IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS, *Plaintiffs*,	§	
v.	§	CIVIL ACTION NO. 5:13-CV-982-OLG
GREG ABBOTT, in his official capacity as Governor of the State of Texas, KEN PAXTON, in his official capacity as Texas Attorney General, GERARD RICKHOFF, in his official capacity as Bexar County Clerk, and KIRK COLE, in his official capacity as interim Commissioner of the Texas Department of State Health Services *Defendants*.	§	

STATE DEFENDANTS' MOTION FOR RECONSIDERATION OF THE ORDER DATED AUGUST 5, 2015

In its order dated August 5, 2015 (Dkt. #105), this Court allowed a new party to intervene post-judgment without allowing the State Defendants an opportunity to respond, granted the intervenor new substantive relief of a death certificate amendment without allowing an opportunity to respond, and ordered the Attorney General and Commissioner of the Department of State Health Services ("Commissioner;" collectively "State Defendants") to personally appear at a show-cause hearing on August 12. The Department of State Health Services Vital Statistics Unit has issued the amended death certificate to the intervenor pursuant to this Court's order. *See* **Ex. A**. The

State Defendants respectfully request that the Court reconsider its August 5 order and vacate the portion of the order setting a hearing.

I. Stone-Hoskins' Post-Judgment, Post-Appeal Motion for Intervention To Resolve a New Legal Question Was Procedurally Improper and Cannot Support Contempt.

The show-cause hearing is predicated on the motion to intervene and its request for substantive relief. (Dkt. #104). The Court allowed Stone-Hoskins to intervene in this suit after the Fifth Circuit resolved the substantive question on appeal and this Court entered a final judgment. The Fifth Circuit has made clear that "intervention attempts after final judgments are ordinarily looked upon with a jaundiced eye [as they] have a strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court." *Staley v. Harris Cnty. Tex.*, 160 F. App'x 410, 412 (5th Cir. 2005) (*quoting United States v. United States Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977) (alteration in original)).

a. This Court Prevented the Required Analysis of Whether *Obergefell* Is Retroactive, in What Contexts, and to What Point in Time.

Stone-Hoskins asserted in his motion for permissive intervention that the question of the retroactivity of *Obergefell* as applied to death certificates shares a common question of law with *DeLeon*: recognition of out-of-state same-sex marriages. (Dkt. #104 at 6). Stone-Hoskins does not complain that he has been denied the right to marry or to have an existing marriage recognized,[1] nor

[1] At most, *Obergefell* applies retroactively to *existing* marriages, but under Texas law, Stone-Hoskins' marriage did not exist on June 26, 2015, because his spouse had died. *See, e.g., Claveria's Estate v.*

does he seek to appeal this Court's July 7, 2015 final judgment. *Cf. United States ex rel. McGough v. Covington Technologies*, 967 F.2d 1391, 1394–95 (9th Cir. 1992) (government's motion to intervene in qui tam action deemed timely because government promptly objected to stipulated dismissal with prejudice and filed motion to intervene within time allowed for filing appeal). Instead, Stone-Hoskins seeks to raise a wholly separate claim based upon a legal question not at issue in *DeLeon*: whether the Vital Statistics Unit must go back to amend death certificates pre-dating the Supreme Court's *Obergefell* decision and the implementing order. Whether a newly-recognized federal constitutional right is retroactive is a complex, fact-specific inquiry that is resolved in subsequent legal proceedings. *See, e.g.*, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754–55 (1995) ("[T]he ordinary application of a new rule of law 'backwards,' say, to pending cases, may or may not, involve a further matter of remedies. Whether it does so, and, if so, what kind of remedy the state court may fashion, depend—like almost all legal issues—upon the kind of case, matter, and circumstances involved.").

The fact-specific inquiry this Court foreclosed here includes such matters as the reopening of estate distributions already made under then-enforceable Texas law. *See Willis v. Snodgrass*, 302 S.W.2d 706 (Tex. App.—Texarkana 1957, writ ref'd n.r.e) (defendants required to pay into the registry of the court

Claveria, 615 S.W.2d 164, 167 (Tex. 1981) (holding that marriage—whether ceremonial or common-law—is terminated upon death or court decree); *Curtin v. State*, 238 S.W.2d 187, 190-91 (Tex. Crim. App.—1950) (holding that a putative marriage is terminated by the death of either of the parties or removal of the impediment).

sums wrongfully distributed). Other issues include clawing back and redistributing life insurance payments or reassessing tax benefits for surviving spouses. Such considerations are the hallmark of the retroactivity analysis Stone-Hoskins eschews, and this Court's order has foreclosed.[2]

b. Other Avenues Exist to Determine Heirship.

In addition to a separate suit to assess retroactivity, Stone-Hoskins could have obtained the relief he seeks through a Texas probate proceeding to determine heirship. Texas statutes provide an avenue for an heir omitted from a judicial determination of heirship to assert a later claim. *See* TEX. EST. CODE § 202.001-.206 (judicial determination of heirship). Particularly in cases where equal protection issues may be implicated, Texas courts have provided a means for heirs to establish a right to inherit. *See Dickson v. Simpson*, 807 S.W.2d 726, 728 (Tex. 1991) (despite strict statutory limitations, illegitimate child must be accorded "fair opportunity to establish her heirship."); *see also Turner v. Nesby*, 848 S.W.2d 872 (Tex. App.—Austin 1993, no writ).

II. Holding the State Defendants in Contempt of Court Is Improper at this Stage of Litigation.

Stone-Hoskins cites absolutely no legal authority for why the State Defendants should be held in contempt of Court; he merely asserts that they should. This failing is perhaps attributable to the fact that contempt is an

[2] Moreover, by granting the intervention, this Court enabled Stone-Hoskins to bring his distinct claim in a forum where neither he nor the State Defendants reside, and where none of the alleged events or omissions giving rise to the claim occurred. *See* 28 U.S.C. § 1391 (general venue statute).

inappropriate remedy at this stage of litigation (much as this discrete legal inquiry is inappropriate to engraft after the fact into this closed litigation). The law of contempt—which the State Defendants now present to the Court, in light of Stone-Hoskins' failure to do so—illustrates why this is so.

a. A Significant Showing is Required to Hold a Party in Contempt of Court.

"'A party commits contempt when he violates a *definite and specific* order of the court requiring him to perform or refrain from performing a *particular act or acts* with knowledge of the court's order.'" *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir.), cert. denied sub nom. *Hornbeck Offshore Servs., LLC v. Jewell*, 134 S. Ct. 823 (2013) (quoting *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)) (emphasis supplied). Civil contempt must be proved by clear and convincing evidence. *Id.*[3] Normally, "a movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required *certain* conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000) (citations omitted) (emphasis supplied).

This is a high burden. "Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction . . . so

[3] *See also, e.g., Goluba v. Sch. Dist. of Ripon*, 45 F.3d 1035, 1037 (7th Cir. 1995); *FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 582 (3d Cir. 2010); *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 145 (2d Cir. 2010); *Eagle Comtronics, Inc. v. Arrow Comm'cn Labs., Inc.*, 305 F.3d 1303, 1314 (Fed. Cir. 2002).

clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of precise facts of the case." *Shafer v. Army & Air Force Exch. Serv.*, 376 F.3d 386, 396 (5th Cir. 2004) (quotation marks and citations omitted). The order must "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required." FED. R. CIV. P. 65(d). Though it "need not 'spell out in detail the means in which its order must be effectuated,' the injunction's provisions must be 'clear in what conduct they [have] mandated and prohibited.'" *Hornbeck*, 713 F.3d at 793 (quoting *Allied Pilots Ass'n*, 228 F.3d at 578–79) (alteration in *Hornbeck*).

b. There is Not Clear and Convincing Evidence that the State Defendants Have Violated a Court Order.

Stone-Hoskins has not presented clear and convincing evidence of an order requiring or prohibiting "definite and specific" conduct, which the State Defendants have violated. He has therefore failed to satisfy his burden, and there is no legal or factual basis to find the State Defendants in contempt of Court. *Id.*; *Allied Pilots Ass'n*, 228 F.3d at 581.

Stone-Hoskins argues that "Cole has failed and refused to comply with the permanent injunction by refusing John's request that the State amend the death certificate of his late husband James to reflect that John is his surviving spouse." (Dkt. #104 at 2). But this underlying, closed proceeding is about the legality of same-sex marriage in Texas, not whether the U.S. Supreme Court's order in *Obergefell* applies retroactively to death certificates. Thus, there is no

"definite and specific order" being violated, as required by, *inter alia*, *Hornbeck*, 713 F.3d at 792. Moreover, the entire basis for a contempt finding would be the State Defendants' failure to implement one *possible* interpretation of a federal court's order unsupported by the actual issues in the proceeding—that it applies retroactively to death certificates maintained by a State agency. This, plainly, does not amount to the "clear and convincing evidence" required to sustain a finding of contempt of Court.

The Fifth Circuit applied this standard in *Hornbeck*. 713 F.3d 787. There, the Court considered the Department of Interior's moratorium on drilling after the December 2010 Deepwater Horizon oil disaster. After the district court enjoined enforcement of the moratorium, the Department of Interior "fail[ed] to seek a remand from the district court to the agency before taking new administrative action; . . . continuously stated [its] public resolve to restore the moratorium; and [communicated] to industry that a new moratorium was in the offing." *Id.* at 793. The Fifth Circuit reversed the district court's ruling that such activity amounted to contempt of the court order enjoining the moratorium. The Court reasoned, "[n]either harboring [the intent to reinstate an enjoined moratorium], nor imposing a new moratorium . . . was a violation of the court order." *Id.*

Texas is implementing the clear mandates of *Obergefell*.[4] Nevertheless, to the extent that *Obergefell* and the Court's order do not require the State to

[4] For example, the Department of State Health Services began complying with *Obergefell* even before this Court's July 7 permanent injunction. It did so on June 26 by altering the marriage

ignore its own duly-enacted statutes and administrative regulations, it has a tandem duty to follow State law. The State must (1) enforce the laws duly enacted by its legislature and rules promulgated by its administrative bodies, and (2) to comply with all applicable federal law—including decisions and orders of the United States Supreme Court regarding the federal Constitution. Where the latter is not clear about its effect on the former, it is the constitutional duty of officers of the State to obtain clarification from the judiciary, while deferring to the laws of the local sovereign.

c. There Is No Basis To Hold an Attorney in Contempt of Court for Simply Representing His Client in a Request for Court Guidance on an Unclear Area of the Law.

The request for an order holding the Attorney General in contempt is particularly striking—which is perhaps why Stone-Hoskins has produced no authority to support it. *Compare Allied Pilots Ass'n*, 228 F.3d at 581 (standard to find contempt of court) *with* Dkt. #104 at 2 ("[b]y denying John relief that is routinely afforded surviving spouses of opposite-sex marriages, both Paxton and Cole are in contempt of this Court's permanent injunction.").

The Attorney General has not refused to amend any death certificate. Instead, he is providing legal advice and representation to a client who has

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license application form to eliminate gender specific fields. On Monday, June 29, 2015, the Employees Retirement System of Texas ("ERS"), the Teachers Retirement System of Texas ("TRS"), and several universities announced benefits would be extended to same-sex spouses; the benefits were made available July 1st. *See Spouses of Gay Public Employees Eligible for Benefits*, The Texas Tribune (July 1, 2015) at http://www.texastribune.org/2015/07/01/spouses-gay-public-employees-eligible-benefits/. And on July 23, 2015, the Texas Department of Family and Protective Services consented to the adoption of three siblings by both partners in a same-sex marriage in *In the Interest of AG., C.G., and V.G.*, Cause Number 2015-PA-01507, in the 37th Judicial District Court of Bexar County, Texas.

preferred to seek court guidance on whether *Obergefell* retroactively requires that he take action that will significantly impact settled proceedings. There is absolutely no authority for the proposition that a constitutional officer of a State may be held in contempt for good-faith representation of a client in discharging his constitutional duty.

CONCLUSION

The State Defendants respectfully request that the Court modify its August 5 order so that the order does not require a show cause hearing.

Respectfully submitted,

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ATTORNEYS FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on August 6, 2015, I served all parties a copy of the foregoing document via the Court's ECF service.

/s/ William T. Deane
WILLIAM T. DEANE

CERTIFICATE OF CONFERENCE

I certify that on August 6, 2015, counsel for State Defendants conferred in good faith with counsel for all parties of record in an attempt to resolve the matter by agreement. The Intervenor opposes the relief requested in this motion. Defendant Rickhoff advised that he takes no position on the relief requested.

/s/ William T. Deane
WILLIAM T. DEANE