

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
TENTH JUDICIAL DISTRICT

ADMINISTRATIVE ORDER NO. 14-11

Re: Same-sex marriage licenses

In the interest of justice and to avoid the uncertainty that has arisen in light of recent federal court rulings about the constitutionality of state constitutional and/or statutory prohibitions against marriage by same-sex individuals, the clerk of the district court is hereby directed to issue marriage licenses to all individuals, including same-sex individuals, provided they are otherwise qualified to marry.

This order is to provide guidance and prevent confusion in the administration of marriage licenses. Accordingly, this order will address relevant statutory and constitutional provisions, state and federal, for the direction of the clerk of the district court and in the event of any potential challenges to this order, a copy of which is being sent to the Kansas Attorney General.

The Public Policy of Kansas

By statute, Article 25 of Chapter 23 of the Kansas Statutes Annotated, addresses marriage licenses. Specifically, K.S.A. 23-2501 (Supp. 2013), directs that “[t]he marriage contract is to be considered in law as a civil contract between two parties who are of the opposite sex. All other marriages are declared to be contrary to public policy of this state and are void. The consent of the parties is essential.”

K.S.A. 23-2505(a) (Supp. 2013), provides for issuance of marriage licenses either by a clerk of the district court (or deputy clerks) or by a district court judge, provided such persons are “legally entitled to a marriage license.” K.S.A. 23-2508 (Supp. 2013), makes clear that marriages from other jurisdictions are valid except that “[i]t is the strong public policy of this state only to recognize as valid marriages from other states that are *between a man and a woman*.” (Emphasis

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS
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added.) There are statutory penalties associated with anyone who violates the laws on issuance of marriage licenses to unqualified persons. See K.S.A. 23-2513 (Supp. 2013) (judge, clerk or person authorized to perform marriage ceremony who fails to comply with act are guilty of misdemeanor); K.S.A. 23-2517 (Supp. 2013).

In addition to this statutory background, a constitutional amendment prohibits same-sex marriage:

Marriage. (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

KAN. CONST. art. 15, §16 (2005).

The Supreme Law of the Land

It is axiomatic state laws, whether statutory or constitutional, which are contrary to federal law are void through the supremacy clause. U.S. CONST., art. VI, cl. 2; *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 506 (1985). Other states which have similar statutory and constitutional prohibitions against same-sex marriage have been declared to violate federal constitutional law, most notably in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (finding Utah's 2004 statute and constitution provisions prohibiting recognition of same-sex marriages to be unconstitutional). The Tenth Circuit is the appeals court that addresses federal appeals from Kansas, New Mexico, Oklahoma, Utah and Wyoming. That court's decision, particularly on federal constitutional pronouncements binds all such states absent a contrary decision by the U.S. Supreme Court.

Utah's legislature passed a statute that prohibits recognition of marriage except in the case of a "legal union of a man and woman" and further prohibits giving legal recognition in contravention to this prohibition to "any law creating any legal status, rights, benefits, or duties

that are substantially equivalent to those provide under Utah law to a man and a woman because they are married.” Utah Code § 30-1-4.1. It also declares as prohibited and void any marriages “between persons of the same sex.” Utah Code § 30-1-2(5). Similarly, the Utah constitution plainly provides:

(1) Marriage consists only of the legal union between a man and a woman.

(2) No other domestic union, however, denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

UTAH CONST. art. I, § 29.

The decision in *Kitchen*, has reached the end of any appeals with the U.S. Supreme Court’s decision not to grant a petition for certiorari. That decision, if applied to a case and controversy out of Kansas, would no doubt hold that under the federal Due Process and Equal Protection Clauses of the United States Constitution “those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that Amendment 3 [the Utah provision] and similar statutory enactments do not withstand constitutional scrutiny.” 755 F.3d at 129-30. The Court upheld the federal district court’s determination that Utah state laws prohibiting same-sex marriage were unconstitutional and, therefore, void.

In addition to the Utah, Colorado, also has similar legal prohibitions against granting same-sex marriages. COLORADO CONST. art. II, § 31; C.R.S. §§ 14-2-104(1)(b) and 14-2-104(2). Such prohibitions also have been declared to be unconstitutional. *Burns v. Hicklenlooper*, 2014 WL 3634834 (D. Colo., July 23, 2014).

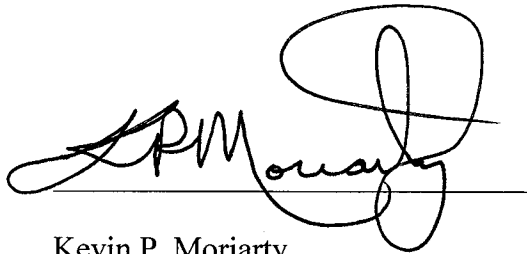
Finally, Oklahoma, also covered by the Tenth Circuit, prohibits same-sex marriage. In *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), the court also struck down as unconstitutional state statutory and constitutional amendments that prohibit same-sex marriage, including

provisions that add criminal liability for non-compliance. *Id.* at 1110 (*citing* Okla. Const. art. II, § 35(A), (C); Oka. Stat. tit. 43, §3.1).

Kansas state courts have identical if not similar prohibitions against same-sex marriage and purport to impose criminal liability on clerks and judges who issue same-sex marriage licenses. Such provisions are contrary to *Kitchen* and the federal Due Process and Equal Protection clause rights of Johnson County citizens and those who must administer the law. Although no federal court has been asked directly to address the provisions of state statutory or constitutional provisions, our district court clerks and judges are entitled to be free of any ambiguity in the administration of justice and the issuance of marriage licenses as are the citizens of Johnson County entitled to Due Process and Equal Protection of the law.

Accordingly, the clerk of the district court and all deputies shall issue marriage licenses to persons of the same gender, provided they otherwise are qualified to marry as provided by K.S.A. 23-2505.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'KPMoriarty', is written over a horizontal line.

Kevin P. Moriarty
Chief Judge

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