

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

| | | |
|----------------------|---|-----------------------|
| GENA FULLER, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | No. 2:12-cv- 4300 FJG |
| |) | |
| JEFF NORMAN, et al., |) | |
| |) | |
| Defendants. |) | |

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Plaintiffs initiated this case as a challenge to the actions and inactions of government officials that have prohibited their marriages to inmates at Jefferson City Correctional Center. The weddings were scheduled for September 24, 2012, but were canceled because Plaintiffs were unable to secure marriage licenses. The factual basis for Plaintiffs' Second Motion for Preliminary Injunction is set forth in the Suggestions in Support of Plaintiffs' Motion for Preliminary Injunction (Doc. # 3), which is incorporated herein by reference.

On January 18, 2013, Plaintiffs filed their First Amended Complaint as matter of course within twenty-one days of the filing of a responsive pleading. (Doc. # 25); *see* FED. R. CIV. P. 15(a)(1)(B). Relevant to this motion, Plaintiffs' First Amended Complaint added a seventh count, which asserts that MO. REV. STAT. § 451.040.2's requirement that marriage license applications be signed "in the presence of the recorder of deeds or their [*sic*] deputy" is unconstitutional as applied where an applicant for a marriage license is incarcerated.

Plaintiffs now move for a preliminary injunction enjoining the mandate that a marriage license application be signed in the presence of a recorder of deeds when the applicant, like Plaintiffs' fiancés, is incarcerated and, thus, unable to appear. Plaintiffs ask this Court to require

Defendant Rademan and his officers, agents, servants, and employees, to issue a marriage license to Plaintiffs without requiring their incarcerated fiancés to appear before him or his deputy upon receiving such alternate assurance of identity of the applicant as this Court deems appropriate.

II. Argument

Courts considering whether to issue a preliminary injunction should weigh (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between such harm and the injury that granting the injunction will inflict on the other interested parties; and (4) whether the issuance of an injunction is in the public interest. *Dataphase Sys. v. C L Sys. Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); accord *Phelps-Roper v. City of Gladstone, Mo.*, 09-0121-CV-W-FJG, 2009 WL 995565, *2 (W.D. Mo. Apr. 14, 2009).

This Court should grant Plaintiffs' request for a preliminary injunction because they are likely to succeed on the merits, each Plaintiff is irreparably harmed by the statute's impossible requirement that her fiancé appear before the recorder, there will be no harm to any Defendant, and the public interest favors the preservation of constitutional rights.

A. Likelihood of Success on the merits.

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967)(citations omitted); see also *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (reaffirming that the right to marry is fundamental). "[T]he designation of 'marriage' itself ... expresses validation, by the state and the community, and ... serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important." *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012), cert. granted, 133 S. Ct. 786 (U.S. 2012).

The fundamental nature of Plaintiffs' right to marry is not altered by the fact that their fiancés are incarcerated. "[T]he decision to marry is a fundamental right" and it survives despite a party to the marriage being incarcerated. *Turner v. Safley*, 482 U.S. 78, 95 (1987). There can be no distinction between actively prohibiting the exercise of the right to marry and action that completely frustrates the right. *See Toms v. Taft*, 338 F.3d 519, 527 (6th Cir. 2003).

Where a statute significantly interferes with the exercise the 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).

Missouri law criminalizes the solemnization of any marriage unless a marriage license has been issued. MO. REV. STAT. § 451.120. A marriage solemnized without a license is not recognized as valid. MO. REV. STAT. § 451.040.1. "Before applicants for a marriage license shall receive a license, and before the recorder of deeds shall be authorized to issue a license, the parties to the marriage shall present an application for the license, duly executed and signed in the presence of the recorder of deeds or their deputy." MO. REV. STAT. § 451.040.2.

The requirement that all parties to the marriage be present before the Recorder of Deeds or his deputy, as applied in this case, makes it impossible for Plaintiffs to be married to the persons of their choice. Plaintiffs' fiancés are inmates confined to the Jefferson City Correctional Center. They may not leave JCCC, except on an outcount, which JCCC officials refuse to provide. Defendant Rademan, for reasons of personal privacy, chooses not to go to JCCC or send a deputy to witness the applications of Plaintiffs' fiancés.

This is not a facial challenge. Even assuming, *arguendo*, that in many of its applications the in-the-presence-of-the-Recorder requirement of § 451.040.2 does not completely frustrate the right to marry, it does so as it is applied here. No Plaintiff can be married to the individuals of her choice in Missouri because § 451.040.2 is impossible for them to comply with.

The State of Missouri can advance any interests furthered by § 451.040.2's requirement without preventing Plaintiffs' marriages. In Hawaii, for instance, "[a]n inmate's fiancée may pick up a marriage license and an affidavit from the clerk's office and take the documents to the prison, where they can be signed in front of a notary. The inmate's fiancée would then return the signed documents to the clerk's office." *Aliviado v. Kimoto*, CIV. 12-00259 SOM, 2012 WL 3202222, *12 (D. Haw. Aug. 2, 2012)(citation omitted). In Tennessee, if "either individual [applying for a marriage license] be incarcerated, the inmate shall not be made to appear but shall submit a notarized statement containing the name, age, current address and a name and address of the individual's parents, guardian or next of kin." TENN. CODE ANN. § 36-3-104. 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 (affidavit, not presence, required); MD. CODE ANN., FAM. LAW § 2-402 (one party must appear in person).

These examples demonstrate that the state can satisfy its interests without the requirement that has foreclosed exercise of the right to marry in this case.

As applied in this case, the statutory requirement that Plaintiffs' fiancés appear in the presence of the Recorder of Deeds or his deputy before Plaintiffs can be married has prevented, and continues to prevent, Plaintiffs from being married. In the circumstances of an incarcerated party to a marriage license application, § 451.040.2 is not narrowly tailored to serve a compelling government interest. Any interest can be satisfied by allowing Plaintiffs' fiancés to complete their license applications before a notary public rather than the Recorder of Deeds. Thus, Plaintiffs are likely to succeed on their as-applied challenge to § 451.040.2's requirement that both parties to a marriage license application must sign the application in the presence of the Recorder of Deeds or his deputy.

B. Remaining *Dataphase* Factors

The remaining *Dataphase* factors weigh in favor of issuing a preliminary injunction for the reasons set forth in the Suggestions in Support of Plaintiffs' Motion for Preliminary Injunction (Doc. # 3), which is incorporated herein by reference.

III. Conclusion

For the foregoing reasons, Plaintiffs request this Court issue a preliminary injunction directing Defendant Rademan, his agents, servants, employees, and attorneys to accept the application for marriage executed by Plaintiffs' fiancés in the presence of a notary public and treat those applications in the same manner as if they had been executed in his presence or the presence of his deputy, or provide such other injunctive relief as is appropriate and will allow Plaintiffs' and their fiancés to secure a marriage license.

Respectfully submitted,

/s/ Anthony E. Rothert

ANTHONY E. ROTHERT, #44827

GRANT R. DOTY, #60788

454 Whittier Street

St. Louis, Missouri 63108

PHONE: (314) 652-3114

FAX: (314) 652-3112

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I certify that on January 18, 2013, a copy of the foregoing was filed using the Court's CM/ECF system and by operation of the system served upon counsel for all parties.

/s/ Anthony E. Rothert