

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MARISA N. PAVAN and TERRAH D. PAVAN,
individually and as parents, next friends, and
guardians of T.R.P., a minor child

PLAINTIFFS

LEIGH D.W. JACOBS and JANA S. JACOBS,
individually, and as parents, next friends, and
guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT,
individually, and as parents, next friends, and
guardians of A.G.S., a minor child

VS. CASE NO. 60CV-15-3153

NATHANIEL SMITH, MD, MPH
Director of the Arkansas Department of Health,
in his official capacity, and his successors in office

DEFENDANT

MEMORANDUM OPINION CONCERNING
DEFENDANT'S MOTION FOR PARTIAL
RECONSIDERATION

This case is at a critical juncture.¹

¹ Fault for this case's present status does not lie with the legislative branch of the government. The General Assembly enacted the statutes that are the subject of this litigation prior to the Supreme Court's decision in *Obergefell v. Hodges*, 567 U.S. ____ (2015).

Fault for this case's present status does not lie with the executive branch of government. The Attorney General is required by law to be the legal representative of all state parties in litigation. *See*, A.C.A. § 25-16-703 (the Attorney General shall maintain and defend the interest of the state in the federal courts and that he or she shall be the legal representative of all state parties in litigation where the interests of the state are involved) and A.C.A. § 25-16-704 (the Attorney General will attend and defend the state before the Supreme Court). Although the legal argument for the constitutionality of the statutes was at best tenuous, the Attorney General's office has capably discharged its statutory and professional responsibilities.

It is clear this case is in its present critical status because of repeated errors by the judicial branch of government. More specifically, because of repeated errors by the Arkansas Supreme Court. That court's errors in this area of the law began with the case of *Wright v. State*, Pulaski Circuit Case No. CV2013-2662. Although the headline issue in that case was marriage, the statutory scheme concerning issuance of birth certificates was also specifically included by the *Wright* plaintiffs. On May 9, 2014, Circuit Judge Chris Piazza ruled certain statutory provisions related to marriage were unconstitutional under equal protection. The State defendants in *Wright* requested that Judge Piazza stay his ruling. He denied the request, stating "Defendants have asked that this Court stay any ruling adverse to its position. This Court, however, cannot in good conscience grant such request. Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied. *See, e.g.* *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of constitutional freedoms, for even minimal periods of

This court clearly has the authority to order the parties and their counsel to appear at mediation.² It is both the court's obligation and its duty in each individual case to utilize its discretion to determine the mediation configuration most likely to result in a positive outcome. Should mediation be conducted? When should the parties conduct mediation? Should the parties personally be present? Which attorneys should be present and should there be a limitation on the number of attorneys for any individual party? If a non-party insurance company is ultimately

time, unquestionably constitutes irreparable injury.”) Under the circumstances presented here, granting a stay of the Plaintiffs’ rights imposes irreparable harm.”

On May 16, 2014, the Arkansas Supreme Court granted an immediate stay in *Wright*. As subsequently determined by *Obergefell*, the Arkansas Supreme Court was in error in staying Judge Piazza’s decision. The unconstitutional stay remained in place for over a year, depriving Arkansas residents and citizens of their constitutional rights to equal protection. On June 26, 2015, after the *Obergefell* decision was rendered, the Arkansas Supreme Court issued a *per curiam* decision dismissing the *Wright* case as being moot. Based upon the United States Supreme Court’s summary reversal of Justice Jo Hart’s majority decision in the present matter, the *Wright* dismissal by the Arkansas Supreme Court was also error.

The Arkansas Supreme Court’s next constitutional error depriving Arkansas residents and citizens of equal protection was the issuance of a stay in the present matter. Based on the same case law as Judge Piazza relied on in the *Wright* case, this court also refused to grant a stay. Without even waiting for briefs to be filed, the Arkansas Supreme Court issued a stay of this court’s decision.

The Arkansas Supreme Court’s next constitutional error was the issuance of Justice Jo Hart’s majority opinion in this case. The United States Supreme Court summarily reversed Justice Jo Hart’s opinion. Summary reversals only happen in about one out of every thousand certiorari petitions, and only in cases where the lower court’s decision was so patently erroneous that the United States Supreme Court doesn’t even allow the parties to file briefs.

The Arkansas Supreme Court’s next error was the issuance of Justice Robin Wynne’s recent majority opinion in this case. Even though the United States Supreme Court reversed and remanded the case to the Arkansas Supreme Court for action consistent with its ruling, Justice Robin Wynne’s majority opinion fails that mandate in two major respects. First, instead of resolving the case, Justice Robin Wynne’s majority opinion referred the matter back to this court. Second, and just as importantly, Justice Robin Wynne’s majority opinion repeated the same error as Justice Jo Hart’s majority opinion - it ordered that this court’s strikeouts of portions of the offending statutes were a violation of separation of powers. This ruling is contrary to over a hundred years of Arkansas case law. It is this portion of the ruling that has placed this case at a critical juncture.

It is the obligation of the judicial branch to safeguard the four corners of both the United States Constitution and the Arkansas Constitution. The judicial branch has failed in its duties and obligations in the *Wright* case and in the present matter. These repeated errors have resulted in Arkansas citizens being denied their equal protection rights under the United States Constitution. This deprivation has occurred on a daily basis for over three years. As there has to date been no apology to these citizens from the judicial branch of government, this court takes this opportunity to apologize, not just to those who have been directly affected, but to all residents and citizens of the great State of Arkansas. A deprivation of the constitutional rights of any person is a violation of the constitutional guarantees to which all are entitled.

² A.C.A. § 16-7-202(a)(1) “It is the duty of each trial and appellate court of this state and each court is hereby vested with the authority to encourage the settlement of cases and controversies before it by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties.”

A.C.A. § 16-7-202(b) “In addition, each circuit and appellate court of this state is vested with the authority to order any civil, juvenile, probate, or domestic relations case or controversy pending before it to mediation.”

liable for payment of any settlement, should the representative for such company also be personally present? All of these are decisions that rely upon the court utilizing its discretion to perform its statutory duties and obligations.

This *Memorandum Opinion* is provided to inform the parties and their counsel why the court has utilized its discretion in this matter to order the Attorney General, as an attorney of record in this case, to be personally present during the mediation.³ This court has respect both personally for the Attorney General and for the enormous scope of her professional duties and responsibilities as Attorney General.

This court fully understands and respects the duties and responsibilities of all of the State's constitutional officers, the fact that their time is limited and should not be wasted, and that the court's statutory authority must be always be judiciously and prudently exercised. Because this court's case assignment has been one hundred percent civil cases for the last decade and because, until recently, actions against state officials had to be brought exclusively in Pulaski County, the Attorney General's office has both prosecuted and defended dozens of cases in Pulaski Circuit Sixth Division. As noted in defendant's motion, there is only one instance, in which the Attorney General was actually a party, in which this court initially ordered the Attorney General to be physically present for mediation. When it became apparent to the court in that particular matter that mediation could in fact be fully and completely conducted without the Attorney General physically being present, the court amended its order to remove that requirement.

³ The court is entering, on even date herewith an *Order* granting the motion in part and denying it in part. There is no need for the Attorney General to be personally present during any portion of the mediation addressing the amount of plaintiffs' attorney's fees and costs. The Attorney General only needs to be present during the portion of the mediation concerning resolution of the case in chief.

This court has never, in any previous case, believed the scheduled requirement of the actual physical presence of the Attorney General, as an attorney of record, to be critical to ensuring the best possibility of successful completion of a mediation. It, however, does believe that is the case in the present matter.

The court entered its original *Order to Mediate* on October 23, 2017. That order allowed only two weeks for the parties to schedule and complete mediation. Lee Rudolfsky, counsel for the defendant, placed a courtesy call to the court's chambers, notifying the court that the Supreme Court's mandate had not yet issued and correctly noticed the court that jurisdiction had not yet been reinvested in this court. As the matter involved procedural matters such as scheduling, the court initiated a return call to Mr. Rudolfsky. During such conversation, Mr. Rudolfsky advised the court that the Attorney General was extremely busy and inquired about a modification of the order to remove her required appearance. The court advised Mr. Rudolfsky that it would take that matter up upon proper motion being made subsequent to jurisdiction being reinvested in this court. The court then promptly made a courtesy call to Ms. Cheryl Maples, lead attorney for the plaintiffs, to advise her of the court's communication with Mr. Rudolfsky.

This court then entered an *Order* setting aside the October 23, 2017 order. The new *Order* specifically advised the parties, that:

In an effort to assist in the planning of their schedules, the parties are notified that once the mandate is issued the court intends to issue a new order containing the exact same language except for a new mediation time schedule.

The *Mandate* was subsequently issued and this court entered a new *Order Requiring Mediation* on November 13, 2017.

Because of the legitimate concern raised by Mr. Rudolfsky regarding the Attorney General's schedule, and because it is now the Thanksgiving and Christmas holiday seasons, even

though the United States Supreme Court has ruled the subject statutes unconstitutional as written, the court dramatically expanded the time frame for mediation to be completed. The parties were given until the close of business on January 5, 2018 to complete mediation. The expanded time frame allowed the Attorney General's office a total of more than two months from the issuance of the original order to find a convenient date on the Attorney General's calendar.

The court notes that defendant's counsel states the motion is unopposed. The court appreciates the fact that the parties are apparently proceeding, at this point, in a collegial manner. Such dialogue is to be encouraged and hopefully will continue through the parties' negotiations concerning resolution of the unconstitutional statutory scheme and the amount to be awarded to plaintiffs' counsel for attorney's fees and costs.

This case is at a critical juncture because Justice Robin Wynne's majority opinion, like Justice Jo Hart's vacated majority opinion, ignores well-established Arkansas case law.⁴ To comply with the high court's mandate all the Arkansas Supreme Court had to do was to simply affirm this court's original decision. Because this court was able to utilize longstanding Arkansas case law to merely strikeout the offending portions of the subject statutes while retaining the original legislative intent in the remainder, this court did not have to consider any further remedy when it issued its original decision. The remaining statutory scheme was constitutional, if somewhat cumbersome, and would have served to allow the Department of Health to issue birth certificates to all citizens in a constitutional manner until such time as the General Assembly had a chance to meet in ordinary session to rewrite the statutes.

⁴ The courts have a duty to only declare unconstitutional those portions of an Act that are unconstitutional, and if the constitutional remainder remains complete in itself, the court's obligation is to uphold that portion of the legislation. *See, Seagrave v. Price*, 349 Ark. 433, 79 S.W.3d 339, 2002 LEXIS 393 (2002), quoting *Levy v. Albright*, 204 Ark. 657, 163 S.W.2d 529 (1942).

Declaratory judgment is a cause of action, it is not the remedy. This court's original remedy was striking out the unconstitutional portions. This court cannot now utilize such remedy. Justice Wynne's majority opinion, since it has not been appealed to the United States Supreme Court, is binding precedent upon this court. Even though there is Arkansas case law allowing for a less draconian resolution than issuance of injunctive relief, that is not now possible because Justice Wynne's majority opinion repeated the same error made in Justice Jo Hart's majority opinion.

Because of the repeated error contained in Justice Robin Wynne's majority opinion, there are only four possible resolutions for this case:

- (1) the parties agree by Friday, January 5, 2018, on strikeout language⁵ that the court can implement which renders the subject statutes constitutional, thereby giving the General Assembly the opportunity to consider the statutory scheme during one of its regular sessions; or
- (2) the parties fail to agree on language but the plaintiffs unilaterally proffer to the court, for its consideration, what they believe is strikeout language that accomplishes the above goal; or
- (3) the parties fail to agree on language but the defendant unilaterally proffers to the court, for its consideration, what he believes is strikeout language that accomplishes the above goal; or
- (4) the parties fail by the close of business on Friday, January 5, 2018, to either jointly or severally present to the court acceptable strikeout language.

The United States Supreme Court has declared portions of the Arkansas statutes addressing issuance of birth certificates unconstitutional. The defendant cannot be allowed to proceed under a statutory scheme that is unconstitutional. So if the result is (4), this court will have no

⁵ The separation of powers doctrine prevents both the judicial and executive branches of government from legislating. This means the parties cannot during mediation add any words or language to the subject statutes, they can only use strikeouts to salvage the legislative intent. Because of the repeated error contained in Justice Robin Wynne's majority opinion, the parties cannot simply parrot back to this court its own previous effort. Whatever the parties can fashion doesn't have to be materially different from this court's previous effort, it just can't be the exact same.

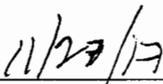
alternative but to enjoin the issuance of any birth certificates by the defendant until such time as the General Assembly can convene, in either special or regular session, to remove the equal protection violation.

This court has given the parties more than ample time, prior to the close of business on Friday, January 5, 2018, to repeatedly meet and confer to find agreed strikeouts to the present statutory language that will allow the defendant to constitutionally issue birth certificates to all residents and citizens. If one or all of the parties submit language under any of options (1) through (3) enumerated above, and the court agrees the knockout language is within the power of the court to accept, then the Attorney General will not be required to attend any mediation that is concerned only with plaintiffs' attorney's fees and costs. If the parties are unable to draft acceptable language prior to mediation, it is this court's opinion that before it has to issue the drastic, but required, injunctive relief of halting the issuance of any birth certificates that every reasonable step should be taken to best configure the mediation for a successful resolution. This court has utilized its discretion in determining that in this particular case, "every reasonable step" includes the actual physical presence of the Attorney General during the mediation.

IT IS SO ORDERED.



TIMOTHY DAVIS FOX
CIRCUIT JUDGE



DATE