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IN THE SUPREME COURT OF FLORIDA

JAMES W. COX,

Petitioner,

v.

CASE NO: 82,967

DELORES DRY, DISTRICT ADMINISTRATOR, DISTRICT 8, STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.
______________________________/

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

JURISDICTIONAL ANSWER BRIEF OF RESPONDENT

ANTHONY N. DeLUCCIA, JR.
Florida Bar #216569
District Legal Counsel
STATE OF FLORIDA, DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES
Post Office Box 60085
Fort Myers, Florida 33906
(813) 338-1427

LINDA K. HARRIS
Florida Bar #396109
Deputy General Counsel
STATE OF FLORIDA, DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES
1323 Winewood Boulevard
Building E, Suite 200
Tallahassee, Florida 32399-0700
(904) 488-2381

ATTORNEYS FOR RESPONDENT

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CITATION OF AUTHORITIES

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PREMLINARY STATEMENT

The Petitioner, James W. Cox, will be referred to in this answer brief as "Petitioner". The Respondent, Delores Dry, District Administrator, State of Florida, Department of Health and Rehabilitative Services, will be referred to as "HRS". All other parties, for purposes of clarity, will be referred to by use of full descriptive titles or names.

The references to exhibits in this brief are made to the exhibits attached to Petitioner's brief.

STATEMENT OF THE CASE AND FACTS AREAS OF DISAGREEMENT

The district court declared the statute (Section 63.042(3)) valid with respect to the constitutional challenge under the right of privacy.

The district court did not disapprove of the stipulation by the parties to the admission of factual matters at trial. However, it seriously questioned the procedure suggested by the trial court regarding constitutionality of a statute. **Exhibit A, p.4.** Then pursuant to its jurisdiction to completely determine the issues raised, it examined the record and applied the law to the issues presented.

Regarding the constitutional issues of equal protection and vagueness, the district court held that these are issues of mixed law and fact. **Exhibit A, p.4.** When a constitutional issue involves a mixed question of law and fact, in absence of prima facie evidence the party with the burden of proof cannot prevail. **Exhibit A, p.4.** The district court was troubled by the trial court's evaluation of the evidence as "unrebutted and overwhelming" establishing that homosexuals have normal abilities to rear children. **Exhibit A, p.5.** The evidence submitted consisted of law review articles, reports in magazines and journals, and two scientific articles. **Exhibit A, p.5.** No credentials concerning the authors were found. **Exhibit A, p.6.** The subject matter of one scientific article focused on natural children of homosexuals, not about children adopted by homosexuals. The other article likewise did not focus on children adopted by homosexuals, but described an anonymous survey of twenty-three homosexual parents and sixteen heterosexual parents located in New Mexico. **Exhibit A, pp. 5, 6.** Because these articles contained data that neither the trial court nor the district court has the training and expertise necessary to evaluate and apply to the facts, and since no expert witnesses were called to discuss or explain these reports, the trial court did not have a record to support summary judgment on the issues in favor of the Petitioner. **Exhibit A, p.7.**

SUMMARY OF ARGUMENT

The district court of appeal clearly acknowledged that this court has discretionary jurisdiction to review this matter because it expressly declares valid Section 63.042(3), Florida Statutes.

This court does not have discretionary review jurisdiction because the district court applied constitutional provision to arrive at its decision. For purposes of determining discretionary review, application is different from construction of a constitutional provision.

It is clear that the decision below does not end the debate regarding the issue of homosexuality and adoption. As the record reveals other states do permit homosexuals to adopt children. Perhaps, evidence of the effects of such adoptions viewed in light of the best interest of the child adopted should be reviewed before rendering a decision on the issue. However, as the district court stated in denying certification of this issue for review, the record herein is too limited to resolve these issues.

Further, it is submitted that the proper branch to deal with these issues is the legislature. Section 63.042(3), Florida Statutes, was enacted in 1977. It is the province of the legislature to determine whether it is in the best interest of children to be adopted by homosexuals. **Exhibit A, fn. p.26.**

ISSUE I

The Supreme Court Has Discretionary Jurisdiction To Review The District Court of Appeal Decision Because It Expressly Declares Valid A State Statute

It is clearly acknowledged that the Supreme Court has the discretionary jurisdiction to review this decision. Footnote number eleven of the opinion clearly states this fact.

ISSUE II

The Supreme Court Does Not Have Discretionary Jurisdiction To Review The District Court Of Appeal Decision Because It Does Not Construe Any Provision Of The State Constitution

The district court was concerned by the trial court's insertion of a constitutional due process issue regarding statutory vagueness the parties did choose to litigate. **Exhibit A, p.8.** This was especially troubling to the district court because the petitioners never alleged that they found the term "homosexual" to be unconstitutionally vague. **Exhibit A, p.8.**

The district court defined the term "homosexual" as used in Section 63.042, Florida Statute, to apply to applicants who are known to engage in current homosexual activity. **Exhibit A, p.10.** It concluded that the legislature had not created a rule concerning a person's thoughts but rather a person's conduct. **Exhibit A, p.10.**

In defining the term "homosexual" the court applied the statutory construction of the statute by an agency charged with its administration. **Exhibit A, p.9.**

The district court recognized that the issue of orientation and activity is one upon which reasonable minds can differ on a scientific, moral, religious and legal basis. Because of the circumstances, it is the province of the legislature to reach its own conclusions regarding the orientation/activity issue without judicial mandate. **Exhibit A, p.9.**

Once the district court defined the term homosexual, it applied the judicially developed rules concerning right to privacy to the facts contained in the record to render its

decision. "Applying" a constitutional provision is not synonymous with "construing" a constitutional provision and the former is not a basis for supreme court direct appeals jurisdiction. **Rojas v. State, 288 So.2d 234 (FLA 1974) cert den, 419 US 851, 95 S. Ct. 93, 42 L-Ed 2d 82 (1974).** "Pursuant to judicial terminology the definition of construing in its constitutional sense requires an opinion which undertakes to explain, define, or eliminate existing doubts arising from the language or terms of the constitutional provision." **Ogle v. Pepin, 273 So.2d 391,392 (FLA 1973).**

With regard to the right of privacy, the district court held that Section 63.042(3), Florida Statutes, does not implicate the concerns of the right to privacy. The right of privacy has been applied to:

1) protect natural persons from public disclosure of personal matters by governments;

2) prohibit unwarranted governmental inquiry concerning private matters.

3) create a zone of autonomy protecting personal decision making.

The Petitioner has willingly revealed his homosexuality and agrees that HRS may inquire about the sexual conduct of an adoption applicant. Therefore, the "public disclosure of personal matters" and "unwarranted governmental intrusion" rights of privacy are not affected by Section 63.042(3), Florida Statutes. **Exhibit A, p.13.**

With regard to the zone of autonomy protecting personal decision making, the district court held that there was no intrusion. In its analysis the court stated that adoption is neither a private matter nor a statutory right. **Exhibit A, p.14.** Rather adoption is a privilege whereby the applicant requests the state to make a decision in the best interest of the prospective adoptive child. **Exhibit A, p.14.** Section 63.042, Florida Statutes, does not interfere with or limit anyone's private sexual life, it limits one's ability to adopt a child if the state knows that applicant is a homosexual. **Exhibit A, p.15.** Indirect limitations do not render statutory privileges unconstitutional under the right of privacy.

ISSUE III-A

The Limited Record Below Makes This Matter Inappropriate For Review Of The Constitutional Issues Raised

The Petition argues that the district court relied on wholly unsupported assumptions to justify reversal of the trial court's judgment. A review of the record disputes this argument. First, Petitioner applied to HRS for adoption of a "special needs" child. A "special needs" child is defined to be a child who among other things may possess one or more physical or emotional disabilities and whose custody has been awarded to the department. **Section 409.166(2), Florida Statutes (1993).** Further, the trial court acknowledged that

> [T]here is some evidence to support the notion that mid-adolescents might not be a good match with a homosexual adoptive parent. **Exhibit B, p.9.**

Therefore the conclusion of the district court;

> [T]hat adoptive children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years. **Exhibit A, p.25.**

does clearly have a basis in the record.

Petitioners argue that the district court should have revised and remanded this matter for trial on the disputed issues of fact. However the record reveals that the parties stipulated that the factual issues would be resolved without the necessity of an evidentiary hearing at the trial court's suggestion. **Exhibit B, p.2, n.1.** Therefore, it is logical to conclude that all the known factual evidence had been submitted by stipulation at trial, and a remand for trial would be fruitless.

The district court merely applied the competent substantial evidence test to set aside the trial court decision, and found that the evidence was insufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion

reached. Heifitz v. Department of Business Regulations, **475 So.2d 1277 (FLA 1st DCA 1985).**

It is submitted that the application of the competent substantial evidence test is a proper function of an appellate court, and is vastly different from substituting its judgment for that of the trial court.

ISSUE III-B

This Court Should Not Accept Jurisdiction And Review The Merits Of This Challenge

(1) The district court applied the competent substantial evidence test to review the records. The conclusions it reached have a basis in the record below. For the reasons stated earlier, the district court settled the issues.

(2) At trial the Petitioner never raised an issue of vagueness. The trial court raised the issue on its own motion. **Exhibit B, p.9, n.7.**

Obliged by the judicial principles of statutory construction which requires upholding the statute, and accordance of great weight to the construction used by an agency charged with a statute's administration, the district court accepted the HRS position that the statute applied to homosexual conduct as reasonable. It clearly noted that this decision did not end the debate regarding the sexual orientation/activity issue. However, it recognized that fifteen years have elapsed since the passage of the statute, and that the legislature was the proper branch of government to resolve the orientation/activity issue with judicial mandate. **Exhibit A, p.26.**

(3) The district court clearly considered the doctrine of primacy in deciding the constitutional issues of equal protection and due process. It was not persuaded that under

Florida's concepts of due process, privacy and equal protection that homosexuality is a fundamental right. **Exhibit A, p.19.**

(4) The district court did not summarily reject Petitioner's privacy claim that sexual orientation is within the zone of personal autonomy concerning personal decision making. It held that it does not limit anyone's private sexual life. The statute limits a homosexual's eligibility to obtain the privilege to adopt a child. An indirect limitation on a statutory privilege does not violate Florida's right to privacy. **Exhibit A, p.15.**

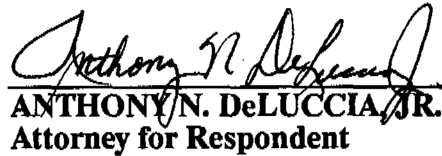
CONCLUSION

There is no doubt that this Court may exercise its discretionary jurisdiction because the district court expressly declared Section 63.042(3), Florida Statutes to be valid with regard to the Petitioners constitutional challenge under the right of privacy..

With regard to the district court opinion expressly construing provisions of the state constitution, this court has distinguished the terms "applying" and "construing" when it considers exercise of discretionary review. A review of this opinion clearly shows that the district court applied constitutional principle to arrive at its decision.

It is submitted that the legislature is the proper branch of government to decide whether it is in the best interest of children to be adopted by homosexuals.

Respectfully submitted,

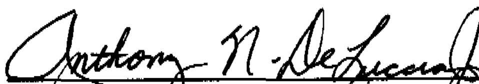


ANTHONY N. DeLUCCIA, JR.
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 31st day of January, 1994, to: **NINA E. VINIK**, American Civil Liberties Union Foundation of Florida, Inc, 225 N.E. 34 Street, Suite 102, Miami, Florida 33137; and **DORIS BUNNELL**, 406-B 13th Street West, Bradenton, Florida 34205.

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES



ANTHONY N. DeLUCCIA, JR.
Florida Bar #216569
District Legal Counsel
Post Office Box 60085
Fort Myers, Florida 33906
(813) 338-1427
Attorney for Respondent