

HEATHER L. SMITH  
CLERK OF APPELLATE COURTS

STATE OF KANSAS ex rel. DEREK )  
SCHMIDT, ATTORNEY GENERAL, )  
Petitioner, )  
)  
v. )  
)  
KEVIN P. MORIARTY, Chief Judge, )  
Tenth Judicial District and SANDRA )  
McCURDY, Clerk of the District Court, )  
Tenth Judicial District, )  
)  
Respondents. )

ORIGINAL ACTION NO. \_\_\_\_\_

**PETITION FOR ISSUANCE OF WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE RELIEF**

COMES NOW the Petitioner, State of Kansas, on relation of Derek Schmidt, Attorney General of the State of Kansas, pursuant to Article 3, Section 3 of the Kansas Constitution, Supreme Court Rule 9.01, K.S.A. 60-801, *et seq.*, K.S.A. 60-901, *et seq.*, and K.S.A. 60-1201, and petitions this Court for a peremptory writ of mandamus as per K.S.A. 60-802(b) or alternatively, an Order enjoining Kevin P. Moriarty, Chief Judge of the Tenth Judicial District, from maintaining or enforcing Administrative Order No. 14-11, filed in the District Court at 2:03 p.m. on October 8, 2014 (and re-filed with an amended discussion just 91 minutes later), wherein he directs the Clerk of the District Court and all deputies to issue marriage licenses to persons of the same gender provided they otherwise are qualified to marry and further enjoining Sandra McCurdy, the Clerk of the District Court, from issuing marriage licenses to persons of the same gender as the Administrative Order is beyond the administrative authority of the Chief Judge and contrary to existing Kansas law, Article 15, § 16 of the Kansas Constitution, K.S.A. 2014 Supp. 23-2501, and this Court’s decision in *In the Matter of the Estate of Marshall G. Gardiner, Deceased*, 273 Kan. 191, 42 P.3d 120 (2002). A short memorandum in support of the Petition is submitted herewith.

## THE PARTIES

1. Petitioner DEREK SCHMIDT is the duly-elected, qualified and acting Attorney General of the State of Kansas. The Office of Attorney General was created by the Kansas Constitution, Article 1, § 1. The powers of the Attorney General are found in the common law, K.S.A. 75-701, *et seq.*, and throughout the Kansas Constitution and statutes. The Attorney General is the proper party to bring this action. K.S.A. 2014 Supp. 75-702. Pursuant to K.S.A. 60-2005, the Attorney General, as an officer of the State of Kansas, is exempt from the payment of a docket fee for the filing of this action.

2. Respondent KEVIN P. MORIARTY is the Chief Judge of the Tenth Judicial District and acts as the principal administrative officer for the Tenth Judicial District pursuant to an appointment by the Court effective January 1, 2014, as per 2013 SC 96 and Supreme Court Rule 107.

3. Respondent SANDRA McCURDY, is the duly authorized Clerk of the District Court for the Tenth Judicial District and is responsible for the issuance of marriage licenses as per K.S.A. 2014 Supp. 23-2505.

## FACTS

4. On October 8, 2014, Chief Judge Moriarty issued Administrative Order 14-11 wherein he directs the Clerk of the District Court and all deputies that they “shall issue marriage licenses to persons of the same gender, provided they otherwise are qualified to marry as provided by K.S.A. 23-2505.” *See* Exhibit A attached hereto.

5. Article 15, Section 16 of the Kansas Constitution provides:

(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.

6. Administrative Order 14-11 is directly contrary to Article 15, Section 16 of the Kansas Constitution.

7. The Kansas Supreme Court clearly, succinctly, and unanimously rejected same sex marriage in *In the Matter of the Estate of Marshall G. Gardiner, Deceased*, 273 Kan. 191, 42 P.3d 120 (2002) where it stated:

The legislature has declared that the public policy of this state is to recognize only the traditional marriage between “two parties who are of the opposite sex,” and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A. 2001 Supp. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. *Id.* at 215.

8. The United States Supreme Court denied certiorari in the *Gardiner* case, thus leaving this Court’s ruling as the law in Kansas. *See Gardiner v. Gardiner*, 537 U.S. 825, 123 S. Ct. 113, 154 L.Ed.2d 36 (2002).

9. Administrative Order 14-11 is directly contrary to the Supreme Court’s holding in *Gardiner*.

10. K.S.A. 2014 Supp. 23-2501 provides:

The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

11. Administrative Order 14-11 is directly contrary to Kansas statutory law.

12. Chief Judge Moriarty derives his administrative authority in the Tenth Judicial District from his appointment by the Kansas Supreme Court pursuant to Supreme Court Rule 107 and K.S.A. 20-329. *See* Exhibit B attached hereto.

13. Administrative Order 14-11 is in excess of Chief Judge Moriarty's administrative authority as accorded to him by statute. *See* Kan. Const. Art. 3, § 1, K.S.A. 20-101, 20-318, 20-319, 20-329, 20-342 and Kansas Supreme Court Rule 107.

14. Upon information and belief, to date, at least eight clerks of the district court – in Shawnee, Sedgwick, Saline, Reno, Douglas, Cowley, Wyandotte and Lyon Counties -- have refused to issue marriage licenses to same gender couples in compliance with Kansas law. Administrative Order 14-11 creates the untenable situation where district court clerks in the 105 counties of this state within a unified judicial system are administering Kansas marriage laws in an inconsistent fashion, creating non-uniform administration of the laws as well as disruption, confusion and disarray.

15. In at least two Kansas Judicial Districts – the Seventh and Nineteenth -- the Chief Judges have issued Administrative Orders that are contrary to the Administrative Order entered in the Tenth Judicial District. *See* Exhibits C and D attached hereto. In the Third Judicial District, the Chief Judge has authorized a statement advising that while marriage applications will be accepted from same gender couples, marriage licenses will not be issued. *See* Exhibit E attached hereto.

16. As has been publically reported, all but one Kansas county are refusing to issue marriage licenses to same gender couples in compliance with Kansas law. *See Same-sex marriage in limbo in Kansas – All but one of 105 counties refusing to issue marriage licenses*. AP,

October 9, 2014. <http://cjonline.com/news/2014-10-09/same-sex-marriage-limbo-kansas>.

17. In the same news article, Chief Judge Wayne Lampson of the Twenty-Ninth Judicial District is quoted as saying: “We’ve taken oaths to uphold the constitution of Kansas, so until the constitution is found to be unconstitutional, you are kind of put in a dilemma. I wish the Supreme Court had actually taken it up and given us some direction across the country because I think we are going to be left with disparity between the states and we are even seeing disparity within Kansas.” *Id.*

18. By his actions, and without an actual case or controversy to provide a basis for a judicial decision and without authority to proceed as an administrative matter, Chief Judge Moriarty has *de facto* overruled the Kansas Constitution, Kansas statutory law, and Kansas Supreme Court precedent by administratively and unlawfully ordering the issuance of marriage licenses to same gender couples. Chief Judge Moriarty has acted without subject matter jurisdiction and in violation of the principle of separation of powers.

19. Unless this Court acts swiftly and definitively, there may be marriage licenses issued in contravention of Kansas law as early as October 10, 2014.

20. In further support of this Petition for Issuance of Writ of Mandamus and Request for Immediate Relief, the Attorney General offers the accompanying Memorandum in Support.

### **RELIEF REQUESTED**

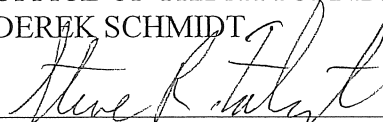
WHEREFORE, Petitioner requests that the Supreme Court of the State of Kansas issue the following relief on an expedited basis:

- (a) An order directing the Respondents to immediately cease from issuing marriage applications or licenses to same gender couples in contravention of existing Kansas

- law;
- (b) A peremptory writ of mandamus barring the Respondents from following or otherwise implementing Administrative Order 14-11;
  - (c) An order vacating Administrative Order 14-11 and declaring it null and void; and
  - (d) Such other and further relief as the Court deems just and proper attributable to Respondents' failure to follow the law.

Respectfully Submitted,

OFFICE OF THE ATTORNEY GENERAL  
DEREK SCHMIDT



---

Steve R. Fabert, #10355  
Assistant Attorney General  
Office of the Attorney General  
120 S.W. 10th Avenue  
Topeka, Kansas 66612-1597  
Tel: (785) 296-2215  
Fax: (785) 296-6296  
Email: [steve.fabert@ag.ks.gov](mailto:steve.fabert@ag.ks.gov)  
Attorney for Petitioner

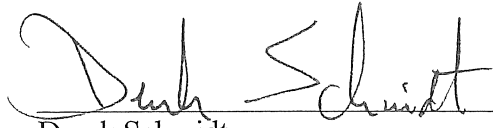
VERIFICATION

STATE OF KANSAS            )  
  ) ss:  
COUNTY OF SHAWNEE    )

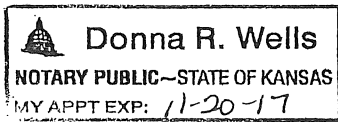
I, Derek Schmidt, of lawful age and being first duly sworn upon his oath, states as follows:

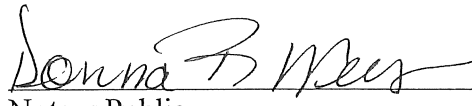
That I am the duly elected, qualified, and acting Attorney General of the State of Kansas, that I am authorized to file this Petition, and that I have read the above and foregoing Petition, and that the statement of facts contained herein are true and correct to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Derek Schmidt  
Kansas Attorney General

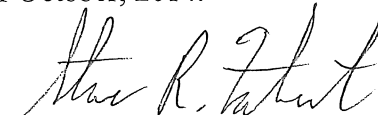
SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public in and for the State of Kansas, on this 10th day of October 2014.



  
\_\_\_\_\_  
Notary Public

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 10<sup>th</sup> day of October, 2014.

  
\_\_\_\_\_  
Steve R. Fabert  
Attorney for Petitioner

✓

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.

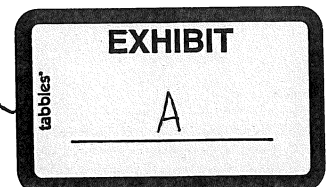
This order is to provide guidance and prevent confusion in the administration of marriage licenses. Accordingly, this order will address relevant statutory and constitutional provisions, state and federal, for the direction of the clerk of the district court and in the event of any potential challenges 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

SCAN DATE 2014/10/08 15:38





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 (10<sup>th</sup> 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).

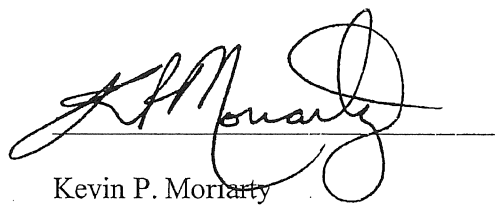
Finally, Oklahoma, prohibits same-sex marriage. In *Bishop v. Smith*, 760 F.3d 1070 (10<sup>th</sup> Cir. 2014), the court struck down as unconstitutional state statutory and constitutional amendments that prohibit same-sex marriage, including provisions that add criminal liability for non-compliance. *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.

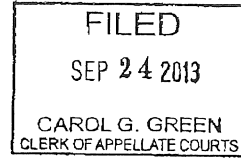
IT IS SO ORDERED.



Kevin P. Moriarty  
Chief Judge

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER APPOINTING CHIEF JUDGE  
FOR THE TENTH JUDICIAL DISTRICT



Pursuant to K.S.A. 20-329 and Supreme Court Rule No. 107, the Honorable Kevin P. Moriarty is hereby appointed Chief Judge for the Tenth Judicial District of Kansas for a term commencing January 1, 2014, and continuing through December 31, 2015, or until further order of this Court.

BY ORDER OF THE COURT this 23 day of September 2013.

Lawton R. Nuss  
Chief Justice

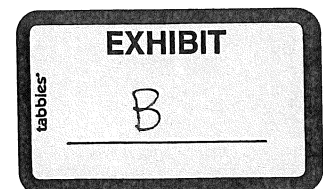
cc: Hon. Lee A. Johnson  
Departmental Justice

Hon. Keven MP O'Grady  
Hon. James F. Vano  
Hon. Thomas M. Sutherland  
Hon. Gerald T. Elliott  
Hon. Erica K. Schoenig  
Hon. James Franklin Davis  
Hon. David W. Hauber  
Hon. James Charles Droege  
Hon. Christina Dunn Gyllenborg  
Hon. Kathleen Sloan  
Hon. Paul C. Gurney

Hon. Thomas E. Foster  
Hon. Brenda Cameron  
Hon. Michael P. Joyce  
Hon. Neil B. Foth  
Hon. Thomas Kelly Ryan  
Hon. Timothy McCarthy  
Hon. Sara Welch  
Hon. Michael H. Farley  
Hon. Linda S. Trigg  
Hon. James E. Phelan  
Hon. Daniel Vokins

Michael S. McLain  
District Court Administrator

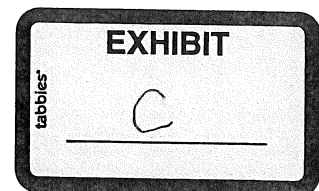
Sandra McCurdy  
Clerk of the District Court



**SEVENTH JUDICIAL DISTRICT  
ADMINISTRATIVE ORDER 14-13**

The Clerk of the District Court referred the Marriage License Application of Thomas Tuozzo and Rodd Hedlund to the Chief Judge for review. The applicants appear to be of the same sex. Article 15, §16 of the Kansas Constitution provides that: “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.” No Kansas or Federal Appellate Court has reviewed this provision of the Constitution and this court is bound by the Kansas Constitution. If the court were to issue a license to the applicants and the appellate courts later hold that Article 15, §16 does not violate the United States Constitution, the parties’ marriage will be void.

The court performs an administrative function when it issues a marriage license. In exercising its administrative functions the court has a different role than it does when it rules on a petition that has been filed in this court as a contested matter. The Court’s role in administrative matters is to apply and follow the existing laws of the State of Kansas. Recently, the United States Supreme Court declined to review several cases in which the Circuit Courts held that similar provisions contained in the constitutions of other states violate the United States Constitution. Included in these cases were two cases from the Tenth Circuit Court of Appeals. While Kansas is within the jurisdiction of the Tenth Circuit, none of these cases involved Article 15, §16 of the Kansas Constitution. This court may not make a determination as to the validity of this constitutional provision without a judicable case before it concerning the court’s issuance of or failure to issue a marriage license.



The Clerk of the District Court shall not issue a marriage license to these applicants or to any other applicants of the same sex. When the Clerk rejects the application, the clerk shall give the applicants a copy of this order

IT IS SO ORDERED.

---

Robert W. Fairchild  
Chief Judge

NINETEENTH JUDICIAL DISTRICT  
ADMINISTRATIVE ORDER 14-3

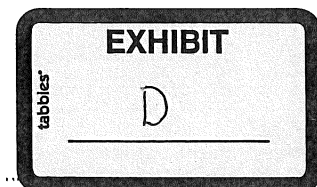
FILED DISTRICT COURT  
COWLEY COUNTY, KS

2014 OCT -9 A 8:42

The Clerk of the District Court referred the Marriage License Application of two individuals to the Chief Judge for review. The applicants appear to be of the same sex. BY \_\_\_\_\_

Article 15, §16 of the Kansas Constitution provides that: "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." No Kansas or Federal Appellate Court has reviewed this provision of the Constitution and this court is bound by the Kansas Constitution. If the court were to issue a license to the applicants and the appellate courts later hold that Article 15, §16 does not violate the United States Constitution, the parties' marriage will be void.


The court performs an administrative function when it issues a marriage license. In exercising its administrative functions the court has a different role than it does when it rules on a petition that has been filed as a contested matter. The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas. Recently, the United States Supreme Court declined to review several cases in which the Circuit Courts held that similar provisions contained in the constitutions of other states violate the United States Constitution. Included in these cases were two cases from the Tenth Circuit Court of Appeals. While Kansas is within the jurisdiction of the Tenth Circuit, none of these cases involved Article 15, §16 of the Kansas Constitution. This court may not make a determination as to the validity of this constitutional provision without a judiciable case before it concerning the court's issuance of or failure to issue a marriage license.

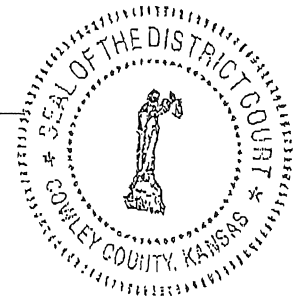


The Clerk of the District Court shall not issue a marriage license to these applicants or to any other applicants of the same sex. When the Clerk rejects the application, the clerk shall give the applicants a copy of this order.

The Clerk of the District Court retains applications for a marriage license for a period of six months. If the appropriate appellate court should issue a valid final legal order that authorizes the Clerk of the District Court to issue a marriage license to a same sex couple, and it is within six months of the original application, upon contacting the Clerk's office, a marriage license may be issued if all other legal requirements for the same have been met.

IT IS SO ORDERED.

  
Nicholas M. St. Peter  
Chief Judge





## Same Sex Marriage Licenses

Shawnee County District Court will accept your application for marriage. Please be aware, however, that Kansas law has not been changed.

The decision of the Supreme Court of the United States declining to accept cases for review from the 10th U.S. Circuit Court of Appeals which found that laws in Utah and Oklahoma prohibiting same-sex marriage are unconstitutional does not apply to Kansas law. The 10th Circuit Federal Court of Appeals has not ruled on Kansas law.

Until Kansas law is changed or there is a binding court ruling stating that the provision of the Kansas Constitution limiting marriage is unconstitutional, no same sex marriage licenses will be issued.

