claimed that after the couple separated their finances, Latham discontinued financial support of the child.[8] Between October and December of 2009, Latham claimed that she was only allowed to spend a total of three days with the child.[9]

Procedural History

In December 2009, Latham filed a complaint for custody and visitation of P.S. in the district court for Douglas County in which she claimed she had standing to bring the action under the doctrine of *in loco parentis*.[10] In February 2010, Schwerdtfeger filed a motion for summary judgment.[11] The court then ordered the parties to submit briefs on Latham's *in loco parentis* status.[12] On July 2, 2010, the district court ruled that the doctrine of *in loco parentis* did not apply and dismissed Latham's claim with prejudice and granted Schwerdtfeger's motion for summary judgment.[13]

Latham appealed and claimed that the district court erred when it concluded that "the doctrine of *in loco parentis* did not apply," that "there were no genuine issues [as] to a material fact," and that she "lacked standing to seek for custody and visitation of the minor child."[14]

When the Nebraska Supreme Court reviewed the case, it did not make a final determination of whether to grant Latham custody and visitation. The court reversed and remanded, holding that 1) the district court erred when it concluded that the doctrine of *in loco parentis* did not apply and 2) there were genuine issues of material fact as to whether Latham was entitled to custody and visitation of the minor child.[15]

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Arkansas Supreme Court Strikes Down Ban on Adoption by Unmarried Cohabitating Couples

by Jordan E. Pratt

In a unanimous opinion handed down on April 7, 2011, the Arkansas Supreme Court invalidated—on state constitutional right-to-privacy grounds—a ban on adoption and foster parenting by unmarried adults who cohabitate with sexual partners.[1] Although the law applied to both heterosexual and homosexual couples, the decision has captured public attention largely because of its implications for the latter group.[2] This article briefly describes the law, the suit leveled against it, and the Arkansas Supreme Court's decision in *Arkansas Dep't of Human Services v. Cole*.

A. The Law

In November 2008, the voters of Arkansas approved a ballot initiative known as the Arkansas Adoption and Foster Care Act of 2008.[3] Taking effect on January 1, 2009, the Act prohibited individuals who cohabitate with a sexual partner outside of marriage from adopting or foster parenting minor children.[4] Noting the state's public policy of promoting marriage, and declaring 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 cohabitating outside of marriage," the Act applied equally to heterosexual and homosexual couples.[5]

B. The Litigation

Two days before the Adoption and Foster Care Act became effective, a group of plaintiffs filed suit in state court for injunctive relief.[6] The group included a lesbian grandmother wishing to adopt her granddaughter (Sheila Cole),[7] unmarried couples who wanted to foster or adopt children, adult parents who wanted to designate unmarried couples as the adoptive parents of their children in the event of their death or incapacity, and the biological children of those parents.[8] In a thirteen-count complaint, the plaintiffs alleged multiple violations of the federal and Arkansas constitutions. In Count 10, the plaintiffs alleged that the Act violated, among other things, federal and state constitutional rights to privacy by placing an impermissible burden on intimate relationships.[9]

The State moved to dismiss the complaint, and the Family Council Action Committee (FCAC), an intervening party in support of the Act, filed its own motion to dismiss.[10] After discovery, the State, FCAC, and the plaintiffs moved for summary judgment.[11] The trial court granted the plaintiffs' motion on Count 10 and determined that the Act violated the Arkansas Constitution. The court found that the Act "infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas" because it "significantly burdens non-marital relationships and acts of sexual intimacy

between adults" and was not narrowly tailored to the State's goal of protecting the best interests of children.[12] The trial court granted the State's and FCAC's motions for summary judgment and motions to dismiss on the federal constitutional claims, and it dismissed the plaintiffs' remaining state constitutional claims because it did not need to decide them.[13] The State and FCAC appealed the court's grant of summary judgment to the plaintiffs on Count 10, and the plaintiffs cross-appealed the court's grant of summary judgment to the State on the federal constitutional claims.[14]

C. The Arkansas Supreme Court's Decision

On direct appeal, the Arkansas Supreme Court affirmed the trial court's decision in a unanimous opinion.[15] Writing for the court, Justice Robert Brown began by briefly acknowledging the presumption of constitutionality accorded the statute.[16] In the remainder of his opinion, Justice Brown explained why, in the court's view, the plaintiffs had rebutted that presumption.

The lynchpin of the court's decision was *Jegley v. Picado*,[17] a 2002 case in which the Arkansas Supreme Court held that the state's constitution implicitly guarantees a fundamental right to privacy. The *Jegley* court invalidated an Arkansas statute that criminalized homosexual sodomy. Although the Arkansas Constitution contains no explicit right to privacy, the *Jegley* court found that it does guarantee one implicitly and that this fundamental right embraces "all private, consensual, noncommercial acts of sexual intimacy between adults."[18] *Jegley* directed that laws burdening this fundamental right to privacy receive strict scrutiny, and it found that a ban on homosexual sodomy could not meet that test.[19]

In the present case, the State contended that the Arkansas Adoption and Foster Care Act did not implicate *Jegley*'s right to privacy because it related to cohabitation, not sexual intimacy. The State further argued that the Act did not burden the right to engage in sexual intimacy because individuals who cohabitate with a sexual partner outside of marriage remained free under the Act to continue their lifestyle as long as they did not wish to adopt or foster children.[20] The court rejected these contentions, observing that the Act did not concern individuals who merely cohabitate, but rather individuals who cohabitate with a *sexual partner*. The court further reasoned that forcing a choice between the exercise of

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North Carolina Appellate Court Decides when Municipality May Be Held Liable in Public Park Case

by Jonathan Y. Ellis

In June 2007, seventeen-year-old Eric Williams died tragically at a public park in Elizabeth City, North Carolina. Eric was attending a high school graduation party when he drowned in a "swimming hole" in Fun Junktion Park, which a friend's parents had rented out from the Pasquotank County Parks and Recreation Department. In the ensuing lawsuit, *Williams v. Pasquotank County*,[1] Eric's estate sued the county and the department for the young man's wrongful death, alleging that the "swimming hole" was unsafe.

In their answer, the county and department asserted governmental and sovereign immunity. In a motion for summary judgment, they argued that they were immune from tort liability because the operation of the public park was a governmental function. The trial court denied the motion, and the county appealed. In a unanimous opinion issued in May, the North Carolina Court of Appeals affirmed.[2]

The issue presented was one that has vexed North Carolina courts for decades: When is a municipality liable for the negligence of its officers and employees? The court of appeals confronted the question head-on. Rather than confine itself to simply categorizing the county's conduct in the case before it, the panel went out of its way to "distill the controlling law . . . and provide a coherent framework for future application."[3]

Background Law

In North Carolina and many other state courts, governmental immunity shields municipalities from negligence suits for the actions of their employees. The North Carolina Supreme Court explained long ago that "a municipal corporation may not be held civilly liable to individuals for the negligence of its agents in performing duties which are governmental in their nature and solely for the public benefit."[4] And despite the expansion of municipal activities, the availability of liability insurance, and the injustice the doctrine can affect in individual cases, the North Carolina Supreme Court has made clear that the abrogation of this doctrine must come—if it is to come at all—from

37 *Id.* at 135.

38 *Id.*

Arkansas Supreme Court Strikes Down Ban on Adoption by Unmarried Cohabitating Couples

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a fundamental right and a statutory privilege—in this case, sexual intimacy and adoption, respectively—can constitute a burden on the right.[21] As its chief support for this proposition, the court enlisted the United States Supreme Court's decision in *Sherbert v. Verner*,[22] a well-known free exercise case that shielded a Seventh-Day Adventist from a state welfare benefits regime requiring availability to work on Saturdays. The Arkansas Supreme Court analogized the Adoption and Foster Care Act, which required a choice between sexual intimacy and adoption, to the welfare benefits regime in *Sherbert*, which required a choice between worshiping God according to the dictates of conscience and receiving welfare benefits. The court reasoned that the Act, by forcing such a choice, burdened the right to privacy implicitly protected by the Arkansas Constitution.[23]

Before deciding whether the burden imposed on the right to privacy was sufficient to trigger heightened scrutiny, the court set out to distinguish the Act from non-cohabitation orders historically permitted in divorce and child custody cases. The court cited two important distinctions. First, cohabitation orders are more narrowly directed toward the state's interest in promoting the best interest of children because they result from case-by-case determinations, not simply a blanket prohibition.[24] Second, the state has a much greater need to shield children from third-party "strangers" who live with divorced parents than it does to shield children from individuals who presumably must undergo extensive pre-adoption and pre-fostering screening.[25]

Having determined that the Adoption and Foster Care Act burdened the right to privacy implicit in the state constitution, the Arkansas Supreme Court found that the burden was severe enough to trigger the strict scrutiny test mandated by *Jegley*. The court reasoned that forcing a choice between sexual intimacy and adoption or fostering "is not appreciably different from [the burden] imposed by the criminal [sodomy] statute in *Jegley*," as both laws would ultimately require state investigations in the bedroom.[26] According to the court, forcing the plaintiffs to choose between their fundamental right to extramarital sexual intimacy and the privilege of having children by adoption or fostering was enough of a burden to trigger *Jegley*'s heightened scrutiny test.

The court concluded that the Arkansas Adoption and Foster Care Act could not meet the rigorous narrow-tailoring requirement of strict scrutiny. The court acknowledged that Arkansas' goal in enacting the statute—protecting the state's children and their best interests—was compelling.[27] But the Act's blanket ban cast too wide a net, the court explained. The court began by noting that several state officials had asserted in their depositions that a categorical prohibition on adoption and fostering by unmarried cohabitating couples would not serve the best interests of children.[28] And counsel for the state had conceded at oral argument that some individuals cohabitating with sexual partners could provide suitable homes for children.[29] Additionally, the state's concerns that unmarried cohabitating relationships are unstable and put children at higher risk than marital relationships "can . . . be addressed by the individualized screening process currently in place in foster and adoption cases."[30] The court described this screening process in detail, concluding that "[w]e have no doubt that this individualized assessment process is a thorough and effective means to screen out unsuitable applicants . . . ."[31]

Having determined that the Arkansas Adoption and Foster Care Act directly and substantially burdened the fundamental right to privacy implicit in the state's constitution and that the Act was not the least restrictive means of protecting the state's children from unstable homes, the Arkansas Supreme Court invalidated the Act and affirmed the decision below.[32] Accordingly, the court refused to address the federal constitutional claims and remaining state constitutional claims that the plaintiffs advanced on cross-appeal.[33] Although limited in its immediate effect to Arkansas, this decision will certainly add to the ongoing national dialogue concerning the ability of the several states to prohibit gay couples from adopting children or serving as foster parents.

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Endnotes

1 Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145 (2011).

2 *See, e.g.*, Nathan Koppel, *Arkansas Supreme Court Expands Gay Adoption Rights*, Wall St. J. (Apr. 7, 2011, 3:30 PM), http://blogs.wsj.com/law/2011/04/07/arkansas-supreme-court-expands-gay-adoption-rights/?mod=WSJBlog (last visited Oct. 10, 2011); Amanda Terkel, *Arkansas Supreme Court Strikes Down Ban on Gay Adoptions*, Huffington Post (Apr. 7, 2011, 2:51 PM), http://www.huffingtonpost.com/2011/04/07/arkansas-supreme-court-ban-gay-adoption_n_846174.html (last updated June 7, 2011).

3 *Cole*, 2011 Ark. at 2.

4 *Id.* at 2-3.

5 *Id.* at 3.

6 *Id.*

7 *See Cole v. Arkansas—About Our Plaintiffs and Their Families*, ACLU.org (Dec. 30, 2008), http://www.aclu.org/lgbt-rights_hiv-aids/cole-v-arkansas-profiles-our-plaintiffs-and-their-families (last updated Oct. 27, 2010).

8 *Cole*, 2011 Ark. at 3.

9 *Id.* at 4-5.

10 *Id.* at 5-6.

11 *Id.* at 6.

12 *Id.* at 5-7.

13 *Id.* at 6.

14 *Id.* at 7.

15 *Id.* at 2.

16 *Id.* at 8.

17 Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

18 *Id.* at 350.

19 *Id.*

20 *Cole*, 2011 Ark. at 10, 11.

21 *Id.*

22 374 U.S. 398 (1963).

23 *Cole*, 2011 Ark. at 12-14.

24 *Id.* at 16.

25 *Id.* at 16-17.

26 *Id.* at 17-18.

27 *Id.* at 21.

28 *Id.* at 21-22.

29 *Id.* at 22.

30 *Id.* at 23.

31 *Id.* at 23–24.

32 *Id.* at 25.

33 *Id.*

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individual cases that courts often find that "making this distinction proves difficult."[10]

North Carolina courts have highlighted a number of different factors that might be used to distinguish between governmental and propriety functions, any one of which might seem decisive. Some opinions have emphasized the function's historical pedigree: Is the function one "traditionally provided by the local governmental units"?[11] Others have asked the similar but distinct question whether a private corporation could perform the same task.[12] Decisions have relied upon the characterization of a function as "governmental" by state statute[13] or by prior judicial opinions that declare the function is directed at a public purpose.[14] Yet others have explained that such labels are not controlling.[15] Some decisions have found the collection of revenue to be "a crucial factor" in withholding governmental immunity.[16] And still others have held that a fee that covers only the municipality's costs will not transform a governmental function into a proprietary one.[17] The result, as the North Carolina Supreme Court has itself recognized, is a doctrine consisting of "irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary."[18]

Fun Junktion Park

And so the law stood when the North Carolina Court of Appeals was asked to determine whether Pasquotank County performed a governmental or proprietary function in its operation of Fun Junktion public park. Faced with such confused precedents, the court might have elected to follow one line of cases and issued a narrow decision that could have been embraced or distinguished by any future court.

For example, the court might have relied on the North Carolina General Assembly's declaration that "the public good and the general welfare of the citizens of this State require adequate recreation programs," and that "the creation, establishment, and operation of parks and recreation programs is a proper governmental function."[19] It might have emphasized the court of appeals' earlier statement in *Hare v. Butler* that "[c]ertain activities are clearly governmental such as law enforcement operations