



COMMONWEALTH of VIRGINIA

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The Honorable John T. Frey
Clerk of Court
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, Virginia 22030

Dear Mr. Frey:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

An injunction issued in the case of *Bostic v. Rainey*¹ prohibits enforcement of Virginia's marriage laws to the extent they deny same-sex couples the same rights afforded other couples. You ask whether the injunction alters the term "husband and wife" as used in § 58.1-810.3 of the *Code of Virginia* for purposes of the recordation tax exemption.

Response

It is my opinion that the decision in *Bostic v. Rainey* requires clerks of court to interpret the term "husband and wife" as used in § 58.1-810.3 to include spouses of the same sex. Accordingly, a deed to which the only parties are married individuals, regardless of whether such individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.

Applicable Law and Discussion

I. Ruling in *Bostic v. Rainey*

On February 13, 2014,² the United States District Court for the Eastern District of Virginia, Norfolk Division ("the District Court") ruled that Virginia's laws defining marriage as between one man and one woman and prohibiting recognition of a union between two people of the same sex were unconstitutional.³ Specifically, the Court held that "[t]hese laws deny [same-sex couples] their rights to

¹ *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 190 L. Ed. 2d 140 (2014).

² As amended on February 14, 2014.

³ *Rainey*, 970 F. Supp. 2d at 483.

due process and equal protection guaranteed under the Fourteenth Amendment of the United States Constitution.”⁴ In a Judgment entered on February 24, 2014, the District Court enjoined the

officers, agents, and employees of the Commonwealth of Virginia . . . from enforcing Article I, §15-A, of the Constitution of Virginia; Virginia Code § 20-45-.2; Virginia Code § 20-45.3, and any other Virginia law if and to the extent that it denies to same sex couples the rights and privileges of marriage that are afforded to opposite sex couples.^{5]}

This judgment was stayed pending final disposition of any appeal by the United States Court of Appeals for the Fourth Circuit.⁶ The Fourth Circuit affirmed the District Court’s judgment on July 28, 2014, specifically upholding the “decision to enjoin enforcement of the Virginia Marriage Laws.”⁷ On August 20, 2014, the United States Supreme Court stayed the Fourth Circuit’s mandate pending the timely filing and disposition of a petition for writ of certiorari. Three petitions were filed, and on October 6, 2014, the Supreme Court denied them all.⁸ The Fourth Circuit’s mandate issued at 1:00 p.m. on October 6, 2014, at which time the District Court’s judgment took effect.

The District Court’s opinion expressly used, and the Fourth Circuit Court of Appeals adopted, the term “Virginia’s Marriage Laws” to refer to “Article I, Section 15-A of the Virginia Constitution, Va. Code §§ 20-45.2, 20-45.3, *and any other law relating to marriage within the Commonwealth of Virginia.*”⁹ This determination that these laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, therefore, reaches beyond the right of individuals to marry in this Commonwealth. It extends to any law that, facially or by application, recognizes the institution of marriage or confers a benefit or special recognition based on marital status. Such laws must apply equally to all such unions, regardless of the sex of its members.

II. Application to the Virginia Recordation Tax

The Virginia Recordation Tax Act requires every circuit court clerk in Virginia to collect certain recordation taxes.¹⁰ These taxes are based on the privilege of having access to the benefits of state recording and registration laws,¹¹ and there are numerous exemptions. Pertinent to your inquiry, the General Assembly has provided that “[w]hen the tax has been paid at the time of the recordation of the original deed, no additional recordation tax shall be required for admitting to record . . . [a] deed to which a husband and wife are the only parties.”¹²

You ask whether the term “husband and wife” should be interpreted to encompass only a married man and woman, or whether the exemption extends to a married couple of the same sex. In light of the District Court’s and the Fourth Circuit’s rulings, the term not only should, but must, be interpreted to

⁴ *Id.* at 484.

⁵ Judgment at 1-2, *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL, (E.D. Va. 2014), ECF No. 139.

⁶ *Id.* at 2.

⁷ *Schaefer*, 760 F.3d at 384.

⁸ *Rainey v. Bostic*, 190 L. Ed. 2d 140 (2014); *Schaefer v. Bostic*, 190 L. Ed. 2d 140 (2014); *McQuigg v. Bostic*, 190 L. Ed. 2d 140 (2014).

⁹ *Rainey*, 970 F. Supp. 2d at 461, n.2 (emphasis added).

¹⁰ See VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2009 & Supp. 2014).

¹¹ See Va. Tax Comm’r Priv. Ltr. Rul., Pub. Doc. 92-234 (Nov. 9, 1992), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf>.

¹² Section 58.1-810.3.

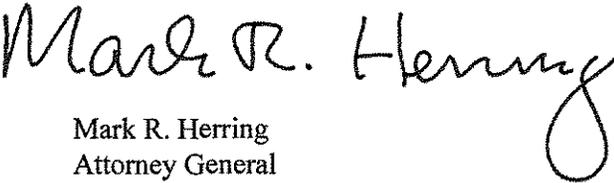
include couples of the same sex who are legally married.¹³ To interpret it otherwise would be to grant recognition and a special privilege to the union of a man and a woman that is not similarly granted to a union between a man and a man or a woman and a woman. As the *Bostic* opinions make clear, the United States Constitution prohibits such an interpretation. I therefore conclude that a deed to which married individuals are the only parties, irrespective of whether the married individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.¹⁴

Conclusion

Accordingly, it is my opinion that the decision in *Bostic v. Rainey* requires clerks of court to interpret the term “husband and wife” as used in § 58.1-810.3 to include spouses of the same sex, and therefore, a deed to which the only parties are married individuals, regardless of whether the individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

¹³ “Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See also* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems . . .”); *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“No act of the legislature should be . . . so construed as to bring it into conflict with constitutional provisions unless such a construction is unavoidable.”).

¹⁴ I note that, while your request addresses only one specific occurrence of “husband and wife”, the term, along with “man and wife,” “wife,” and “husband” appears in the *Code of Virginia* no fewer than 61 times, applying to subjects ranging from insurance contracts, to joint ownership of property, and to adoption. *See, respectively*, VA. CODE ANN. §§ 38.2-302 (2014), 55-20.2 (2012), 63.2-1215 (2012). The guarantees of equal protection and due process apply equally to these provisions, and they must be applied equally to all legal marriages. As *Bostic v. Rainey* makes clear, the Constitution of the United States requires no less.