

OAG 19-022

November 15, 2019

Subject: Whether KRS 402.210(1)(a) requires the presence of both parties applying for a marriage license when one or both of those individuals is an inmate.

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Syllabus: County clerks must issue marriage licenses to inmates without requiring the inmates to apply in person.

Statutes construed: KRS 402.210

OAGs cited: OAG 82-416

Opinion of the Attorney General

The Nelson County Attorney has requested an opinion interpreting KRS 402.210(1)(a), which requires that “[b]oth parties of the marriage shall . . . [b]e present for a marriage license to be issued. . . .” Specifically, he asks whether both parties must appear in person at the county clerk’s office to apply for a license when one of the parties to the marriage is an inmate at the Nelson County Jail. Because such a requirement would prevent inmates from exercising their constitutional right to marry, clerks may not require both parties to the marriage to apply in person for the license if one of the parties is incarcerated, notwithstanding the language of KRS 402.210(1)(a).

KRS 402.210(1)(a)

In 2018, the General Assembly passed, and the Governor signed, Senate Bill 48, “AN ACT relating to child marriage.” SB 48 amended KRS 402.210 to prohibit marriage by anyone under the age of 17, and to require a court order for 17 year olds to marry. *See* 2018 Ky. Acts Ch. 36 (2018 SB 48), § 4; KRS 402.210(2)-(3). To ensure compliance with these provisions, SB 48 added a new requirement that both parties to the marriage license “[b]e present for a marriage license to be issued,” and “[p]resent to the county clerk” one of the nine forms of “documentary proof of age” listed by the statute. KRS 402.210(1)(a)-(b).

The Constitutional Right to Marry

It is well-established that inmates enjoy a constitutional right to marriage. The right to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].” *Loving v. Virginia*, 388 U.S. 1, 18 (1967). Due to the importance of this right, courts apply “strict scrutiny to any law or policy that places a ‘direct and substantial burden’ on the right to marry.” *Jones v. Perry*, 215 F. Supp. 3d 563, 569 (E.D. Ky. 2016) (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001)). In applying strict scrutiny, courts examine whether the law or policy is “supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). A policy “places a ‘direct and substantial burden’ on this right when ‘a large portion of those affected by the rule are absolutely or largely prevented from marrying, or whe[n] those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.’” *Jones*, 215 F. Supp. 3d at 569 (quoting *Vaughn*, 269 F.3d at 710).

In *Jones*, the fiancé of a woman incarcerated at the Kentucky Correctional Institute for Women brought suit against the Shelby County Clerk, who had declined to issue a marriage license based on guidance from the Kentucky Department of Libraries and Archives (“KDLA”) that “the county clerk in each county must have both parties sign the application and both must be present at that time.” *Id.* at 566 (citation omitted). The KDLA had reasoned that Kentucky law required the presence of both parties to the marriage license because the marriage license form had signature lines for both parties to the marriage, and

KRS 402.110 stated that “clerks must ‘see to it that every blank space required to be filled by the applicant is so filled before delivering’ a marriage license.” *Id.* (citation omitted).¹

The clerk argued that the requirement furthered an important state interest of verifying the eligibility of the marriage applicants—specifically, by deterring dishonesty by applicants, permitting the clerk to observe the applicant’s demeanor, and by allowing the clerk to determine any “disqualifying characteristics that are readily observable in person.” *Id.* at 572-73. The court rejected that argument because “many alternative methods could just as easily effectuate that interest.” *Id.* at 573. The court suggested that a deputy clerk could travel to the prison, that the clerk could deputize a prison employee for the purpose of completing marriage licenses, or that the incarcerated person could complete a sworn affidavit attesting to the veracity of his or her statements on the marriage license. *Id.* The court therefore enjoined the clerk from refusing to issue the marriage license.

County Clerks May Verify Age Without Preventing Inmates From Marrying

In light of *Jones* and the cases cited therein, we are confident that a court would hold KRS 402.210(1)(a) unconstitutional as applied to incarcerated persons. *See Jones*, 215 F. Supp. 3d at 572-73; *Amos v. Higgins*, 996 F. Supp. 2d 810, 813 (W.D. Mo. 2014) (Missouri statute requiring each applicant to sign the marriage application in the presence of the recorder of deeds or their deputy is “unconstitutional as applied to situations where an applicant for a marriage license is unable to appear...due to their incarceration”).

¹ In 1982, our Office had similarly interpreted the marriage laws to require in-person application by both parties to the marriage. *See* OAG 82-416 (“The application should be made by the applicants in person in the clerk’s office.”). In 2009, the Education and Workforce Development Cabinet sought updated guidance on that issue. Because that request was made in anticipation of litigation, our office did not issue an opinion, but we did provide a letter to the Cabinet setting forth our view that intervening case law made clear that inmates had a right to marry and that prison officials could not refuse to assist the inmates in doing so unless their refusal was “reasonably related to legitimate penological interests.” Letter of Attorney General, *Jones v. Perry*, No. 3:16-cv-00051-GFVT-EBA (E.D. Ky. 2016) ECF 8-1 (citing *Toms v. Taft*, 348 F.3d 519, 527 (6th Cir. 2003)).

While KRS 402.210(1)(a) serves the important state interest of preventing potentially exploitative underage marriage, it is not narrowly tailored to furthering that interest, at least as applied to inmates. As the *Jones* court observed, clerks may use other methods to verify that the marriage license applicant is of age without infringing the applicant's right to marriage. For instance, the age of the inmate is known to the warden, who could certify that the person is of age to marry.

Another alternative would be to permit applicants to complete an affidavit. We understand that before the passage of SB 48 (2018) and consistent with the *Jones* decision, county clerks across the state developed a form of "Addendum to a Marriage License," which they accepted in lieu of personal appearances from inmates. Among other things, that form required incarcerated marriage license applicants to provide their name, age, and date of birth. The Addendum therefore accomplishes the purpose of KRS 402.210(1)(a) by ensuring that the applicants are of legal age, without unduly interfering with the incarcerated applicants' exercise of their constitutional right to marry.

In sum, clerks must endeavor to assist inmates in exercising their constitutional right to marry. Clerks may not require inmates to appear in person before issuing a marriage license. Instead, clerks must accomplish the purpose of KRS 402.210 by verifying an incarcerated applicant's age without requiring the applicant to appear in person.

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