

## A BRIEF SUMMARY OF DECISIONS FROM THE ARKANSAS SUPREME COURT AFFECTING GAYS AND LESBIANS

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In Arkansas, the gay and lesbian civil-rights movement has found victories in an unlikely place: the Arkansas judiciary. According to a recent poll, fifty percent of Arkansans believe there should be no legal recognition, including no recognition in the form of a civil union or domestic-partnership rights, of a same-sex couple's relationship.<sup>1</sup> Additionally, Arkansas is one of thirty states with constitutional language defining marriage as the legal union between a man and a woman.<sup>2</sup> Yet, over the last ten years, the Arkansas Supreme Court has handed down opinions protecting same-sex couples' rights.

First, in 2002, the Arkansas Supreme Court issued its opinion in *Jegley v. Picado*,<sup>3</sup> striking down a criminal statute proscribing same-sex sodomy and holding that the state's constitution protected private, consensual, non-commercial acts of sexual intimacy. One year later, in *Taylor v. Taylor*,<sup>4</sup> the court reversed an order modifying custody where that order was based, in part, on the alleged negative perception resulting from the child's mother

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1. Janine A. Parry & Bill Schreckhise, *The Arkansas Poll, 2011 Summary Report*, at 4, <http://www.uark.edu/depts/plscinfo/partners/arkpoll/11/2011%20Arkansas%20Poll%20summary%20report.pdf> (last visited Oct. 26, 2011). That same poll showed that twenty-three percent of Arkansans believe that same-sex couples should be allowed to marry, and twenty percent of Arkansans, while not agreeing that same-sex couples should be allowed to marry, support allowing same-sex couples to form civil unions or domestic partnerships. In comparison, according to an April 2011 CNN poll, fifty-one percent of Americans believe that same-sex marriages should be recognized by the law, with the same rights as traditional marriages. *April 19, 2011 Poll*, CNN Opinion Research Corporation, <http://i2.cdn.turner.com/cnn/2011/images/04/19/rel6h.pdf> (last visited Oct. 26, 2011). A May 2011 Gallup poll put the number supporting same-sex marriage at fifty-three percent. *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup, <http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx> (last visited Oct. 26, 2011).

2. For an overview, see Nat'l Conference of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/default.aspx?tabid=16430> (last visited Oct. 31, 2011). Arkansas passed its amendment barring recognition of same-sex marriages in 2004. See ARK. CONST. amend. LXXXIII § 1.

3. 349 Ark. 600, 80 S.W.3d 332 (2002) ("*Picado II*").

4. 353 Ark. 69, 110 S.W.3d 731 (2003).

allowing a lesbian to live with her. Then, in 2011 (seven years after Arkansas voters approved a marriage amendment), the Arkansas Supreme Court decided *Bethany v. Jones*<sup>5</sup> and allowed a former same-sex partner of a mother to have visitation with her former partner's biological child, whom the couple had originally agreed to raise together. Months later, in the much anticipated decision of *Arkansas Department of Human Services v. Cole*,<sup>6</sup> the Supreme Court struck down a voter-initiated act prohibiting unmarried, cohabiting couples from adopting or fostering children. While the law applied equally to homosexuals and heterosexuals, the transparent objective of the law was to keep gays and lesbians from adopting or fostering children.<sup>7</sup> This article briefly discusses these four cases. In each case, the Arkansas Supreme Court could have come to opposite conclusions. Instead, the court forged a path that gives at least some protection to same-sex couples and their families.

#### I. JEGLEY V. PICADO<sup>8</sup>

*Jegley v. Picado* is a case about sexual freedom, but as evidenced by rulings that followed, it had far-reaching implications. At issue was Arkansas's law criminalizing same-sex sodomy:<sup>9</sup>

- (a) A person commits sodomy if such person performs any act of sexual gratification involving:
  - (1) The penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal; or
  - (2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal.
- (b) Sodomy is a Class A misdemeanor.

As a Class A misdemeanor, a criminal conviction carried a penalty of up to one year in jail and a \$1000 fine.<sup>10</sup> Until 1961, all fifty states outlawed some form of sodomy.<sup>11</sup> By 1986, when the Supreme Court of the United States initially held that there was no federal constitutional right to homosexual sodomy,<sup>12</sup> only twenty-four states plus the District of Columbia con-

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5. 2011 Ark. 67, \_\_\_ S.W.3d \_\_\_\_.

6. 2011 Ark. 145, \_\_\_ S.W.3d \_\_\_\_.

7. See *infra* notes 216–218 and accompanying text.

8. 349 Ark. 600, 80 S.W.3d 332 (2002).

9. ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997).

10. 349 Ark. at 608, 80 S.W.3d at 334 (citing ARK. CODE ANN. §§ 5-4-201, 5-4-401 (Michie Repl. 1997)).

11. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. See *id.* at 190–96.

tinued to provide criminal penalties for sodomy.<sup>13</sup> By the time the matter was before the Arkansas Supreme Court in 2002, twenty-six states plus the District of Columbia had legislatively repealed their sodomy laws.<sup>14</sup> Nine states had invalidated their laws by judicial decision.<sup>15</sup> Six states, including Arkansas, maintained “same-sex” sodomy laws,<sup>16</sup> while nine states plus Puerto Rico had statutes proscribing both “same-sex and opposite-sex” sodomy.<sup>17</sup>

Before the *Picado* court invalidated Arkansas’s sodomy law, there were three attempts to legislatively eliminate the law;<sup>18</sup> none were successful. The judicial effort to eliminate the statute began in January 1998, when seven Arkansans filed a complaint in Pulaski County Chancery Court.<sup>19</sup> (The case was later transferred to the circuit court after the Arkansas Supreme Court held the chancery court lacked jurisdiction to consider the matter.)<sup>20</sup> All plaintiffs alleged that they intended to commit acts that would violate the sodomy statute, and all feared prosecution.<sup>21</sup> They also alleged collateral harms as a result of the sodomy statute, most of which were based on the fact that they intended to do something that would be considered criminal behavior.<sup>22</sup> In addition to specific anti-gay sentiment, which they attributed to the sodomy law, the plaintiffs submitted affidavits showing how the sodomy statute personally affected them. In March 2001, the circuit court found that the sodomy statute violated the rights to privacy and equal

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13. *Id.* at 193–94 (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986)).

14. *Picado II*, 349 Ark. at 625–26 n.4, 80 S.W.3d at 345–46 n.4 (citing legislative acts in Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wyoming).

15. *Id.* (citing cases from Georgia, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, and Tennessee).

16. *Id.* (citing statutes from Arkansas, Kansas, Michigan, Missouri, Oklahoma, and Texas).

17. *Id.* (citing statutes from Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Utah, and Virginia).

18. *See* S.B. 378, 80th Gen. Assemb., Reg. Sess. (Ark. 1995) (replacing the sodomy statute with a statute criminalizing bestiality); S.B. 565, 79th Gen. Assemb., Reg. Sess. (Ark. 1993) (replacing the sodomy statute with a statute criminalizing bestiality); S.B. 125, 78th Gen. Assemb., Reg. Sess. (Ark. 1991) (limiting the definition of sodomy to acts of sexual gratification with an animal).

19. Appellees’ Supplemental Abstract, Brief, & Supplemental Addendum, at SA 1–SA 12, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.2d 332 (2002). (No. 01-815) [hereinafter Appellees’ Brief, *Picado II*].

20. *Bryant v. Picado*, 338 Ark. 227, 232, 996 S.W.2d 17, 19 (1999) (“*Picado I*”).

21. Appellees’ Brief, *Picado II*, *supra* note 19, at SA 2–SA 5.

22. *Id.* at SA 9.

protection under the Arkansas Constitution,<sup>23</sup> and the State appealed to the Arkansas Supreme Court.

The *Picado* plaintiffs' first hurdle was to show that they had standing to litigate the issue. In motions to dismiss and for summary judgment, the State argued that the case presented no justiciable controversy.<sup>24</sup> While the State acknowledged that it had the authority to prosecute violations of the statute, it argued that there had been no prosecution attempted or threatened against these specific plaintiffs.<sup>25</sup> The State noted that there was no reported Arkansas case in the previous seventy years where the state prosecuted someone for engaging in private, consensual, sexual conduct between adults.<sup>26</sup> It also argued that any fear of the collateral harms alleged by the plaintiffs were insufficient to give the plaintiffs standing to challenge the sodomy suit.<sup>27</sup> The State maintained this argument before the state Supreme Court.<sup>28</sup>

The Court accepted the plaintiffs' arguments and held that they had standing to challenge the sodomy law. First, it noted the previous failed attempts to repeal the statute, "sending a signal to prosecutors of the statute's continuing vitality."<sup>29</sup> According to the Court, the State was not disavowing the legitimacy of the statute, as evidenced by its vigorous defense of the statute.<sup>30</sup> More importantly, the Court recognized the implications of the statute and recognized that the statute had been used outside the criminal context.<sup>31</sup> For example, in *Stowe v. Bowlin*,<sup>32</sup> the Arkansas Supreme Court held that the lower court should have allowed the appellant to impeach the appellee's credibility as a witness by referencing the appellee's admitted

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23. Appellants' Supplement Brief & Addendum, at A 278–A 288, *Picado II*, 349 Ark. 600, 80 S.W.2d 332 (No.1-815) [hereinafter Appellant's Brief, *Picado II*].

24. Appellant's Brief, *Picado II*, *supra* note 23, at 1–8.

25. *Id.* at A14–A15.

26. *Id.* at A 15. Though this was not the first time the sodomy statute had been challenged in an Arkansas state court, previous challenges involved public conduct. *See* Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973) (enforcing sodomy statute against an act committed in an automobile parked 120 to 140 yards off the interstate and in an area described as "quite crowded"); Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973) (enforcing sodomy statute against an act committed in an automobile on a public road near Interstate 30 against a minor).

27. Appellant's Brief, *Picado II*, *supra* note 23, at A18–A19 (Supplemental Brief in Support of Defendant's Motion to Dismiss at 9).

28. The circuit court found that the claim was justiciable per the Supreme Court's ruling in *Picado I*. However, the Supreme Court stated that *Picado I* was limited to whether the chancery court had jurisdiction to consider the constitutionality of the statute. *Picado II*, 349 Ark. at 612, 80 S.W.3d at 336–37. Thus, the circuit court reached the right result, but for the wrong reason.

29. *Id.* at 621, 80 S.W.3d at 342.

30. *Id.*, 80 S.W.3d at 342–43.

31. *Id.*, 80 S.W.3d at 343.

32. 259 Ark. 221, 224–25 531 S.W.2d 955, 957–58 (1976).

engagement in sodomy. And in *Thigpen v. Carpenter*,<sup>33</sup> the Arkansas Court of Appeals affirmed the chancellor's consideration of the appellant's homosexuality as a relevant factor in depriving her of the custody of her children. The *Picado II* court concluded:

[W]e cannot say that appellees are without some reason to fear prosecution for violation of the sodomy statute. To hold otherwise would leave appellees trapped in a veritable Catch-22. As long as Arkansas prosecutors exercise their discretion and fail to prosecute those individuals who violate the sodomy statute through consensual, private behavior, appellees and those similarly affected by the statute would have no choice but to suffer the brand of criminal impressed upon them by a potentially unconstitutional law. The discretionary acts of the State's prosecutors could effectively bar shut the courthouse doors and protect the sodomy statute from constitutional challenge. We cannot allow this to happen.<sup>34</sup>

In other words, the court accepted the plaintiffs' fears regarding implications of the statute as sufficient grounds to give them standing to challenge the statute. Because those who would discriminate against homosexuals based on the criminality of their conduct relied so heavily on the sodomy statute, it was very important to homosexuals that the statute be declared unconstitutional.<sup>35</sup>

The *Picado* plaintiffs could not rely on federal precedent, as it existed at that time, to combat the sodomy statute. In *Bowers v. Hardwick*,<sup>36</sup> the Supreme Court of the United States held that there was no constitutional right to commit sodomy, even between consenting adults. There, the petitioner challenged the Georgia sodomy statute, which carried a penalty of up to twenty years' imprisonment.<sup>37</sup> Like the *Picado* plaintiffs, the respondent in *Bowers* claimed that he was a practicing homosexual and that the statute placed him at imminent threat of arrest.<sup>38</sup> The Court of Appeals for the Eleventh Circuit held that the sodomy statute violated the Constitution, stating that the respondent's homosexual activity was a private, intimate activity

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33. 21 Ark. App. 194, 198-99, 730 S.W.2d 510, 513 (1987).

34. *Picado II*, 349 Ark. at 622, 80 S.W.3d at 343 (citations omitted).

35. For example, at a meeting of the Child Welfare Agency Review Board in 1998, a board member in favor of limiting foster placements to households with married heterosexual couples remarked, "The state of Arkansas still has sodomy laws on the books. I am aware this is currently under legal challenge but I agree with the law." Appellees' Brief, *supra* note 19, *Picado II*, at SA 40.

36. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 588 (2003).

37. *Bowers*, 478 U.S. at 188 n.1. Under the Georgia statute, "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *Id.* (quoting Ga. Code Ann. § 16-6-2 (1984)).

38. *Id.* at 188. In fact, the respondent had been charged with committing sodomy, but the District Attorney declined to present the matter to a grand jury. *Id.* at 187-88.

protected by both the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>39</sup> But the Supreme Court disagreed, ruling that previous cases conferring a right to privacy did not extend to homosexual sodomy.<sup>40</sup>

In *Picado*, the State heavily relied on the federal precedent, including *Bowers*, in defense of the sodomy statute. The State conceded that the Arkansas Constitution might encompass a right to privacy more broad than the federal constitution, but it urged the Arkansas Supreme Court to be “reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.”<sup>41</sup> It cited several Federal Court of Appeals decisions evaluating laws affecting homosexual conduct under the “rational basis” standard of review and rejecting the idea that discrimination based on sexual orientation was the same as gender-based discrimination.<sup>42</sup> The State encouraged the Supreme Court to defer the decision to eliminate the statute to the legislature.<sup>43</sup> The *Picado* plaintiffs, however, looked to the Arkansas Constitution and its case law in arguing against the statute’s constitutionality.<sup>44</sup> They also cited decisions from other states (particularly Kentucky, Montana, and Pennsylvania) as well as federal precedent.<sup>45</sup>

In addition to briefs submitted by the parties, the Supreme Court also had before it two *amicus* briefs. The first was from a group that included

39. *Id.* at 189 (citing *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), and noting that the Eleventh Circuit relied on the decisions in *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

40. *Bowers*, 478 U.S. at 190–91.

41. Appellants’ Supplemental Brief, *Picado II*, *supra* note 23, at 10 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

42. Appellants’ Supplemental Brief, *Picado II*, *supra* note 23, at 12–13 (citing *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985)).

43. Appellants’ Supplemental Brief, *Picado II*, *supra* note 23, at 15 (quoting *Carter v. State*, 255 Ark. 225, 230, 500 S.W.2d 368, 371 (1973)) (“If social changes have rendered our sodomy statutes unsuitable to the society in which we now live, we need not be concerned about the matter because there is a branch of our government within whose purview the making of appropriate adjustment and changes peculiarly lies.”).

44. Appellees’ Brief, *Picado II*, *supra* note 19, at 8–10 (relying on ARK. CONST. art. II, §§ 2, 29; *Carroll v. Johnson* 263 Ark. 280, 565 S.W.2d 10 (1978); *Coker v. City of Ft. Smith*, 162 Ark. 567, 258 S.W. 388 (1924); *Ex parte Martin*, 13 Ark. 198 (1853)).

45. Appellee’s Brief, *Picado II*, *supra* note 19, at 10–14.

religious leaders, congregations, and legal scholars.<sup>46</sup> The group wrote that there was expanding conviction in both religious and scholarly communities “that the question of the morality of such conduct is a matter of private, not public, concern, and that vital constitutional principles compel that the conduct be decriminalized.”<sup>47</sup> The religious and law scholar *amici* rejected “public morality” as a justification for an invasion of privacy or a disparate treatment of gays and lesbians, and they noted opposition in the religious community to criminalizing the prohibited conduct.<sup>48</sup> For example, they heavily quoted remarks from the United Presbyterian Church (U.S.A.):

There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence. Society does have a legitimate role in regulating some sexual conduct, for criminal law properly functions to preserve public order and decency and to protect citizens from public offense, personal injury, and exploitation. Thus, criminal law properly prohibits homosexual and heterosexual acts that involve rape, coercion, and corruption of minors, mercenary exploitation, or public display. *However, homosexual and heterosexual acts in private between consenting adults involve none of these legitimate interests of society. Sexual conduct in private is a matter of private morality to be instructed by religious precept or ethical example and persuasion, rather than by legal coercion.*<sup>49</sup>

The religious and law scholar *amici* also quoted favorably from the American Lutheran Church, the Reformed Church in America, the Disciples of Christ, the American Jewish Congress, the Union of American Hebrew Congregations, the National Federation of Priests' Councils (part of the Roman Catholic Church), the Council for Christian Social Action of the United Church of Christ, the Protestant Episcopal Church, and the Unitarian Universalists Association.<sup>50</sup>

The second group of *amici* represented the fields of psychology and sociology.<sup>51</sup> According to this group, the sodomy statute stigmatized homosexuals, reinforced harmful prejudices against them, interfered with efforts to deter criminal conduct against them, and undermined public health goals

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46. Brief for The National Conference for Community Justice, et al as Amici Curiae Supporting Respondents, *Jegly v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) (No. 01-815), [hereinafter Religious and Law Scholar Amici Brief, *Picado II*].

47. *Id.*, at 1–2.

48. *Id.*

49. *Id.* at 6 (quoting Minutes of the 190th Gen. Assemb., United Presbyterian Church (U.S.A.) at 265 (1978)) (emphasis added in original).

50. Religious and Law Scholar Amici Brief, *Picado II*, *supra* note 46, at 6–12.

51. The American Psychological Association, et al., as Amici Curiae Supporting Appellees, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) (No. 01-815) [hereinafter Psychological/Sociological Associations Amici, *Picado II*].

such as combating the spread of AIDS.<sup>52</sup> It noted that a large number of people, homosexual and heterosexual, engaged in oral and anal sex<sup>53</sup> (though the statute in question only prohibited homosexual conduct). The psychology and sociology *amici* also contended that sexual conduct was an important part of long-term intimate relationships for many same-sex couples.<sup>54</sup>

In the end, the Arkansas Supreme Court agreed with the *Picado* plaintiffs and the *amici*. First, it held that sodomy law, as applied,<sup>55</sup> violated an Arkansan's right to privacy. The court observed that, despite the *Bowers* decision, other states had relied on their own state constitutions when determining the constitutionality of their respective sodomy/homosexual conduct statutes.<sup>56</sup> After analyzing constitutional provisions, legislative acts, and procedural rules that touch on the right to privacy, the Supreme Court held that the right to privacy encompassed in the Arkansas Constitution protected all private, consensual, noncommercial acts of sexual intimacy between adults.<sup>57</sup> Because the sodomy law infringed on that right, according to the court, the law was subject to strict-scrutiny review.<sup>58</sup> In other words, the statute could only survive if the statute was the least restrictive method available to carry out a compelling state interest.<sup>59</sup> The State could not offer a compelling interest to justify the sodomy statute; therefore, the statute was declared unconstitutional "as applied to private, consensual, noncommercial, same-sex sodomy."<sup>60</sup>

Ordinarily, this should have been the end of the court's discussion of the sodomy statute, as a statute need only violate one provision of the con-

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52. *Id.* at 2.

53. *Id.* at 3–4. Specifically, the *amici* cited a survey showing that seventy-seven percent of adult men and sixty-eight percent of adult women had performed oral sex on a partner, while seventy-nine percent of adult men and seventy-three percent of adult women had received oral sex. *Id.* at 3 (citing E. Laumann, et al., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (H. Chicago Press 1994)). They also wrote that twenty-five percent of American adults had engaged in heterosexual anal intercourse. *Id.* at 4 (citing S.N. Seidman & R.O. Reider, *A Review of Sexual Behavior in the United States*, 151 *AM. J. PSYCHIATRY* 330 (1994)).

54. Psychological/Sociological Associations Amici, *Picado II*, *supra* note 51, at 4–15.

55. The sodomy statute also criminalized certain acts with an animal. There was no challenge to that portion of the statute. Accordingly, there was no argument that the statute could never be constitutionally applied. *See Picado II*, 349 Ark. at 632, 80 S.W.3d at 350.

56. *Id.* at 625–26, 80 S.W.3d at 345–46 (citing *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

57. *Picado II*, 349 Ark. at 627–32, 80 S.W.3d at 346–50.

58. *Id.* at 632, 80 S.W.3d at 350.

59. *Id.*, 80 S.W.3d at 350.

60. *Id.*, 80 S.W.3d at 350.



stitution to be unconstitutional.<sup>61</sup> But the Arkansas Supreme Court also addressed the plaintiffs' equal-protection arguments as well. The court stated that homosexuals did not constitute a protected class for equal-protection purposes, but they were a separate and identifiable class for the purposes of an equal-protection analysis.<sup>62</sup> Because the statute distinguished between two groups of people, it had to be rationally related to a legitimate government purpose.<sup>63</sup> Again, the Arkansas Supreme Court borrowed liberally from decisions from other states and rejected the idea that the legislature could punish same-sex sodomy while permitting the same conduct by those of the opposite sex.<sup>64</sup> Without a rational basis for the law, the statute violated Arkansas's Equal Rights Amendment.

The immediate effect of the court's opinion was "not only to invalidate the application of the sodomy statute as the basis of a crime between consenting adults but also to end the practice of using the excuse of sodomy laws as a means of denying homosexual litigants their equality before the law in other matters."<sup>65</sup> The opinion, however, had a more far-reaching effect. Much of the legal commentary about *Picado II* was devoted to how the case promoted an independent state constitutional jurisprudence. It was one of three cases handed down in 2002 where the Supreme Court interpreted the Arkansas Constitution to provide greater protections than its federal counterpart.<sup>66</sup> In 2004, the Arkansas Supreme Court would depart from federal precedent again and hold that a request to search one's home must include an admonition that the homeowner has the right to decline consent to

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61. See *infra* note 206 and accompanying text (observing that, because the law banning cohabiting, nonmarried persons from adopting or fostering children violated the fundamental right to privacy, the court needed not consider other grounds for striking down the statute).

62. *Picado II*, 349 Ark. at 634, 80 S.W.3d at 351.

63. *Id.*, 80 S.W.3d at 351.

64. *Id.* at 636–38, 80 S.W.3d at 353–54.

65. Steve Sheppard, *Arkansas I, Texas 0: Sodomy Law Reform and the Arkansas Law*, 2003 ARK. L. NOTES 87, 98 (2003).

66. Ka Tina R. Hodge, *Arkansas's Entry into the Not-So-New Judicial Federalism*, 25 U. ARK. LITTLE ROCK L. REV. 835, 851–56 (2003). Also included in the discussion were *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), *rev'd and remanded*, 532 U.S. 769 (2001) (per curiam), *aff'd*, 348 Ark. 647, 74 S.W.3d 215 (2002) (rejecting *Whren v. United States*, 517 U.S. 806 (1996), and holding that the Arkansas Constitution protected citizens against pretextual arrests); and *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002) (explicitly relying on state law to interpret the validity of the "knock and talk" procedure). See also Robert L. Brown, *Expanded Rights Though State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499, 515–17 (2002) (also discussing the three cases); Bonnie Johnson, Note, *Constitutional Law—Privacy and Equal Protection—Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians*, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), 25 U. ARK. LITTLE ROCK L. REV. 681, 687–91 (2003) (discussing *Picado II* specifically).

the search.<sup>67</sup> And in 2009, one commentator opined that the Arkansas Supreme Court had become “comfortable using the Arkansas Constitution [rather than the federal constitution or a combination of the two] as an independent and sufficient basis to protect individual rights.”<sup>68</sup>

While *Picado II* was pending, a case challenging Texas’s sodomy law was working its way through the courts. The *Picado II* plaintiffs had actually used a news report of the Texas case as evidence of an imminent threat that they could be arrested and prosecuted under the Arkansas law.<sup>69</sup> The case reached the Supreme Court of the United States, which revisited its decision in *Bowers*.<sup>70</sup> By this time, the statute at issue in *Bowers* had been declared unconstitutional on state grounds.<sup>71</sup> Other states, including Arkansas, had followed suit.<sup>72</sup> The Supreme Court ultimately held that *Bowers* was wrongly decided and that the Due Process Clauses of the Fifth and Fourteenth Amendments protected private, consensual, sexual activity.<sup>73</sup> Thus, one could argue that the Arkansas statute was destined to fall. Even so, the Arkansas Supreme Court’s use of the Arkansas Constitution to derive the right protected in *Picado* would play a major role in future cases. Thus, *Picado* is an important (if not necessary) part of Arkansas constitutional jurisprudence.

## II. TAYLOR V. TAYLOR<sup>74</sup>

Before *Taylor v. Taylor*, the Arkansas appellate courts had only a small number of judicial opinions on the role sexual orientation plays on child-custody determinations. While *Taylor* does not necessarily preclude consideration of a parent’s sexual orientation in a child-custody decision, it at least

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67. State v. Brown, 356 Ark. 460, 474, 156 S.W.3d 722, 732 (2004).

68. Jerald A. Sharum, *Arkansas’s Tradition of Popular Constitutional Activism and the Ascendancy of the Arkansas Supreme Court*, 32 U. ARK. LITTLE ROCK L. REV. 33, 83 (2009).

69. See Appellees’ Brief, *Picado II*, at SA 69–70 (No. 01-815) (a copy of Brenda Rodriguez, *State Court Throws Out Sodomy Law Ban had Covered Only Same-Sex Acts; Harris County Plans to Appeal Ruling*, DALLAS MORNING NEWS, June 9, 2000, [http://archive.dallasnews.com/cgi-bin/di\\_ning%2bNews%2bpublishingDocID%3d41](http://archive.dallasnews.com/cgi-bin/di_ning%2bNews%2bpublishingDocID%3d41)).

70. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

71. See *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998).

72. In addition to Arkansas and Georgia, the Supreme Court cited Kentucky, Montana, and Tennessee as states that had used their own state constitutions to strike down its respective sodomy laws. *Lawrence*, 539 U.S. at 576 (citing cases relied upon by the Arkansas Supreme Court in *Picado II*).

73. *Id.* at 564–79. Unlike the Arkansas Supreme Court, the Supreme Court of the United States did not address whether homosexual sodomy was protected under the Equal Protection Clause of the Fourteenth Amendment. But see *id.* at 579–87 (O’Connor, J., concurring) (arguing that *Bowers* is still good law, but contending that the Texas statute violated the Equal Protection Clause).

74. 353 Ark. 69, 110 S.W.3d 731 (2003).

requires more than perceived stigmas against homosexuals to justify a custody determination against a gay or lesbian parent. Though the issue had been addressed in several states before the *Taylor* decision,<sup>75</sup> both parties in *Taylor* relied solely on Arkansas cases to support their respective positions. It may be hard to classify jurisdictions along the lines of their attitudes toward homosexual parents, as there may be any number of factors other than sexual orientation that come into play. But there is clearly a variance between the states regarding the role that sexual orientation plays in a child-custody decision.

The Tennessee Court of Appeals has held that homosexuality is not a *per se* bar to custody and that “the key consideration is whether a parent’s sexuality has a negative effect on the child’s welfare.”<sup>76</sup> Similar decisions have been made in California,<sup>77</sup> Indiana,<sup>78</sup> New Jersey,<sup>79</sup> New Mexico,<sup>80</sup> New York,<sup>81</sup> and Washington.<sup>82</sup> The Florida Supreme Court specifically rejected private biases against homosexuals as grounds to support a custody decision.<sup>83</sup> In Mississippi, a court can consider a parent’s homosexual lifestyle as long as it is not the sole factor in the custody decision.<sup>84</sup> Along these lines, the Iowa Supreme Court reversed a portion of a decree that specified the father could only have visitation without other unrelated adult males

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75. See generally Elizabeth Trainer, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5th 591 (1998).

76. *Massey-Holt v. Holt*, 255 S.W.3d 603, 610 (Tenn. Ct. App. 2007) (quoting *Berry v. Berry*, E2004-01832-COA-R3CV, 2005 WL 1277847, at 3 (Tenn. Ct. App. May 31, 2005)).

77. See *Nadler v. Superior Ct. In and For Sacramento County*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

78. *Pryor v. Pryor*, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (“[H]omosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.”) (quoting *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981)).

79. *In re J. S. & C.*, 129 N.J. Super. 486, 492, 324 A.2d 90, 94 (1974) (“Although a deprivation of the parent’s visitation rights due solely to homosexuality would be unjustified discrimination, this fact does not prevent or relieve a court from the duty of closely examining any claim where it is alleged that exposure to a specific homosexual parent may have a detrimental effect on a child.”).

80. *State ex rel. Human Servs. Dep’t*, 107 N.M. 769, 772, 764 P.2d 1327, 1330 (N.M. Ct. App. 1988) (“We believe the sexual orientation of a proposed custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment.”).

81. *Guinan v. Guinan*, 102 A.D.2d 963, 963, 477 N.Y.S.2d 830, 831 (N.Y. App. Div. 1984) (“A parent’s sexual indiscretions should be a consideration in a custody dispute only if they are shown to adversely affect the child’s welfare.”) (citations omitted).

82. *Matter of Marriage of Cabalquinto*, 100 Wash. 2d 325, 329, 669 P.2d 886, 888 (1983) (“[H]omosexuality in and of itself is not a bar to custody or to reasonable rights of visitation.”).

83. *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000).

84. *Davidson v. Coit*, 899 So. 2d 904, 911 (Miss. Ct. App. 2005) (citing *Morris v. Morris*, 783 So. 2d 681, 693 (Miss. 2001)).

present; the sole justification for the restriction was the father's homosexuality.<sup>85</sup>

This does not mean that a parent's sexual orientation is irrelevant, even in those states where there is not a *per se* rule against homosexuals. An excellent example is the decision in *Marlow v. Marlow* from the Indiana Court of Appeals.<sup>86</sup> That court clearly considered the father's sexual orientation in its decision to restrict the father from including the children in activities that promote a homosexual lifestyle, but the evidence showed that the children were raised in conservative, fundamentalist Christian home where homosexuality was taught to be a sin.<sup>87</sup> When the children were exposed to the father's homosexual lifestyle (in the form of a conference that promoted tolerance toward homosexuals and the father's discussion of his sexual orientation in front of the children), the children started showing signs of emotional distress.<sup>88</sup> Similarly, the Illinois Court of Appeals in *In re Marriage of Martins*<sup>89</sup> reversed an order denying a petition to change custody after holding that the trial court failed to fully evaluate the impact of the mother's lesbian lifestyle on the children.<sup>90</sup>

Of course, there are states that are less favorable toward homosexual parents. For example, in *Bottoms v. Bottoms*,<sup>91</sup> the Supreme Court of Virginia held that the social stigma of homosexuality justified a custody decision against a lesbian parent.<sup>92</sup> And while the Supreme Court of Missouri has held that homosexuality does not render a parent *ipso facto* unfit to have custody of his or her children,<sup>93</sup> the state's court of appeals allows trial courts to consider social stigma in cases involving homosexual parents.<sup>94</sup>

Over the years, at least two states' judiciaries have changed their position on homosexual parents. In *Constant A. v. Paul C.A.*,<sup>95</sup> the Superior Court of Pennsylvania established a presumption in favor of a "traditional family environment" and held that a homosexual parent bore the burden of

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85. *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990).

86. 702 N.E.2d 733 (Ind. Ct. App. 1998).

87. *Id.* at 734.

88. *Id.* at 735-36.

89. 645 N.E.2d 567 (Ill. App. Ct. 1995).

90. *Id.* at 389-90, 645 N.E.2d at 573-74. *But see In re Marriage of R.S. & S.S.*, 677 N.E.2d 1297, 1303 (Ill. App. Ct. 1996) (describing Illinois' approach to child-custody cases as "sexual orientation neutral").

91. 457 S.E.2d 102 (1995).

92. *Id.* at 420, 457 S.E.2d at 108.

93. *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. 1998) ("A homosexual parent is not *ipso facto* unfit for custody of his or her child . . . . It is not error, however, to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination.") (citations omitted).

94. *See, e.g., S.E.G. v. R.A.G.*, 735 S.W.2d 164, 165-66 (Mo. Ct. App. 1987).

95. 496 A.2d 1 (Pa. Super. 1985).

proving that his or her homosexual relationship had no adverse effect on the child.<sup>96</sup> That court recently overruled that decision and held that homosexual parents bore no special evidentiary presumption in child-custody cases.<sup>97</sup> And in *Jacobson v. Jacobson*,<sup>98</sup> the Supreme Court of North Dakota affirmed a grant of custody to a heterosexual parent when the trial court determined that both parents were fit to care for the children. Twenty-two years later, that court overruled *Jacobson* and held that a decision to modify custody based upon a parent's sexual orientation was clearly erroneous absent evidence showing that the lifestyle posed a threat to the children's physical or emotional health.<sup>99</sup>

Before *Taylor*, there was little case law directly addressing the issue in Arkansas. The most significant, however, is *Thigpen v. Carpenter*.<sup>100</sup> The mother argued that there was no evidence that sexual orientation adversely affected the children.<sup>101</sup> The court's opinion focused on the fact that the mother lived a promiscuous lifestyle in front of the children.<sup>102</sup> There were other factors, but it is clear that the mother's sexual orientation played a major role in the decision against her:

The chancellor pointed out four factors he considered: 1) that with the appellee, the children would be residing in the same neighborhood in which they had always resided (the appellant's home was in Austin, Texas); 2) that the appellant's educational goals would substantially interfere with the time she has for parenting (the appellant is a graduate student at the University of Texas and is pursuing a Ph.D. in biochemistry); 3) that homosexuality is generally socially unacceptable, and the children could be exposed to ridicule and teasing by other children; and, 4) that it was contrary to the court's sense of morality to expose the children to a homosexual lifestyle, and that it was no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a nonspousal lover of the opposite sex.<sup>103</sup>

One judge concurred in the decision, but specifically addressed the mother's argument regarding her sexual orientation. Judge George K. Cracraft noted that (at the time) homosexual conduct violated the law and that the lower court properly considered such a violation when making its decision.<sup>104</sup>

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96. *Id.* at 5.

97. *M.A.T. v. G.S.T.* 989 A.2d 11 (Pa. Super. 2010).

98. 314 N.W.2d 78 (N.D. 1981).

99. *Damron v. Damron*, 670 N.W.2d 871, 875 (N.D. 2003).

100. 21 Ark. App. 194, 730 S.W.2d 510 (1987).

101. *Id.* at 197, 730 S.W.2d at 512.

102. *Id.* at 197, 730 S.W.2d at 512-13.

103. *Id.* at 199, 730 S.W.2d at 513-14.

104. *Id.* at 200-01, 730 S.W.2d at 514 (Cracraft, J., concurring).

There are two other cases before *Taylor* that involved homosexual parents, but neither is directly on point as it relates to custody decisions involving gay and lesbian parents. In 1995, the Arkansas Court of Appeals handed down its decision in *Larson v. Larson*.<sup>105</sup> The mother alleged that the trial court found her unfit solely based on her homosexuality. But the court of appeals noted other grounds for the custody decision (the mother and her partner had engaged in sexual relations while the children were in the home; the parties' daughter sometimes slept between the mother and her partner; the parties' son had gone to live with the father by agreement; and the mother was ambivalent toward having custody of the son).<sup>106</sup> Judge Judith Rogers concurred in the judgment, but she was concerned that the trial judge placed too much emphasis on the mother's lifestyle.<sup>107</sup>

Finally, in 2001, the Supreme Court of Arkansas considered *Taylor v. Taylor*.<sup>108</sup> (no relation to the primary focus of this article). There, the father sought a custody modification and a contempt citation after the mother purchased a home and moved in with her lesbian partner. Expert testimony showed that the children would be best served by remaining with the mother, but outside the presence of her partner.<sup>109</sup> In line with that recommendation, the lower court ordered the mother's partner to move out of the home within thirty days.<sup>110</sup> The focus of the Supreme Court's opinion affirming the order, however, was on the fact that the mother was cohabiting with a person outside of marriage.<sup>111</sup>

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105. 50 Ark. App. 158, 902 S.W.2d 254 (1995).

106. *Id.* at 161, 902 S.W.2d at 256. *See also* Holmes v. Holmes, 98 Ark. App. 341, 255 S.W.3d 482 (2007) (rejecting appellant's argument that the trial court's decision not to award custody to her was improperly based upon her sexual orientation in light of evidence showing that appellant cohabited with six different sexual partners (male and female) in front of the child, despite an explicit order forbidding extramarital cohabitation in front of the child).

107. *Larson*, 50 Ark. App. at 162, 902 S.W.2d at 257. Judge Rogers wrote:

A fair reading of the chancellor's memorandum opinion reflects a decided emphasis on the appellant's lifestyle. In truth, the chancellor's own condemnation of appellant's sexual preference is apparent from his written word. In fact, however, the chancellor focused on the relative faults of both parties. It is because of the comparative reasoning employed by the chancellor and its disparaging tone that I have some hesitation in affirming the decision. Such reasoning comes perilously close to basing a decision on punitive grounds instead of properly focusing on the welfare and emotional well-being of the children. Nevertheless, upon my review, I am not convinced that the chancellor allowed any one circumstance to overshadow his ultimate determination that the best interest of the children favored a change of custody.

*Id.* at 162, 902 S.W.2d at 257 (Rogers, J., concurring).

108. 345 Ark. 300, 303, 47 S.W.3d 222, 224 (2001).

109. *Id.* at 303, 47 S.W.2d at 224.

110. *Id.*

111. *Id.*

In 2011, the Supreme Court decided *Taylor v. Taylor*. There, the parties were divorced in 1999, and Ms. Taylor was awarded primary custody of the children.<sup>112</sup> Six months after the divorce, Kellie Tabora moved in with Ms. Taylor and the children. Tabora paid \$500 a month for living expenses. Tabora was a lesbian, and she occasionally slept in the same bed as Ms. Taylor, but both denied any relationship or sexual activity. A year after Tabora moved in with Ms. Taylor, Mr. Taylor petitioned the court for a custody modification, citing his improved financial position and Ms. Taylor's living conditions. In the hearing on the petition, Mr. Taylor called several witnesses to testify that they were concerned about Ms. Taylor's living arrangement, while Ms. Taylor called witnesses to testify that the children were well-adjusted and unaffected by the living arrangement.<sup>113</sup>

In the end, the circuit court granted Mr. Taylor's petition to modify custody. With respect to Ms. Taylor living with Tabora, the court opined:

The plaintiff here claims the circumstances of the expressed sexual preference of Kelli Tabora and the fact that she and defendant slept together for approximately one year requires the conclusion that sex occurs. But if the testimony of defendant and Kelli Tabora is accepted as the truth what is present here is that no actual inappropriate behavior but rather the appearance of inappropriate behavior exists. Is that harmful enough to require removal of these children from that environment? It would seem likely that if it is generally known by friends and acquaintances that defendant resides with and also sleeps with an admitted lesbian, that most will conclude sex is involved. This assumption on the part of the public would subject the children to ridicule and embarrassment and could very well be harmful to them. Therefore, it is the conclusion of this Court that residence of Kelli Tabora with defendant and the children even without sex is inappropriate behavior and is a circumstance that justifies changing of custody from defendant to plaintiff. It is at least poor parental judgment on the part of defendant to allow a well known lesbian to both reside with defendant and the children and sleep in the same bed with defendant.<sup>114</sup>

Before the Arkansas Supreme Court, Ms. Taylor argued that the lower court erred in finding changed circumstances justifying a custody modification.<sup>115</sup> She acknowledged case law upholding orders prohibiting parents from allowing romantic partners from staying in the home while children are

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112. 353 Ark. 69, 72, 110 S.W3d 731, 732 (2003).

113. *Id.* at 73, 110 S.W.3d at 733.

114. *Id.* at 75, 110 S.W.3d at 734.

115. *Id.* at 72, 110 S.W.3d at 732.

present,<sup>116</sup> but she argued that this case was different, as there had only been a finding of the *appearance* of inappropriate activity. She noted the testimony that her children had not been teased as a result of her living arrangement, and she wrote, "The trial judge's conclusions, which cater to the lower instincts of the public, do not go beyond mere speculation and conjecture."<sup>117</sup> In his argument, Mr. Taylor relied on testimony from several witnesses whom testified that they would not allow their children to be with Ms. Taylor if she were living with a lesbian. He also argued that the record as a whole, including evidence of his improved and superior financial situation, justified the change in circumstances.<sup>118</sup>

The Supreme Court did not exactly address whether it was proper to consider sexual orientation when making a custody determination. Rather, it framed the issue as whether it was proper to consider "a situation in which a parent's current actions might bring about a future harm for a child based on the public's erroneous perception."<sup>119</sup> The court looked to cases from courts in West Virginia,<sup>120</sup> Oklahoma,<sup>121</sup> Nebraska,<sup>122</sup> and Illinois,<sup>123</sup> where the appellate court sided with the homosexual parent in the absence of any proof of exposure to the relationship or harm to the child.<sup>124</sup> It also acknowledged a decision in Missouri, where the court of appeals held that unrestricted access to homosexual parent would endanger the child.<sup>125</sup> In that case, howev-

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116. Appellant's Brief, at 149; *Taylor v. Taylor*, 353 Ark. 69, 80, 110 S.W.3d 731, 737 (2003) (citing *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1995)).

117. Appellant's Brief, at 151.

118. *Taylor*, 353 Ark. at 73, 110 S.W.3d at 733. In addition to Ms. Taylor's living arrangement, the Supreme Court was also asked to address whether the lower court could consider the relative financial position and education background of the parties. The court ultimately concluded that there was no material change in circumstances as it related to the parties' finances and education, as Mr. Taylor was aware of their relative finances and education at the time he entered into the initial custody agreement. *Taylor*, 353 Ark. at 79, 110 S.W.3d at 737.

119. *Id.* at 80, 110 S.W.3d at 737.

120. *Rowsey v. Rowsey*, 174 W. Va. 692, 329 S.E.2d 57 (1985) (holding that the fact that the mother was associating with a lesbian was not a basis for a change of custody to the non-custodial parent).

121. *Fox v. Fox*, 1995 Ok. 87, 904 P.2d 66 (Okla. 1995) (reversing a finding of parental unfitness, based upon the mother's sexual orientation, in light of no evidence showing that the mother's sexual orientation had an adverse effect on the children).

122. *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997) (affirming an order denying a motion to change custody where the child was not directly exposed to the mother's sexual relationship).

123. *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1048, 677 N.E.2d 1297, 1298 (1996) (stating "the potential for social condemnation, standing alone, cannot justify a change in custody").

124. *Taylor*, 353 Ark. at 81-82, 110 S.W.3d at 738.

125. *J.P. v. P.W.*, 772 S.W.2d 786 (Mo. Ct. App. 1989).



er, the parent and his same-sex partner were overtly affectionate in front of the child.<sup>126</sup> Despite these acknowledgements, the Arkansas Supreme Court rejected the idea that a custody decision could be based on perceptions and appearances, rather than concrete proof of likely harm.<sup>127</sup> The court concluded:

While we are well aware of the expression that “perception is reality,” when dealing with the extreme seriousness of changing the custody of children from one parent to the other, we are convinced that evidence-based factors must govern. Here, there is not only the absence of proof that a homosexual relationship was occurring, but the great weight of evidence supported Rexayne Taylor’s position that the boys were well-adjusted and happy in their environment and had not been adversely affected by her living arrangement. We, therefore, hold that the circuit court abused its discretion in changing the custody of R.T. and A.T. from Rexayne Taylor to Wes Taylor.<sup>128</sup>

But was this case the victory for gays and lesbians? If the case is interpreted narrowly, then it might not be. The Supreme Court reaffirmed that it would not tolerate a parent’s unmarried cohabitation with a romantic partner in the presence of a child.<sup>129</sup> It applies this rule regardless of the parent’s sexual orientation.<sup>130</sup> But because same-sex couples cannot marry in Arkansas,<sup>131</sup> it would be difficult for them to have a committed relationship and parent a child without running afoul of this rule. Assuming that the relationship is long-term, one would assume that the child would eventually recognize the existence of the relationship and its implications. Further, the Supreme Court did not repudiate any of the language in *Thigpen*, where the court considered sexual orientation to be a relevant factor in a custody determination. *Taylor* merely addressed the issue of a child being in the custody of someone who might be perceived, though speculation and innuendo, to be homosexual. Arguably, the case is distinguishable if the parent actually is homosexual. As one commentator cynically noted:

The message sent to sexual minority parents in Arkansas by the court in this factually strange case is quite clear—to maintain custody of your children, deny being a sexual minority and testify that there is no sexual

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126. *Id.* at 788.

127. *Taylor*, 353 Ark. at 83, 110 S.W.3d at 739.

128. *Id.* at 83–84, 110 S.W.3d at 739–40.

129. *Id.* at 80, 110 S.W.3d at 737 (citing *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978)).

130. *See Taylor*, 345 Ark. at 304–05, 47 S.W.3d at 225.

131. ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”).

relationship. Furthermore, if you happened to have been sharing a bed with an “admitted” sexual minority individual, definitely stop sleeping in the same bed when the other parent files a change of custody motion.<sup>132</sup>

Some, however, are optimistic. In explaining the law, one treatise author wrote:

[A]lthough the *Taylor* court based its decision in part on a finding that the mother was not actually engaged in a sexual relationship, it also seems to stand for the proposition that even if the parent is in a homosexual relationship, a change of custody will not be entertained unless actual harm to the child is shown. In addition, the court cited the principle that “[t]he need for a factual finding of harm to the child requires that the court focus on evidence-based factors and not on stereotypical presumptions of future harm.”<sup>133</sup>

Despite handing down *Taylor* nine years ago, there have been few cases to elaborate on its holding. Most opinions citing *Taylor* are for other propositions.<sup>134</sup> Regardless of how far one can take the *Taylor* decision, however, associating with someone who is gay or lesbian is insufficient, by itself, to warrant an adverse custody decision in Arkansas. Problems may arise if the parent is actively engaged in a same-sex relationship. Even in such cases, however, Arkansas courts may require evidence of harm to the child before ruling against the homosexual parent for no other reason than sexual orientation.

### III. BETHANY V. JONES<sup>135</sup>

*Bethany v. Jones* involves another problem as it relates to homosexual couples. When same-sex partners have a child through surrogacy or artificial

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132. Nancy G. Maxwell & Richard Donner, *The Psychological Consequences of Judicially Imposed Closets in Child Custody and Visitation Disputes Involving Gay or Lesbian Parents*, 13 WM. & MARY J. WOMEN & L. 305, 321 (2006). See also Jason Scott, *One State, Two State; Red State, Blue State: An Analysis of LGBT Equal Rights*, 77 UMKC L. REV. 513, 523 (2008).

133. Karen Moulding, “Custody between legal parents—The irrelevance of sexual orientation—Lifestyle and affairs—Post-divorce cohabitation,” 1 SEXUAL ORIENTATION & THE LAW § 1:9.

134. See, e.g., *Tanner v. Kadusheva*, 2011 Ark. App. 379, 1 \_\_ S.W.3d \_\_ (distinguishing *Taylor* in light of evidence showing that the appellant planned to move to Oklahoma at some point in the future); *Sykes v. Warren*, 99 Ark. App. 210, 258 S.W.3d 788 (2007) (citing *Taylor*’s holding that the parties’ relative financial resources are relevant); *Holmes v. Holmes*, 98 Ark. App. 341, 349, 255 S.W.3d 482 (2007) (distinguishing *Taylor* in light of evidence showing that the appellant had six different sexual partners, both male and female, in a four-and-a-half year period).

135. 2011 Ark. 67, \_\_ S.W.3d \_\_.

insemination, one “parent” has no biological connection to the child. So, what happens if the relationship ends and the couple disagree on the custody of the child? Does the biological parent have an advantage over the non-biological parent? Does the non-biological parent have any rights?

Again, there has not been a uniform approach in this area. Some jurisdictions have been willing to apply either the doctrine of in loco parentis or de facto parentage when a same-sex partner seeks custody or visitation of his or her former paramour’s biological child.<sup>136</sup> Some jurisdictions, including New Jersey,<sup>137</sup> Montana,<sup>138</sup> Pennsylvania,<sup>139</sup> Vermont,<sup>140</sup> and Washington<sup>141</sup> allow homosexuals some degree of custody or visitation rights to a former same-sex partner’s biological child.<sup>142</sup> California has gone so far as to hold that a lesbian was a “parent,” as defined by the Uniform Parentage Act, to her former same-sex partner’s twin children when she supported her partner’s artificial insemination and held the resulting twin children out as her own (thus making the partner liable for child support).<sup>143</sup> Other jurisdictions, including Maryland<sup>144</sup> and Tennessee,<sup>145</sup> have held that homosexuals

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136. While similar, in loco parentis and de facto parentage are two different doctrines. See Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 378–85 (2004); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 502–09 (1990) (both discussing the two doctrines in the context of providing parental rights to the non-biological parent in a same-sex relationship). For the purpose of this discussion, however, the distinction is not important.

137. See, e.g., V.C. v. M.J.B., 319 N.J. Super. 103, 112, 725 A.2d 13, 19 (App. Div. 1999) (holding that relationship between child and former same-sex partner rose to the level of in loco parentis, but that the partner was limited to seeking visitation).

138. See, e.g., L.F.A. v. Ankney, 2009 MT 363, ¶ 18, 353 Mont. 220, 220 P.3d 391 (2009) (holding that same-sex former partner, who stood in loco parentis to the child, was not required to show parental unfitness before allowing her to bring a parenting plan before the court).

139. See, e.g., T.B. v. L.R.M., 786 A.2d 913, 920 (Pa. 2001) (affirming the decision that a former same-sex partner stood in loco parentis to the child and that the partner’s inability to adopt the child did not bar her action for partial custody or visitation).

140. See, e.g., Miller-Jenkins v. Miller-Jenkins, 2006 VT 78 ¶ 47, 180 Vt. 441, 912 A.2d 951 (2006) (allowing biological mother’s same-sex partner temporary visitation of child born by artificial insemination, because partner acted in loco parentis to the child).

141. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (allowing a former same-sex partner to assert a common law claim of de facto parentage).

142. See also Osborne, *supra* note 136.

143. Elisa B. v. Superior Court, 37 Cal. 4th 108, 33 Cal. Rptr. 3d 46 (2005).

144. See, e.g., Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) (rejecting the doctrine of de facto parentage and holding that a former same-sex partner could not seek custody or visitation of her partner’s child absent a finding that the biological mother was unfit).

145. See, e.g., *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999), (holding that former same-sex partners lacked standing to petition to visitation with their partners’ biological children).

lack standing to seek custody or visitation of their former partner's children.<sup>146</sup> Courts in Missouri and Utah are also unfavorable to non-biological parents of former same-sex couples. Under the theories adopted in both states, the biological parent has the right to unilaterally sever his or her child's relationship with the partner and end the partner's in loco parentis status.<sup>147</sup>

Recently, the Arkansas Supreme Court decided the fate of a young child born to Alicia Bethany. She and her former partner Emily Jones started dating in 2000, and they purchased a home together in 2003.<sup>148</sup> A year later, they decided to start a family. They agreed that Bethany would bear the child, because Jones was experiencing reproductive health issues.<sup>149</sup> Bethany later gave birth to a baby girl. The child was given Jones's last name and Jones's grandmother's name as her first name.<sup>150</sup> The intent was for the couple to co-parent the child.<sup>151</sup> The child would later call Bethany "mama" and Jones "mommy."<sup>152</sup> While Bethany gave birth to the child, Jones served as the child's caretaker during the first years of the child's life.<sup>153</sup> Bethany and Jones separated in 2008, but they decided to continue to co-parent the child.<sup>154</sup> The dispute arose after Jones kept the child for over a twenty-four hour period.<sup>155</sup> Before the court, Bethany alleged that she was concerned about Jones's ability to parent, citing factors such as instability, depression, safety of the child, and dishonesty.<sup>156</sup> Jones originally filed for guardianship of the child, but she dismissed this suit.<sup>157</sup> She then filed for custody of the child. Bethany argued that Jones had no standing to bring the suit. The circuit court rejected Jones's claim that she was entitled to custody under Ar-

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146. See also *Riepe v. Riepe*, 91 P.3d 312, 333–34 (Ariz. Ct. App. 2004) (Barker J., dissenting) (rejecting the majority's holding that an Arizona statute did not require a stepparent to prove that he or she had a relationship to the child that was equal or superior to that of the natural parent; the criticism was based, in part, on the judge's opinion that it had the unintended consequence of allowing same-sex parenting).

147. See *White v. White*, 293 S.W.3d 1, 15–16 (Mo. Ct. App. 2009) (holding that same-sex partner lacked standing to bring custody action, even if she stood in loco parentis to the child, once the partners separated); *Jones v. Barlow*, 154 P.3d 808, 812–15 (Utah 2007) (holding that a legal parent could terminate partner's in loco parentis status by removing the child from the relationship, thereby depriving that partner of standing to pursue custody or visitation under the doctrine).

148. *Bethany*, 2011 Ark. 67, at 1, \_\_\_ S.W.3d at \_\_\_.

149. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_.

150. *Id.*, \_\_\_ S.W.3d at \_\_\_.

151. *Id.*, \_\_\_ S.W.3d at \_\_\_.

152. *Id.*, \_\_\_ S.W.3d at \_\_\_.

153. *Bethany*, 2011 Ark. 67, at 6, \_\_\_ S.W.3d at \_\_\_.

154. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_.

155. *Id.*, \_\_\_ S.W.3d at \_\_\_.

156. *Id.* at 3, \_\_\_ S.W.3d at \_\_\_.

157. *Id.* at 3 n.1, \_\_\_ S.W.3d at \_\_\_ n.1.

kansas Code Annotated sections 9-10-113 (outlining custody in paternity actions) or 9-13-101 (concerning custody in divorce actions), because this was not a custody suit or a divorce.<sup>158</sup> But the court recognized the decision in *Robinson v. Ford-Robinson*,<sup>159</sup> where the Arkansas Court of Appeals affirmed a lower court's grant of visitation rights to a stepparent who stood in loco parentis, and it found that Jones could proceed under that theory as well as the doctrine of equitable estoppel.<sup>160</sup> After a bench trial, the court awarded Bethany visitation. The court recognized that the case before it differed from *Robinson* only in the fact that the parties were not married (due to the prohibition under Arkansas law).<sup>161</sup> And it found that Jones stood in loco parentis to the child. The court also declared that Bethany was estopped from denying Jones some rights.<sup>162</sup> The circuit court recognized Bethany's right to the "care, custody, and control" of her daughter<sup>163</sup> and that, absent a finding of parental unfitness, it could not award Jones custody.<sup>164</sup> But a finding of parental unfitness, according to the circuit court, was not a prerequisite to awarding visitation.<sup>165</sup> After analyzing what was in the child's best interests, the court awarded Jones standard visitation.<sup>166</sup> Bethany filed a notice of appeal to the Arkansas Court of Appeals,<sup>167</sup> but the Arkansas Supreme Court considered the matter.

One issue before the Supreme Court was whether *Robinson* and the doctrine of in loco parentis could be applied outside the context of a divorce case.<sup>168</sup> Bethany urged the Supreme Court to reverse. She contended that the

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158. Abstract, Addendum, and Brief of Appellant, *Bethany v. Jones* (No. 10-295), at Add. 14–15 [hereinafter Appellant's Brief, *Bethany*].

159. 88 Ark. App. 151, 196 S.W.3d 503 (2004), *aff'd*, 362 Ark. 232, 208 S.W.3d 140 (2005).

160. Appellant's Brief, *Bethany*, at Add. 15. Bethany also sought dismissal for improper venue. The circuit court denied the motion, and the Supreme Court affirmed. *Bethany*, 2011 Ark. 67, at 14–15, \_\_\_ S.W.3d at \_\_\_\_.

161. Appellant's Brief, *Bethany*, at Add. 23 (Order entered Nov. 24, 2009).

162. *Id.* at 24–26. The elements of estoppel are: (1) the party to be estopped must know the facts; (2) one must intend that her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the other party's conduct to her injury. *Id.* at Add. 24 (citing *Linda Elenia Askew Trust v. Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985)).

163. Appellant's Brief, *Bethany*, at Add. 28 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Linder v. Linder*, 348 Ark. 322, 357–58, 72 S.W.3d 841, 861 (2002)).

164. *Linder*, 348 Ark. at 322 (citing *Robinson*, 88 Ark. App. 157–58, 196 S.W.3d at 508).

165. *Id.* (citing *Robinson*, 88 Ark. App. 157–58, 196 S.W.3d at 508).

166. *Id.* at Add. 29–30.

167. *Id.* at Add. 31 (Notice of Appeal).

168. In loco parentis is defined as "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." *Robinson*, 88 Ark. App. at 157, 196 S.W.3d at 507 (citing *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997)). After holding that an award of visitation was not contrary to *Troxel* or *Linder* and

circuit court's reliance on *Robinson* created a third-party cause of action for custody and visitation in Arkansas and that such an action did not exist under Arkansas law.<sup>169</sup> She believed that the circuit court violated her parental rights and that she had legitimate reasons for restricting Jones's access to the child.<sup>170</sup> She was concerned that the circuit court's ruling could allow anyone in a child's life to sue for visitation (from former nannies to bitter ex-boyfriends).<sup>171</sup> She also contended that she should not have been equitably estopped from denying parental rights, because Jones was not ignorant of the fact that she (Jones) had no legal relationship to her or the child.<sup>172</sup>

In contrast, Jones argued that the doctrine of in loco parentis, as discussed in *Robinson*, was applicable, and she cited cases from other jurisdictions applying the doctrine to former same-sex partners.<sup>173</sup> She contended that *Troxel* did not apply, because she stood in loco parentis to the child.<sup>174</sup> Finally, Jones argues that she satisfied all four elements of equitable estoppel, including the element that she be ignorant of the true facts. She wrote that the unknown fact was not the lack of legal status between the parties, but Bethany's commitment (or lack thereof) to allowing Jones to have a relationship with the child.<sup>175</sup>

The Arkansas Supreme Court recognized that the federal constitution protects a parent's right "to direct and govern the care, custody, and control of their children."<sup>176</sup> But it also stated that grandparents who stand in loco parentis to a child are treated differently from those who are not.<sup>177</sup> After discussing the doctrine as it was outlined in *Robinson*, the Supreme Court addressed whether it could be applied in the case before it:

[T]he doctrine of in loco parentis focuses on the relationship between the child and the person asserting that they stood in loco parentis. Bethany on the other hand seems to argue that because Arkansas does not recognize same-sex marriage or grant domestic-partnership rights, Jones has no legal standing to assert that she stood in loco parentis. In other words, Bethany focuses on her relationship with Jones instead of looking at the relationship between Jones and E.B. There is nothing in our decision in

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that the stepparent stood in loco parentis to the stepchild, the *Robinson* court affirmed the decision to award the stepmother visitation. *Id.* at 155–58, 196 S.W.3d at 506–08.

169. Appellant's Brief, *Bethany*, at Arg. 5–7.

170. *Id.* at Arg. 9–10.

171. *Id.* at Arg. 11.

172. *Id.* at Arg. 12–14.

173. Abstract, Addendum and Brief of Appellee, *Bethany v. Jones*, at Arg. 7–11 (No. 10-295) [hereinafter Appellee's Brief, *Bethany*].

174. *Id.* at Arg. 13–14.

175. *Id.* at Arg. 22–23.

176. *Bethany*, 2011 Ark. 67, at 8, \_\_\_ S.W.3d at \_\_\_ (quoting *Troxel v. Granville*, 530 U.S. 57 (2000)).

177. *Id.* at 9, \_\_\_ S.W.3d at \_\_\_.

*Robinson* to support Bethany's assertion in this regard. Although this court in *Robinson* noted the fact that the visitation issue arose in the context of a divorce proceeding, this court stated that "critical" to its review was the fact that the circuit court found that the stepmother stood in loco parentis to the minor child. We reiterate that the focus should be on what, if any, bond has formed between the child and the nonparent.<sup>178</sup>

After holding that the circuit court could award visitation to someone standing in loco parentis outside of the divorce context, the court affirmed the circuit court's finding that Jones stood in loco parentis to the child and that it was in the child's best interest for her to have visitation.<sup>179</sup> The court also relied on *Mullins v. Picklesimer*,<sup>180</sup> a Kentucky case also involving a same-sex custody dispute, and rejected the idea that its holding would open the floodgates to allowing anyone to seek custody of a child.<sup>181</sup>

The Nebraska Supreme Court relied on *Bethany* when it handed down its decision in *Latham v. Schwerdfeger*.<sup>182</sup> That case also involved a custody dispute between same-sex partners. The child in *Latham* was born through in vitro fertilization. The non-birth mother sought custody of the child after visitation stopped. The trial court granted the birth mother visitation after finding that the doctrine of in loco parentis did not apply. Relying on *Bethany*, and as a number other cases across the country, the Nebraska court held that the doctrine did apply and reversed the lower court's finding that the non-birth mother lacked standing to pursue custody and visitation.<sup>183</sup>

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178. *Id.* at 10–11, \_\_\_ S.W.3d at \_\_\_ (citation omitted). The court's reasoning is similar to that espoused by the Supreme Court of Pennsylvania:

Simply put, the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands in loco parentis to A.M. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties. What is relevant, however, is the method by which the third party gained authority to do so. The record is clear that Appellant consented to Appellee's performance of parental duties. She encouraged Appellee to assume the status of a parent and acquiesced as Appellee carried out the day-to-day care of A.M. Thus, this is not a case where the third party assumed the parental status against the wishes of the biological parent. The Superior Court aptly noted, under similar circumstances, that a biological parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so.

*T.B. v. L.R.M.*, 786 A.2d 913, 918–19 (Pa. 2001) (citations omitted).

179. *Id.* at 11–13, \_\_\_ S.W.3d at \_\_\_.

180. 317 S.W.3d 569 (Ky. 2010).

181. *Bethany*, 2011 Ark. 67, at 13–14, \_\_\_ S.W.3d \_\_\_.

182. 802 N.W.2d 66 (Neb. 2011).

183. *Id.* at 73–75.

In addition, the Arkansas Court of Appeals cited both *Robinson* and *Bethany* in *Fox v. Glassing*.<sup>184</sup> That case involved a nonmarried, opposite-sex couple. Fox and Glassing lived together in 2003 and eventually had a child, J.F.<sup>185</sup> Glassing's young son, S.G., also lived in the household.<sup>186</sup> When the couple separated, a custody battle ensued over J.F.<sup>187</sup> Fox also sought visitation rights with S.G.<sup>188</sup> The circuit court awarded Glassing custody of J.F. and denied Fox visitation with S.G.<sup>189</sup> The court of appeals reversed the denial of the visitation order.<sup>190</sup> Relying on *Bethany*, the court noted that a person may qualify as an "in loco parentis parent" even when not married to the biological parent.<sup>191</sup>

On its face, *Bethany* may give homosexual couples some confidence that Arkansas courts may respect their "agreed-upon" parental rights if the relationship fails; however, this may not be the case. Jones was successful because she had an actual relationship with and stood in loco parentis to the child. Had she not stood in loco parentis for one reason or another (maybe because Jones worked outside the home while Bethany was the primary caretaker), the case may have been different. The circuit court explicitly rejected traditional custody statutes as a basis for the on-birth parent's standing to seek custody or visitation.<sup>192</sup> And in *Walchli v. Morris*,<sup>193</sup> decided less than a month after *Bethany*, the Arkansas Court of Appeals rejected a grandmother's request for visitation under the doctrine of in loco parentis, finding that the grandmother's relationship with the child did not rise to the level of co-parent. There is no indication that the Arkansas appellate courts will extend the decision in *Bethany* to a former same-sex partner who does not stand in loco parentis to the child. Further, the circuit court refused to consider awarding custody to Jones in light of the *Troxel* decision. The fact that Arkansas law treats homosexuals and heterosexuals equally as it relates to the doctrine of in loco parentis is great, but a "parent" that plays no role in the care of the child may have no rights whatsoever.

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184. 2011 Ark. App. 633, \_\_\_ S.W.3d \_\_\_\_.

185. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_\_.

186. *Id.*, \_\_\_ S.W.3d at \_\_\_\_.

187. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_\_.

188. *Id.*

189. *Id.*

190. 2011 Ark. App. 633, 6, \_\_\_ S.W.3d \_\_\_\_.

191. *Id.* at 5–6, \_\_\_ S.W.3d at \_\_\_\_\_. Both *Robinson* and *Bethany* were discussed in Daniel v. Spivey, 2012 Ark. 39, \_\_\_ S.W.3d \_\_\_\_ (reversing a stepparent visitation order after holding that the stepparent did not stand in loco parentis to the child).

192. See Appellant's Brief, *Bethany*, at Add. 14–15 (Order entered June 26, 2009, pp. 2–3). The court ruled that ARK. CODE ANN. § 9-13-101 (outlining custody decision in a divorce) was inapplicable because the parties were not married, and it stated that Ark. Code Ann. § 9-10-113 (the paternity statute) did not apply because this case was not a paternity action.

193. 2011 Ark. App. 170, \_\_\_ S.W.3d \_\_\_\_.



IV. ARKANSAS DEPARTMENT OF HUMAN SERVICES. V. COLE<sup>194</sup>

While *Arkansas Department of Human Services v. Cole* was decided in April 2011, its story began before the Supreme Court handed down its decision in *Picado*. There had been multiple efforts to ban homosexuals from fostering or adopting children in Arkansas, but the Supreme Court ultimately decided that such a ban violated privacy protections under the Arkansas Constitution.

The Child Welfare Agency Review Board, established by the Child Welfare Agency Licensing Act,<sup>195</sup> has the duty of “setting minimum standards governing the granting, revocation, refusal, conversion, and suspension of licenses for a child welfare agency and the operation of a child welfare agency.”<sup>196</sup> The Board is specifically authorized to establish rules that “[p]romote the health, safety, and welfare of children in the care of a child welfare agency.”<sup>197</sup> Relying upon that authority, the Board promulgated Regulation 200.3.2 of the Minimum Licensing Standards for Child Welfare Agencies:

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.<sup>198</sup>

In April 1999, the constitutionality of the regulation was challenged.<sup>199</sup> The plaintiffs in the case alleged violations of the rights to equal protection, privacy, and intimate association. The circuit court rejected these arguments, but it found that the regulation did not promote the health, safety, or welfare of children.<sup>200</sup> Thus, the provision violated the separation-of-powers doctrine under the Arkansas Constitution.<sup>201</sup> The court’s decision was based upon a number of findings. The parties stipulated to a number of facts:

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194. 2011 Ark. 145, \_\_\_ S.W.3d \_\_\_.

195. ARK. CODE ANN. § 9-28-401 to -409 (LEXIS Repl. 2009).

196. *Id.* § 9-28-405(a)(1).

197. *Id.* § 9-28-405(c)(1)(A).

198. As quoted in *Dep’t of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 58, 238 S.W.3d 1, 3 (2006).

199. *Id.*

200. *Id.*

201. *Id.*

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.

....

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.

....

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.

10. The defendants are aware of "homosexuals," as defined, who have served as foster parents in Arkansas.

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", [sic] as defined.

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.

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.<sup>202</sup>

The circuit court made these additional findings:

23. The blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents.

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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.

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202. *Id.* at 62–63, 238 S.W.3d at 6–7 (citations to record omitted).

32. Being raised by gay parents does not prevent children from forming healthy relationships with their peers or others.

33. Being raised by gay parents does not cause academic problems.

34. Being raised by gay parents does not cause gender identity problems.

. . . .

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 [sic] 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.

. . . .

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.<sup>203</sup>

Both the Board and the plaintiffs challenged the circuit court's decision. The Board argued that the regulation did not violate the separation-of-powers doctrine, while the plaintiffs contended that the regulation violated their rights to equal protection and privacy. In *Department of Human Services and Child Welfare Agency Review Board v. Howard*, the Arkansas Supreme Court held that the Board acted outside the scope of its authority. It found "no correlation between the health, welfare, and safety of foster children *and* the blanket exclusion of any individual who is a homosexual or

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203. *Id.* at 63–65, 238 S.W.3d at 7.

who resides in a household with a homosexual.”<sup>204</sup> It stated that the regulation was not a product of the Board’s desire to promote the health, safety, and welfare of children, but rather a produce of its views of morality and anti-homosexual bias.<sup>205</sup> Thus, the Board acted outside the scope of its authority, and its actions were unconstitutional.<sup>206</sup>

Because it held that the regulation violated the separation-of-powers doctrine, the Supreme Court declined to address the plaintiff’s constitutional arguments.<sup>207</sup> But Justice Robert Brown, who would later write the majority opinion in *Cole*, authored a concurring opinion addressing the plaintiff’s equal-protection and privacy arguments:

Regulation 200.3(2) overtly and significantly burdens the privacy rights of couples engaged in sexual conduct in the bedroom which this court has specifically declared to be impermissible as violative of equal-protection and privacy rights. The State argues that prohibiting foster-parent status due to sexual activity in the bedroom is categorically different from making the conduct a misdemeanor which was the issue in *Jegley*. But is it? In both instances, gay and lesbian couples are saddled with an infirmity due to sexual orientation. To be sure, in the first instance, a crime is the burden. But in the second, gay couples are denied the freedom to act as foster parents for dependent and neglected children. And who are the ultimate losers in this? It is the foster children who will be forced to reside in youth homes because an insufficient pool of willing foster parents is available.

....

The trial court’s findings of facts as well as the stipulation by the parties undermine any basis for the attack on bedroom privacy occasioned by Regulation 200.3(2). Indeed, the trial court found that being raised by gay and lesbian parents does not increase adjustment problems for children. There is no rational basis in the form of studies or empirical data that sustains the regulation. And the United States Supreme Court as well as this court have made it clear that mere moral disapproval of sexual activity by a group does not qualify as a legitimate reason for an attack on equal protection or privacy rights. All that DHS has left propping up Regulation 200.3(2) is a moral preference by the Child Welfare Agency Review Board without anything to suggest that foster children will be jeopardized as a result.<sup>208</sup>

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204. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7.

205. *Id.* at 65, 238 S.W.3d at 8.

206. *Id.* at 66, 238 S.W.3d at 8.

207. *Id.* at 66, 238 S.W.3d at 8–9.

208. *Id.* at 68–69, 238 S.W.3d at 10–11 (Brown, J., concurring) (citations omitted).

Soon after the Supreme Court handed down *Howard*, an effort began to reestablish the Board's restriction on homosexuals adopting and fostering children. Candidates for Governor and leaders in the Arkansas General Assembly publicly decried *Howard* and promised to legislatively reinstate the ban.<sup>209</sup> In 2007, a senator filed a bill entitled, "An Act To Protect the Children Who Are Most Vulnerable by Clarifying the Public Policy of the State of Arkansas Regarding the Placement of Children with an Adoptive or Foster Parent [and] to Authorize the Department of Health and Human Services to Promulgate Rules and Regulations."<sup>210</sup> The bill passed in the Senate, but it did not make it out of the House Judiciary Committee.<sup>211</sup> The following year, the Arkansas Family Council Action Committee ("Family Council") gathered enough signatures to put the matter before voters.<sup>212</sup> Commonly referred to as "Initiated Act 1," Arkansas voters considered "An Act Providing That an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old." Initiated Act 1 was approved by 57% of the voters.<sup>213</sup> The Act established a declaration that "it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage."<sup>214</sup> It also established a public policy of favoring marriage over unmarried cohabitation with respect to adoption and foster care.<sup>215</sup> To that end, the Act provided:

(a) A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state.

(b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.<sup>216</sup>

The language of the Act was broad enough to make it appear that its drafters were not targeting homosexuals. The best argument supporting this view was that the Act focused more on the relationship between the prospective adopting parents and not their sexual orientation or behavior.<sup>217</sup>

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209. Alexander Justiss, Note, *Is the Arkansas Supreme Court Abandoning Judicial Federalism?*, 30 U. ARK. LITTLE ROCK L. REV. 105, 133 (2007).

210. *Id.* at 134.

211. *Id.* at 135–36.

212. Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31, 40 (2010).

213. *Id.*

214. Initiated Act 1 § 5, 2009 Ark. Acts. 14, 14–16 (codified at ARK. CODE ANN. §§ 9-8-301 to 306 (Repl. 2009)).

215. *Id.* at § 4.

216. *Id.* at § 1.

217. See Wardle, *supra* note 212, at 44–45.

Even so, there was no question regarding Act 1's intended effect. It was in direct response to the *Howard* decision. Four years prior, Arkansans approved a constitutional amendment barring homosexuals from marrying.<sup>218</sup> By including the language limiting potential adopting couples to those validly married "under the constitution and laws of this state," the Act intentionally excluded those who may have validly been married under the laws of another state.<sup>219</sup> Because homosexuals cannot marry in Arkansas, they could not, by extension, adopt or foster children. Finally, despite the public policy favoring married individuals, the Act did not bar single people from adopting or fostering children, and it did not apply to guardianships. One commentator explained:

Some supporters of the Initiative suggested that its adoption would ensure that the State uses the "gold standard" when deciding which homes were suitable for placements. But there are at least two difficulties with this rationale. First, it is by no means clear that married couples are the gold standard for adoptive placements, because other factors seem to play a more important role when determining whether in fact a child will thrive and thus who should be deemed the "gold" would-be adoptive parents. Even were it true that marital couples were the equivalent of the gold standard, the initiative did not limit adoptions to this allegedly optimal scenario, because it did nothing to preclude singles from adopting. However, absent persuasive reasons to think that single persons provide better adoptive homes for children than nonmarital couples, permitting the former but not the latter to adopt undermines the contention that the Initiative was about finding the best place for children and instead suggests that other reasons motivated the adoption of the Act. Further, even if it were established that singles were better than nonmarital couples for children, it still would be necessary to provide justification for excluding qualified applicants from the pool. Thus, there are a whole host of reasons to believe that adoption of the Initiative was not motivated by a desire to secure the best placements for children but, instead, for other less praiseworthy reasons.<sup>220</sup>

Less than two months after Arkansas voters approved Act 1, a suit was filed in Pulaski County Circuit Court challenging its constitutionality on both federal and state grounds.<sup>221</sup> The plaintiffs included unmarried adults

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218. See ARK. CONST. amend 83 (approved by the voters in 2004).

219. Initiated Act 1 § 5.

220. Mark Strasser, *Adoption, Best Interests, and the Arkansas Constitution*, 63 ARK. L. REV. 3, 27 (2010). Of particular note is a flyer, which was attached to the complaint in *Cole* and distributed by the Family Council Action Committee. Among the benefits of Act 1, according to the flyer, was that it "Blunts the Gay Agenda." Ark. Dep't of Human Servs. Addendum, *Cole*, at Add. 40.

221. *Cole*, 2011 Ark. 145, at 2—3, \_\_\_ S.W.3d at \_\_\_.

who wished to foster or adopt children, adult parents who wished to direct the adoption of their biological children in the event of their incapacitation or death, and the biological children of those parents.<sup>222</sup> The Family Council intervened in the lawsuit and, along with the State, defended the constitutionality of the act.<sup>223</sup> By order entered April 16, 2010, the circuit court addressed the parties' cross-motions for summary judgment.<sup>224</sup> It found that, under federal law, Initiated Act 1 involved no fundamental right and no suspect class.<sup>225</sup> Thus, the law needed only be rationally related to a legitimate government purpose to pass constitutional muster on the federal level. Therefore, the court accepted the State's argument "that cohabiting environments, on average, facilitate poorer child performance outcomes and expose children to higher risks of abuse than do home environments where the parents are married or single."<sup>226</sup>

The law did not fare as well when analyzed under state grounds. The circuit court recognized the right to engage in private, consensual, noncommercial acts of sexual intimacy announced in *Picado*, and it found that Act 1 infringed upon that right.<sup>227</sup> Accordingly, the law had to be the least restrictive method available to carry out a compelling state interest.<sup>228</sup> The court found that Act 1 failed to meet that heightened scrutiny.<sup>229</sup> Thus, the circuit court struck down Act 1 as against the Arkansas Constitution. The next stop for this case was the Arkansas Supreme Court.

As was the case in *Picado*, federal precedent did not favor the *Cole* plaintiffs. Since 1977, Florida has barred anyone engaging in "current, voluntary homosexual activity" from adopting children.<sup>230</sup> There had been several attempts to legislatively repeal the statute, but none were successful.<sup>231</sup> In *Lofton v. Secretary of Department of Children and Family Services*,<sup>232</sup> the Court of Appeals for the Eleventh Circuit considered the constitutionality of the statute.<sup>233</sup> The plaintiffs presented three arguments: (1) that the statute violated the rights to familial privacy, intimate association, and family integrity; (2) that the statute impermissibly burdened the right to private sexual

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222. *Id.* at 2–3.

223. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_\_.

224. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_\_.

225. *Id.* at 6, \_\_\_ S.W.3d at \_\_\_\_.

226. Ark. Dep't of Human Servs. Addendum, *Cole*, at Add. 1007 (Pulaski County Circuit Ct. Order in No. 60CV-08-14284, entered April 16, 2010).

227. *Cole*, 2011 Ark. 145 at 19.

228. *Id.* at 20.

229. Ark. Dep't of Human Servs. Addendum, *Cole*, at Add. 1008.

230. *Lofton v. Sec. of Dep't of Children & Family Servs.*, 358 F.3d 804, 806–07 (11th Cir. 2004), *cert. denied* 543 U.S. 1081 (2005) (citing Fla. Stat. Ann. § 63.042(3)).

231. *Id.* at 807.

232. *Id.* at 804.

233. *Id.* at 807.

intimacy; and (3) that the statute violated the Equal Protection Clause by categorically barring only homosexuals from adopting children.<sup>234</sup> The district court rejected the arguments and granted the government's motion for summary judgment.<sup>235</sup>

The court of appeals affirmed the district court and rejected the plaintiff's arguments.<sup>236</sup> First, it recognized that there was no fundamental right to adopt or be adopted.<sup>237</sup> While conceding that there may be procedural due process rights to groups that have formed familial bonds,<sup>238</sup> it declined to extend substantive rights to family integrity "for groups of individuals who have formed deeply loving and interdependent relationships."<sup>239</sup> Second, it refused to extend *Lawrence* to include a fundamental right to private sexual intimacy.<sup>240</sup> Because there was no fundamental right involved, according to the court, there was no need to determine whether Florida's prohibition against homosexuals adopting children infringed upon any such right.<sup>241</sup> Finally, it held that there was a rational basis for the law.<sup>242</sup> Specifically, the law, according to the court, encouraged a stable and nurturing environment for the socialization and education of children and promoted the optimal family structure of a married mother and father.<sup>243</sup>

The Eleventh Circuit specifically considered several of the plaintiff's arguments. First, it rejected the idea that homosexuals were no different than single heterosexuals, who made up twenty-five percent of adoptive parents.<sup>244</sup> The court held that it was not irrational to believe that a single heterosexual person could be in a better position to create a stable, dual-parenting environment than a homosexual parent.<sup>245</sup> Second, it was not persuaded by the fact that the ban resulted in an overpopulated foster care system.<sup>246</sup> The court identified the state's interest, not in placing foster children in a home as quickly as possible, but in placing them in an optimal home.<sup>247</sup> Third, the plaintiffs noted that homosexuals in Florida are allowed to become foster parents and permanent guardians, but the court did not believe this defeated

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234. *Id.* at 809.

235. *Id.* at 808–09.

236. *Lofton*, 358 F.3d at 810.

237. *Id.* at 811–12.

238. *Id.* 358 F.3d at 812–15.

239. *Id.* at 815.

240. *Id.* at 815–17.

241. *Id.* at 817.

242. *Lofton*, 358 F.3d at 818 (ultimately concluding that there was no fundamental right or suspect class involved).

243. *Id.* at 819–20.

244. *Id.* at 820.

245. *Id.* at 822.

246. *Id.* at 823.

247. *Id.*



the rational basis for the adoption law. Instead, it deferred to the legislative branch's decision to distinguish adoption from foster parentage and guardianship.<sup>248</sup> Fourth, it explicitly rejected any social science research, which tended to show that there is no basis for rejecting homosexual adoption.<sup>249</sup> The court reasoned that the research was still novel and inclusive, and it again rejected the legislature's decision to side against homosexual adoptive parents.<sup>250</sup> Finally, it distinguished the instant case from *Romer v. Evans*,<sup>251</sup> where the Supreme Court of the United States struck down a state constitutional amendment that prohibited any government action designed to protect homosexuals from discrimination.<sup>252</sup> The Eleventh Circuit found the Florida law to be narrow and outside the scope of *Romer*.<sup>253</sup>

Not only was the federal precedent against the *Cole* plaintiffs, but also was precedent in other states. In a law review article on Initiated Act 1, Professor Lynn Wardle wrote that nine other jurisdictions (Alabama, Florida, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, Utah, and Wisconsin) clearly did not allow same-sex couples and partners to adopt or foster children.<sup>254</sup> Twenty-three states (Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Virginia, West Virginia, and Wyoming) had no legislation or appellate court decision on the issue, but he described these jurisdictions as also not allowing same-sex couples to adopt.<sup>255</sup>

Nonetheless, the Arkansas Supreme Court would not have been breaking new ground by allowing same-sex couples to adopt. Professor Wardle acknowledged that seventeen states (California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Vermont, and Washington) plus the District of Columbia either allowed or "probably allowed" same-sex couples to adopt.<sup>256</sup> Several of those states have some type of statutory provision that allows same-sex couples to adopt children.<sup>257</sup> In other

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248. *Lofton*, 358 F.3d at 823–24.

249. *Id.* at 825–26.

250. *Id.*

251. 517 U.S. 620 (1996).

252. *Id.* at 621.

253. *Lofton*, 358 F.3d 826–27.

254. Wardle, *supra* note 212, at 98.

255. *Id.* at 47, 98.

256. *Id.*

257. *Id.* at 48 n.71 (citing CAL. FAM. CODE § 9000(b) (West 2010) ("A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides."); COL. REV. STAT. ANN. § 19-5-203(d.5)(I) (West 2010) ("Written and verified consent in a second-parent adoption that the child has a sole legal parent, and the sole legal parent wishes the child to be adopted

states, the judiciary has held that the law does not prohibit homosexuals from adopting or fostering children.<sup>258</sup> None of the cases cited by Professor Wardle focused the constitutional dimensions of a ban.

Further, the laws restricting same-sex couples from adopting children have been coming under fire in state courts. For example, the Florida ban addressed in *Lofton* is now in question, as a Florida state court has declared it unconstitutional on state grounds.<sup>259</sup> In *In re Adoption of Doe*, the court considered a petition to adopt, filed by a gay man.<sup>260</sup> He argued that the Florida law banning him from adopting two children violated that state's constitution.<sup>261</sup> The Florida court recognized that the law had survived other challenges in state court.<sup>262</sup> For example, in *Florida Department of Health and Rehabilitative Services v. Cox*,<sup>263</sup> the Florida district court rejected the arguments that the statute violated the rights of privacy, substantive due process, or equal protection.<sup>264</sup> With no fundamental right or suspect class involved, the court applied the rational-basis test to the law, and the court

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by a specified second adult.”); CONN. GEN. STAT. ANN. § 45a-726a (West 2010) (“[A] child-placing agency may consider the sexual orientation of the prospective adoptive or foster parent or parents when placing a child for adoption or in foster care.”); MASS. GEN. LAWS ANN. ch. 210, § 1 (West 2010) (“A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself ....”); N.H. REV. STAT. ANN. § 170-B:4 (West 2010) (“Any of the following individuals may adopt ... [a]n unmarried adult ... [t]he unmarried parent of the adoptee.”); VT. STAT. ANN. tit. 15A, § 1-102(b) (West 2010) (“If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.”)).

258. *Id.* (citing *In re M.M.D. & B.H.M.*, 662 A.2d 837, 862 (D.C. 1995) (allowing second-parent adoption in stages by a couple); *In re Petition of K.M. & D.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (allowing lesbian partner adoption); *Mariga v. Flint*, 822 N.E.2d 620, 628 (Ind. Ct. App. 2005) (granting petition of biological mother's domestic partner to adopt biological mother's children); *In re Adoption of M.A.*, 930 A.2d 1088, 1098 (Me. 2007) (allowing joint petition for adoption by a gay couple after interpreting adoption law to allow adoption by two unmarried persons); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995) (holding that children could be adopted by their mother's partner without terminating their mother's parental rights); *In re Jacob*, 660 N.E.2d 397, 400 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners had standing under New York law to become adoptive parents); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195, 1196—97 (Pa. 2002) (finding an exception provision in state adoption law gives court discretion to grant partner's adoption that otherwise is not allowed by statute)).

259. *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct., 11th Jud. Cir., Nov. 25, 2008) (unpublished).

260. *Id.* at 1.

261. *Id.*

262. *Id.* at 4.

263. 627 So.2d 1210 (Fla. Dist. Ct. App. 1993).

264. *Id.* at 1215—19.

accepted that it would be best if they were raised by heterosexuals, as most children available for adoption will be heterosexual.<sup>265</sup>

Returning to *Doe*, the court cited the Florida law, which required the State to provide dependent children with a permanent, stable home, and it recognized that the petitioners could provide the children in question with that permanency and stability.<sup>266</sup> It also recognized that children had a liberty interest in being free from State care.<sup>267</sup> It borrowed heavily from a California Supreme Court decision, *In re Jasmon O.* which provided the following:<sup>268</sup>

The California Supreme Court also recognized that foster children have fundamental interests of their own that are subject to constitutional protection. “Children, too, have fundamental rights-including the fundamental right to be protected from neglect and to ‘have a placement that is stable [and] permanent.’” “Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent.” “[A]fter a child has spent a substantial period in foster care and attempts at reunification have proved fruitless, the child’s interest in stability outweighs the parent’s interest in asserting the right to the custody and companionship of the child.” Each of these statements from the California Supreme Court rings true, unsurprisingly so because each of these rights are familiar to Florida’s statutory and constitutional framework for the protection of foster children’s rights. The declared foster child’s right to an adoptive home when the child is available for adoption is a fundamental right.<sup>269</sup>

The Florida circuit court found that the ban on same-sex adoptive parenting “violates the Children’s rights by burdening liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other.”<sup>270</sup> The court then considered the equal-protection challenge. It recognized that the law had previously survived challenges, including the federal challenge in *Lofton*, but the court held that the question was ripe for reconsideration given the developments in social-science fields and

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265. *Id.* at 1219–21. The Supreme Court of Florida quashed the district court’s opinion, holding that the trial court’s record was insufficient to determine whether the statute could survive the rational-basis standard for equal protection, but it did so without discussing the substance of the district court’s opinion. *Cox v. Fla. Dep’t of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995) (per curiam).

266. *Doe*, 2008 WL 5006172, at 21–23.

267. *Id.* at 24.

268. 8 Cal. 4th 398, 878 P.2d 1297 (1994).

269. *Doe*, 2008 WL 5006172, at 24 (quoting *Jasmon O.*, 8 Cal. 4th at 419, 878 P.2d at 1307) (internal citations omitted).

270. *Id.* at 25.

the endorsements by major psychological, psychiatric, child-welfare, and social-work groups.<sup>271</sup> Applying the rational-basis test, it considered three interests proposed by the State: (1) promotion of the welfare of children by placing them in homes that experience higher levels of stressors that are disadvantageous to children, (2) placing adoptive children in homes that minimize social stigmatization, and (3) protection of the societal moral interests of the child.<sup>272</sup>

First, the Florida court rejected the idea that the ban on homosexuals adopting children protected children from “the undesirable realities of the homosexual lifestyle.”<sup>273</sup> It relied on evidence showing that gays and lesbians were no more susceptible to mental health or psychological disorders, substance abuse, or relationship instability than their heterosexual counterparts.<sup>274</sup> Second, it found that social stigmatization was not a rational basis for the law, holding that “there is a well established and accepted consensus in the field that there is no optimal gender combination of parents.”<sup>275</sup> Finally, it stated that the protection of public morality was not a rational basis for the ban.<sup>276</sup> It noted that Florida law allows homosexuals to foster children, and it stated that “there is no ‘morality’ interest with regard to one group of individuals permitted to form the visage of a family in one context but prohibited in another.”<sup>277</sup>

Of course, *Doe* is not even binding in most of Florida, as it was a trial court decision. There is no indication that the case would survive appellate scrutiny. Nonetheless, *Doe* is an example of how gays and lesbians have been using state constitutions to gain rights, even in states where their relationships are given no legal recognition.<sup>278</sup>

In *Cole*, both the State and the Family Council filed briefs in support of the voter-initiated law banning cohabiting, unmarried couples from fostering or adopting children. In their briefs, the State and the Family Council challenged the circuit court’s decision that the act significantly burdens the fundamental right to private acts of sexual intimacy. While they conceded that *Picado* invalidated criminal prohibitions against private sexual conduct, they contended that the case did not entail a right to cohabitation.<sup>279</sup> The State

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271. *Id.* at 27.

272. *Doe*, 2008 WL 5006172, at 27.

273. *Id.* at 28.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 29.

278. On the same day that Arkansas voters adopted a constitutional amendment banning recognition of same-sex marriages, Florida voters also amended their constitution to limit the definition of marriage to the legal union of a man and a woman. *See* FLA. CONST. art. I, § 27.

279. Family Council Action Committee Brief at Arg. 3, 7–9, *Cole*, 2011 Ark 145 (No. 10-840) [hereinafter Family Council Action Committee Brief]; Arkansas Department of

noted that there are a number of things that would disqualify someone from adopting in Arkansas, including a failure to meet the residency requirement and not meeting any religious requirements requested by the biological parents.<sup>280</sup> The Family Council further claimed that giving marital privileges to cohabitating partners would run afoul of the state constitutional amendment banning same-sex marriages.<sup>281</sup> It stated that the purpose of the state child-welfare system is to protect children and that the State does not intrude upon the lives of adults until they seek to adopt or foster a child.<sup>282</sup> Relying on *Lofton*, it concluded that the point of the adoption statutes is to provide a child with a secure environment, not provide an opportunity for an adult to become a parent.<sup>283</sup> The Family Council also noted the Arkansas judiciary's condemnation of cohabitation in the presence of children in the context of traditional child-custody cases.<sup>284</sup> Based upon its conclusion that Act 1 did not infringe upon a fundamental right, the Family Council urged the Supreme Court to apply the rational-basis test in determining the constitutionality of the act, and it asserted that placing children in homes with married couples, which studies showed to be more stable on average, was a rational basis for the act.<sup>285</sup>

On the other hand, the *Cole* plaintiffs argued that Act 1 did impinge upon Arkansas's constitutional right to privacy. They contended that the State could not comply with Act 1 without monitoring the activity of unmarried adults.<sup>286</sup> The argument was that if a foster parent began cohabiting with a sexual partner, the relationship would run afoul of the ban, and DHS would have to immediately remove the child from the home, regardless of the child's best interests.<sup>287</sup> Because the law infringed upon constitutional interests, according to the plaintiffs, the law could survive only if it was the least restrictive method available to promote a compelling state interest.<sup>288</sup> And they believed that the law was not narrowly tailored to meet any such interest.

The *Cole* plaintiffs further argued that there was no rational basis for Act 1. First, the law reduced the number of available foster and adoptive

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Human Services Appellant's Brief at Arg. 12–18, *Cole*, 2011 Ark. 145 (No. 10-840) [hereinafter State's Brief, *Cole*].

280. State's Brief, *Cole*, *supra* note 279, at Arg. 9–11.

281. Family Council Action Committee Brief, *supra* note 279, at Arg. 4, 11–13.

282. *Id.* at Arg. 5–6.

283. *Id.* at Arg. 6–7 (citing *Lofton*, 358 F.3d at 811).

284. *Id.* at Arg. 9–11 (citing *Alphin v. Alphin*, 364 Ark. 332, 341, 219 S.W.3d 160, 165–66 (2005)).

285. *Id.* at Arg. 17.

286. Appellees/Cross-Appellant's Supplemental Abstract, Brief and Supplemental Addendum at Arg. 7, *Cole*, 2011 Ark. 145 (No. 10-840) [hereinafter Sheila Cole's Brief, *Cole*].

287. *Id.*

288. *Id.* at Arg. 8.

homes, thus operating against what is in the best interests of children waiting for a home.<sup>289</sup> They believed that the individualized process in place was sufficient to protect the interests of children.<sup>290</sup> Second, they adopted the reasoning of the Florida Circuit Court in *Doe*: that there was no basis for allowing cohabiting persons to be guardians but not foster or adoptive parents.<sup>291</sup> Third, they asserted that the State's and the Family Council's reliance on "average" outcomes was irrelevant, as those studies did not focus on particular individuals, particularly those who would otherwise be qualified to adopt children but for the prohibition in Act 1.<sup>292</sup> Fourth, they relied on evidence suggesting that children raised by same-sex couples fared no worse than those raised by opposite-sex couples.<sup>293</sup> Finally, the plaintiffs

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289. *Id.* at Arg. 21–22.

290. *Id.* at Arg. 22–23.

291. *Id.*, at Arg. 23. They specifically noted that guardianships require far less court oversight than foster relationships and adoptions. *Id.*

292. Sheila Cole's Brief, *Cole*, at Arg. 24–27.

293. *Id.* at 27–28. Indeed, the psychological and sociological *amici* in *Picado* also saw no differences between homosexual and heterosexual parents:

Many gay men and lesbians are also parents. The consistent conclusion drawn from two decades of scientific research conducted on gay and lesbian parents and their children is that these children demonstrate no deficits in intellectual development, social adjustment or psychological well-being from children raised by heterosexual parents. (citations omitted).

A recent article surveying the scientific studies on this issue reported no differences between children raised by lesbians and those raised by heterosexuals with respect to self-esteem, anxiety, depression, behavioral problems, performance in sports, school and friendships, use of counseling, unsociability, hyperactivity, or emotional difficulty. (citations omitted) To the extent that the authors of that article reported results from prior studies suggesting that there might be some differences between children raised by homosexual and those raised by heterosexual parents, the data suggesting the differences were generally not statistically significant and were often contradicted by other studies. (citations omitted) The authors also reported that "in studies of matched lesbian and heterosexual couples, women in every category—heterosexual birth mother, lesbian birth mother, non-biological lesbian social mother—all score about the same as one another, but all score significantly higher than the men on measures having to do with the care of children." (citations omitted) Finally, the authors reported data suggesting that non-biological lesbian mothers have stronger parenting skills than both biological and non-biological heterosexual fathers, but observed that such differences "may have more to do with gender than with sexual orientation." (citations omitted)

Psychological/Sociological Associations Amici, *Picado II*, at 13–14 (citing Green & Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications for Public Policy* 197, 213 (J. Gonsiorek & J. Weinrich eds., 1991); C. Patterson, *Children of Lesbian and Gay Parents*, 63 *CHILD DEV.* 1025 (1992); D. Flaks *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 *DEVELOPMENTAL PSYCHOL.* 105 (1995); R. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *AM. J. PSYCHIATRY* 692 (1978); M. Kirkpatrick *et*

found it irrational for supporters of the law to believe that children do best with both a mother and a father, yet support a law that still allows noncohabiting singles to adopt, even if they are frequently engaged in sexual activities.<sup>294</sup>

Conversely, while it did not address whether Act 1 could survive heightened scrutiny in its main brief, the Family Council believed that the act was narrowly tailored to protect children. It accused the plaintiffs of not appreciating “the high value of the interest at stake . . . or the consequences of process failure, such as neglect, abuse, and even death.”<sup>295</sup> Family Council explained that “by cutting out the riskiest, poorest-performing environments, [Act 1] directly and narrowly protects children from negative and potentially dangerous outcomes.”<sup>296</sup>

The court had before it an *amicus* brief supported by a number of groups representing various adoption and psychological organizations.<sup>297</sup> They believed that the Act’s blanket ban was harmful to the best interests of children, and they urged an individualized assessment of each adoption.<sup>298</sup> They advocated adoption over long-term foster care.<sup>299</sup> Given the number of children awaiting a foster home or adoption (they cited a study showing 518 children in Arkansas awaiting adoption but only 228 available homes, as well as 3856 children awaiting foster care but only 1077 available homes),<sup>300</sup> they viewed that children faced the choice not “of adoption by a married or unmarried cohabiting couple, but rather the much more stark choice of

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al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981); J. Stacey & T. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 169, 171 (2001)).

294. Cole’s Brief at Arg. 28–29, *Cole*.

295. Family Council Reply Brief, *Cole*, at Arg. 14.

296. *Id.* at Arg. 14–15.

297. Brief of Amicus Curiae Dr. Roger Hiatt, et al., *Cole*, 2011 Ark. 145 (No. 10-840) [hereinafter “*Amicus Brief in Support of Appellees, Cole*”] (including American Academy of Adoption Attorneys; Arkansas Advocates for Children & Families; Arkansas Chapter of American Academy of Pediatrics; Arkansas Psychological Ass’n; Arkansas Chapter of the Nat’l Ass’n of Social Workers; Center for Adoption Policy; Child Welfare League of America; Evan B. Donaldson Adoption Institute; Foster Care Alumni of America; Barbara Miles (former Arkansas foster youth); Nat’l Center for Adoption Law & Policy; Nat’l Center for Youth Law; North American Council on Adoptable Children; Marcia A. Shobe, Ph.D., Univ. of Arkansas of Fayetteville, School of Social Work; and Howard M. Turney Ph.D., Univ. of Arkansas at Little Rock, School of Social Work). There were also two other *amicus* briefs filed in support of the *Cole* plaintiffs. One was filed by the Lambda Legal Defense and Education Fund. The other was filed on behalf of a number of Arkansas law school professors.

298. *Id.* at 1.

299. *Id.* at 2–4.

300. *Id.* at 4 (citing Arkansas Department of Human Services Division of Children and Family Services SFY 2009 Annual Report Card (the “Report Card”) (*available at* <http://www.state.ar.us/dhs/chilnfamlARC%20SFY%202009%20Final.pdf> (last visited Oct. 20, 2010))).

adoption by whatever couple or individual is available or no adoption at all.”<sup>301</sup> They noted that lawmakers were moving away from categorical adoption bans and toward “a more inclusive approach that does not rule out an applicant unless an individualized evaluation suggests that he or she would not be an appropriate parent.”<sup>302</sup> These *amici* also cited studies that found no scientific basis for categorically banning gays and lesbians from adopting or fostering children. Specifically, they wrote that gay and lesbian parents fare as well as heterosexual parents when it comes to parenting skill, and that there was no adverse relationship between parents’ sexual orientation and cognitive skills and development.<sup>303</sup> Further, according to these *amici*, children raised by homosexual parents did not experience higher rates of emotional or behavioral problems, were not more likely to become gay or lesbian themselves, and fared just as well on assessments of peer relationship quality and popularity compared to children raised by heterosexual parents.<sup>304</sup> The criticism of this research, as those who supported the act would identify, is that it compares homosexuals to heterosexuals, not married couples to nonmarried, cohabiting couples. But the *amici* in support of the appellees also believed that there was no basis for categorically banning unmarried heterosexual couples from fostering or adopting children. They noted that children raised by single people (who were, again, not excluded from fostering or adopting), had outcomes comparable to (or in some cases, worse than) unmarried heterosexual couples.<sup>305</sup> Thus, they contended that Act 1 was contrary to the health, safety, and welfare of children in state custody.

There were professionals in support of the Act as well. For example, the court considered an *amicus* brief from a group of physicians and mental health professionals led by Dr. Roger Hiatt, a child and adolescent psychiatrist with seventeen years of experience working with children in Arkan-

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301. *Id.* at 5.

302. *Amicus* Brief in Support of Appellees, at 9, *Cole*, 2011 Ark. 145 (No. 10-840) (citing Alice Bussiere, *The Development of Adoption Law*, 1 ADOPTION Q., 3, 8 (1998); Joan Heifetz Hollinger, *Proposed Uniform Adoption Act of 1994*, in THE PRAEGER HANDBOOK OF ADOPTION, at 653–56 (Kath S. Stolley & Vern L. Bullough eds. 2006); see also Child Welfare Information Gateway, *The Adoption Home Study Process* (2010), at 8, available at [http://www.childwelfare.gov/pubs/f\\_homstu.cfm](http://www.childwelfare.gov/pubs/f_homstu.cfm) (“many agencies are looking for ways to rule families *in* rather than rule them *out*, in order to meet the needs of children in the U.S. foster care system waiting for adoptive families”).

303. *Id.* at 15–16.

304. *Id.* at 16–17.

305. *Id.* at 20–21 (citing Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 885 (2003); Cynthia Osborne & Sara McLanahan, *Partnership Instability and Child Well-Being*, 69 J. MARRIAGE & FAM. 1065, 1072 (2007); Wendy D. Manning & Susan Brown, *Children’s Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 359 (2006).



sas.<sup>306</sup> In their collective professional judgment, an adoptive child's best interest would be better served by married parents or single parents, as opposed to unmarried, cohabiting couples.<sup>307</sup> They cited studies showing that cohabiting adults are more likely to suffer from alcoholism, depression, and aggression.<sup>308</sup> And they relied on other studies linking cohabiting parents to increased behavior problems, poorer academic scores, and increased illegal drug use in children.<sup>309</sup> These professionals were also unwilling to accept any studies supporting same-sex households, contending that such studies were "nascent and not definitive enough to create the basis for dramatic legal and social change in the preference for placing children in married, dual-gender homes."<sup>310</sup>

The Arkansas Supreme Court unanimously affirmed the circuit court's decision to strike down Act 1.<sup>311</sup> The court's analysis started with *Picado* and its applicability to the act.<sup>312</sup> The court noted that Act 1 explicitly banned those people "*cohabiting with a sexual partner*" (emphasis from the court) outside of marriage from fostering or adopting children.<sup>313</sup> Thus, for an unmarried person to foster or adopt children, he or she would have to give up the right to cohabit with a sexual partner.<sup>314</sup> Relying on the decision in *Sherbert v. Verner*,<sup>315</sup> where the Supreme Court of the United States reversed a denial of unemployment benefits based upon the claimant's refusal to work on Saturdays for religious reasons,<sup>316</sup> the court stated that Act 1 re-

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306. Brief of *Amicus Curiae* Dr. Roger Hiatt, et al., at 1–2, *Cole*, 2011 Ark. 145 (No. 10-840) [hereinafter Hiatt Brief, *Cole*].

307. *Id.* at 3.

308. *Id.* at 4–5 (citing G.J. Duncan, B. Wilkerson & P. England, *Cleaning Up Their Act: The Impacts of Marriage and Cohabitation on Licit and Illicit Drug Use*, 43 *DEMOGRAPHY* 691–710 (2003); A.V. Horwitz & H.R. White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 *J. OF MARRIAGE & THE FAMILY* 505–14 (1998)).

309. *Id.* at 6 (citing Sandi Nelson, Rebecca L. Clark & Gregory Acs, *Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couple and Blended Families*, B-31 *NEW FEDERALISM NAT'L SURVEY OF AMERICA'S FAMILIES*, URBAN INSTITUTE (2001); Shannon E. Cavanaugh, *Family Structure History and Adolescent Adjustment*, 29 *J. OF FAMILY ISSUES* 944–80 (2008)).

310. *Id.* at 7–8, \_\_\_ S.W.3d at \_\_\_\_.

311. *Cole*, 2011 Ark. at 9–10, \_\_\_ S.W.3d at \_\_\_\_.

312. *Id.*

313. *Id.*

314. *Id.*

315. 374 U.S. 398 (1963).

316. In the words of the High Court:

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

*Id.* at 404.

quired citizens to forego a constitutional right in order to be eligible to foster or adopt children. Moreover, according to the court, when a person who is living apart from their sexual partner or lives with a partner but remains celibate, the State becomes obligated as a result of Act 1 to either remove the child from the home if the sexual partners decide to move in together or intrude into the bedroom to ensure that the partners are indeed celibate.<sup>317</sup> Thus, Act 1, according to the court, jeopardized the right to private, consensual, noncommercial intimacy.<sup>318</sup>

But to hold that Act 1 violated this right of privacy seemed to run contrary to a rule often cited in the context of child-custody cases: “[E]xtramarital cohabitation in the presence of children ‘has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change in circumstances warranting a change of custody.’”<sup>319</sup> The Supreme Court was not concerned with this issue, however, as the determination of what is in a child’s best interest in a child-custody case is made on a case-by-case basis.<sup>320</sup> The court stated that Act 1 acted as a blanket prohibition and failed to consider the child’s best interests on a case-by-case basis.<sup>321</sup> In addition, it noted that unlike the child-custody situation, any cohabiting partners are known by entities approving the foster arrangement or adoption.<sup>322</sup> Unsuitable parents are screened out of the process.<sup>323</sup>

The court stated that because Act 1 infringed upon a fundamental right, it could only survive if it advanced a compelling state interest and was the least restrictive method available to carry out that state interest.<sup>324</sup> It determined that protecting children was unquestionably a compelling state interest,<sup>325</sup> so the issue became whether Act 1 was the least restrictive method of protecting children. The Supreme Court held that it was not. It cited the opinions of those who believed that the ban served no child welfare purpose:

Ed Appler, Child Welfare Agency Review Board (CWARB) member and President of Grace Adoptions, said in his deposition taken August 4, 2009, that, as a Review Board Member and as a social worker, he could not identify any child welfare interests that are advanced by Act 1. Sandi Doherty, Division of Children and Family Services (DCFS) Program

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317. *Cole*, 2011 Ark. 145, at 17, \_\_\_ S.W.3d \_\_\_\_.

318. *Id.* at 13–14, \_\_\_ S.W.3d at \_\_\_\_.

319. *Id.* at 14, \_\_\_ S.W.3d at \_\_\_\_ (quoting *Alphin*, 364 Ark. 332, 340, 219 S.W.3d 160, 165 (2005)).

320. *Id.* at 15, \_\_\_ S.W.3d at \_\_\_\_.

321. *Id.*

322. *Id.* at 15, \_\_\_ S.W.3d at \_\_\_\_.

323. *Cole*, 2011 Ark. at 16, \_\_\_ S.W.3d at \_\_\_\_.

324. *Id.* at 19, \_\_\_ S.W.3d at \_\_\_\_ (quoting *Picado II*, 349 Ark. at 632, 80 S.W.3d at 350).

325. *Id.* at 20, \_\_\_ S.W.3d at \_\_\_\_ No one contested this point. *Id.*

Administrator and former DCFS Area Director and County Supervisor, in her deposition taken November 17, 2009, stated that in her personal view Act 1 is not consistent with the best practices because it bars placement of children with relatives who are cohabiting with a sexual partner. Marilyn Counts, DCFS Administrator of Adoptions, in her deposition taken December 9, 2009, agreed that she could not identify any child welfare interests that are furthered by categorically excluding unmarried couples from being assessed on an individual basis as to whether they would be a suitable adoptive parent. John Selig, Director of DHS, in his deposition taken December 16, 2009, stated that in his personal opinion, it is not in the best interest of children to have a categorical ban on any cohabiting couple from fostering or adopting children because the case workers should have as much discretion as possible to make the best placement. Moreover, counsel for the State and FCAC admitted at oral argument that some adults cohabiting with their sexual partners would be suitable and appropriate foster or adoptive parents, all of which militates against a blanket ban.<sup>326</sup>

In addition, the court stated that any concerns raised to justify the ban were alleviated by the individualized screening process put in place for foster and adoption decisions.<sup>327</sup> It was confident that the screening process would eliminate unsuitable parents regardless of their sexual orientation.<sup>328</sup> The process may not be perfect, but it was rigorous enough for prospective foster or adoptive children.<sup>329</sup>

The Supreme Court's holding made it unnecessary to address other issues raised by the parties, including whether Act 1 was rationally related to a legitimate government purpose, whether it violated the due process and equal protection clauses of the Arkansas Constitution, and whether the act violated rights under the federal Constitution.<sup>330</sup> (The plaintiffs cross-appealed from the circuit court's ruling and sought a holding on these grounds.) But the court made it clear that Act 1 infringed upon a state constitutional right and that it was not narrowly tailored to meet the compelling government interest of protecting children.

## V. CONCLUSIONS

From these cases, one can reach a number of conclusions. The first conclusion is one that has been written about since the Supreme Court handed down its opinion in *Picado*: that the Arkansas Supreme Court is not

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326. *Id.* at 21, \_\_\_ S.W.3d at \_\_\_\_.

327. *Id.*

328. *Id.* at 22, \_\_\_ S.W.3d at \_\_\_\_.

329. *Cole*, 2011 Ark. at 16 n.4, \_\_\_ S.W.3d at \_\_\_\_ n.4.

330. *Id.* at 25–26, \_\_\_ S.W.3d at \_\_\_\_.

afraid to rely on its own constitution and laws to reach conclusions. In both *Picado* and *Cole*, the court could have used federal precedent as a justification to come to different conclusions. It did not. While the court in *Picado* did not break new ground, its decision in *Cole* did. There were state appellate courts that had held that same-sex couples had a right to adopt children, but such holdings were not in the face of a law that categorically banned them from doing so. And while there are Florida trial courts willing to strike down its ban on homosexuals adopting children, there is no guarantee that such a holding will withstand appellate scrutiny. In any event, when looking at fundamental rights, Arkansans should look to their own state's constitution.

This may mean that those in favor of advocating gay rights will see the Arkansas judiciary as friendly to their claims. This may not be the case, however, which leads to the second conclusion. While gays and lesbians have benefitted from many favorable decisions over the last decade, they were not premised upon the conclusion that gays and lesbians are a group deserving of suspect or quasi-suspect classification. The Arkansas Supreme Court struck down the same-sex sodomy law, in part, on equal protection grounds, but that analysis has not really played a role in any of the state's jurisprudence. *Picado* was relevant to *Cole*, not because of any equal-protection implications, but because of a fundamental right to privacy that exists regardless of one's sexual orientation. Gays and lesbians benefit because the Arkansas judiciary applies the law equally to heterosexuals and homosexuals.

The third conclusion (or at least an extension of the second) is that the best way for gays and lesbians to protect themselves in an Arkansas court is to have relationships that mirror traditional relationships, as least to the extent possible. Even then, at least for now, it will not be perfect. This lesson should be apparent from *Bethany*. Despite the fact that the couple there agreed to co-parent a child, there was no legal relationship (beyond that of in loco parentis status) between the child and the "non-biological mother." Thus, the circuit court was unwilling to award custody. That barrier may always exist (absent a scenario where the non-biological parent adopts the child, which is now a possibility after *Cole*). The non-biological mother in *Bethany* was successful because she played a substantial role in the child's life. She may not have been successful had she simply been someone whom the child called "mommy."

The fourth conclusion that there is still room to legally discriminate against gays and lesbians in the Arkansas judiciary is not as positive as the three that preceded it. This comes from the *Taylor* opinion. Ms. Taylor was successful in defending the change-of-custody petition, not because the Supreme Court found that sexual orientation should play no role in the custody decision, but because it felt that a custody decision should be justified by more than erroneous public perception. What would have happened if Ms.

Taylor was actually in a relationship with a lesbian? Would she have even been able to win an initial custody determination had she considered herself a lesbian at the time of the divorce? Even without evidence showing that the parent's sexual orientation is directly harming the children at the subject of the litigation before any given court, there is—at least at this time—room for a court to rule against a gay or lesbian for no other reason than he or she is gay or lesbian.

Perhaps some may take solace in a final conclusion: that despite an animus against gays and lesbians and a constitutional amendment with forbids recognition of same-sex marriage, gays and lesbians in committed relationships may have some rights in Arkansas. Unless the voters repeal its constitutional amendment banning same-sex marriage (which is unlikely given public sentiment on the issue)<sup>331</sup> or the federal courts declare it unconstitutional (as the Court of Appeals for the Ninth Circuit has done with respect to California's marriage amendment),<sup>332</sup> gays and lesbians will have to rely on the judiciary in Arkansas for rights in the area of domestic relations. But at least the option is there.

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331. See note 1 and accompanying text.

332. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). See also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (finding that the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7, violated core constitutional principles of equal protection); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (finding that DOMA violated the Tenth Amendment to the United States Constitution). While this article was undergoing final edits, the United States District Court for the Northern District of California also declared DOMA to be unconstitutional. See *Golinski v. U.S. Office of Personnel Management*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 569685 (N.D. Cal. 2012). What distinguishes *Golinski* from the cases decided by the District Court in Massachusetts is its finding that the law was subject to heightened scrutiny. A law subjected to heightened scrutiny violates the Equal Protection Clause if it is not substantially related to an important government interest. Needless to say, there will be more judicial opinions written about marriage amendments and DOMA.