IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

PAUL HARD,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	**Civil Action No.: 2:13-CV-922-WKW-SRW**
	)	
LUTHER JOHNSON STRANGE, et al.	)	
	)	
Defendant.	)	**Intervening Defendant's Memorandum of Law In Support of her Motion for Reconsideration**
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	)	
	)	

Intervening Defendant's Memorandum of Law In Support of her Motion for Reconsideration

Comes now Intervening Defendant Pat Fancher seeking to clarify its position on the issues now before this Court and presents the following memorandum of law in support of its motion to set aside its order of dismissal and grant relief to Ms. Fancher.

At this time Intervening Defendant does not argue that *Obergefell v. Hodges* has no precedential value upon the Middle District, rather, Intervening Defendant argues that *Obergefell* does not grant Plaintiff the remedy he requests because the current case is distinguishable from *Obergefell*. Furthermore, while Plaintiff is quick to point out that the Middle District is "bound" by *Obergefell*[1] Intervening Defendant notes that *Hyde* and *Windsor* also bind this Court.

[1] Pl.'s Opp'n to Mot. for Reconsideration, at 1, ECF Doc 93.

Intervening Defendant further notes that *Hyde* is controlling U.S. Supreme Court precedent on indirect retroactivity[2], the question now at issue.

On the matter of retroactivity it should be noted that there is a profound difference between retrospective relief as applied to the matter before the court and retroactivity as applied to cases which involve people, places, and events having nothing to do with the original matter; *Hard v. Strange* presents this Court with the latter. However, Plaintiff's response to Intervening Defendant's motion to reconsider confuses these separate concepts. Plaintiff's counsel is correct to suggest that retrospective relief is a long standing principle of law and indeed a court does apply its ruling 'retroactively' to the parties before it. A tort claim for instance will naturally require a court to examine what wrongs may have occurred and adjudicate relief if necessary. However, this bears stark difference from circumstances under which a pending case may be affected by the outcome of another case which announces a new rule. Additionally, Plaintiff's response to Intervening Defendant's motion for reconsideration quotes *Harper* as saying that the general rule of retrospective relief has operated for "near a thousand years," but again Plaintiff confused retrospective relief and new rules applied retroactively. The quote originally arises from a dissenting opinion from Justice Holmes in 1910 and does not refer to the application of new rules to pending cases. In fact, to quote another portion of that dissent Justice Holmes suggests that the authority of the United States Courts provides jurisdiction "only to declare the

[2] For the convenience of the Court Intervening Defendant refers here to "indirect retroactivity" as those decisions made by a separate court in a separate case announcing a new rule which may or may not apply to pending cases involving third parties. (Intervening Defendant will continue to use the term "retroactivity" generally to refer to this type of jurisprudence in her motions unless specified.) This type of retroactivity is very different from retrospective relief which does not announce a new rule and which involves merely the period between an existing right to bring a cause of action and the potential remedy. Retrospective relief also adjudicates only one set of facts and binds the parties before it while retroactivity of new decisions toward ongoing cases bears a different analysis and a much different history.

law…it is not an authority to make it." *Barton Kuhn v. Fairmont Coal Company*, 215 U.S. 349, 371-72. Clearly that dissent is at its end with regard to *Obergefell*. Nonetheless, what is not thousands of years old is the question of whether an opinion from one court on a similar matter applies retroactively to cases involving third parties. On the contrary, the question of retroactivity as applied to other, pending cases is one which has been consistently revisited by the U.S. Supreme Court and one which caused a former chief justice of the Supreme Court to say "These questions [of retroactivity] are among the most difficult of those which have engaged the attention of [the] courts ..." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (Charles Evans Hughes, C.J.).

MEMORANDUM OF LAW ON RETROACTIVITY

When David Fancher and Paul Hard traveled to Massachusetts to go through a wedding ceremony, they knew that their "marriage"[3] was not recognized and would not be recognized by the State of Alabama.

But now, Paul Hard says, the rules have changed,[4] and he wants the courts to apply those changed rules retroactively. He demands that the courts recognize him as David Fancher's spouse, even though throughout the duration of their relationship they knew the State of Alabama did not recognize their marriage.

I. RETROACTIVITY IS NOT ALWAYS APPLIED IN NEW SITUATIONS.

Even children on a school playground instinctively know that there is something wrong about changing the rules in the middle of the game, or retroactively after the game is finished.

[3] Intervenor Defendant will hereafter refrain from putting the term "marriage" and similar terms in quotations but would like the Court to understand that Intervenor Defendant does not recognize same-sex marriage as valid.

[4] Intervenor Defendant notes that the *Obergefell* ruling was decided by a 5-4 majority, and two of those five Justices hade a duty to recuse themsselves because they had personally performed same-sex weddings,

That is the reason the United States Constitution, Article One, Section 10, prohibits states from adopting ex post facto laws, and it is the reason the courts have been hesitant about applying new rules retroactively. People are entitled to assume that the current rules will be in effect until they change, and they act and plan in reliance on that assumption.

At least until recently, the prevailing rule was a presumption against retroactivity, a presumption which could be overcome only upon showing special circumstances that require retroactivity:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. *Dash* v. *Van Kleeck*, 7 Johns. 499; *Jackson* v. *Van Zandt*, 12 Johns. 168; *United States* v. *Heth*, 3 Cranch, 399, 414; *Southwestern Coal Co.* v. *McBride*, 185 U.S. 499, 503; *United States* v. *American Sugar Co.*, 202 U.S. 563, 577.
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> *United States Fid. & Guar. Co. v. United States*, 209 U.S. 306, 314, 28 S.Ct. 537, 539 (1908).

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07) (1971), the Court ruled that decisions will be given retroactive effect unless (1) the decision establishes a new rule of law by creating a new precedent or overruling a previous precedent, (2) the prior history of the rule together with considering how retroactivity would further or retard its operation, or (3) retroactivity would impose inequities on persons affected by the rule. Clearly, under the first and second considerations identified in *Chevron* and probably the third as well, the *Obergefell* decision would not be applied retroactively.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), the Court broadened the doctrine of retroactivity, but even in *Harper* the Court did not make retroactivity an absolute.

One exception -- the only exception mentioned in *Harper* because it was the only exception applicable to the facts of *Harper* -- was when state law provided an adequate form of "predeprivation process," such as authorizing taxpayers to sue to enjoin imposition of a tax prior to payment or allowing taxpayers to withhold payment and then present their objections as defenses in a tax enforcement proceeding. *Harper* was the Court's attempt at uniformity on the issue.[5] There, the Court discussed in detail the history of retroactivity both in the civil and criminal contexts, and after explaining this history, the Court aimed to create a uniform rule on retroactivity. (*Id*.) The distinctions between civil and criminal were to be replaced with a general rule of retroactivity. (*Id*.)

According to Justice O'Connor and Chief Justice Rehnquist this uniform rule was ripe to produce issues down the road. Dissenting in that case the pair of Justices opined, "in the usual case, of course, retroactivity is not an issue…[b]ut where the law changes in some respect, the courts sometimes may elect not to apply the new law; instead they apply the law that governed when the events giving rise to the suit took place, especially where the change in law is abrupt…" [6] When that happens, O'Connor and Rehnquist propose two methods for a prospective application of the new rule, "[f]irst, a court may choose to make the decision purely prospective, refusing to apply it not only to the parties before the court but also to *any* case where the relevant facts predate the decision." (*Id*.) Alternatively, "a court may apply the [new] rule to some but not all cases where the operative events occurred before the court's decision…" (*Id*.) Likewise, it wasn't long before the Court began to question its newly decided general rule from *Harper*.

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[5] See *Harper*, 509 U.S. 86 at 94-98 (Supreme Court explaining the history up until that point on retroactive or prospective applications).

[6] *Id*. at 115 (O'Connor J. and Rehnquist C.J., dissenting) (Citing James B. Beam, 501 U.S. at 534, 535-36 (1990)).

Later, in *Reynoldsville Casket Co. v. Hyde* the Court backtracked on the general rule of retroactivity it announced it *Harper*.[7] In *Hyde* the Supreme Court set forth a number of scenarios under which a newly announced rule would not be applied retroactively to a pending case. (*Id*.) Moved by Ms. Hyde's circumstance, the Supreme Court set forth a number of criteria which if met would have supplied the Court with amble reason to apply one of its newly created rules prospectively only. See *Hyde* at 758-59. While the Court there decided that Ms. Hyde could not met these standards, Ms. Fancher can and does. Point four of the Supreme Court's *Hyde* analysis makes it clear that a court may decline to apply a new rule retroactively where applying that new rule would affect public policy.[8] Justice Kennedy even concurred separately to emphasize the Court's mindset toward retroactivity in the wake of newly decided principles of law stating, "[w]e do not read today's opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions."[9]

This framework represents the Supreme Court's willingness to depart from its general rule in *Harper* given certain circumstances. In fact, this structure should look familiar -- *Chevron* brought forth the same concept, a framework analysis to protect the interests of third parties. The Supreme Court in *Hyde* implicitly revisits the notion of fairness with a re-stated retroactivity framework. *Hyde* at 758-59. The current case presents the Middle District with precisely the circumstances which govern the exception to the general rule of retroactivity:

I. Point four of the framework regarding potential public policy justifications;

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[7] See *Reynoldsville Casket Co. v Hyde*, 514 U.S. 749, 758-59 (1995)
[8] *Id*. at 759.
[9] *Id*. at 761 (Kennedy, J. Concurring).

II. "[S]pecial circumstance[s]" which might justify prospective application of new rules;[10]

III. That courts may, "shape relief in light of…unexpected judicial decisions."[11]

Thus, it is difficult to conceive a circumstance that would fall more neatly within the Court's line of reasoning from *Hyde* than the case now before the Middle District.

II. *OBERGEFELL* SHOULD NOT BE APPLIED RETROACTIVELY.

There are three strong reasons for not giving *Obergefell* retroactive effect. First, Unlike *Harper* which involved retroactive tax relief, *Obergefell*'s recognition of a right to same-sex marriage is a dramatic and fundamental sea-change in the relation of church to state, family to civil government, so revolutionary that its full implications will not be apparent for generations to come. As Chief Justice Roberts wrote in his dissent,

> Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. ... Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

Obergefell, (Roberts, C.J. dissenting) at 2.

Second, Justice Kennedy's opinion in *Obergefell* did not announce that the right to same-sex marriage was a right same-sex couples had always possessed but which was only now being recognized; rather, the decision announced that the right to same-sex marriage is a new right that same-sex couples now acquire. Probably the most significant language of the entire opinion was this: "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment

[10] Repeated in Intervening Defendant's motion to set aside, Intervening Defendant believes that a judicial decision affecting the definition of marriage, an institution which preceded that Court's birth, is indeed a "special circumstance."

[11] *Id*. at 761 (Kennedy, J. Concurring).

did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charger protecting the right of all persons to enjoy liberty as we learn its meaning." *Obergefell* 576 US. ___, 11 (2015). By adopting this "Living Constitution" approach to constitutional interpretation, the Court said the Constitution's meaning evolves and changes with time: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." *Id.* at 17. One might interpret this to mean that such rights always existed but are only now recognized, but Justice Kennedy says otherwise: "The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." *Id.* at 19.[12] And so the opinion concludes: "The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them." *Id.* at 22. Justice Kennedy is not saying same-sex marriage has been a right from the beginning of time but only now has our constitutional understanding evolved to the point that we can now recognize it. Rather, he is saying it is now time for this right to "rise" it therefore may "no longer" be denied. Because this is a "newly arisen right," it is not a right that should be given retroactive application.

Third, Plaintiff has given the Court no reason to believe David Fancher wanted the law to be applied retroactively as to intestate distribution of his estate. At the time David Fancher died, he

[12] Intervenor Defendant rejects this school of constitutional interpretation and notes that such jurisprudence is constitutional quicksand. Not only can subsequent generations (not of the people, but of unelected judges) use this reasoning to justify any "right" they fancy; they can also use it to cut off or narrow rights that we currently regard as sacred and unalienable. Nevertheless, because the Court majority has used this reasoning to justify this so-called right to same-sex marriage, Intervenor Defendant will use the same reasoning to demonstrate its limited scope.

knew that his marriage to Paul Hard was not recognized by the State of Alabama. The law presumes that he knew that under the laws of intestacy, any portion of his estate that was not provided for by his will, would pass by intestacy to his mother. Nor is this presumption unreasonable or surprising. When David Fancher died on 1 August 2011, he and Paul Hard had been married less than three months. From the time of his birth (29 January 1957) until his death more than fifty-four years later, David had been and continued to be the loving son of Patricia Fancher, and they enjoyed a close and loving relationship throughout all of this time. It is therefore reasonable and natural to believe that David would have wanted some of his estate to pass to his mother, and through her, eventually, to his other blood relatives. It is also reasonable to assume that David would consider that his mother, the widow of a Baptist pastor, might have greater need of this estate than would Dr. Paul Hard, a psychologist.

III. *API AND WINDSOR STAND IN THE WAY OF RETROACTIVITY.*

Even if *Obergefell* applies retroactively in the face of *Hyde*, there is still another hurdle for Plaintiff. If applied, the question of retroactivity becomes one of length; exactly how far back should a court look? On this particular issue there is a problem with retroactivity because of this--if a court is too look backward in time to 2011 on its way the court will run into *Alabama Policy Institute v. King*,[13] from earlier this year and *U.S. v. Windsor* in 2013 which upheld a state's right to not recognize another state's opinion on marriage.[14] Thus, even if *Obergefell* should be applied retroactively, shouldn't *Windsor* cut off the case law time line before one reaches 2011? Intervening Defendant would feel differently on this point if *Windsor* were overruled, but because it was not, *Windsor* suggests that even two years after Fancher's death the State of Alabama was fully justified in declining to recognize the marriage.

[13] case no. 1140460 (Ala. 2015).
[14] *United States v. Windsor*, 133 S.Ct. 2675, 2680 (2013).

IV. *OBERGEFELL* AND *HARD* ARE NOT SIMILAR.

Plaintiff claims the *Obergefell* case decided by the United States Supreme Court had "similar factual circumstances and context" to this case. In fact, they are very different. *Obergefell*'s partner, John Arthur, was terminally ill. *Obergefell* and Arthur went through a marriage ceremony in Maryland 19 July 2013, returned to Ohio, and filed a lawsuit seeking an order that *Obergefell*'s name be listed on Arthur's death certificate. The Federal District Court for the Southern District of Ohio, Western Division, issued that order on 22 July 2013. Arthur died three months later, 22 October 2013. *Obergefell* and *Hard* involve a very crucial difference: *Obergefell* sought and received relief prospectively, whereas Hard seeks relief retroactively.

V. JUDGE GRANADE'S ORDER DOES NOT VALIDATE AN AMENDED DEATH CERTIFICATE ISSUED OUTSIDE HER JURISDICTION.

Plaintiff argues that "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." However, this Court noted in its order dismissing Governor Bentley as a party that Judge Granade's ruling is not binding in the Middle District of Alabama.[15]

Plaintiff says the validity of the amended death certificate for David Fancher listing Paul hard as his surviving spouse, is not affected by this decision of the Alabama Supreme Court because it was issued a few days before the Alabama Supreme Court's decision. Ironically, Plaintiff's insistence that retroactivity is the rule apparently does not apply to decisions of the Alabama Supreme Court.

[15] Memorandum Opinion and Order, ECF Doc. 76.

The question whether *Obergefell* will apply to common law marriages in Alabama is not directly raised by this case. However, if this Court were to rule that *Obergefell* must be applied retroactively, then by implication it might be applied to past same-sex relationships that, if they had involved people of opposite sexes, would have constituted common law marriages. Accordingly, this Court should apply *Obergefell* prospectively and find in favor of Ms. Fancher. In the alternative the Court may wish to certify the following questions to the Alabama Supreme Court for a determination of how Alabama law's sanctity of marriage law should be applied after *Obergefell*:

(1) Does *Obergefell* apply to common law marriages and same-sex relationships in Alabama?

(2) If so, does it apply retroactively?

CONCLUSION

Paul Hard has already received David Fancher's estate as provided in Fancher's will. Patricia Fancher asks only that the wrongful death proceeds be distributed according to the laws of intestacy that were in effect at the time her son David died. She asks only that these proceeds not be distributed according to the retroactive application of a Court-created right that was non-existent at the time her son died and a marriage that was legally nonexistent in Alabama from its inception until four years after its termination.

In *Obergefell v. Hodges* Justice Kennedy observed that the three consolidated cases before them on the issue of gay marriage, "pose **no risk of harm to** themselves **or third parties**." But what about when they do? That, Intervening Defendant believes, is a question that

Justice Kennedy clearly did not address in *Obergefell* but did in *Hyde* when he said, "courts may shape relief in light of…the unfairness caused by unexpected judicial decisions."[16]

In light of the Supreme Court's back and forth jurisprudential history addressing retroactivity it is without question that the Middle District would be justified in ruling that while *Obergefell* may bind the Middle District, that case does not control the Hard-Fancher Massachusetts union of 2011. This position is bolstered by (1) the Supreme Court's retroactivity framework that the Court set forth in *Hyde* of which Ms. Fancher fits, (2) the majority opinion of the Supreme Court in *Obergefell* itself which time and again treats homosexual marriage as a new right which is only "now", in June 2015, springing forth, (3) binding precedent from the Supreme Court in *Windsor* that stands in between the times of the *Obergefell* decision and Fancher's death, (4) the fact that Mr. Obergefell sought and received relief prospectively while Mr. Hard seeks his relief retroactively --- and (5) that Plaintiff's amended death certificate is not legally valid.

Respectfully submitted this 27th day of July, 2015.

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[16] *Id*. at 761 (Kennedy, J. Concurring).

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Local Rules 5.3 and 5.4 I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system by which copies of said motion are served upon each party registered in the case, including Plaintiff's counsel:

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This 27th day of July 2015.

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