STATE OF KANSAS

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August 4, 1977

ATTORNEY GENERAL OPINION NO. 77- 248

The Honorable Sam K. Bruner
Associate District Judge
Johnson County Courthouse
Olathe, Kansas 66061

Re: Marriage--Licenses--Persons Eligible

Synopsis: A license may not be issued for the marriage of two persons of the same sex.

* * *

Dear Judge Bruner:

You request my opinion whether under ch. 23, art. 1, K.S.A., a license may be issued for the marriage of two persons of the same sex. K.S.A. 23-106, which specifically authorizes the issuance of marriage licenses, is silent as to the gender of parties to the marriage. K.S.A. 23-101 is likewise neutral on this point:

> "The marriage contract is to be considered in law as a civil contract, to which the consent of the parties is essential; and the marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law."

K.S.A. 23-104a prescribes how marriages shall be solemnized:

> "Marriage may be validly solemnized and contracted in this state after a license has been issued therefor, and in the following manner: By the mutual declarations of the two (2) parties to be joined in marriage, made before a duly authorized officiating person and in the presence of at least two (2) competent witnesses over eighteen (18) years of age other than such officiating person, that they take each other as husband and wife." [Emphasis supplied.]

The question is raised whether, in view of the largely gender-neutral language throughout art. 1, ch. 2, K.S.A., the marriage of persons of the same sex is permitted. This question was first considered in Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185, app. dismissed, 409 U.S. 810, 34 L. Ed. 2d 65, 93 S. Ct. 37 (1971), in which the court affirmed a judgment that the county clerk was not required to issue a marriage license for two males, and specifically directing that a license not be issued to them. The court stated thus:

> "Petitioners contend . . . that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages. We think, however, that a sensible reading of the statute discloses a contrary intent.
>
> Minn. St. C. 517, which governs 'marriage,' employs that term as one of common usage, meaning the state of union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of the marriage statutes, which date from territorial days, would have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as 'husband and wife,' and 'bride and groom' . . . ." 191 N.W.2d at 185-186. [Footnote omitted.]

A like question was presented in Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971), in which the plaintiff, a noncommissioned officer in the United States Army, sought a declaration

whether he was indeed married to the defendant, to whom the plaintiff was purportedly wed in a marriage ceremony, but whom the plaintiff discovered to be a man after the ceremony was completed. The court stated thus:

> "The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and woman. . . . '"Marriage" may be defined as the status or relation of a man and a woman who have been legally united as husband and wife. It may be more particularly defined as the voluntary union . . . of one man and one woman as husband and wife * * *.' (52 Am.Jur.2d, Marriage, § 1). Black's Law Dictionary furnishes three definitions of marriage, all of which recognized that it is a union or contract between a man and a woman. As was stated in Mirizio v. Mirizio, 242 N.Y. 74, 81, 150 N.E. 605, 607: 'The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.'" 325 N.Y.S.2d at 500. [Citation omitted.]

In Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), the court affirmed a lower court judgment that two females were not entitled to issuance of a license permitting them to marry:

> "Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons.
>
> Marriage was a custom long before the state commmenced to issue licenses for that purpose. For a time the records of marriage were kept by the church. Some states even now recognize a common-law marriage which has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and

> a woman and we have been presented with no authority to the contrary.
>
> It appears to use that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined." 501 S.W.2d at 589.

In Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974), the court reviewed denial of a marriage license to two males, and affirmed that judgment. Its discussion of the legal questions involved is clearly more extensive and detailed than offered in the cases cited supra, and the court again concludes, based upon a review of cases dealing with the marriage relationship, that it consists of the legal union of one man and one woman who are otherwise qualified to enter into the relationship, a view which the court found clearly implicit in those cases, and not expressly articulated only because the point was so obvious as not to require recitation. Our own statute, concerning solemnization of marriages, K.S.A. 23-104a, refers to marriage as the union of "husband and wife," terms which are sufficiently gender-specific to compel the inference that a marriage may not be solemnized between persons of the same sex.

The clear weight of authority in the decided cases directly on point, decided in jurisdictions with marriage laws equally silent on the question as our own, compel the conclusion that a marriage license may not be issued for the marriage of persons of the same sex.

Yours truly,

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