

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

AMENDED - 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

added.) There are statutory penalties associated with marriages conducted by 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, Kansas has 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 that state laws, whether statutory or constitutional, that 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 that have similar statutory and constitutional prohibitions against same-sex marriage have been declared to violate federal constitutional law, as notably held by the Tenth Circuit Court of Appeals 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 comprised of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. Two appeals decisions and one district court decision have found unconstitutional state laws on same-sex marriage in Colorado, Oklahoma and Utah. The Tenth Circuit’s pronouncements on constitutional law are second only to the Supreme Court.

In *Kitchen*, Utah’s legislature passed statutes that prohibits recognition of any marriage that does not involve the “legal union of a man and woman.” Utah Code § 30-1-4.1. It declares

as void any marriages “between persons of the same sex.” Utah Code § 30-1-2(5). 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 when the Supreme Court declined to review the same by deciding not to grant a petition for certiorari. Accordingly, if any case from Kansas were brought before a federal court, it would be bound by the Tenth Circuit decision and 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. *Kitchen* struck down Utah’s laws.

Similarly, Colorado, prohibits same-sex marriages. COLORADO CONST. art. II, § 31; C.R.S. §§ 14-2-104(1)(b) and 14-2-104(2). Its prohibitions also have been declared to be unconstitutional. *Burns v. Hicklenlooper*, 2014 WL 3634834 (D. Colo., July 23, 2014).

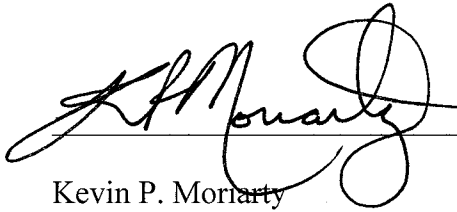
Finally, Oklahoma, prohibits same-sex marriage. In *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), the court struck down as unconstitutional state statutory and constitutional amendments that prohibit same-sex marriage, including provisions that add criminal liability for non-compliance. *Id.* at 1110 (citing Okla. Const. art. II, § 35(A), (C); Okla. Stat. tit. 43, §3.1). Laws that criminalize judges or clerks from issuing same sex marriage licenses are void.

Kansas law prohibits 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 yet has been asked directly to address the provisions of state statutory or constitutional provisions, citizens of Johnson County are asking for marriage licenses for same-sex couples and our district court clerks and judges are entitled to protection from laws that are unconstitutional. Our citizens are entitled to exercise their constitutional rights and our administration of justice should be free of any ambiguity or inconsistency in the administration of justice, including the issuance of marriage licenses.

Accordingly, the clerk of the district court is directed to issue marriage licenses to all persons, regardless of gender, provided they otherwise are qualified pursuant to K.S.A. 23-2505.

IT IS SO ORDERED.


Kevin P. Moriarty
Chief Judge