



The Office of Vince Ryan
County Attorney

July 1, 2015

Harris County Criminal Court at Law Judges
Harris County Civil Court at Law Judges
Harris County Probate Court Judges
Harris County Justices of the Peace
c/o Ed Wells, Court Manager
Office of Court Management
1201 Franklin, 7th Floor
Houston, Texas 77002

Honorable Stan Stanart
Harris County Clerk
201 Caroline, 4th Floor
Houston, Texas 77002

In re: Conduct of Marriage Ceremonies for Same-Sex Couples and Issuance of
Marriage Licenses to Same-Sex Couples over Religious Objections

The Office of the Harris County Attorney has been asked:

1. Are the county's judges and justices of the peace required to conduct marriage ceremonies for same-sex couples in the face of sincerely held religious objections?
2. May the County Clerk or a deputy county clerk refuse to issue a marriage license based on sincerely held religious objections?

We conclude:

1. A judge or justice of the peace is authorized to perform a marriage but is under no obligation to do so. However, once the judge elects to undertake the performance of marriages, the service must be offered to all (including same-sex couples) in a non-discriminatory manner.
2. A county clerk must ensure that marriage licenses are offered and issued to same-sex couples in a timely and non-discriminatory manner, but may make reasonable accommodations for a deputy clerk whose sincerely held religious beliefs will be substantially burdened by being required to issue marriage licenses to same-sex couples. However, in making accommodations a county clerk is not required to incur undue hardship. These accommodations may not be used to deny or delay the issuance of marriage licenses to qualifying applicants.

Background

Your questions arise in the wake of the U.S. Supreme Court's June 26 decision in *Obergefell v. Hodges*, 576 U.S. ____, No. 14-556 (June 26, 2015). In *Obergefell*, the Supreme Court held that same-sex couples may exercise the fundamental right to marry in all states and that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character. Relying in part on its decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated bans on interracial unions, as well as on a long line of cases that have defined personal rights, the Court reaffirmed that the right to marry is a fundamental right protected by the United States Constitution. The Court set out the principles and traditions that underlie the determination that marriage is a fundamental right and observed that these apply equally to same-sex couples. Further, the Court found that the right of same-sex couples to marry is derived from the equal protection and due process guarantees of the Fourteenth Amendment. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of the fundamental right to marry. This opinion has the effect of invalidating article I, section 32 of the Texas constitution, which defines marriage to exclude same-sex unions as well as any other state laws that would prohibit same-sex marriages. See, e.g., Tex. Fam. Code Ann. § 2.001(b) (West 2006) (prohibiting issuance of a license for marriage of persons of the same sex and held unconstitutional by *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014)). As the U.S. Supreme Court said in *Cooper v. Aaron*, "the interpretation of the Fourteenth Amendment enunciated by this Court ... is the supreme law of the land, and Art. VI of the Constitution makes it a binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" 358 U.S. 1, 18 (1958).

1. Conduct of Marriage Ceremonies

Section 2.202(a) of the Texas Family Code provides in pertinent part:

(a) The following persons are authorized to conduct a marriage ceremony:

....

(4) a justice of the supreme court, judge of the court of criminal appeals, justice of the courts of appeals, judge of the district, county, and probate courts, judge of the county courts at law, judge of the courts of domestic relations, judge of the juvenile courts, retired justice or judge of those courts, justice of the peace, retired justice of the peace, judge of a municipal court, retired judge of a municipal court, or judge or magistrate of a federal court of this state; and

(5) a retired judge or magistrate of a federal court of this state.

Tex. Fam. Code Ann. § 2.202(a) (West 2006).

The statute simply authorizes judges to perform marriage ceremonies. It does not require that they do so. See also Tex. Fam. Code Ann. § 2.203(a) (West 2006) (stating when presented with an unexpired marriage license, an authorized person may conduct the marriage ceremony).

While the section 2.202 authorization for judges to perform wedding ceremonies is permissive rather than mandatory, discriminating on the basis of race, religion, or national origin against an applicant otherwise competent to be married is prohibited. Tex. Fam. Code Ann. § 2.205(a) (West 2006). When a judge conducts a marriage ceremony, the judge is performing a judicial function. State Comm'n on Jud'l Conduct, Public Admonition, CJC No. 04-0435-CO. On a finding by the State Commission on Judicial Conduct that a judge has intentionally violated section 2.205(a), the Commission may recommend to the Supreme Court of Texas that the judge be removed from office. Tex. Fam. Code §2.205(b) (West 2006).

Section 2.205 of the Family Code was originally enacted in 1983 as a response to the refusal of several justices of the peace to perform marriages for interracial couples — fifteen years after *Loving v. Virginia* — in effect codifying the equal protection *Loving* already provided. Act of May 26, 1983, 68th Leg., R.S., ch. 437, H.B. 1819, §1, 1983 Gen. Laws 2498. The purpose of the bill was to give the effect of law to a recent Attorney General opinion on the subject and to make the duty to not discriminate clear to recalcitrant justices of the peace. See House Comm. on Judiciary, Bill Analysis, H.B. 1819, 68th Leg., R.S. (1983) (“As one [J.P.] said, ‘if the good Lord intended us to mix it up, he’d have made us all the same color.’”). Although section 2.205 does not list discrimination against same-sex couples, the Supreme Court made clear that same-sex couples have a constitutionally protected fundamental right to marry. Therefore, it is unlawful for state actors such as judges to discriminate in conducting wedding ceremonies. No judge who chooses to offer marriage services may discriminate against couples because they are of the same sex.

While a judge is authorized, but not required to conduct a marriage ceremony, once the judge elects to perform marriages, the service must be offered to all in a non-discriminatory manner. Tex. Att’y Gen. Op. No. JM-1 (1983); see also Tex. Code of Jud’l Conduct, Canon 3.B(5), (6), reprinted in Tex. Gov’t Code Ann. tit. 2, subtit. G app. B (West 2013) (prohibiting a judge from exhibiting bias or prejudice based on sexual orientation). As an agent of the State acting in an official capacity a judge, when conducting a wedding ceremony, may not deprive any person of the equal protection of the law. The extension of the performance of the ceremony to one group while denying it to another would constitute such a denial. A judge who chooses to perform marriages must do so for same-sex couples, notwithstanding any personal religious objection. See Tex. Code Jud. Conduct, Canon 3B(5), Canon 3B(6), reprinted in Tex. Gov’t Code Ann. tit. 2, subtit. G app. B (West 2013).

2. Accommodation of Clerks

County clerks and their deputies must issue licenses to all qualified applicants. Tex. Fam. Code Ann. §§ 2.008(a) (West 2006), 2.009(c) (West 2015). Failure to comply with this requirement may subject the clerk to a fine of up to \$500.00 and potentially may lead to removal from office. Tex. Fam. Code Ann. § 2.012 (West 2006); Tex. Loc. Gov’t Code Ann. §§ 87.011(3), 87.013(a)(2) (West 2008). Refusing to issue such a license may also expose the clerk to an action for damages for the denial of a civil right under color of law. 42 U.S.C. § 1983.¹

¹ There have been suggestions that attorneys may be willing to represent clerks pro bono who, because of religious scruples, decline to issue licenses to same-sex couples. While that may well be the case, any clerk considering the

While clerks have a duty to issue marriage licenses to qualified applicants without discrimination, protections of the free exercise of religion remain in place where appropriate. *See* Tex. Const. art. I, §6; U.S. Const. amend I. Under the Texas Religious Freedom Restoration Act (RFRA), a governmental agency or political subdivision may not “substantially burden” a person’s free exercise of religion. Tex. Civ. Prac. & Rem. Code Ann. § 110.003(a) (West 2011). This restriction does not apply if the burden: (1) is in furtherance of a legitimate governmental interest, and (2) is the least restrictive means of furthering that governmental interest. *Id.* at (b).

“Substantially burden” is determined on a case-by-case, fact-specific basis. *Barr v. City of Sinton*, 295 S.W.3d 287, 302 (Tex. 2009). A person’s religious exercise has been “substantially burdened” under RFRA when his or her ability to express adherence to his or her faith through a particular religiously motivated act has been meaningfully curtailed or he or she has otherwise been significantly pressured to modify his or her conduct. *Emack v. State of Texas*, 354 S.W.3d 828, 839 (Tex. App. – Austin 2011, no pet.) (citing *Barr*, 295 S.W.3d at 302).

Even though same-sex marriage may deeply offend the religious beliefs of a clerk, establishing that the routine job duties of issuing a license is a “substantial burden” on that clerk’s free exercise of religion may be difficult under the decisions interpreting RFRA.² RFRA confers no right to challenge the independent conduct of third parties. *East Texas Baptist Univ. v. Burwell*, ___ F.3d ___, 2015 WL 385281, *5 (5th Cir. June 22, 2015). When the offensive act is that of third parties, as opposed to an act one is forced to engage in directly, the free exercise of religion is not substantially burdened. *Id.* at *5-8. Acts with an indirect and attenuated connection to the subject of the law cannot substantially burden the right to free exercise of religion in any degree approaching constitutional significance. *See Brady v. Dean*, 790 A.2d 428, (Vt. 2001) (dismissing clerks’ claims that participating in issuing same-sex civil union licenses substantially burdened their sincerely held religious beliefs under Vermont RFRA).

Moreover, RFRA specifically exempts situations where it could be used to thwart the application of civil rights laws. *See* Tex. Civ. Prac. & Rem. Code Ann. § 110.011(a) (West 2011) (stating that the chapter does not establish or eliminate a defense to a civil action under a federal or state civil rights law). At least for the elected county clerk who refuses to issue marriage licenses to same-sex applicants, and consequently becomes the defendant in a federal or state civil rights suit, RFRA explicitly offers no protections.

Likewise, existing laws protecting the civil rights of employees remain in place where appropriate. An employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but is not required to incur undue hardship. *Eversley v. Mbank Dallas*, 843 F.2d 172, 175 (5th Cir. 1988). “Undue hardship” exists, as a matter of law,

possibility of subjecting himself or herself to potential litigation of this type should be fully aware that the clerk may well be determined to have acted outside the scope of his or her official duties, which may prevent any insurance or bond covering the clerk’s official duties from applying and could result in the clerk’s being personally liable for damages and for the plaintiff’s attorneys’ fees. *See* 42 U.S.C. §§ 1983, 1988; *Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (holding that attorneys’ fees available in cases of injunctive or declaratory relief).

² Because the state and federal RFRA share common language, history, and purpose, state and federal courts use decisions interpreting them interchangeably. *Barr*, 295 S.W.3d at 296. This letter likewise refers to the two statutes interchangeably as RFRA.

when an employer is required to bear more than a de minimus cost. *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63 at 84 (1977); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982).

For example, an employer is not required to rearrange its schedule and force employees to “trade shifts” to accommodate the religious practices of a truck driver who had a deeply held religious belief against partnering with female drivers. The court held that such an arrangement constituted more than a de minimus expense and adversely affected other employees. *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000).

An employee claiming religious discrimination on the basis of a failure-to-accommodate theory, must first set forth a prima facie case that (1) he or she had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he or she informed the employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected the employee to an adverse employment action because of his or her inability to fulfill the job requirement. *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). If an employee makes out a prima facie failure-to-accommodate case, the burden then shifts to the employer to show that it “initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship.” *Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998).

When the government acts as an employer, it has a significant degree of control over employees’ words and actions; otherwise, there would be little chance for the efficient provision of public services. *Walden v. Center for Disease Control and Prevention*, 669 F.3d 1277, 1285 (11th Cir. 2012). Consequently, the First Amendment rights of government employees is balanced with the government interest as an employer for the efficiency of the services it provides through its employees. *Id.* at 1286.

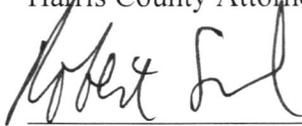
The right of a same-sex couple to obtain a marriage license has been found to be a fundamental right protected by the United States Constitution, *Obergefell v. Hodges*, 576 U.S. ____, No. 14-566 (June 26, 2015). Thus, the issuance of licenses to same-sex couples is in the furtherance of a legitimate governmental interest. County clerks may not flatly refuse to issue a marriage license based on their religious objections, as they have an obligation to issue a license to any applicant who supplies the information required by statute. Tex. Fam. Code Ann. §§2.004, 2.009(c) (West 2006). However, if there are other deputy clerks who are available to perform the ministerial duty of issuing the license without impinging the fundamental rights of the applicants, the deputy clerks who have such objections are not required to perform this duty. Allowing the deputy clerks to issue the licenses would constitute a less restrictive means of furthering the governmental interest. Thus, the clerk’s office may adopt office procedures to ensure: (1) that licenses are issued without delay to all qualified applicants, and (2) that to the extent an individual deputy has sincerely held religious objections to personally issuing certain licenses, other deputies are available to issue the license. Ultimately, the county clerk must ensure that licenses are issued to all qualifying applicants without delay.

Conclusion

A judge or justice of the peace is authorized to perform a marriage but is under no obligation to do so. However, once the judge elects to undertake the performance of marriages, the service must be offered to all (including same-sex couples) in a non-discriminatory manner.

A county clerk must ensure that marriage licenses are offered and issued to same-sex couples in a timely and non-discriminatory manner, but may make reasonable accommodations for a deputy clerk whose sincerely held religious beliefs will be substantially burdened by being required to issue marriage licenses to same-sex couples. However, in making accommodations a county clerk is not required to incur undue hardship. These accommodations may not be used to deny or delay the issuance of marriage licenses to qualifying applicants.

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