Department of Health and Rehabilitative Services v. Cox: Is Florida's Statute in the Child's Best Interests?

Section 63.042(3) of the Florida Statutes (1991), enacted in 1977, provides that "'No person eligible to adopt under this statute may adopt if that person is a homosexual.'"[1] On March 22, 1991, plaintiff James W. Cox attempted to enroll in parenting classes with defendant, The Department of Health and Rehabilitative Services ("HRS") in Sarasota, Florida. Cox voluntarily disclosed to HRS that he was homosexual. On April 3, 1991, plaintiff Rodney M. Jackman also disclosed his homosexuality to HRS. Soon after, HRS became aware that Cox and Jackman lived together and advised them that HRS would not accept an application for adoption from either man because of section 63.042(3). After receiving this information, plaintiffs filed an action alleging that section 63.042(3) is unconstitutional on its face and as applied to them, based on their right to privacy, due process, and equal protection of the laws.[2] Both plaintiffs and defendant moved for summary judgment. The court decided to determine the facial validity of section 63.042(3) based on the previous facts as well as any additional data the parties desired to provide the court.[3] The trial court also asked the parties to brief any potential ambiguities of the word "homosexual."[4] Relying

1. State Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1212 (Fla. Dist. Ct. App. 1993) (quoting ch. 77-140, LAWS OF FLA. § 63.042(3) (1991)).

2. *Id.* at 1212.

3. *Id.* By stipulation, the parties filed copies of law review and magazine articles, journals and various editorials. These articles were listed by the court in a separate Appendix B. Of the approximately 17 articles submitted by the parties, the appeals court noted only two to be "major scientific articles." One is an article by J. Charlotte Patterson entitled "Children of Lesbian and Gay Parents," printed at page 1025 of the October 1992 edition of *Child Development*. The other is an article by Mary B. Harris and Parlene J. Turner entitled "Gay and Lesbian Parents," published in volume 12 of the winter 1985 *Journal of Homosexuality*. 627 So. 2d at 1212-13.

4. 627 So. 2d at 1212. The trial court asked the parties to brief this definition despite the fact that plaintiffs admitted their homosexuality and claimed no confusion with respect to the definition of "homosexual." *Id.*

chiefly upon an unappealed circuit court opinion, *Seebol v. Farie*,[5] the trial court held section 63.042(3) void for vagueness and determined that it violated homosexuals' rights to privacy and rights to equal protection.[6] HRS appealed to the District Court of Appeal of Florida, Second District.[7] That court reversed, holding that section 63.042(3) of the Florida Statutes is not void for vagueness, that it does not violate plaintiffs' right to privacy or substantive due process rights, that "strict scrutiny" would not be applied to the statute under an equal protection analysis, and that, under the lesser "rational basis" test, section 63.042(3) survives.[8]

With respect to the adoption of children, courts historically have applied the best interests of the child test to determine whether to allow an individual or individuals to adopt.[9] Under this test, the judge weighs numerous factors to evaluate whether the adoption will be in the child's best interests.[10] Most state statutes neither encourage nor prohibit homosexuals from adopting. Instead, homosexuality is simply one of the many factors weighed in determining the child's best interests.[11] However, two states, Florida and New Hampshire, expressly prohibit adoption by homosexuals.[12] New Hampshire's statute further prohibits homosexuals from fostering children.[13] The New Hampshire Supreme Court upheld that statute finding that it did not violate equal protection because the right to adopt is not fundamental and homosexuals do not constitute a suspect class.[14] Thus, under the "rational basis" test, the New Hampshire statute withstood the

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5. 16 Fla. L. Weekly C52 (16th Cir. Ct. Mar. 15, 1991). The opinion has not been published in an official Florida reporter.

6. 627 So. 2d at 1212.

7. *Id.*

8. *Id.* at 1213-20.

9. *Id.* at 1220.

10. *See* The Uniform Marriage & Divorce Act § 402, 9A U.L.A. 561 (1987). That section gives some guidance as to what encompasses the child's best interests. They include:

> (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.

Id.

11. *See infra* notes 16-18 and accompanying text.

12. *See* FLA. STAT. ANN. § 63.042(3) (1991); N.H. REV. STAT. ANN. § 170-B:4 (1991).

13. N.H. REV. STAT. ANN. § 107-B:4 (1991).

14. 627 So. 2d 1210, 1214 (citing Op. of the Justices, 530 A.2d 21 (N.H. 1987)).

constitutional challenge.[15] However, many states have done the reverse of what Florida and New Hampshire have done. California treats homosexuality as merely a factor in applying the child's best interests test.[16] The Division of Youth and Family Services for the State of New Jersey has supported homosexuals adopting children by reviewing applications on a case-by-case basis.[17] The Supreme Court of Ohio has recently permitted the adoption of a "special needs" child by a homosexual, also recognizing the need to review adoption applications on a case-by-case basis without exacting any clear-cut rules regarding homosexual applicants.[18] In the case relied on heavily by the lower court in *Cox*, the Sixteenth Circuit for Monroe County, Florida held the Florida statute at issue in *Cox* prohibiting adoption by homosexuals unconstitutional.[19]

The recent trend among the states allowing adoption by homosexuals notwithstanding, the Florida appeals court upheld section 63.042(3) in *Cox*.[20] In doing so, the court first concluded that section 63.042(3) is not unconstitutionally vague simply because it does not define the word "homosexual."[21] HRS argued, and the court agreed, that section 63.042(3) should be interpreted to include the New Hampshire definition of "homosexual" that being "'any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender.'"[22] In this respect, the statute is meant to encompass only those individuals who are known to engage in "current, voluntary homosexual activity."[23] Adequate notice of the statutorily proscribed conduct is all that is necessary, not precise

15. *Id.* at 1214 (citing Op. of the Justices, 530 F.2d 21 (N.H. 1987)).

16. *See* Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); and Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

17. *In re* Adoption of a Child by J.M.G., 267 N.J. Super. 622, 629, 632 A.2d 550, 553 (1993) (citing to the Field Operations Manual II, § 14(31) (1986), of the New Jersey State Dep't of Human Servs.).

18. *In re* Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990). "Special needs" child refers to the fact that Charles B. suffered from leukemia, possible brain damage from fetal alcohol syndrome, a low I.Q., and a speech impediment. His natural family abused him and he lived in four different foster homes. These factors led the court to believe that Charles B. would be better off with his adoptive parent, a homosexual, instead of in an institution or moving from foster home to foster home. *Id.* at 884-89.

19. *See supra* note 5.

20. 627 So. 2d at 1210.

21. *Id.* at 1213-15.

22. *Id.* at 1214 (quoting N.H. REV. STAT. ANN. § 170-B:2 (1991)).

23. *Id.*

definition of every word.[24] Based on that concept, the court concluded that a person of "common understanding and intelligence" would be placed on notice that the definition of "homosexual" in section 63.042(3) is the same as that in the New Hampshire statute.[25] The court next turned to plaintiff's right to privacy argument.[26] Plaintiffs claimed a right to privacy concerning their sexual orientation.[27] However, both of the plaintiffs voluntarily admitted that they were homosexual.[28] "They cannot claim an expectation of privacy concerning a fact that they have willingly disclosed."[29] Thus, because the state did not demand information, but rather the information was voluntarily provided, the court failed to find any right to privacy violated by the statute.[30] The trial court did not expressly rule on plaintiffs' due process claim.[31] However, the appeals court did hold that plaintiffs' due process rights were not violated by the Florida statute.[32] This decision was based on two parts: first, the New Hampshire Supreme Court held that the opportunity to adopt is not a fundamental liberty;[33] and, second, the United States Supreme Court has held that engaging in homosexual activities is also not a fundamental liberty.[34] Lastly, and perhaps the most significant aspect of the holding in *Cox*, the Florida appeals court reversed the lower court's finding that section 63.042(3) violates plaintiffs' equal protection under the laws.[35] The first step in the

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24. *Id.* (citing Southeastern Fisheries Ass'n v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984)).

25. *Id.* at 1214-15.

26. *Id.* at 1215.

27. *Id.* The trial court agreed with plaintiffs on this matter, basing its reasoning chiefly upon *Seebol*. *See supra* notes 5 and 19. The reason the appeals court's analysis of the right to privacy issue differs from *Seebol* and the lower court in *Cox* is because the appeals court concludes first that "homosexual" is defined as "current, voluntary homosexual activity." *See supra* notes 21-25 and accompanying text. In light of this, the court does not believe that § 63.042(3) sufficiently intrudes upon a right to privacy. 627 So. 2d at 1215.

28. 627 So. 2d at 1215.

29. *Id.*

30. *Id.* at 1215-17. One can argue that the information provided by applicants regarding their sexual orientation is not truly voluntary because the HRS form asks whether or not the applicant is homosexual or bisexual. *See* HRS-CYF Form 5071, Adoption, Paternity and other Florida Family Practice, § 2.26 (2d ed. 1992). The court specifically stated that it would not determine what would happen if an applicant refused to answer the sexual orientation portion of the application. 627 So. 2d at 1217.

31. 627 So. 2d at 1217.

32. *Id.* at 1217-18.

33. *Id.* at 1217 (citing Op. of the Justices, 530 A.2d 21 (N.H. 1987)).

34. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

35. *Id.* at 1218-20.

court's two-part analysis concerned what standard to apply to the statute, and the second was the application of that standard. Two standards are applicable to equal protection analysis: "strict scrutiny" and "rational basis."[36] "Strict scrutiny" is only applicable where there exists a fundamental right or a suspect class.[37] The court had previously determined that there are no fundamental rights to adopt or engage in homosexual activity; therefore, the question was whether homosexuals were "suspect."[38] After citing Colorado, Florida, and Kentucky cases, as well as federal cases in the Seventh and Ninth Circuits, the court concluded that homosexuals were not "suspect," and therefore, the "rational basis" test was applicable to the statute.[39] Under that test, "'[l]egislative classifications are valid unless they bear no rational relationship to the State's objectives.'"[40] In this case, the court easily found a rational relationship between the child's best interests and section 63.042(3).[41] The child's best interests include a "stable heterosexual household during puberty and the teenage years."[42]

While the court in *Cox* upheld section 63.042(3) under the "rational basis" test, it did not seem satisfied that its conclusion would be the same under a different scenario, or even that its holding would remain good law.[43] Florida is one of only two states with these statutes in

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36. *Id.* at 1218. Recently, courts have established a middle scrutiny level, and have applied it mainly to gender classifications. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). This middle scrutiny level was not argued for in this case. 627 So. 2d at 1218.

37. 627 So. 2d at 1218.

38. 627 So. 2d at 1218. *See supra* notes 33-34 and accompanying text.

39. *Id.* at 1218-19 (citing Evans v. Romer, 854 P.2d 1270 (Colo. 1993); *In re* Florida Bd. of Bar Examiners, 358 So. 2d 7 (Fla. 1978); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990)).

40. *Id.* at 1219 (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979)).

41. *Id.* at 1220.

42. *Id.*

43. The court wrote,

> [T]here are people in Florida who strongly disagree with this proffered reasoning. Others may believe that this reasoning warrants a denial of most, but not all, adoptions by homosexual applicants. The materials placed *in this record by the plaintiffs*, however, have not established that this reasoning is irrational nor have they overcome the presumption of constitutionality. Accordingly, the state has *not yet* had any obligation to provide evidence to support the reasonably conceivable state of facts that supply an initial rational basis for its classification. *It may be that the legislature should revisit this issue in light of the research that has taken place* . . . .

effect, and it appears as though the recent trend is in placing the emphasis not on the applicant's sexual orientation, but rather on the child's best interests.[44] This shift was seen recently with respect to homosexuals attempting to gain custody over their natural children. Initially, the courts resisted awarding custody to homosexual parents;[45] however, recently the courts have been applying the nexus test: requiring a nexus between the best interests of the child (i.e., how being raised with a homosexual parent would affect that child) and the homosexuality of the parent attempting to gain custody.[46] This results in a case-by-case analysis of individuals seeking custody of their children, instead of an absolute denial based on that individual's sexual orientation. Those who oppose the decision in *Cox* would argue that this same shift from not permitting custody based on sexual orientation to the case-by-case approach should be applied to the area of homosexuals seeking to adopt. In fact, many states have adopted a case-by-case analysis with respect to adoptions.[47] However, the focus must not be placed on arguments over the definition of "homosexual" or whether or not there exists a fundamental right to adopt. The issue must remain whether the adoption would be in the *best interests of the child*. With that perspective, it seems clear that the case-by-case approach is the only answer. However, Florida and New Hampshire have chosen to expressly eliminate this method and reject those applicants who are known to engage in homosexual activity.[48] Further, both of these statutes have survived constitutional challenges.[49] Thus, even in cases where it appears to be in the best interests of the child, those state statutes would expressly prohibit adoption if the applicant voluntarily admitted his or her homosexuality. While this Casenote is not arguing that homosexuals should get "strict scrutiny," or that there is not a "rational basis" to believe that sexual orientation might affect a child's upbringing, one can imagine circumstances in which a child's best interests might not be served by the Florida and New Hampshire

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Id. at 1220 (emphasis added). It is this paragraph that seems to indicate that the court's holding is very specific to the lack of factual data provided by Plaintiffs in this case, and the court is almost giving a hint to the legislature that they may soon be in trouble.

44. *See supra* notes 16-19 and accompanying text.

45. *See, e.g.*, Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985) and N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980).

46. *See* People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973).

47. *See supra* notes 16-19 and accompanying text.

48. *See supra* note 12.

49. *See supra* notes 14-15 and notes 20-42 and accompanying text.

statutes.[50] In those instances, these blanket rules seem to do injustice to the established test, the best interest of the child test.

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50. For one example see note 18 and accompanying text.