston and Ms. Roginski's residence satisfied DSS criteria. Ms. Johnston and Ms. Roginski lived in an apartment with a bedroom and a smaller room, in addition to common areas such as a kitchen. Ms. Johnston and Ms. Roginski had converted the smaller room into a nursery with a crib, a changing table, and other items that they had anticipated would be helpful in caring for an infant with developmental needs.

21. Subsequently, Ms. Johnston and Ms. Roginski were invited to attend a training program for prospective foster care parents.

22. Ms. Johnston and Ms. Roginski attended the first seven of nine scheduled classes without incident. Then, on October 8, 2003, Rothweiler and, separately, her supervisor, Theresa Mapel, informed Ms. Johnston that DSS was declining to place any foster child with her. On October 15, 2003, Mapel's supervisor Wendy Austin informed Ms. Johnston that she and Ms. Roginski could no longer attend the training program.

23. In a letter dated October 16, 2003, Austin formally notified Ms. Johnston that DSS was denying her application for a Missouri foster parent license. The letter stated in relevant part as follows: "During the training and assessment process, you informed Children's Division staff that you have had a monogamous relationship with your female partner, Dawn. Missouri case law, as it stands, does not support legal

custody of a child with a lesbian couple. Since all foster homes are potential permanent homes, the juvenile courts under present court ruling, would not be able to assure permanency for a child placed in your home. Your foster/adoptive home license is being denied for the above reason.” The letter reiterated that Ms. Johnston and Ms. Roginski could no longer attend the training program.

24. On October 23, 2003, Ms. Johnston timely noticed an administrative appeal.

25. Administrative proceedings were had before a neutral fact finder, including a hearing on January 27, 2004.

26. During the course of the administrative proceedings, DSS articulated three additional reasons for its denial of Ms. Johnston’s application for a Missouri foster parent license. In addition to its original assertion that lesbian and gay individuals offer no hope of permanent placement on account of Missouri case law precluding lesbian and gay individuals from adopting, DSS asserted that (1) lesbian and gay individuals do not possess reputable character on account of a Missouri statutory provision criminalizing private, consensual, adult, non-commercial same-sex sodomy, (2) foster children placed with lesbian or gay individuals might suffer harm because they might be stigmatized, and (3) foster children placed with lesbian or gay individuals might suffer harm because their biological parents might object to such placement.

27. On March 11, 2005, DSS issued a final decision and order affirming its denial of Ms. Johnston’s application for a Missouri foster parent license.

28. The findings of fact confirm that DSS denied Ms. Johnston’s application for a Missouri foster parent license for the sole reason that she is in a lesbian relationship.

29. The findings of fact confirm that, their lesbian relationship aside, Ms. Johnston and Ms. Roginski have exceptional qualifications to be foster parents, a fact that DSS has conceded all along.

30. Ms. Johnston timely petitions for judicial review of DSS's final decision and order denying her application for a Missouri foster parent license.

31. Ms. Johnston's rights and interests have been directly and substantially prejudiced by DSS's final decision and order.

#### Assignments of Error

32. DSS's denial of Ms. Johnston's application for a Missouri foster parent license on the grounds that lesbian and gay individuals offer no hope of permanent placement on account of Missouri case law precluding adoption by lesbian and gay individuals is arbitrary, capricious, and unreasonable; an abuse of discretion; and unsupported by substantial and competent evidence upon the whole record. There is no Missouri case law precluding adoption by lesbian and gay individuals. To the contrary, the Missouri Supreme Court has held that the sexual orientation of a parent is irrelevant to the determination of the best interests of a child.

33. DSS's denial of Ms. Johnston's application for a Missouri foster parent license on the grounds that lesbian and gay individuals do not possess reputable character on account of a Missouri statutory provision criminalizing private, consensual, adult, non-commercial same-sex sodomy is arbitrary, capricious, and unreasonable; an abuse of discretion; and unsupported by substantial and competent evidence upon the whole record. Any Missouri statutory provision purporting to criminalize private, consensual, adult, non-commercial same-sex sodomy is unconstitutional and otherwise unenforceable

in light of rulings by the United States Supreme Court and the Western Division of the Missouri Court of Appeals.

34. DSS's denial of Ms. Johnston's application for a Missouri foster parent license on the grounds that foster children placed with lesbian or gay individuals might suffer harm because they might be stigmatized is arbitrary, capricious, and unreasonable; an abuse of discretion; unsupported by substantial and competent evidence upon the whole record; and in violation of state and federal constitutional provisions. Such harm is purely speculative in this case. Moreover, the categorical exclusion of lesbian and gay individuals from foster parenting on such grounds is entirely arbitrary. Regardless, as Ms. Johnston argued during the course of the administrative proceedings, the equal protection guarantees afforded by Mo. Const. art. I, § 2, and U.S. Const. amend. XIV, § 1, preclude DSS from giving effect to private biases.

35. DSS's denial of Ms. Johnston's application for a Missouri foster parent license on the grounds that foster children placed with lesbian or gay individuals might suffer harm because their biological parents might object to such placement is arbitrary, capricious, and unreasonable; an abuse of discretion; unsupported by substantial and competent evidence upon the whole record; and in violation of state and federal constitutional provisions. Such harm is purely speculative in this case. Moreover, the categorical exclusion of lesbian and gay individuals from foster parenting on such grounds is both grossly overinclusive and grossly underinclusive and therefore entirely arbitrary. As Ms. Johnston argued during the course of the administrative proceedings, the equal protection guarantees afforded by Mo. Const. art. I, § 2, and U.S. Const. amend.

XIV, § 1, preclude DSS from categorically excluding lesbian and gay individuals from foster parenting under such circumstances.

CLAIM FOR RELIEF

36. Ms. Johnston incorporates by reference paragraphs 1 to 37.

37. DSS denied Ms. Johnston's application for a Missouri foster parent license despite its concession that she and Ms. Roginski have exceptional qualifications to be foster parents. DSS would not have done so but for the fact that Ms. Johnston is in a lesbian relationship.

38. DSS denied Ms. Johnston's application for a Missouri foster parent license in violation of the Missouri Administrative Procedure and Review Act, RSMo § 536.010, et seq., because its final decision and order is arbitrary, capricious, and unreasonable; an abuse of discretion; unsupported by substantial and competent evidence upon the whole record; and in violation of state and federal constitutional provisions.

WHEREFORE Ms. Johnston respectfully prays for the following relief:

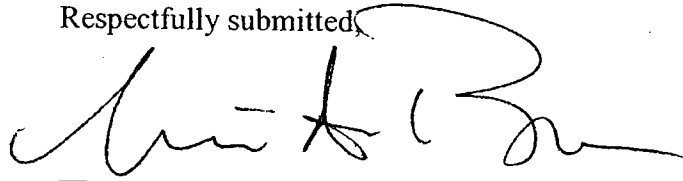
(a) Entry of judgment reversing DSS's final decision and order denying Ms. Johnston's application for a Missouri foster parent license;

(b) Issuance of an order requiring DSS to permit Ms. Johnston and Ms. Roginski to complete the training program for prospective foster care parents and, upon completion of the training program and any remaining requirements, to approve Ms. Johnston's application for a Missouri foster parent license, pursuant to RSMo § 536.140(5);

(c) An award of reasonable fees and expenses, pursuant to RSMo § 536.087;

(d) Such further relief as this Court may deem just and proper.

Respectfully submitted,



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Husch & Eppenberger, LLC  
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Kenneth Y. Choe  
Application for Admission Pro Hac Vice  
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Lesbian and Gay Rights Project  
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New York, NY 10004  
(212) 549-2627  
(212) 549-2650 (facsimile)

Counsel for Petitioner

CERTIFICATE OF SERVICE

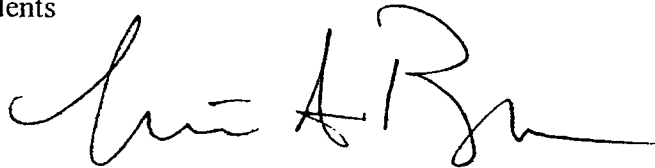
I hereby certify that a copy of the above and foregoing was mailed this 8<sup>th</sup> day of April, 2005, to:

Fred Simmens  
Director  
Children's Division  
Department of Social Services  
State of Missouri  
221 West High Street  
P.O. Box 1527  
Jefferson City, MO 65102

Respondents

G. Patrick Wiederaenders  
Litigation Section  
Division of Legal Services  
Department of Social Services  
State of Missouri  
103 North Main Street, Suite 200  
Independence, MO 64050

Counsel for Respondents



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Lisa A. Brunner

**BEFORE THE  
MISSOURI DEPARTMENT OF SOCIAL SERVICES  
DIRECTOR, CHILDREN'S DIVISION  
DECISION AND ORDER**

**In Re:** Lisa Johnston

)  
) **Hearing No.:** 1640-FHL-FY04KC  
)  
)

**INTRODUCTION AND APPEARANCES**

**Issue Being Appealed:** Lisa Johnston ("Applicant") appealed the determination of the Missouri Children's Division ("the Agency"), which had denied her application for a Foster Home License due to a determination that she was in a monogamous homosexual relationship with a female partner.

**Date of Agency's Action:** October 16, 2003

**Date of Applicant's Request for Hearing:** October 28, 2003

**Date Hearing Request Received:** October 30, 2003

**Date of Hearing:** January 27, 2004 (The hearing was originally scheduled for November 26, 2003, but was rescheduled with the consent of all parties. The hearing record was held open until February 13, 2004 for both parties to submit post-hearing briefs.)

**Location of Hearing:** Clay County Children's Division Office  
Liberty, Missouri

**Hearing Officer:** Thad Taylor, Attorney at Law

**Agency's Representative:** G. Patrick Wiederaenders, Attorney at Law

**Agency's Witnesses:** Wendy Austin, NW Regional Coordinator  
Tricia Rothweiler, Social Services Worker

**Applicant's Representatives:** Colin Stewart, Attorney at Law  
Kenneth Choe, Attorney at Law  
Lisa Brunner, Attorney at Law

**Applicant's Witnesses:** Lisa Johnston and Dawn Roginski

Exh. A

**Based upon the entire record and evidence in this appeal, the Director of the Missouri Children's Division makes the following:**

**SUMMARY OF AGENCY'S EVIDENCE**

The Agency's exhibits consisted of a chronological narrative prepared by Ms. Rothweiler; a Foster/Adopt Home Assessment Application dated August 20, 2003; and a notification letter dated October 16, 2003.

Applicant applied for a Foster Home License on July 28, 2003. She and her roommate both passed background screenings and were initially approved to begin attending STARS training. Upon receiving references and making the home assessment, Ms. Rothweiler determined that Applicant and her roommate were lesbians. Ms. Rothweiler had concerns regarding the relationship and the Agency's policy, and discussed the case with her supervisor, Theresa Maple, at which time it was determined that Applicant would be opted out of the STARS training and her application for a Foster Home License would be denied. On October 16, 2003, a letter was sent from Wendy Austin, NW Regional Coordinator, to Applicant to inform her that her application to be a foster parent was denied. The notification letter stated that "Missouri case law, as it stands, does not support legal custody of a child with a lesbian couple."

Upon cross-examination, Ms. Rothweiler stated that at this time there are no children in Clay county who are in need of foster care and are suffering from the lack of enough licensed foster homes. Ms. Rothweiler stated that although there is not a written policy regarding the policy of not licensing homosexuals, the Agency has a long-standing unwritten policy of not licensing homosexuals. Ms. Rothweiler stated that Applicant's education and professional experience is exceptional and her partner has a lot of experience that could help troubled youth. Ms. Rothweiler testified that she is not required to inquire and investigate sexual orientation when reviewing a foster home license application, but that it is relevant to the inquiry if known. Ms. Rothweiler stated that the reason Applicant's application was denied was because Applicant is a lesbian.

Ms. Austin testified that sexual orientation is relevant to permanency and that the primary consideration is the best interests of the children. Ms. Austin explained that workers are not instructed to inquire about sexual orientation, but if there is a self-disclosure or it is brought to their attention, they are instructed to act on the information. Ms. Austin explained that having homosexual foster parents is not in the best interests of the child because, state law does not allow permanency of children with homosexuals, some birth parents object to having their children fostered by homosexuals, and the children would face stigmatization at school and other adverse affects based on homophobia in the community.

On cross-examination, Ms. Austin stated that to her knowledge, a child had never been removed from a foster home based solely on the foster parent's sexual orientation. Ms.

Austin stated that she learned through experience the Agency's policy to not license homosexuals and that there is no written Agency policy that specifically addresses the issue. The record was held open for the Agency to present a post-hearing brief that has been marked Agency's Exhibit "E".

**Applicant's Objection to testimony outside the scope of the notice provided:**

Applicant objected to the admissibility of Ms. Austin's testimony regarding the reasons for the Agency's rejection because the testimony went outside the scope of the reasons stated in the Notification letter (Exhibit "D") as to why Applicant was opted out of the STARS training and denied a foster home license. The Notification letter stated that Missouri case law did not allow homosexuals as foster parents. Mr. Stewart stated that the only issue in this hearing should be regarding the Agency's interpretation of case law as it applies to placement of foster children with Applicant. The discussion of the birth parents' views regarding placement of a child with a lesbian couple and the discussion of other conflicts that may arise from people in the community were not reasons stated for the Agency's denial of a foster home license. The only issue at the hearing should be whether Missouri case law imposes an obstacle to a lesbian couple receiving a foster home license. For the Agency to suggest that there is some other reason for denying Applicant a foster home license, other than those imposed by Missouri case law, is prejudicial to Applicant because she was not notified of any reason other than case law. Mr. Stewart stated that for the Agency to give effect to private prejudices in its policy would be impermissible and unconstitutional.

This objection is overruled. The Notification letter was sufficient to notify Applicant that her application for a foster home license was denied based on her sexual orientation, which encompassed the Agency's reason for its action, and informed her of her right to an administrative hearing. Any harm caused by the alleged failure to more specifically state the reasons for the Agency's denial of Applicant's foster home license is mitigated by the record being held open after the hearing for the Agency to submit a brief (Agency' Exhibit "E") and for Applicant to submit a response brief (Applicant's Exhibit "2").

**SUMMARY OF APPLICANT'S EVIDENCE**

Mr. Stewart stated that the Agency did not provide any indication of the case law that it is relying to deny Applicant's foster home license. Mr. Stewart stated that there is no Missouri case law to support the Agency's action. Applicant submitted a pre-hearing memorandum of law (Applicant's Exhibit "1").

Ms. Johnston testified that she has a bachelor's degree in Human Development and Family Services, with a special emphasis on childhood development, from the University of Kansas. She currently works for KCMC Child Development Corporation where she consults with child care homes regarding developmentally appropriate curricula. Prior to joining KCMC, Ms. Johnston worked for three years as a lead teacher in a day treatment program at

