



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 4, 2014

Via Electronic Mail & U.S. Mail
The Honorable Stephen M. Bean
County Clerk, Macon County
141 S. Main Street
Decatur, Illinois 62523

Dear Mr. Bean:

We have received your February 27, 2014 letter concerning the recent decision by the United States District Court in *Lee v. Orr*, No. 13-cv-8719 (N.D. Ill. Feb. 21, 2014).

The court in *Lee* ruled that the restrictions against same-sex marriage under current Illinois law are unconstitutional. The court's ruling allows same-sex couples to obtain marriage licenses in Cook County before June 1, 2014.

As a result of that ruling, you sought guidance from the Macon County State's Attorney about the legal effect of the *Lee* decision on your ability to issue marriage licenses to same-sex couples. In letters responding to your inquiry, the Macon County State's Attorney's Office advised you that the court's ruling in *Lee* does not apply to Macon County because the court expressly stated that the ruling applied only to Cook County. The State's Attorney's Office nevertheless concluded that "it is ultimately your decision as to whether or not to proceed immediately with the issuance of marriage licenses to same-sex couples."¹

You have now requested guidance from this office as to whether the decision in *Lee* applies to counties throughout Illinois.

For the reasons explained in more detail in the legal papers filed in the *Lee* case, my office's position is that current Illinois restrictions against same-sex marriage violate the equal protection rights that belong to all citizens under the United States Constitution. Since the United States Supreme Court's landmark decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013),

¹ Letter to The Honorable Stephen M. Bean, Macon County Clerk, from Michael B. Baggett, Assistant State's Attorney, Macon County State's Attorney's Office (February 21, 2014); Letter to The Honorable Stephen M. Bean, Macon County Clerk, from Michael B. Baggett, Assistant State's Attorney, Macon County State's Attorney's Office (February 26, 2014).

there has been a consistent stream of lower federal court decisions declaring restrictions against same-sex marriage unconstitutional. *See, e.g., De Leon v. Perry*, 2014 WL 715741 (W.D. Tex., Feb. 26, 2014) (listing recent cases); *Bostic v. Rainey*, 2014 WL 561978 (E.D. Va., Feb. 13, 2014); *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky., Feb. 12, 2014); *Bishop v. United States ex rel. Holder*, 2014 WL 116013 (N.D. Okla., Jan. 14, 2014); *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah, Dec. 12, 2013). In addition, the Illinois General Assembly has amended the Illinois Marriage and Marriage Dissolution Act to recognize and allow same-sex marriage. The Governor signed these amendments on November 20, 2013, to go into effect June 1, 2014. *See* Public Act 98-597, effective June 1, 2014.

In its February 21, 2014 decision, the court in *Lee* likewise ruled that “marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation, and the public policy of this State has been duly amended to reflect that position.” Because the case was filed only against Cook County Clerk David Orr, the court stated that its ruling applied only to Cook County: “Although this Court finds that the marriage ban for same-sex couples violates the Fourteenth Amendment’s Equal Protection Clause on its face, this finding can only apply to Cook County based upon the posture of the lawsuit.”

As a general matter, a court decision is not binding on persons who were not parties to the case. In limited circumstances, a person who was not a party may be considered to be in privity with one of the parties and therefore bound by the court’s rulings. That exception does not apply here. County clerks in different counties exercise similar responsibilities, but they are separately elected, they act on behalf of separate units of government, and they are separately represented in litigation. Consequently, Cook County Clerk David Orr’s participation as a defendant in *Lee*, where he was represented by the Cook County State’s Attorney, does not place other county clerks in privity with him. County clerks also are not in privity with the Attorney General. In *Lee*, this office did not represent the interests of the Cook County Clerk or any other county clerks. We intervened on the side of the plaintiffs, not the defendant, and for that reason as well this office should not be deemed to have acted as a representative of any county clerks who would have been defendants if they had been sued.

Even though the ruling in *Lee* is not binding on you, the protections guaranteed by the Constitution must exist without regard to county lines, and the *Lee* decision, along with the federal court decisions noted above, should be persuasive as you evaluate whether to issue marriage licenses to same-sex couples. Additionally, while the ruling in *Lee* does not control other courts as binding precedent, we expect *Lee* to be persuasive to other state or federal trial courts addressing the same questions. If there is another suit challenging a county clerk’s refusal to issue a marriage license to a same-sex couple in Illinois, our office would likely move to intervene, as we did in *Lee*, and urge the court to follow the holding in *Lee*.

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Thus, in deciding whether to issue marriage licenses to same-sex couples before June 1, each county clerk should consult with his or her State's Attorney and give full consideration to the rulings in *Lee* and the many other cases cited above, as well as to the cost and potential outcome of litigation in the event of a lawsuit challenging any denial. In the meantime, same-sex couples who wish to marry in Illinois before June 1 may ask their local clerks to issue the marriage licenses. If such requests are denied, couples may opt to obtain their marriage licenses in Cook County to be married there, or they may file a lawsuit, as the plaintiffs did in *Lee*, in which we would argue that it is unconstitutional to deny marriage licenses to same-sex couples.

Very truly yours,

A handwritten signature in black ink that reads "Lisa Madigan". The signature is written in a cursive, flowing style.

Lisa Madigan
Attorney General

cc: All County Clerks