IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS ex rel. DEREK SCHMIDT, ATTORNEY GENERAL, Petitioner,	)	
v.	)	ORIGINAL ACTION NO. _____
KEVIN P. MORIARTY, Chief Judge, Tenth Judicial District and SANDRA McCURDY, Clerk of the District Court, Tenth Judicial District, Respondents.	)	

MEMORANDUM IN SUPPORT OF PETITION FOR ISSUANCE OF WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE RELIEF

COMES NOW the Petitioner, State of Kansas, on the relation of Attorney General Derek Schmidt, and pursuant to Kansas Supreme Court Rule 9.01, submits this short memorandum in support of his Petition for Issuance of Writ of Mandamus and Request for Immediate Relief. For the reasons stated in the Petition and as further supported herein, the Attorney General respectfully requests that this Court act on an emergency basis to issue an Order or Writ pursuant to Article 3, § 3 of the Kansas Constitution and K.S.A. 60-802 directing Chief Judge Kevin P. Moriarty of the Tenth Judicial District and ordering the withdrawal and cancellation of Administrative Order 14-11, or alternatively, an order staying Administrative Order 14-11 pending further Order of this Court. The Attorney General also requests an Order enjoining the Clerk of the District Court, Sandra McCurdy, from implementing Administrative Order 14-11, until further Order of the Court.

I) ARGUMENT AND AUTHORITIES

Mandamus in the Kansas Supreme Court is an appropriate remedy to challenge *ultra vires* actions of a district court judge. *See, for example, In re Administration of Justice in the Eighteenth Judicial Dist.,* 269 Kan. 865, 9 P.3d 28 (2000); *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 686 P.2d 171 (1984); *Nunn v. Morrison*, 227 Kan. 730, 608 P.2d 1359 (1980). A remedy in mandamus is not limited to situations where a judge lacks jurisdiction to act. It is also available where a judicial act is plainly contrary to law, at least where the petition "presents an issue of great public importance and concern", and no effective remedy by way of a direct appeal is available. *See S.M. v. Johnson*, 290 Kan. 11, 221 P.3d 99 (2009). The petitioner need only establish that a statute requires the public official to perform an act without discretion in order to justify issuance of the writ. *See Taylor v. Kobach*, ___ Kan, ___, 2014 WL 4638981 (Kan., September 18, 2014).

Kansas law clearly and unequivocally prohibits the actions that Administrative Order 14-11, attached to the Petition as Exhibit A thereto, directs the staff of the court clerk's office to perform. The order was issued by Chief Judge Moriarty without lawful authority, directing personnel of the Johnson County District Court to issue licenses to same-sex marriage applicants who are otherwise qualified under K.S.A. 2014 Supp. 23-2505. K.S.A. 2014 Supp. 23-2505 provides for issuance of marriage licenses upon application to those who are "legally entitled" to receive such a license. As this Court has recognized, Kansas law provides that marriage is valid only between persons of opposite sex. *In the Matter of the Estate of Marshall G. Gardiner, Deceased,* 273 Kan. 191, 42 P.3d 120 (2002). *See also*, K.S.A. 2013 Supp. 23-2501, which provides in relevant part that marriage is a "civil contract between two parties who are of opposite

sex." Following the *Gardiner* decision the Kansas Constitution was amended by the voters of Kansas, who adopted Article 15, §16 of the Kansas Constitution, which states:

> **§ 16: 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.

The substance of the law remains the same as it was when the *Gardiner* case was decided. Recodification of the statutes under new labels and their embodiment into the Kansas Constitution has not changed the preexisting prohibition on same-sex marriage.

The *Gardiner* appeal resulted in the rejection of a challenge to the constitutionality of the ban on same sex marriage. See *In re Estate of Gardiner*, 29 Kan.App.2d 92, 126, 22 P.3d 1086 (2001). The subsequently issued opinion of this Court also rejected a constitutional challenge to the district court's refusal to give full faith and credit to Wisconsin law. The United States Supreme Court denied certiorari in the *Gardiner* case, thus leaving Kansas law undisturbed. *See Gardiner v. Gardiner*, 537 U.S. 825, 123 S. Ct. 113, 154 L. Ed. 2d 36 (2002).

The order issued by Chief Judge Moriarty is plainly contrary to Kansas law and was issued without legal justification or authority. District Court Judges in Kansas lack the authority to *sua sponte* change Kansas law and invalidate state statutes outside the context of a pending judicial proceeding between litigants. Judicial rulings made outside the context of a pending case or controversy between parties with legal standing violate the separation of powers doctrine, and exceed the subject matter jurisdiction of the courts. *See Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). There can be no clearer example of an attempt to decide an unripe controversy

than an expression of opinion about the manner in which some possible future lawsuit between unidentified parties might ultimately be resolved.

Chief Judge Moriarty's Order goes beyond the scope of his administrative powers as a Chief Judge appointed by and subject to the supervision of this Court. K.S.A. 20-329, amended 2014 Sess. Laws Ch. 82, § 11, in relevant part provides that a Chief Judge "shall have general control over the assignment of cases within the district, subject to supervision by the supreme court.. . . Within guidelines established by statute, rule of the supreme court or the district court, the chief judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court." Administrative Order 14-11 goes well beyond the Chief Judge's limited administrative authority. Similarly, K.S.A. 20-342, amended 2014 Sess. Laws Ch. 82, § 12, provides that local rules "shall be consistent with applicable statutes and . . . rules of the supreme court." This Court has administrative authority over all of the courts in this state pursuant to K.S.A. 20-101 and Kan. Const. Art. 3, § 1. Nothing in the order appointing Judge Moriarty as chief judge of the Tenth Judicial District implies that he has authority to decide cases that have never been brought, or to issue declarations concerning alleged constitutional defects in laws that have never been challenged in any judicial proceeding.

Chief Judge Moriarty has no litigation pending before him that would provide him with a basis to make any ruling concerning the continued precedential effect of the *Gardiner* case, which rejected a constitutional challenge to Kansas' statutory rule prohibiting marriages between persons of the same sex. While district courts have jurisdiction to determine *cases,* this jurisdiction is limited to cases before them. The *Gardiner* opinion is controlling law of this State unless and until it is reversed or set aside. The United States Supreme Court denied a petition for certiorari filed in

the *Gardiner* case. *See Gardiner v. Gardiner*, 537 U.S. 825, 123 S.Ct. 113, 154 L.Ed.2d 36 (2002). It is therefore just as worthy of *stare decisis* effect as the federal cases mentioned in Judge Moriarty's directive to court staff, if not more so.

No other judicial district in Kansas has issued a directive similar to Administrative Order 14-11. *See, e.g.,* Exhibits C, D, and E attached to the Petition. Every other chief judge who has publicly stated how his or her court will proceed has refrained from modification of prior procedures. Other courts that have addressed the effect of judicial challenges to laws prohibiting same-sex marriage have routinely stayed any order invalidating such laws in order to permit appeals to be pursued. All of the federal appellate decisions mentioned in Administrative Order 14-11 involved a stay pending exhaustion of rights of appeal. Most recently the Supreme Court of South Carolina, confronted with issues similar to those now facing Kansas courts, entered an order staying issuance of same-sex marriage licenses. *See State of South Carolina ex rel Alan Wilson, Attorney General, Petitioner, v. Irvin G. Condon, in his capacity as Judge of Probate Charleston County, Respondent*, Appellate, ___ S.E.2d ___, 2014 WL 5038396 (S.C., October 9, 2014) copy attached as Exhibit 1.

If and when litigation is commenced challenging the constitutionality of Article 15, §16 of the Kansas Constitution in a court of competent jurisdiction, the Kansas Attorney General will have the right to participate in that litigation and brief the legal issues raised by the recent denial of certiorari in other cases. It is not appropriate for any judge to issue *sua sponte* orders prejudging issues that have not yet been raised in any pleading or legal brief, especially when that judge has not been assigned to preside over a lawsuit raising the issues addressed in the order. Kansas citizens are ill served by an unauthorized order that unrealistically raises hopes and expectations

that are likely to be dashed when the issues are ultimately resolved by final orders issued after all interested parties have been afforded due process and a right to be heard. An order of one judicial district in such a matter of statewide importance is also confusing and disruptive to Kansas citizens and the judicial system as a whole, which is a unified one as per statute. *See, e.g.,* K.S.A. 20-101.

Assuming, *arguendo,* that a Kansas judge with administrative authority over the issuance of marriage licenses has reason to be concerned about possible future constitutional challenges, that concern should focus on the decisions of the United States Supreme Court, not the opinions of two members of an intermediate court. The United States Supreme Court has not yet determined that there is a constitutional right to participate in same sex marriages. If a majority of the Court already recognized such a constitutional right, the cases would say so, and certiorari would have been granted on Monday October 6 to declare that conclusion to be the law of the land. Instead stay orders continue to be issued to prevent the enforcement of lower court rulings suggesting that such a right exists. *See Otter v. Latta, et al.,* No.14A387, 2014 WL 5025970 (U.S., October 8, 2014).

The most recent decision of the United States Supreme Court concerning same sex marriage plainly states over and over that the definition of what constitutes a lawful marriage is not a federal constitutional issue, but is a matter left to the states. *See discussion in U.S. v. Windsor*, __U.S.__, 133 S. Ct. 2675, 2691, 186 L. Ed. 2d 808 (2013). The key language in this opinion that has been disregarded in the majority opinions relied upon by Chief Judge Moriarty is telling:

> The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. **DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage** here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter

into same-sex **marriages made lawful by the unquestioned authority of the States.**

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, **a dignity conferred by the States in the exercise of their sovereign power**, was more than an incidental effect of the federal statute.

* * *

By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as **married for the purpose of state law but unmarried for the purpose of federal law**, thus diminishing the stability and predictability of basic personal **relations the State has found it proper to acknowledge and protect**.

* * *

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages **made lawful by the State**. DOMA singles out a class of persons **deemed by a State entitled to recognition and protection** to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge **a status the State finds to be dignified and proper**. (See 133 S.Ct. at pp. 2693-96; emphasis supplied)

None of the above quoted language would make any sense if there were a constitutional right to same sex marriage separate and apart from the grant of that right by state law. When a judicial opinion repeatedly states in such plain terms that it is not based upon the recognition of a previously rejected federal constitutional right to same sex marriage, it is wishful thinking to read the decision as achieving that result by implication. Courts should be given credit for meaning what they say and saying what they mean, especially when an issue of constitutional magnitude is under discussion. It is understandable when disappointed litigants read a judicial opinion searching for signs of a constitutional ruling they wish the court had made. What is not so understandable is for a judge who may someday be expected to decide contested legal matters based on similar contentions abandons all pretense of objectivity, deliberation, and consideration of due process and rushes to declare a victor in a fight that has not yet commenced.

II) CONCLUSION

Because the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory order of mandamus should issue pursuant to K.S.A. 60-802(b). The Attorney General also requests an order enjoining the Clerk of the Court, Sandra McCurdy, from following Judge Moriarty's unlawful Administrative Order, pending further Order of this Court. In the alternative, a temporary stay should be imposed to deny effect to the unauthorized order until such time as Judge Moriarty has had an opportunity to explain his actions to this Court as per Kansas Supreme Court Rule 9.01.

Respectfully Submitted,

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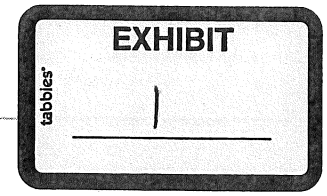
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served upon KEVIN P. MORIARTY, Chief Judge, Tenth Judicial District, and SANDRA McCURDY, Clerk of the District Court, Tenth Judicial District, by means of facsimile transmission to (913)715-3889 and (913)715-3401, respectively, this 10th day of October, 2014.

Steve R. Fabert
Attorney for Petitioner



2014 WL 5038396
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of South Carolina.

The STATE of South Carolina ex rel Alan WILSON, Attorney General, Petitioner,
v.
Irvin G. CONDON, in his capacity as Judge of Probate Charleston County, Respondent.
Appellate Case No.2014–002121.

Oct. 9, 2014.

ORDER

*1 The Attorney General petitions this Court, in its original jurisdiction, to enjoin respondent from issuing any licenses for same-sex marriages pending a decision by United States District Court Judge J. Michelle Childs in *Bradacs v. Haley,* 3:13–CV–02351–JMC. Respondent has filed a return requesting the Court deny the petition for original jurisdiction, but requests that if the Court grants the petition, respondent be given guidance on how to proceed. Colleen Therese Condon and Anne Nichols Bleckley move to intervene in the action and request an opportunity to reply to the Attorney General's petition.

In *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.2014), the Fourth Circuit Court of Appeals held that the statutory scheme in Virginia banning same-sex marriage violates the United States Constitution. The Fourth Circuit acknowledged in its opinion that three other states in the Fourth Circuit have similar bans, including South Carolina. *See* S.C. Const. art. XVII, § 15; S.C.Code Ann. §§ 20–1–10 through –15 (2014). The United States Supreme Court denied the petition for a writ of certiorari in that case on October 6, 2014. *McQuigg v. Bostic,* 14–251, 2014 WL 4354536 (U.S. Oct. 6, 2014). Based on that ruling, respondent accepted a marriage application from a same-sex couple and indicated he would issue a marriage license to the couple after the expiration of the twenty-four hour waiting period. *See* S.C.Code Ann. § 20–1–220 (2014).

The Attorney General argues the Fourth Circuit's decision in *Bostic* is not binding on this Court; therefore, the constitutionality of South Carolina's law on same sex marriage "remains a live issue." Indeed, the Attorney General argues *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), which the United States Supreme Court dismissed for want of a substantial federal question,[1] continues to be binding on the courts of this state absent a ruling to the contrary by a Federal District Court in South Carolina or by this Court.

Currently, the issue of whether Article XVII, Section 15 of the South Carolina Constitution, which provides, in relevant part, that a marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in the State of South Carolina, and Sections 20–1–10 through –15, violate the United States Constitution is actively under consideration by Judge Childs in the *Bradacs* case. We agree with the Attorney General that this issue is more appropriately resolved in the pending litigation in the Federal District Court. Avoiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources. *Cf. Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (discussing discretionary abstention when concurrent proceedings are pending in the state and federal courts or in multiple federal courts). Further, although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.

*2 Accordingly, we accept this case in our original jurisdiction for the limited purpose of maintaining the status quo until the Federal District Court can resolve the case pending before it. We also grant the motion to intervene, but take no further action on the motion with the exception that movants' request to dismiss the Attorney General's petition *sua sponte* is denied. Respondent and all other probate judges are hereby directed not to issue marriage licenses to same-sex couples pending a decision by the Federal District Court in *Bradacs.* Further, unless otherwise ordered by this Court, the issue of the constitutionality of the foregoing state law provisions shall not be considered by any court in the South Carolina Unified Judicial System while that issue remains pending before the Federal District Court.

JEAN H. TOAL, C.J., DONALD W. BEATTY, J., and

KAYE G. HEARN, J.

We concur with the order of the majority directing respondent and all other probate judges not to issue marriage licenses to same-sex couples, but would continue this Court's order in effect pending final judgment in the *Bradacs* federal court litigation.

COSTA M. PLEICONES, J., and JOHN W. KITTREDGE, J.

Footnotes

1 The Supreme Court of Minnesota held in *Baker* that a Minnesota statute prohibiting the marriage of persons of the same sex does not offend the First, Eighth, Ninth or Fourteenth Amendments to the United States Constitution. *Baker v. Nelson,* 191 N.W.2d 185 (Minn.1971).

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