

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

PAUL HARD, spouse and next best friend of
CHARLES DAVID FANCHER, deceased;

Plaintiff,

v.

LUTHER JOHNSON STRANGE III in his official
capacity as Attorney General of the State of
Alabama,

Defendants,

and

PAT FANCHER; RICHARD I. LOHR, II, in his
official capacity as administrator of the estate of
CHARLES DAVID FANCHER;

Intervenor-Defendants.

Civil Action No. 2:13-cv-922-WKW

OPPOSITION TO MOTION FOR RECONSIDERATION

On July 15, 2015, Intervenor-Defendant Pat Fancher filed her Motion to Set Aside Order of Dismissal and Renewed Prayer for Relief. (Doc. # 90.) The motion is wholly without merit and should be denied in its entirety for the following reasons.

First, this Court is bound by the decision in *Obergefell v. Hodges*, 576 U. S. ___ 28 (2015). Under that decision, Plaintiff must be recognized under Alabama law as the legal surviving spouse of David Fancher. This is precisely the legal question that was decided in *Obergefell* under similar factual circumstances and context. *Id.* The question before the Court is not a retrospective one but rather a presently existing one, *i.e.*, who currently is the surviving spouse of David Fancher and to whom should the proceeds of the wrongful death settlement

associated with his death currently being held by the Clerk of the Court be distributed. This is not a situation where a closed case must be reopened, past distributions undone, or previously settled estates revisited.

Second, contrary to Intervenor-Defendant's assertions, it is well settled that decisions of the United States Supreme Court apply to other open cases involving the same question of law and have retroactive application. "[B]oth the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed [j]udicial decisions . . . for near a thousand years." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (citations and quotations omitted). "When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [its] announcement of the rule." *Id.* (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)).

Intervenor-Defendant's reliance on *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), is misplaced. That decision actually supports application of *Obergfell* to the instant case. In any event, Intervenor-Defendant does not establish that the circumstances of this case warrant deviation from the general rule of retroactive application. She does not explain at all how she has purportedly relied on Alabama's discriminatory marriage laws such that the present circumstances qualify this as an "exceptional" case in which the old rule of law should be applied. In fact, Mrs. Fancher had not relied on the Alabama marriage laws in any way with respect to her son's marriage to Plaintiff, and, unless she is clairvoyant, she could not have relied on them with respect to the untimely, unexpected, and tragic death of David Fancher.

Furthermore, Intervenor-Defendant's public policy argument in favor of departing from the general rule of retroactivity is unavailing. Intervenor-Defendant argues that retroactive application of *Obergefell* will result in chaos and uncertainty as old, settled estates will necessarily have to be reopened and resettled under the new *Obergefell* rule. This parade of horrors is nothing more than speculative hand-wringing. No such cataclysm has befallen the jurisdictions that long ago experienced the transition to marriage equality, Massachusetts being a prime example. In fact, Intervenor-Defendant has not identified a single case supporting or demonstrating her calamitous point.

Third, there is no question of law to certify to the Alabama Supreme Court. Applying the *Obergefell* decision to the present case does not require the interpretation of any unsettled Alabama law that would necessitate certification to the Alabama Supreme Court. The only question involved in this case is whether the state of Alabama must recognize Plaintiff as the surviving spouse of David Fancher. It does. This is a question of federal constitutional law that was directly settled by *Obergefell*. The Court need not interpret the Alabama intestacy or wrongful death statutes to resolve this case. Now that it is clear that Plaintiff is the surviving spouse of David Fancher, the application of those statutes is unambiguous and straight-forward. Nor would the question of whether *Obergefell* should be applied retroactively require input from the Alabama Supreme Court because that question is one of federal law which this Court is fully capable and competent to decide.

Finally, Intervenor-Defendant argues that the amended death certificate for David Fancher listing Plaintiff as his surviving spouse is invalid. This is also incorrect. Intervenor-Defendant asserts that the State Registrar of Vital Statistics did not have authority to recognize Plaintiff's marriage because a few days after it was issued the Alabama Supreme Court clarified

what Alabama marriage law was. The amended death certificate was valid at the time it was issued because its issuance was required by the United States Constitution, in accordance with the declaration of law made by Judge Granade that Alabama's marriage laws violated the due process and equal protection rights of gay and lesbian Alabamians, including Plaintiff.¹ The State of Alabama does not now suggest, nor has it ever suggested, that the amended certificate is invalid.

For the foregoing reasons, Intervenor-Defendant's motion for reconsideration should be denied in its entirety.

DATED: July 21, 2015

Respectfully submitted,

SOUTHERN POVERTY LAW CENTER

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¹ In addition, the Alabama Supreme Court's writ of mandamus "clarifying" Alabama marriage law was directed exclusively to probate judges, not executive branch agencies such as the State Registrar of Vital Statistics.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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