

A Way To Go

Married Arizonans stand to gain if Proposition 8 declared unconstitutional

By Bruce Christien

ARIZONA LESBIAN AND GAY COUPLES that got married in California, when it was legal there, could actually see their relationships acknowledged in this state if a federal district court judge rules that Proposition 8 is unconstitutional.

The opposing sides in the trial submitted on Feb. 26 hundreds of pages supporting their positions to Chief U.S. District Judge Vaughn Walker. The two-and-a-half week, non-jury trial took place in January.

Walker will review the documents and evidence presented during the trial to determine whether each side proved what it said it would during opening arguments. He then will schedule closing arguments. An end to the case still could be months away.

"If the court rules that Proposition 8 is unconstitutional under the U.S. Constitution, and then all laws from any state that prohibits our institution of marriage would similarly be unconstitutional," said Chris Fowler, an attorney for Rutter Hobbs & Davidoff Inc., a Los Angeles-based law firm.

Fowler and his partner were among the 18,000 lesbian and gay couples that took advantage of the six months when California permitted same-sex marriage. A number of Arizona residents also traveled to the neighboring state to recite their vows. But in November 2008, voters there passed Proposition 8, which amended the state's constitution to prohibit same-sex marriage.

That's when Fowler, already an activist in LGBT causes, got interested in the issue as a violation of his rights. He and his partner had been together for nine years before they got married, so he said not really much changed for them, except that on their wedding day, he learned that he successfully was matched with a son for adoption.

Long way to go

A challenge to the constitutionality of Proposition 8 was taken to the California State Supreme Court, which upheld the initiative results last May. But it also ruled that all those who were married during the time it was permissible must still be recognized as married couples in California.

That means that all the Arizona couples that were married in California still are recognized as legal couples in that state, Fowler confirmed, even though Arizona refuses to acknowledge them.

Whatever Walker rules, however, Fowler said there probably is "no circumstance that this case won't go the appellate courts and then to the U.S. Supreme Court." However, that could be a couple of years away.

Even if Walker rules that Proposition 8 is unconstitutional, Fowler said the ruling likely would be stayed until an appellate court and the U.S. Supreme Court get their turns.

Supreme test

And although time may be on the side of gay marriage, Fowler

isn't ready to embrace letting the current Supreme Court hear the case. He points out that even if it is another two years before getting to the highest judicial level in the land, the makeup of the Supremes still sways to the right.

"Right now even if you project that there may be two justices who may be ready to retire, those two justices already are more likely to be on our side," he said.



Chris Fowler

Those justices are John Paul Stevens, who is 90, and Ruth Bader Ginsburg, who was recently treated for cancer. She insists she plans to stay, but her illness may end up getting the best of her.

Dynamic duo

As an observer, Fowler said he was unsure whether to embrace the trial when nationally recognized, high-powered attorneys David Boise and Theodore Olsen announced they would challenge the anti-gay marriage ban in federal court.

Boise defended Al Gore and Olsen fought for George W. Bush in *Gore v. Bush*, the 2000 Supreme Court case that paved the way to Bush's presidency. Bush then appointed the conservative Olsen



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to be U.S. solicitor general.

“I admit I had some concerns when they filed,” Fowler acknowledged. “It wasn’t just a matter that it might be too soon, because if they fail, it could push progress back for years.”

He cited the infamous *Bowers v. Hardwick* decision of 1986 in which the Supreme Court upheld the constitutionality of Georgia’s sodomy law, which criminalized oral and anal sex in private between consenting adults. The law only had been applied to homosexuals.

It took 17 years before the court overruled that finding in *Lawrence v. Texas*, when the justices decided laws prohibiting private sexual acts by consenting adults violated their expectations of a right to privacy. The court declared such laws to be unconstitutional.

Fowler also acknowledged he wondered what prompted Olsen and Boise to challenge Proposition 8.

“I questioned why these two, non-gay individuals were doing this? I questioned their motives. What is in it for them?”

Second thoughts

As the trial proceeded, however, Fowler began feeling more comfortable with Olsen and Boise.

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“These are two very high-powered, very well-respected attorneys,” Fowler said. “Ted Olsen has more appearances before the Supreme Court than anyone. I still have concerns, but I’m also very excited about the possibilities.

“These are two amazing litigators who put the evidence and a case together in a way that never happened before,” he said. “It’s heartwarming to see the success so far of the trial and the way the issues were brought together for my rights. We now know this is how cases like this will be litigated in the future.”

Judging the judge

Some supporters of Proposition 8 question whether Walker, who is gay, can be a fair, objective adjudicator. Proponents of seeing the initiative being overturned wonder if Walker might bend over backward as a way to not show partiality to his own orientation.

Fowler said that neither will occur.

“He was appointed by a Republican,” Fowler said. “He has a reputation for being very fair, and the way he conducted the trial was very fair and open-minded.”

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