

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT ASHLAND
CASE NO. 0:15-CV-00044-DLB**

APRIL MILLER, *et al.*

PLAINTIFFS

v.

ROWAN COUNTY, KENTUCKY, *et al.*

DEFENDANTS

**DEFENDANT ROWAN COUNTY, KENTUCKY'S MOTION
FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF**

The Defendant, Rowan County, Kentucky, by and through counsel, respectfully moves the Court for leave to file a Supplemental Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction. The Supplemental Memorandum addresses points raised in Defendant Davis' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction. Since the Responses of both Davis and the County were filed the same day, Rowan County was not able to address an argument Davis made in her own Response. Rowan County's original Response was nine pages and the Supplemental Memorandum it seeks to file is only 6 pages. In combination, these two briefs are still well below this Court's 40-page limit on opposition brief. LR 7.1(d).

The Supplemental Memorandum is attached hereto and a proposed Order is also attached.

Respectfully submitted,

/s/ Jeffrey C. Mando

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CERTIFICATE OF SERVICE

This is to certify that on the 7th day of August, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to: William E. Sharp, Esq.; Daniel J. Canon, Esq.; Laura E. Landenwich, Esq.; L. Joe Dunman, Esq.; Roger K. Gannam, Esq.; and, Jonathan D. Christman, Esq.

/s/ Jeffrey C. Mando

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ORDER

Upon Motion of the Defendant, Rowan County, Kentucky, and the Court being otherwise fully advised and informed, Defendant is hereby GRANTED leave to file their Supplemental Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

SO ORDERED this ____ day of August, 2015

Hon. David L. Bunning
Judge, U.S. District Court

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DEFENDANTS

SUPPLEMENTAL MEMORANDUM OF DEFENDANT, ROWAN COUNTY,
IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Defendant, Rowan County, Kentucky, by and through counsel, for its Supplemental Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction states as follows:

While asserting that an injunction is not necessary to protect the fundamental rights of the Plaintiffs, Defendant Davis contends that if an injunction should be issued, the Court should direct Rowan County Judge Executive Blevins to issue marriage licenses in Rowan County. (R. 29, Def. Davis' Resp. in Opp. to Pl. Mot. for Pre. Inj. at PageID 362 – 365) In other words, if the Court concludes that a preliminary injunction is warranted, Davis suggests that instead of ordering her to perform her *mandatory* duty to issue marriage licenses, the Court should impose that duty on Judge Executive Blevins despite his *limited* and *discretionary* authority to issue marriage licenses. *Compare* KRS 402.100 to KRS 402.240.

Davis acknowledges that Judge Executive Blevins' authority to issue licenses is restricted to cases involving the clerk's "absence or vacancy from office." While Davis does not argue that she vacated her office, she contends that her refusal to issue marriage licenses in accordance with her statutory duties should be considered an absence. As a

result, she posits that Judge Executive Blevins should be burdened with an injunction instead of her. This argument is unsupported by the evidence or governing law.

First, Judge Executive Blevins is not named a party to this action. (R. 1, Complaint) Davis fails to recognize, much less address this fact in her Response, and does not explain what legal basis the Court has to issue an injunction against a non-party.

Second, Davis does not address the fact that KRS 402.240 imposes at most a discretionary obligation. Unlike the statute governing her own conduct, KRS 402.240 merely permits a Judge Executive to issue marriage licenses by stating that he “may” do so. *Stringer v. Realty Unlimited*, 97 S.W.3d 446, 448 (Ky. 2002) (noting that “may” ordinarily implies “permission or liberty to act”); *see also* KRS 446.010(26) (“‘May’ is permissive”). KRS 402.240, therefore, provides a limited grant of authority for judge executives to issue marriage licenses, rather than imposing a mandatory duty to do so.

Third, Davis’ suggestion that the limited circumstances identified in KRS 402.240 for a Judge Executive to issue a marriage license existed here is wholly unsupported by fact or law. In the absence of a legislative definition, words and phrases in statutes are construed as to their common and ordinary meaning. *Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014); KRS 446.080 (nontechnical words in statutes “shall be construed according to the common and approved usage of language”). These common and ordinary meanings are derived by Kentucky courts from ordinary dictionary definitions, and Merriam Webster had been cited several times as a quality source for such meanings. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 59 (Ky. 2011) (referring to dictionary definition to discern common usage of undefined statutory term); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (same).

According to Merriam Webster's Online Dictionary, "absence" means "the state of being absent." Merriam Webster's Online Dictionary, *available at* <http://www.merriam-webster.com/dictionary/absence> (last checked August 5, 2015). In turn, "absent" is defined as "not present or attending; missing" or "not existing." Merriam Webster's Online Dictionary, *available at* [http://www.merriam-webster.com/dictionary/absent\[1\]](http://www.merriam-webster.com/dictionary/absent[1]) (last checked August 5, 2015). Under these definitions, the "absence" of the county clerk as used in KRS 402.240 means that she is not present or physically gone from her office. Nothing in these definitions, and nothing in the common usage of the word "absence" suggests that this term was intended by the Kentucky General Assembly to apply any time a county clerk was present but refused to perform one of her job duties.

Davis cites to the use of the term "absence" in KRS 67.725 to support her argument but her rationale for doing so is unclear because that statute hurts – rather than helps – her position. KRS 67.725 governs the line of succession for county officers in the case of an emergency. It states that the judge executive "shall be deemed 'absent' when he is outside the county at the time of the occurrence or declaration of the emergency and is unable to return[.]" KRS 67.725. This definition clearly states that the judge executive is "absent" when he is not present in the county and unable to return to do his job duties. *Id.* It does not say, as Davis contends, that the judge executive's absence also arises merely because he refuses or declines to perform some of his mandatory job duties. For this reason, the definition in KRS 67.725 lends further support for the idea that "absence" in KRS 402.240 has its ordinary meaning: the state of being gone or not present.

According to the testimony offered at the preliminary injunction hearing, Davis was not absent from Rowan County when Plaintiffs requested marriage licenses. (R. 26, Tran.

from 07.20.15 Hearing at PageID 231) She testified that she was present in the County and in her office and Judge Executive Blevins testified that it was his understanding that Davis was present when Plaintiffs sought marriage licenses. (*Id.* at PageID 281 – 282) As a result, Judge Blevins testified that he did not feel he had the authority under KRS 402.240 to issue marriage licenses to the Plaintiffs. (*Id.* at PageID 231 – 232) The facts, therefore, do not support Davis’ contention that Judge Executive Blevins ever had authority to issue marriage licenses under KRS 402.240.

Davis tries to avoid this inconvenient truth by theorizing that “absence” really just means a “lack” of something, including her own lack of willingness to perform the duties of her job. Davis’ theory is flawed for several reasons. First, “lack” is offered as an alternative way of describing “absence” only to point out the very same meaning. Because something is lacking or wanting when it is not present or existing, the ultimate meaning of the statute remains unchanged even if the Court considers an absence to be a mere “lack.”

Second, and more importantly, even if KRS 402.240 could be construed to refer to a “lack” as opposed to an “absence,” the statute would still only refer to the “lack” of the county clerk and thus would still only refer to her non-presence. To mean what Davis wants KRS 402.240 to mean, the statute would have to reference a “lack of the county clerk’s willingness to perform her job duties.” But that language is not contained in KRS 402.240. The word play proffered by Davis is therefore an attempt to insert language into KRS 402.240 which the General Assembly did not adopt. This violates one of the cardinal rules of statutory construction. *Pearce*, 448 S.W.3d at 749 (quoting *Western Kentucky Coal Co. v. Nall & Bailey*, 228 Ky. 76, 14 S.W.2d 400, 401-02 (Ky. 1929) (Kentucky courts must

“construe a ‘statute only as written, and the intent of the Legislature must be deduced from the language it used”).

For all of these reasons, Defendant, Rowan County, opposes Davis’ contention that if a preliminary injunction must be issued, it should direct Rowan County Judge Executive Blevins to issue marriage licenses in Rowan County. And, for the reasons stated in its Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, Plaintiffs’ Motion for Preliminary Injunction against Rowan County must be denied.

Respectfully submitted,

/s/ Jeffrey C. Mando

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