



NORTH CAROLINA
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MEMORANDUM

TO: Superior Court Judges
Chief District Court Judges
District Court Judges
Clerks of Superior Court
Magistrates

FROM: Pamela Weaver Best

DATE: October 14, 2014

SUBJECT: Same-Sex Marriages

Effective October 10, 2014, same-sex marriages are permitted and recognized in North Carolina in accordance with the courts' decisions in the Fourth Circuit Court of Appeals, *Bostic v. Schaefer*, 760 F.3d 352, *cert. denied sub nom. McQuigg v. Bostic*, ___ S.Ct. ___, 2014 WL 4354536 (Oct. 6, 2014) and the October 10, 2014, order of Judge Max Cogburn in *General Synod of the United Church of Christ, et al. v. Drew Reisinger, Register of Deeds for Buncombe County, et al.* Judge Cogburn found "Article XIV, Section 6 of the North Carolina Constitution, North Carolina General Statute § 51-1 *et seq.*, and any other source of state law that operates to deny same-sex couples the right to marry in the State of North Carolina, ... unconstitutional as they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution."

As a result of these court decisions, we have received a number of questions from court officials regarding magistrates who refuse to marry same-sex couples. What follows are the questions and answers.

Question 1: May a magistrate who conducts other marriages refuse to marry a same-sex couple for whom a marriage license has been issued by the Register of Deeds?

Answer: No. Under the ruling now binding upon the State of North Carolina, to refuse to do so violates the equal protection clause of the U.S. Constitution. Before entering upon the office of magistrate, every magistrate is required to take an oath. That is a requirement imposed by Article IV, Sec. 7 of the North Carolina Constitution which states:

Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath:

I, _____, do solemnly swear that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as Magistrate, so help me God. [N.C. Const., Art. IV, sec.7]

Performing marriage ceremonies is a ministerial act authorized as an official “additional power” of magistrates under G.S. 7A-292(9). That provision references the marriage qualification provisions in Chapter 51.

If a valid marriage license issued under G.S. 51-6 is presented, it is a statutory duty of the magistrate to conduct the marriage between the persons named in the license in the same manner as the magistrate would conduct any other marriage. A failure to do so would be a violation of the U.S. Constitution under the federal ruling, and would constitute a violation of the oath and a failure to perform a duty of the office.

For these reasons, all magistrates must treat same-sex marriages for which a marriage license has been issued by the Register of Deeds the same way that marriages between a man and a woman are scheduled and conducted.

Question 2: What if a magistrate refuses to perform same-sex marriages?

Answer: If a magistrate refuses to discharge the duties of his or her office, including a refusal to perform a marriage of a same-sex couple, that refusal is grounds for suspension or removal from office, as well as, potential criminal charges. If any magistrate “... shall willfully omit, neglect or refuse to discharge any of the duties of his office ... he shall be guilty of a class 1 misdemeanor.” G.S. 14-230. Our case law makes clear that this criminal provision remains enforceable in addition to the procedures for suspension and removal under G.S. 7A-173.

A magistrate “...may be suspended from performing the duties of his office by the chief district judge of the district court district in which his county is located, or removed from office by the senior regular resident superior court judge of, or any regular superior court judge holding court in, the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.” G.S. 7A-173(a). Canons 2 and 3 of the Code of Judicial Conduct are applicable here.

Canon 2

A judge should avoid impropriety in all the judge’s activities.

A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3

A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities.

The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

Question 3: Does the reason the magistrate refuses to perform the marriage change the matter?

Answer: No.

Question 4: Will the Attorney General represent a magistrate who refuses to marry a same-sex couple if the magistrate faces civil or criminal liability or removal for the refusal to marry the same-sex couple?

Answer: Probably not. G.S. 143-300.4(a) sets out the four situations when the Attorney General **shall** refuse to provide representation to an employee:

1. If the employee's act or omission was not within the scope and course of the employee's employment as a State employee; or,
2. If the employee failed to act because of actual fraud, corruption, or actual malice; or,
3. If defense of the action on the part of the state would create a conflict of interest between the State and the employee; or,
4. If defense of the action would not be in the best interests of the State.

Further, the Attorney General does not represent judicial officials in removal proceedings.

Question 5: A magistrate has received a call from a citizen, which threatened the magistrate if he or she performs same-sex marriages. What remedy does a magistrate have if the magistrate is threatened for discharging their duties in accordance with the law?

Answer: Threats against magistrates may be punished as Class I felonies under G.S. 14-16.7. If you are threatened by any individual, immediately contact law enforcement and notify your Chief District Court Judge, and Amy Funderburk or Pamela Weaver Best at the Administrative Office of the Courts.

If you have any other questions, please contact me at Pamela.w.best@nccourts.org or 919.890.1304.