Discrimination Against Cohabitants

Arizona has not explicity set forth in our law a policy conerning preservation of the sanctity of marriage.

In 1993, the Supreme Court of Wisconsin was faced with the issue of discrimination of interest to all landlords. In this case, the landlord had instigated a policy of allowing individuals who were married, divorced, widowed, separated, or single to rent a unit; however, he refused to rent to groups of unrelated individuals. A suit was initiated by potential tenants, a group of three single women and another of two single women and one woman's children, who expressed art interest in renting an apartment in the dependant's complex. Because these two sets of potential renters were unrelated, the landlord refused them the opportunity to rent. The aggrieved individuals notified the County who filed suit against the landlord because his policy violated a County ordinance that prohibited housing discrimination based upon marital status. However, the Court held that a landlord's policy of not renting to unmarried persons who planned to live together could not violate the existing County ordinance that prohibited housing discrimination based upon marital status because such an ordinance was invalid.

In reaching this result, the Court embarked upon a two-fold analysis. The Court first examined the Dane County Ordinance Chapter 3 1. This ordinance explicitly prohibited discrimination in housing based upon marital status and provided that "all persons shall have an equal opportunity for housing regardless of... (the) marital status of the person maintaining a household..." The ordinance further defined marital status as being "married, divorced, widowed, separated, single, or a cohabitant." Dane County Ordinance § 31.03.

The Court held that the Chapter 31 was invalid to the extent that it protected “cohabitant." The Court reasoned that the inclusion of this term in the definition of marital status did not comport with the actual meaning of marital status which meant "the state or condition of being either married or single." Instead, the Court found that cohabitation was instead a form of "conduct" because it encompassed an active form of behavior and did not describe a "state or condition." The Court refused to equate marital status with cohabitation because other Wisconsin courts had clearly distinguished the difference between "status" and "conduct." Thus, any protection against discrimination against those who cohabitated was negated because cohabitation was an affirmative action that was not protected.

Second, the Court held that County was not authorized to enact an ordinance which protected a cohabitant against discrimination because such legislation was adverse to the state's public policy of encouraging and protecting marriage. The County ordinances in question were passed pursuant to the enabling authority granted by Wisconsin statute § 66.432. However, this statute prohibited a County from passing an ordinance "which (would) infringe the spirit of a state law or ... (was) repugnant to the general policy of the state." Cohabitation was clearly frowned upon by Wisconsin statute § 765 which declared marriage to be the "foundation of family and of society" that was both vital interest to society and an institution which the state sought to promote and protect. Thus, the ordinance violated the policy of the state and was unenforceable.

The Court found that the above reasonings negated the protection to cohabitants provided in the Dane County ordinances and justified the defendant's refusal to rent to the aggrieved parties. However, this decision was subject to much scrutiny in a dissenting opinion drafted by Chief

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Justice Hefferman. His main contention with the Court's finding was that is was contrary to Wisconsin's anti-discriminatory intent and did nothing to further the state's goal of preventing and removing all discrimination in housing. He further noted that the majority assumed that all cohabitants were "living together as husband and wife" without a legal marriage. Justice Hefferman noted that such a definition was too narrow and precluded any unrelated individuals from living together a purely cost-sharing relationship -- an arrangement that in no way would be contrary to Wisconsin's policy of encouraging marriages. He stated that this ruling would have a significant impact on the numerous students and employees that were affiliated with either the University of Wisconsin-Madison or the state government, both located within Dane County, because such individuals were often young, single, and could only afford rent-sharing arrangements. Justice Hefferman feared that the result of this case would displace thousands of residents and preclude them from finding adequate and affordable housing in Dane County.

Arizona courts have never been faced with an issue similar to that addressed in Dane County, Wisconsin. A.R.S. § 41-1491.14(B) provides:

> a person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with the sale or rental, because of race, color, religion, sex, familial status or national origin.

This statute does not protect anyone from discrimination according to marital status, as does the Wisconsin statute. In addition, Arizona has not explicitly set forth in our law a policy concerning preservation of the sanctity of marriage. Consequently, it may be strongly argued that since cohabitants are afforded no protection in Arizona's statutes, they can be discriminated against without any serious concern regarding the anti-discrimination laws in this state. It is advised that the multihousing industry be alert to any statutory changes in this area as well as any municipalities that could potentially address this issue.

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September 1994 / Apartment News