

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Heidi Kennard, individually and on behalf)	
of those similarly situated,)	
)	
Plaintiff,)	
)	
v.)	No. 2:14-cv-04017-BCW
)	
Christine Kleindienst, in her official)	
capacity as Callaway County)	
Recorder of Deeds and on behalf of)	
all Missouri Recorders of Deeds,)	
)	
Defendant.)	
)	

[PROPOSED] ORDER AND JUDGMENT

This Court, having reviewed and taken notice of the pleadings herein, and with the consent of the Plaintiff, individually and on behalf of the Plaintiff Class, and Defendant, in her official capacity as Callaway County Recorder of Deeds and on behalf of Defendant Class, and after an adequate notice to the two classes and a fairness hearing, hereby enters Judgment as follows:

FINDINGS

1. Plaintiff's marriage was precluded because her fiancé is incarcerated within Callaway County and unable to present himself before Defendant to complete the marriage license application pursuant to Missouri Revised Statutes § 451.040.2.
2. Plaintiff's lawsuit challenges the enforcement of policies or customs that prevent her and others from marrying because one or both of the applicants could not

comply with the in presence requirement under Missouri Revised Statutes § 451.040.2, claiming that such enforcement violates the fundamental right to marry secured by the Fourteenth Amendment.

3. Individuals similarly situated to members of the Plaintiff Class have already successfully litigated this issue with respect to several members of the Defendant Class. *See Glass v. Trowbridge*, No. 14-CV-3059-S-DGK, 2014 WL 1878820 (W.D. Mo. May 12, 2014); *Amos v. Higgins*, 996 F. Supp. 2d 810 (W.D. Mo. 2014); *Nichols v. Moyers*, No. 4:13CV735 CDP, 2013 WL 2418218 (E.D. Mo. June 3, 2013); *Fuller v. Norman*, 936 F. Supp. 2d 1096 (W.D. Mo. 2013).

4. In light of this litigation history, the recurring nature of the legal issue, and the desire for uniformity, this case was certified as a bilateral class action.

5. As currently certified, the Plaintiff Class consists of “individuals who seek, or will in the future seek, to marry an individual 18 years of age or older who is unable to appear in person before a Recorder of Deeds because of incarceration, military service, or disability.” (Doc. #41).

6. The Defendant Class consists of all Missouri Recorders of Deeds. (Doc. # 32).

7. Shortly after issuance of the preliminary injunction, the Governor signed Senate Bill 796, which amended § 451.040. Specifically, as amended, the statute allows for recorders of deeds to accept affidavits in lieu of presence for those unable to appear because of incarceration or out-of-state military service.

8. The amended statute provides less protection to the fundamental right to marry than the Plaintiff Class currently enjoys with the preliminary injunction and is not adequate to protect the constitutional rights of the Plaintiff Class.

9. After mediation, the class representatives agreed to jointly move for entry of a consent judgment.

10. After directing notice to the Plaintiff Class and the Defendant Class, this Court held a fairness hearing on January 26, 2015.

ORDER

Based on the aforementioned Findings, the Court hereby orders as follows:

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no “State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

2. Marriage is a fundamental right protected by the due process clause of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). “There can be no serious doubt that in America the right to marry is a rigorously protected fundamental right.” *Bostic v. Rainey*, 970 F. Supp. 2d 456, 470-71 (E.D. Va. 2014) (collecting cases); *De Leon v. Perry*, 975 F. Supp. 2d 632, 657-58 (W.D. Tex. 2014) (collecting cases); *see also, e.g., Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right,” and marriage is an “expression[] of emotional support and public

commitment.”); *Zablocki*, 434 U.S. at 384 (“The right to marry is of fundamental importance for all individuals.”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Griswold v. Conn.*, 381 U.S. 479, 486 (1965).

3. The fundamental nature of the right to marry is not altered by the fact that a party to a prospective marriage might be incarcerated, in the military, or disabled. *See e.g., Turner*, 482 U.S. at 95 (Because “the decision to marry is a fundamental right,” it survives despite a party to the marriage being incarcerated).

4. “Forcing [parties] to delay the marriage burdens the right to marriage.” *United States v. Norris*, No. 1:07-CR-77-TS, 2007 WL 4335459, *3 (N.D. Ind. Dec. 7, 2007).

5. “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.” *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The statutory requirement that both parties to a prospective marriage execute and sign a marriage license in the presence of the recorder of deeds or their deputy significantly interferes with the exercise of the fundamental right to marry of those couples where it is impossible for a future spouse to appear in the presence of the recorder of deeds as a result of his or her incarceration, military service, or disability. It has the effect of

preventing the marriage. There can be no distinction between actively prohibiting the exercise of the right to marry and action that completely frustrates that right. *See Toms v. Taft*, 338 F.3d 519, 527 (6th Cir. 2003).

6. Where a statute significantly interferes with the exercise of a fundamental right, “it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388. “Legislation infringing a fundamental right must survive strict scrutiny—the law must be narrowly tailored to serve a compelling state interest.” *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (internal quotations omitted). Thus, the in-person presence requirement is applied constitutionally only where it is closely tailored to solely effectuate a sufficiently important state interest. *Fuller*, 936 F. Supp. 2d at 1098.

7. Any interests that might be furthered by § 451.040.2’s remaining in-presence requirement can be advanced without preventing the marriages of couples where one prospective spouse cannot appear in the presence of a recorder of deeds as a result of incarceration, military service, or disability. In North Carolina, “[i]f an applicant for a marriage license is over 18 years of age and is unable to appear in person at the register of deeds’ office, the other party to the planned marriage must appear in person on behalf of the applicant and submit a sworn and notarized affidavit in lieu of the absent applicant’s personal appearance.” N.C. Gen. Stat. Ann. § 51-8.2. In Texas, “[i]f an applicant is unable to appear personally before the county clerk to apply for a marriage license, any adult person or the other applicant may apply on behalf of the absent applicant.” Tex. Fam. Code Ann. § 2.006(a); *see also id.* (b) (stating requirements).

Kansas requires the presence of only one applicant. Kan. Stat. Ann. § 23-2505; *see also* Fla. Stat. Ann. § 741.04 (requiring an affidavit, not presence); Md. Code Ann., Fam. Law § 2-402 (requiring that one party appear in person). Therefore, Defendant and members of the Defendant Class, as well as their employees and agents, are prohibited from requiring individuals 18 years of age or older who are unable to appear in person before the recorder of deeds because of incarceration, military service, or disability, to appear in the presence of recorders of deeds or their deputies as a condition for issuance of a marriage license.

8. Further, Defendant and members of the Defendant Class shall, upon reasonable written proof as to the authenticity of the signature of an applicant on a marriage license application; reasonable proof of the fact that the applicant, 18 years of age or older, is unable to appear in the presence of the recorder of deeds at the time the application is completed; and receipt of all fees and other documents required for the issuance of a marriage license under the laws of the State of Missouri, issue marriage licenses to any member of the Plaintiff Class without requiring any individual applicant unable to appear to execute or sign a marriage license application in the presence of the recorder of deeds or any deputy.¹

¹ Completion of the attached Affidavit and Verification forms shall provide prima facia proof of the authenticity of the applicant's signature and proof of the fact that the applicant is physically unable to appear in the presence of the recorder of deeds at the time the application is completed. Future changes to the Affidavit and Verification forms should be coordinated with and agreed to by the counsel for the parties and presented to the Court for approval.

9. As reasonable written proof of the foregoing facts, the Defendant Class may require that the individual applicant who is unable to appear submit an affidavit or sworn statement on a form furnished by the recorder of deeds, which shall include the necessary information for the recorder of deeds to issue a marriage license under Chapter 451 of Missouri Revised Statutes. The affidavit or form shall also include an attestation signed by the application and an independent verification stating in substantial part that the applicant is unable to appear in the presence of the recorder of deeds as a result of the applicant's incarceration, military service, or disability.

10. Having conducted a fairness hearing pursuant to Fed. R. Civ. P. 23(e) [and having considered the objections filed with the Court], and heard the arguments of plaintiffs' and defendants' counsel, this Court finds that the consent judgment is fair, reasonable, and adequate.

11. Plaintiff is the prevailing party for purposes of 42 U.S.C. § 1988.

12. The Court retains jurisdiction to enforce this judgment.

Dated: _____

JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT JUDGE