

Rulings Offer Hope For Same-Sex Couples

by Mark Friedman

Posted 2/24/2014 12:00 am

A Little Rock attorney challenging the Arkansas Constitution's ban on same-sex marriage said the recent string of federal rulings striking down same-sex marriage prohibitions gives him hope that the same will happen in Arkansas.

"With every domino that falls, we feel more encouraged," said attorney Jack Wagoner III of Little Rock, who is representing a number of same-sex couples in lawsuits in U.S. District Court and Pulaski County Circuit Court. "As these decisions continue to pile up and pile up, I think it increases the likelihood that the court here is going to follow suit."

Earlier this month, a federal judge ruled that Virginia's ban on same-sex marriage was unconstitutional, which came on the heels of similar decisions out of federal courts in Utah and Oklahoma.

But just because there has been a number of favorable rulings for plaintiffs, it doesn't mean the Arkansas plaintiffs' case is a slam dunk.

In the recent rulings, the federal judges have relied on the landmark June 2013 U.S. Supreme Court decision, *United States v. Windsor*, which struck down the federal Defense of Marriage Act. That ruling meant the federal government must recognize same-sex marriages in states where they are legal.

But the ruling still left a lot open to interpretation, said Harvard Law School Professor Michael Klarman.

"The way that the opinion in *Windsor* is written, you can either interpret it as a federalism decision that says Congress doesn't have the power to come up with the definition of marriage independently of the states," Klarman said. "Or you could read it ... [in a way] that would suggest that there's simply a constitutional problem with any level of government not recognizing same-sex marriages."

The ruling was intentionally written to be ambiguous, which means the lower court judges are free to rule in either direction depending on their own predilections, Klarman said.

The federal judges in the Virginia, Oklahoma and Utah cases were younger, liberal and appointed by President Obama, he said.

“Other judges, older more conservative Republican appointees, would no doubt interpret Windsor the other way,” Klarman said.

In Arkansas, Wagoner’s federal case has been assigned to U.S. District Judge Kristine Baker, 42, an Obama appointee.

What to Prove

Wagoner said to win his cases he will have to prove that there’s not a rational basis for Arkansas’ laws preventing same-sex couples from marrying and not recognizing same-sex marriages in other states.

A court date hasn’t been set in the federal case. But in the state court case a hearing on a motion for summary judgment is set for April 17 in front of Pulaski County Circuit Judge Chris Piazza.

Klarman, the Harvard professor, said he thinks plaintiffs stand a better chance winning in federal court, where the judges are appointed for life.

“I would think state judges are going to be a little more reluctant to go out on a limb, because they tend to be elected and tend to be a little more subject to political pressure,” he said.

Wagoner said he plans to file a motion in federal court within the next 45 days to ask for a preliminary injunction that would require the state of Arkansas to recognize same-sex marriages performed in other states while the lawsuit is pending.

The Arkansas Attorney General's Office is representing the state officials who have been named as defendants in both state and federal court. A spokesman for the Attorney General's Office declined to comment on the cases.

Still, there's little doubt that the issue of same-sex marriages will end up before the Supreme Court. "The question is when," Klarman said.

He said cases will be ready for an appeal to the Supreme Court by the time its next term begins in October.

"I think things are changing more quickly than people might have predicted," Klarman said.

When Windsor was decided in June, only nine states allowed same-sex marriage. The number is now 17.

"It's going to grow within the next year or so to another three or four," Klarman said. "And that's going to be the pattern every year."