

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

EX COPY

GREG STEWART and STILLMAN)
STEWART; LISA BLAKEY and JANET)
RODRIGUEZ; and TODD VESELY and)
JOEL BUSCH,)

Case No. CI 13-3157

Plaintiffs,)

v.)

ORDER

DAVE HEINEMAN, in his official capacity)
as Governor of Nebraska; KERRY)
WINTERER, in his official capacity as)
Chief Executive Officer of the Nebraska)
Department of Health and Human Services;)
and THOMAS PRISTOW, in his official)
capacity as Director of the Nebraska)
Division of Children and Family Services,)

Defendants.)

This matter comes before the court on Defendants' Motion to Dismiss. A hearing was held on December 16, 2013. At the hearing Plaintiffs were represented by attorneys Amy Miller, Leslie Cooper, and Chase Strangio and Defendants were represented by Assistant Attorneys General Dale Comer and Jessica Forch. The court, being fully informed, now finds and orders as follows:

BACKGROUND

In Nebraska the Department of Health and Human Services (hereinafter "DHHS") is the legal guardian of all children committed to it and is charged with placing those children in suitable homes. NEB. REV. STAT. § 43-905(1) (Supp. 2013). To fulfill its statutory duties, DHHS evaluates and

licenses foster homes and places children with adoptive families. 474 NAC § 6-003.01. DHHS requires all adults providing foster care to:

- 1) Be mentally and physically able to provide care and supervision;
- 2) Exercise reasonable judgment in caring for children;
- 3) Not engage in or have a history of behaviors which would injure or endanger the health or morals of children; and
- 4) Provide-
 - a) Three favorable character references; and
 - b) Health reports indicating persons are physically capable of caring for children. After initial licensing, a new self-certifying health report must be provided every two years.

A conviction for, an admission of, or substantial evidence of crimes involving intentional bodily harm, crimes against children, or crimes involving moral turpitude on the part of the foster parent(s) or any other member of the household which has current bearing on the applicants' provision of foster care is a basis for the denial or revocation of a license.

474 NAC § 6-003.25A. Individuals and families are required to obtain a foster home license before they may be considered as an adoptive placement for a state ward.

In January 1995, DHHS issued Administrative Memorandum #1-95 (hereinafter "Memo #1-95") which directed that no foster home license be issued to "persons who identify themselves as homosexuals" or "unrelated, unmarried adults residing together." In an addendum to Memo #1-95 DHHS clarified that the policy would not affect foster placements made prior to the issuance of the memorandum or placements with a child's relative. In addition, staff were directed not to specifically ask about an individual's sexual orientation or make inquiries into the applicant's marital status in addition to those already included in the licensing application and home study.

Plaintiffs Greg Stewart and Stillman Stewart are residents of Lincoln, Nebraska who have been in a committed same-sex relationship for over thirty years. They were married in 2008 in

California. Their marriage is not recognized by the State of Nebraska. They are parents to five children, all of whom they adopted out of the foster care system in California, where they previously resided. Greg and Stillman Stewart contacted DHHS in October 2012 to inquire about obtaining a foster home license. DHHS informed them that as a same-sex couple they are prohibited from obtaining a foster care license pursuant DHHS policy.

Plaintiffs Lisa Blakey and Janet Rodriguez are residents of Lincoln, Nebraska. They have been in a committed same-sex relationship for over eight years. They wish to become foster parents but are categorically barred from obtaining a foster home license both because they are lesbian women and unmarried, unrelated persons who reside together.

Plaintiffs Todd Vesely and Joel Busch are residents of Lincoln, Nebraska. They have been in a committed same-sex relationship for over nine years. They would like to be foster parents and adopt children. The couple began the process of applying to become foster parents in July of 2008. They completed training, underwent a home study, and passed required background checks. In June of 2010, the couple received a letter from Todd Reckling, the Director of DHHS's Division of Children and Family Services, informing them that as unrelated adults residing together they were categorically barred from obtaining a foster home license pursuant to DHHS policy.

The Plaintiffs now collectively bring the instant action alleging that Memo #1-95 violates their rights to equal protection and due process. In response, Defendants filed a Motion to Dismiss alleging that Plaintiffs lack standing and have failed to state a claim on which relief may be granted.

STANDARD OF REVIEW

When a motion to dismiss is brought under both NEB. CT. R. PLDG. §§ 6-1112(b)(1) and (6), the court should first determine whether the court has subject matter jurisdiction under Rule 6-

1112(b)(1). *Anderson v. Wells Fargo Fin. Acceptance Pa., Inc.*, 269 Neb. 595, 601, 694 N.W.2d 625, 630 (2005). “If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the [failure to state a claim] grounds.” *Id.* When a motion to dismiss pursuant to NEB. CT. R. PLDG. § 6-1112(b)(1) is filed at the pleadings stage and the motion challenges the sufficiency of the complaint to invoke the court's jurisdiction, then the court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing. *Citizens Opposing Indus. Livestock v. Jefferson County Bd. of Adjustment*, 274 Neb. 386, 391, 740 N.W.2d 362, 366 (2007).

In reviewing a motion to dismiss under NEB. CT. R. PLDG. § 6-1112(b)(6), the court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *Zawaideh v. Nebraska Dep't of Health and Human Servs. Reg. and Licensure*, 280 Neb. 997, 1004, 792 N.W.2d 484, 492 (2011). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Doe v. Board of Regents*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

DISCUSSION

Plaintiffs assert that Memo #1-95 violates their rights to equal protection and due process under both the Nebraska and United States Constitutions. Defendants now argue that Plaintiffs lack standing and have failed to state a claim upon which relief may be granted.

A. Standing

1. Greg Stewart, Stillman Stewart, Lisa Blakey, and Janet Rodriguez

Defendants allege that plaintiffs Greg Stewart, Stillman Stewart, Lisa Blakey, and Janet Rodriguez do not have standing because they have not yet applied for a foster care license. To establish standing, a plaintiff must show that as a consequence of the challenged statute he or she is, or is about to be, deprived of a protected right. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 948, 554 N.W.2d 151, 155 (1996). The injury in fact in an equal protection case is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). A plaintiff in a case such as this need only show that he or she is “able and ready” to apply for a benefit should the discriminatory policy which prevents him or her from so doing be removed. *Gratz*, 539 U.S. at 262.

In this case, plaintiffs Greg Stewart, Stillman Stewart, Lisa Blakey, and Janet Rodriguez have sufficiently alleged that they are “able and ready” to apply for a foster care license. It is clear from the plain language of the policy that, if submitted, the applications of the Plaintiffs would have been denied. Plaintiffs are not required to make futile gestures. *See Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988). The court finds that the existence of the barrier is an injury and that Greg Stewart, Stillman Stewart, Lisa Blakey, and Janet Rodriguez have standing to bring the instant claims.

2. Todd Vesely and Joel Busch

Defendants argue that plaintiffs Todd Vesely and Joel Busch lack standing because they have not exhausted all available administrative remedies. They would like to be foster parents and adopt children. Vesely and Busch allege that they applied for a foster care license and were denied.

Generally, the doctrine of exhaustion requires persons dissatisfied with an agency decision to exhaust all administrative remedies prior to bringing suit in this court. However, an exception to this doctrine exists where it can be shown that pursuit of administrative remedies would be futile. *Vaccaro v. City of Omaha*, 6 Neb. App. 410, 415, 573 N.W.2d 798, 801 (1998). In this case, Vesely and Busch allege that they were informed, in a letter from the Director of DHHS's Division of Children and Family Services Todd Reckling, that they would not be granted a foster care license pursuant to DHHS's policy barring the licencing of unmarried, unrelated adults who reside together. For this reason, an administrative appeal would have been futile. The court finds that Todd Vesely and Joel Busch have standing to bring the instant claims.

B. Failure to State a Claim

Neb.Rev.Stat. Section §43-101 provides, in part: “. . . any minor child may be adopted by **any adult person or persons** . . . except that no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor.” The Nebraska Legislature did not prohibit “unrelated, unmarried adults residing together” from adopting children. Nor did the Legislature prohibit any person or persons “who identify themselves as homosexual” from adopting children. Nor did the Legislature prohibit “unrelated, unmarried adults residing together” and/or “persons who identify themselves as homosexuals” from being foster parents. As alleged by plaintiffs in the Complaint, Nebraska law currently allows “unrelated, unmarried adults residing together”, as well as person(s) “who identify themselves as homosexuals”, to adopt children through private adoption agencies or private individuals.

“An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes the agency has to administer.” *Mahnke v. State*, 276 Neb. 57, 69, 751 Neb.

635, 645 (2008). The Legislature granted DHHS the power to “adopt and promulgate rules and regulations on requirements for licenses, waivers, variances, and approval of foster family homes taking into consideration the health, safety, well-being, and **best interests of the child.**” NEB. REV. STAT. § 71-1902 (Supp. 2013).

The only specific direction given as to what types of persons might not be appropriate foster or adoptive parents is expressed in section 43-107(b)(vii)(Supp. 2013) which requires DHHS to perform a criminal background check and a check of the central register of child protection cases for any history of behavior injurious or dangerous to the health or morals of a child as part of the preplacement home study. Similarly, the legislature allows DHHS to conduct an investigation into a prospective foster parent’s character and requires DHHS to conduct a criminal background check prior to issuing a foster care license. In creating this statutory scheme, the Legislature could have excluded other classes of persons from consideration as foster parents or adoptive parents. The Legislature did not statutorily exclude any class of persons from consideration as foster parents or adoptive parents.

The Nebraska Department of Health and Human Services requires persons who wish to adopt children from state care to first become licensed foster parents. 474 NAC § 6-003.01. The policy set forth in Memo #1-95 effectively bans persons who are “unrelated, unmarried adults residing together” or persons “who identify themselves as homosexuals” from adopting children from state custody because they are prohibited from obtaining a foster care license. As previously noted, Nebraska does not have a corresponding law or regulation prohibiting adoptions through private agencies or private individuals because the adoptive parent is living with an adult to whom he or she is neither married nor related or because the adoptive parent is homosexual.

Nebraska law requires that a “home study” be done whenever a person or persons desire to adopt a minor child. Neb.Rev.Stat. 43-107. The home study is to be conducted either by DHHS or a private adoption agency licensed by DHHS. Pursuant to Neb.Rev.Stat. 43-109, if the court finds that the adoption is in the **best interests of the minor child**, the court shall enter a decree of adoption. This same standard is utilized whether the adoption is through a private adoption agency, private individual, or involves a state ward.

The court also notes that “unrelated, unmarried adults residing together” are not prohibited by Nebraska law from being granted custody of minor children. Literally, hundreds of cases each year come before the Lancaster County District Court that involve unrelated, unmarried adults who resided together, had children together, and now have separated. The district court is called upon to determine which unmarried parent shall be awarded custody of the minor child(ren). Frequently, one or both of the parents have formed new relationships and are currently residing with another unrelated, unmarried adult. There is no Nebraska statute or case law that prohibits a parent from being given custody of a minor child for the sole reason that they are living with an unrelated adult. While such a living situation is a factor that can be considered, along with all of the other factors considered in determining the **best interest of the child**, the living situation alone is not the sole determinative factor.

In each of these situations, whether it is a child custody dispute, an adoption through a private adoption agency, an adoption through a private individual, or an adoption of a state ward, the court uses the same standard (the **best interests of the minor child**) in making its determination. The Nebraska Legislature and the Nebraska courts have not imposed a blanket prohibition of persons who are “unrelated, unmarried adults residing together” or “who identify themselves as

homosexuals” from being awarded custody or from being allowed to adopt children from private adoption agencies or private individuals. However, the DHHS, through Memo 1-95, has prohibited persons who are “unrelated, unmarried adults residing together” and persons “who identify themselves as homosexuals” from being foster parents and from adopting children who are State wards.

1. Equal Protection

Defendants assert that Plaintiffs have failed to state a claim upon which relief may be granted for a violation of their right to equal protection. In general, the Equal Protection Clause requires the government to treat similarly situated people alike. *State v. Atkins*, 250 Neb. 315, 320, 549 N.W.2d 159, 163 (1996). The initial inquiry in an equal protection analysis is whether the plaintiff has demonstrated that he or she was treated differently than others who are similarly situated. *Id.* at 321, 549 N.W.2d at 163. Once that initial bar has been met, the inquiry shifts to whether the legislation at issue can survive the appropriate level of judicial scrutiny. *Id.*

The plaintiff’s allege that persons who are “unrelated, unmarried adults residing together” and/or persons “who identify themselves as homosexuals” who desire to be foster parents and adopt children who are state wards are similarly situated as persons who are “unrelated, unmarried adults residing together” and/or persons “who identify themselves as homosexuals” who desire to adopt children from private adoption agencies or private individuals. Nebraska law allows “unrelated, unmarried adults residing together” and/or “persons who identify themselves as homosexuals” to adopt children from private adoption agencies or private individuals. However, as a result of Memo 1-95, the State prohibits “unrelated, unmarried adults residing together” and/or “persons who identify themselves as homosexuals” from being foster parents and thus prevents them from adopting

children who are state wards.

The State argues that placing foster children in a setting closest to a traditional family setting is a legitimate government interest of surpassing importance. However, private adoption agencies must be licensed and are regulated by the State. The State has not placed similar restrictions on private adoption agencies and the State does not prohibit private adoption agencies from placing children in adoptive homes of “unrelated, unmarried adults residing together” or person(s) “who identify themselves as homosexuals”. The court finds that the allegations of disparate results between the State’s treatment of persons who are “unrelated, unmarried adults residing together”, as well as person(s) “who identify themselves as homosexuals”, who wish to be foster parents and adopt children from state care and the State’s treatment of those similarly situated persons who wish to adopt children through private adoption agencies or private individuals is sufficient to state a cause of action for an equal protection violation. The court notes that this matter is before the court on a motion to dismiss and no evidence has been presented as to whether Administrative Memorandum 1-95 can survive the appropriate level of judicial scrutiny.

2. Due Process

Defendants also argue that Plaintiffs have failed to state a claim upon which relief may be granted for a violation of their right to due process. The Due Process Clause provides heightened protection against government interference with fundamental rights and liberty interests including the right to marry, have children, direct the education and upbringing of one’s children, marital privacy, the use of contraception, bodily integrity, and abortion. *Washington v. Glucksberg*, 521 US 702, 720-721 (1997). The Due Process Clause forbids government infringement of fundamental rights and liberty interests except where the infringement is narrowly tailored to serve a compelling

government interest. *Id.* Where a fundamental right or liberty interest is not implicated, the Due Process Clause requires only that the law be rationally related to a legitimate government interest. *Id.* at 728.

In the Complaint, Plaintiffs allege that Memo #1-95 impermissibly violates their right to enter into and maintain intimate personal relationships. Though loosely defined, the right to intimate association has been recognized as a fundamental liberty because of the “role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-619 (1984). The United States Supreme Court has held that the fundamental right to privacy encompasses a person’s right to enter into a homosexual relationship. *Lawrence v. Texas*, 539 U.S. 558 (2003). The Plaintiffs allege that they cannot both assert their rights to intimate association and privacy and remain eligible to receive a foster care license and adopt state wards, and therefore Memo # 1-95 burdens their rights. *Cf. Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974) (finding that maternity regulations that penalized a teacher for becoming pregnant constituted a heavy burden on her fundamental right to bear a child.) Plaintiffs have also alleged that the State’s interest in protecting children in its care could instead be adequately met in a less restrictive manner by the home study process. (See, *Ark. Dept. Of Human Servs. v. Cole*, 2001 Ark. 145, 380 S.W.3d 429 (2011), wherein the Supreme Court of Arkansas reached such a conclusion).

It is the conclusion of the court that, for purposes of a motion to dismiss, the plaintiffs have sufficiently alleged a cause of action on their due process claim. Again, the court notes that this matter is before the court on a motion to dismiss and no evidence has been presented as to whether Administrative Memorandum 1-95 can survive the appropriate level of judicial scrutiny

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is overruled and denied. A copy of this order is sent to counsel for the parties.

Dated this 24th day of April, 2014.

BY THE COURT:



Hon. John A. Colborn
District Judge