

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND
CIVIL ACTION NO. 15-cv-044-DLB

APRIL MILLER, PH.D., et al.

PLAINTIFFS

v.

KIM DAVIS, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS ROWAN
COUNTY CLERK, et al.

DEFENDANTS

and

**RESPONSE OF THIRD-PARTY DEFENDANTS
TO PLAINTIFFS' MOTION TO ENFORCE
SEPTEMBER 3 AND SEPTEMBER 8 ORDERS**

KIM DAVIS

THIRD-PARTY PLAINTIFF

v.

STEVEN L. BESHEAR, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF KENTUCKY, et al.

THIRD-PARTY DEFENDANTS

*** *** *** *** ***

Come the third-party defendants Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives (collectively "Third-Party Defendants"), by counsel, and pursuant to the Order of October 14, 2015 (D.E. 135), respectfully tender this Response to Plaintiffs' Motion to Enforce September 3 and September 8 Orders (D.E. 120).

I. PROCEDURAL AND FACTUAL BACKGROUND

The plaintiffs are a group of same-sex and opposite-sex couples residing in Rowan County, Kentucky who filed suit against Kim Davis ("Davis"), the Rowan County Clerk, for violation of their constitutional rights as a result of Davis' refusal to issue

marriage licenses to qualified couples. See Complaint (D.E. 1). Following briefing and hearings, this Court entered a preliminary injunction that enjoins Davis in her official capacity from enforcing her “no marriage licenses” policy. See Memorandum Opinion and Order (D.E. 43) (“Preliminary Injunction”). In so doing, the Court carefully considered and rejected each of Davis’ constitutional defenses. Id. at 16-28. This Court, the Sixth Circuit, and the Supreme Court all declined to stay the Preliminary Injunction. See Order of 8-17-2015 (D.E. 52); Virtual Order of 8-28-2015 (D.E. 65); Sixth Circuit Order of 8-26-2015 (Exhibit 2 to D.E. 63); Supreme Court Order of 8-31-2015. This Court then clarified the scope of the Preliminary Injunction, finding that Davis is enjoined from applying her “no marriage licenses” policy not just to the named Plaintiffs but to all qualified couples. See Order (D.E. 74) (“Clarified Injunction”).

After Davis defied the Preliminary Injunction and Clarified Injunction by refusing to issue marriage licenses to qualified couples, this Court found her in contempt and remanded her to federal custody. See Order (D.E. 75). Thereafter, three of the Plaintiff couples obtained marriage licenses from the Office of Rowan County Clerk. See Status Report (D.E. 84). Those licenses were issued on the form prescribed by the Kentucky Department of Libraries and Archives. Compare Exhibit D to D.E. 34 (blank form) with Exhibit 1 to D.E. 84 (issued licenses). Plaintiffs noted that in the blank for the name of the Rowan County Clerk, the issued licenses said “Rowan County.” See Status Report (D.E. 84). Notwithstanding this minor deviation in the completion of the form, this Court found that it “is therefore satisfied that the Rowan County Clerk’s Office is fulfilling its obligations to issue marriage licenses to all legally eligible couples” and ordered Davis released from custody. See Order (D.E. 89). The Court cautioned Davis not to

interfere, directly or indirectly, with the issuance of marriage licenses to legally eligible couples. Id.

In a report required by the Court's Order, Rowan County Deputy Clerk Brian Mason ("Mason") advised the Court that upon her return to the office, Davis confiscated the prescribed marriage license forms and provided an altered form. See Notice (D.E. 114). Kentucky law sets forth the required contents of the form, and directs that "[e]ach county clerk shall use the form prescribed by the Department of Libraries and Archives" [KRS 402.100] and that the "form of marriage license prescribed in KRS 402.100 shall be uniform through this state." KRS 402.110. Nevertheless, Davis directed Mason to issue licenses only on the altered form. Notice (D.E. 114). The altered form differs from the prescribed form – and thus from the statutory requirements – in some respects:

- a. KRS 402.100(3)(a) states that the form shall contain "the name of the county clerk under whose authority the license was issued, and the county in which the license was issued." KRS 402.100(3)(a). The altered form removes "in the office of [name], [county] County Clerk" and replaces it with "Pursuant to Federal Court Order #15-CV-44 DLB." Compare Exhibit D to D.E. 34 (blank form) with Exhibit 1 to D.E 120 (license issued on altered form).
- b. KRS 402.100(1)(c) states that the form shall contain "the signature of the county clerk or deputy clerk issuing the license." KRS 402.100(1)(c). The altered form identifies the issuing party as "Notary Public" and includes a blank for the date of the expiration of his commission. Compare Exhibit D

to D.E. 34 (blank form) with Exhibit 1 to D.E 120 (license issued on altered form).

- c. KRS 402.100(1)(a) states that the form shall contain “[a]n authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named.” KRS 402.100(1)(a). The altered form identifies neither the Office of the Rowan County Clerk nor a deputy clerk. Compare Exhibit D to D.E. 34 (blank form) with Exhibit 1 to D.E 120 (license issued on altered form). The altered form appears to indicate that the license is issued by a notary public. Id.

Citing the discrepancies between the prescribed and altered forms, Plaintiffs have moved the Court, among other relief, to compel the Office of Rowan County Clerk to utilize the prescribed form and re-issue marriage licenses that utilized the altered form. See Motion to Enforce September 3 and September 8 Orders (D.E. 120). The Court has directed the Third-Party Defendants to respond and “address the validity of the marriage licenses issued by the Rowan County Clerk’s Office on or after September 14, 2015.” See Order (D.E. 135).

II. ANALYSIS

A. The Third-Party Defendants’ Role with Respect to Marriage Licensing is Limited to Prescribing the Form Pursuant to KRS 402.100.

The Third-Party Defendants submit this response pursuant to the Court’s Order, though it must be emphasized that the Third-Party Defendants possess only a minor, statutorily-constrained role in the marriage licensing scheme. That role is limited to the Kentucky Department for Libraries and Archives (“KDLA”) prescribing a form that

contains the information required by KRS 402.100. Following Obergefell v. Hodges, 135 S.Ct. 2584 (2015), the KDLA made a single change to the marriage license form: replacing “bride” and “groom” with “first party” and “second party.” No party to this action has alleged that the updated form fails to comply with KRS 402.100 or that the form was otherwise incorrectly drafted.

The authority to issue marriage licenses is solely vested in the county clerks and their deputies. See KRS 402.080, 402.100, 402.110. “[W]hen the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority.” Brown v. Barkley, 628 S.W.2d 616, 623 (Ky. 1982). Similarly, the Third-Party Defendants do not supervise the county clerks or their deputies or possess authority to compel them to act. County clerks are elected constitutional officers. KY. CONST. § 99. The Governor has no supervisory authority over other elected constitutional officers. See Brown, 628 S.W.2d 616; Shipp v. Bradley, 275 S.W. 1, 7 (Ky. 1925) (elected county sheriffs are not state officials).

Thus, the Third-Party Defendants cannot issue marriage licenses or compel Davis to issue marriage licenses. The role of the Executive Branch in marriage licensing is simply to prescribe a form in compliance with KRS 402.100, which has been done. Because of this, it is not for the Third-Party Defendants to determine “the validity of the marriage licenses issued by the Rowan County Clerk’s Office. . . .” See Order (D.E. 135). This response provides the Third-Party Defendants’ analysis of Kentucky law, but it should not be construed as an official adjudication of “the validity of the marriage licenses” – a determination the Third-Party Defendants are not empowered to

make. Moreover, there is a distinction between whether the licenses themselves comply with licensing statutes and whether marriages performed pursuant to those licenses are valid under Kentucky law.

B. Although The Altered Marriage Licenses Are Not Fully Consistent with KRS Chapter 402, The Third-Party Defendants Will Recognize the Licenses As Legally Effective Absent Any Contrary Judicial Declaration.

The altered marriage licenses contain much of the information required by KRS 402.100. A basic purpose of the marriage license is to preserve as documentary evidence the fact of marriage. Ky. Atty. Gen. Op. 78-347 (citing Caldwell v. Williams, 118 S.W. 932 (Ky. 1909)). To that end, Kentucky law requires couples to obtain a marriage license and that the license contain certain biographical and statistical information. KRS 402.080, 402.100(1)(b). The altered licenses fulfill these purposes. However, the altered licenses fall short of meeting certain other statutory requirements. The altered licenses do not contain “the name of the county clerk under whose authority the license was issued, and the county in which the license was issued” as required by KRS 402.100(3)(a). While the altered licenses are signed by someone who is a deputy county clerk,¹ they do not identify his role as such and instead refer to the issuing official as “Notary Public,” which is inconsistent with KRS 402.100(1)(a) and (1)(c). The alteration of the licenses alone is inconsistent with KRS 402.100 and 402.110, which dictate that “[e]ach county clerk shall use the form prescribed by the Department of Libraries and Archives” and that the “form of marriage license prescribed in KRS 402.100 shall be uniform through this state.”

While the altered licenses issued by the Rowan County Clerk’s Office do not fully comply with statute, such deviation does not necessarily render the licenses ineffective

¹ To date, all licenses have evidently been signed by Deputy Clerk Brian Mason. See Notice (D.E. 114).

or the marriages solemnized pursuant to said licenses invalid. Obtaining a marriage license from the county clerk or deputy county clerk is a prerequisite for couples to be married. KRS 402.080. The couples who have obtained altered licenses from the Rowan County Clerk's Office have nonetheless obtained a marriage license. Those couples who thereafter have their marriage solemnized pursuant to KRS Chapter 402 are legally married.

The Kentucky Court of Appeals has explained that there are two prerequisites for a valid civil marriage. "First, the parties intending to be married must obtain a marriage license from a county clerk." Pinkhasov v. Petocz, 331 S.W.3d 285, 294 (Ky. App. 2011). "Second, having obtained a marriage license, the parties intending to be married must solemnize their intent to be married before a person or society believed in good faith to possess authority to solemnize the marriage." Id. Kentucky law favors marriage, and the presumption of the legality of a marriage "is one of the strongest known to the law." Griffith v. Lunney, 187 S.W.2d 431, 433 (Ky. 1945). "Where a marriage ceremony is shown, every presumption will be indulged that it was legally performed." Vest's Administrator v. Vest, 28 S.W.2d 782, 783 (Ky. 1930).

Pinkhasov provides the most recent analysis by the Kentucky appellate courts. There, the couple "did not wish for any civil marriage license or marriage certificate to be secured, executed or filed" for immigration reasons. 331 S.W.3d at 288. Neither party was an American citizen, and each wanted "to remain legally free to marry American citizens for the purpose of applying for citizenship." Id. So, the couple participated in "a marriage ceremony consistent with the laws, customs, and traditions of the Jewish faith, but without a 'secular, legal marriage contract.'" Id. No marriage

license was sought, and, consistent with the couple's instructions, the presiding rabbi did not complete the civil marriage solemnization procedure. Id. at 288-89. The parties' relationship eventually broke down, and one of the spouses petitioned the circuit court for dissolution of marriage. Id. at 289. The circuit court held that a marriage had been created notwithstanding the couples' failure to comply with KRS Chapter 402, but the Court of Appeals reversed. Id. at 289-90.

The Court of Appeals observed that the couple "intentionally strategized and sought to circumvent the intent, effect, and force of Kentucky's statutes concerning legally valid civil marriage." Id. at 295. The Court explained that a couple must do two things to effectuate a legal marriage: obtain a marriage license and have the marriage solemnized. Id. at 294. The Court noted that "functionaries, such as county clerks and marriage officiants, who contravene statutorily imposed duties relative to the licensing, establishment, and recording of a legally valid civil marriage may be exposed to penalties under KRS 402.990." Id. However, "conformity with the two foregoing requirements deduced from KRS 402.080 is entirely within the power, control, and responsibility of the parties intending to be legally married." Id. Therefore, "strict compliance therewith is necessary for the establishment of a legally valid and binding civil marriage." Id. Having failed to complete either task, the parties in Pinkhasov could not "reasonably argue that a legally valid civil marriage was ever intended, effectuated or supposed." Id. at 295. Therefore, the Court held that no legal marriage was created. According to Pinkhasov, therefore, when there is not strict compliance with the statutory marriage scheme, the validity of the marriage depends upon whether the deviation was the fault of the couple or someone else.

Where the couples are legally eligible for marriage and have complied with the statutory prerequisites within their control, Kentucky's courts will recognize the marriage as valid notwithstanding the fact that a functionary in the process did not perform his/her obligations precisely as required. For example, a Kentucky statute provides that a marriage solemnized by a person professing to have (but actually lacking) authority is not invalid if the couple believed the officiant had authority. KRS 402.070. Kentucky's High Court has held that a couple was legally married notwithstanding the fact that the officiant of the solemnization was not authorized to do so by KRS Chapter 402 where the couple believed the officiant to be qualified. Arthurs v. Johnson, 280 S.W.2d 504, 505 (Ky. 1955). Likewise, in Potter v. Stanley, 219 S.W. 167 (Ky. 1920), the High Court held that a couple was legally married notwithstanding the fact that the license and certificate "had been mislaid or destroyed, and could not be found in the office of the custodian of such documents." Id. at 169.

The rationale behind this distinction is clear. It is within an eligible couple's ability to obtain a marriage license and have it solemnized, while the failure of a functionary to properly discharge his or her responsibilities is generally outside the couple's control. While there may be a consequence to the functionary,² there is no adverse effect on the couples who marry pursuant to a facially deficient license. Thus, while Davis, as county

² The General Assembly has enacted KRS 402.990 to provide for penalties for those who violate the provisions of KRS Chapter 402. For example:

(7) Any clerk who knowingly issues a marriage license in violation of his duty under this chapter shall be guilty of a Class A misdemeanor.

(8) If any deputy clerk or any person other than a county clerk knowingly issues a marriage license in violation of this chapter, but not for a prohibited marriage, he shall be guilty of a Class A misdemeanor, and if he knowingly issues a license for a marriage prohibited by this chapter, he shall be guilty of a Class A misdemeanor.

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(10) Any county clerk who violates any of the provisions of KRS 402.110 or 402.230 shall be guilty of a violation.

KRS 402.990.

clerk, may be subject to statutory sanction under KRS 402.990, her actions in altering marriage licenses will not penalize those eligible couples who have done everything within their ability to be lawfully married. This analysis is consistent with well-established Kentucky law.

Since entry of the Preliminary Injunction, the Rowan County Clerk's Office has issued marriage licenses that differ from those issued pre-Obergefell. The licenses issued from September 4 through September 11 contained a minor deviation from the prescribed form, which this Court found acceptable. See Order (D.E. 89). Given that this Court is satisfied with these licenses, the Third-Party Defendants likewise accept them as valid. Thereafter, the Rowan County Clerk's Office has issued marriage licenses that further deviate from the prescribed form. As explained above, those altered licenses are not fully consistent with Kentucky statute, but such deviations do not render the marriages ineffective. Thus, the Third-Party Defendants have and will continue to recognize as valid those marriages solemnized pursuant to the altered licenses for purposes of the governmental rights, benefits, and responsibilities conveyed by the Executive Branch agencies over which Governor Beshear exercises supervisory control. See, e.g. Obergefell, 135 S. Ct. at 2601 (identifying numerous areas in which government recognition of marriage is material, including taxation, adoption, and workers' compensation benefits).

However, the Third-Party Defendants are not the official arbiters of whether a lawful marriage has been consummated. Kentucky provides a statutory cause of action to affirm or avoid a disputed marriage. KRS 402.250. The legality of a marriage also could be tested as part of some other court proceeding, such as a claim for dissolution

of marriage (as in Pinkhasov) or wrongful death (as in Arthurs). Until this Court or another court of competent jurisdiction holds to the contrary, the Third-Party Defendants will continue to follow the analysis set out above.

C. The Third-Party Defendants Express No Position on Plaintiffs' Constitutional Allegations Relating to the Altered Licenses or the Request for Further Relief.

Plaintiffs allege that “[t]he marriage licenses currently issued by the Rowan County Clerk’s Office are so materially altered that they create a two-tier system of marriage licenses throughout the state.” See Motion to Enforce at 8 (D.E. 120). Plaintiffs also claim that the altered licenses “effectively feature a stamp of animus against the LGBT community.” Id. Plaintiffs request the Court order further relief to bring the Rowan County Clerk’s Office into conformity with the Preliminary Injunction and Clarified Injunction. Id. at 8-11. Having addressed the issue specified in the Order of October 14, 2015 (D.E. 135), the Third-Party Defendants express no opinion on Plaintiffs’ constitutional claims regarding the altered marriage licenses or the request for additional relief.

III. CONCLUSION

For the reasons set out above, the Third-Party Defendants will recognize as valid those properly-solemnized marriages performed pursuant to the altered licenses issued by the Rowan County Clerk’s Office, unless directed to do otherwise by this Court or another court of competent jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 13th day of November 2015, which simultaneously serves a copy to the following via electronic mail:

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