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MEMORANDUM

To: Members of the Special Committee on Foster Care Adequacy

From: Scott Abbott, Assistant Revisor of Statutes

Date: Updated November 12, 2015

Re: Legal considerations in foster care placement

QUESTIONS PRESENTED

This memorandum was prepared in response to questions posed by Chairman Knox regarding legal considerations in foster care placement as follows:

I. What is the legality of discriminating against non-traditional family settings in foster care placement decisions, including single parents, unmarried cohabitating couples and same-sex couples?

II. What is the state's legal liability for harm that occurs to foster children from placement decisions and what are the state's obligations to provide care for foster children?

SHORT ANSWERS

I. Although there are no binding state or federal court cases pertaining to this issue in Kansas, other state courts have struck down state laws attempting to discriminate against non-traditional family settings in foster care placement and adoption decisions.

II. The state generally has a liability to provide for the safety and wellbeing of children placed in the foster care system. However, the state is generally not legally liable in tort for harm that occurs to foster children. Additionally, the state will only be liable for action that deprives a foster child of such child's constitutional rights if: (1) The state knew of the danger to the child or failed to exercise professional judgment with respect

to the danger; (2) the conduct caused the injury suffered; and (3) the state's actions "shock the conscience."

ANALYSIS

I. LEGALITY OF DISCRIMINATING AGAINST NON-TRADITIONAL FAMILY SETTINGS IN FOSTER CARE PLACEMENT

The answer to this question is unclear due to the recent U.S. Supreme Court decision in *Obergefell v. Hodges*.[1] In *Obergefell*, the Court ruled that the fundamental right to marry extends to same-sex couples; accordingly, any ban on same-sex marriage is unconstitutional under both the Equal Protection Clause and the Due Process Clause of the 14th amendment to the United States Constitution. There has not yet been sufficient time for challenges to laws that discriminate against non-traditional family settings in foster care placement based on the *Obergefell* decision.

Despite this uncertainty, courts in other states offer some guidance on the issue. At least five other states have taken action discriminating against non-traditional family settings in foster care placements and adoption decisions. In each of those five instances, state courts have struck down those actions. Those five cases are described below in reverse chronological order. Although the Florida and Georgia examples pertain to adoption and not foster parenting, they are included because similar legal standards are often applied in both contexts and the cases may still be informative.

A. Nebraska's Gay and Lesbian Foster Parent Ban

In Nebraska, three same-sex couples filed suit to challenge the Nebraska Department of Health and Human Services' decision not to approve the couples' application for foster home licenses.[2] The department issued a memorandum in 1995 declaring that the department would not issue foster home licenses to "persons who identify themselves as homosexuals" or "unrelated, unmarried adults residing together." In 2012, the department director verbally instructed department staff to no longer follow the memorandum's stated policy. The director also instituted a new procedure for reviewing and approving foster home licenses. Specifically, the department began to require different levels of review for approval as follows:

[1] 135 S.Ct. 2584 (2015).
[2] Stewart v. Heineman, Case CI 13-3157 (D. Lancaster Cty. Sept. 15, 2015).

Married opposite-sex couples and single individuals who identify as heterosexual: two tiers of review;
Unrelated, unmarried individuals who reside together and are not a same-sex couple: four tiers of review;
Convicted felons: four tiers of review; and
Same-sex couple: five tiers of review.

Although these new tiers of review replaced the categorical ban on gay and lesbian foster parents in Nebraska, each of the three plaintiff couples were told by the department that they were prohibited from acquiring a foster home license.

After hearing the case, the Nebraska district court struck down both the memorandum policy and the tiered review system as unconstitutional. The court noted that the department's stated policy was to follow the "best interest of the child" standard when deciding the placement of foster children. However, the court concluded that both the memorandum policy and the tiered review system violated the Equal Protection Clause and the Due Process Clause of the 14th amendment to the United States Constitution, especially in light of the *Obergefell v. Hodges* decision. To date, the state of Nebraska has not appealed this decision.

B. Arkansas's Unmarried Couple Foster Parent and Adoption Ban

In 2011, the Arkansas Supreme Court struck down a ballot initiative banning adoption and foster parenting by unmarried couples. In 2008, Nebraska voters passed a ballot initiative that banned any unmarried person living with a sexual partner from serving as an adoptive parent or as a foster parent. Later that year, a group of unmarried adults seeking to adopt or foster children in Arkansas, including unmarried opposite-sex and same-sex couples, filed suit to challenge that ballot initiative.[3]

This case reached the Arkansas Supreme Court, which struck down the ballot initiative as unconstitutional on state grounds. The court noted first that adoption and foster parenting are not fundamental rights under the Arkansas constitution. However, the Arkansas Constitution, similar to the United States Constitution, provides an implicit right to privacy that protects all "private, consensual, noncommercial acts of sexual intimacy between adults." Accordingly, the ballot initiative's prohibition against unmarried sexual partners serving as adoptive or foster parents unduly burdened the fundamental privacy rights of unmarried partners.

[3] Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429 (Ark. 2011).

C. Florida's Adoption Ban

In 2010, a gay man successfully challenged a Florida law that provided that no person who otherwise meets the state's adoption requirements may adopt "if that person is a homosexual."[4] In 2004, the Florida Department of Children and Families removed two children from their home based on findings of abandonment of neglect. The department placed the two children with the plaintiff, a licensed foster caregiver. The plaintiff later applied to adopt the children and was subsequently denied, despite the department's finding that the plaintiff otherwise provided a suitable environment for the children.

Upon review, the Florida Supreme Court approved the plaintiff's adoption application and struck down the provision of law prohibiting adoption by homosexual individuals. The court first noted that this case did not involve a fundamental right—as there is not a fundamental right to adopt— or a suspect classification. Accordingly, the court evaluated the claims under the rational basis test, the lowest standard of review, which requires that the law's classification bear "a rational relationship to a legitimate governmental objective." The court heard expert testimony from both sides on the potential benefits and harms of placing a child with a gay or lesbian parent and concluded that the Florida law violated the equal protection provisions of the Florida Constitution.

D. Georgia's Adoption Denial

In 2008, a Georgia court reversed a decision to remove a child from a woman's custody on the basis of the woman's sexual orientation. In 2006, a six-year-old girl's mother recognized that she could no longer properly care for her daughter and asked another woman, Elizabeth Hadaway, to take custody of and care for the girl. With the biological mother's support, a Georgia court granted Hadaway's petition for legal custody of the six-year-old.[5] Subsequently, state workers conducted a home evaluation to facilitate adoption proceedings; the evaluation indicated that Hadaway lived with a female partner with whom she shared a bedroom and ultimately approved the adoption petition.

During the final proceedings, the Georgia court denied the adoption petition, finding the adoption to not be in the best interest of the child because the home evaluation report contained

[4] Fla. Dep't of Children and Families v. Adoption of X.X.G., 45 So.3d 79 (Fla. 2010).
[5] In re Hadaway, A07A1626 (Ga. Ct. App. Mar. 24, 2008).

information that Hadaway and her partner were adopting as a couple. The court denied the petition and ordered the six-year-old girl be returned to her biological mother. The biological mother declined to take custody of her child, insisting that the girl remain with Hadaway. The Georgia court then held Hadaway in contempt for not returning the child to her biological mother pursuant to the previous court order.

On appeal, the Georgia Court of Appeals overturned the contempt judgment because Hadaway did not willfully disobey the court order. The six-year-old girl has since been returned to Hadaway's custody.

E. Missouri's Foster Parent Denial

In 2006, a Missouri court held an agency regulation prohibiting foster parenting by gay or lesbian parents unconstitutional. Previously, in 2003, the Missouri Department of Social Services denied petitioner Lisa Johnston's application for a foster care license.[6] The department concluded that Johnston "was not a person of reputable character" and that "but for her sexual orientation, [Johnston] and her partner have exceptional qualifications to be foster parents." The department based its decision on a sodomy statute that has since been held unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*.[7]

Petitioner Johnston challenged the decision in Missouri court, which held that the department policy prohibiting foster parenting by gay or lesbian individuals was not supported by competent evidence, and that the sodomy statute upon which the agency based its decision was unconstitutional.

II. STATE'S LEGAL LIABILITY FOR HARM TO FOSTER CHILDREN AND THE STATE'S OBLIGATIONS TO CARE FOR FOSTER CHILDREN

A. Tort Claims

The state would likely be immune from damages resulting from a tort claim arising out of harm to a child in the foster care system. The Kansas tort claims act[8] provides the general rule for torts committed by a state entity or employee: governmental liability is the rule and immunity is the exception. The Kansas tort claims act sets forth exceptions from liability in K.S.A. 75-

[6] Johnston v. Mo. Dep't of Soc. Servs., Case No. 0516CV09517 (Cir. Ct. Jackson Cty. Feb. 17, 2006).
[7] 539 U.S. 558 (2003).
[8] K.S.A. 2015 Supp. 75-6101 *et seq*.

6104. Specifically, subsection (e) provides immunity from damages resulting from "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved[.]"

The Supreme Court of Kansas has interpreted this "discretionary function immunity" provision in the context of foster care decisions in *Gloria G. v. State Dept. of Soc. and Rehab. Servs.*[9] The Court concluded that foster care placement and removal decisions are "of the discretionary nature that the legislature intended to put beyond judicial review." Accordingly, the state will generally be immune from tort claims arising out of foster child placement decisions.

B. Federal Section 1983 Claims and the State's Obligation to Protect the Safety and Wellbeing of Children Placed in Foster Care

State officials involved in foster care placements can be held liable under federal law for injuries suffered by foster children if certain conditions are met. Federal law creates a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]"[10] These so-called "Section 1983" claims generally do not provide relief for harm caused by private third parties, as would otherwise be the status of foster parents. However, the U.S. Supreme Court decision in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.* established the "special relationship" doctrine.[11] This doctrine states that, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." The Tenth Circuit Court of Appeals, among other circuit courts, extends this special relationship to foster care placements, recognizing that foster children have a constitutional right to protection while in foster care.[12] The Tenth Circuit sets forth three requirements before any state official may be held liable under Section 1983:

1) The state official must have known of the danger or failed to exercise professional judgment;

2) The official's conduct must have a causal connection to the injury incurred; and

3) The official's conduct must "shock the conscience."

A child's constitutional rights while in foster care have been described different ways by different federal courts. The state's basic requirement to provide safety and general well-being is

[9] 251 Kan. 179 (1992); see also Jarboe v. Bd. of Cty. Comm'rs of Sedgwick Cty, 262 Kan. 615 (1997).
[10] 42 U.S.C. § 1983.
[11] 489 U.S. 189, 199-200 (1989).
[12] *See, e.g.*, Yvonne v. N.M. Dep't of Human Servs., 959 F.2d 883 (10th Cir. 1992).

established by the U.S. Supreme Court decision in *DeShaney* described above. The Second Circuit has held that a child in state custody has a constitutional right "not to be placed in a foster care setting known to be unsafe."[13] The Seventh Circuit found that children in foster care have a constitutional right not to be placed with foster parents who the state's caseworkers "know or suspect is likely to abuse or neglect the foster child."[14] Ultimately, this collection of federal cases creates a legal landscape where the state is obligated to provide, at the minimum, a physically secure environment for children in the foster care system.

Additionally, the Tenth Circuit has described the standard by which to evaluate a caseworker's "professional judgment": "'[f]ailure to exercise professional judgment' does not mean mere negligence [. . .] while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements."

Prior cases, as well as cases from other federal judicial circuits, examine the issue of qualified immunity in this context. Qualified immunity provides immunity for government officials acting in a discretionary function whose conduct does not violate a clearly established constitutional or statutory right.[15] However, because the Tenth Circuit has recognized a foster child's constitutional right to be reasonably safe from harm while in the foster care system, a qualified immunity claim would likely fail in Kansas federal court.

[13] Doe v. N.Y.C. Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981).
[14] K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990).
[15] *See id.* at 890-891.