[redacted]

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)
JUDGE SUSAN SCHULTZ GIBSON

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v. — ORDER

BOBBI JO CLARY — DEFENDANT

[redacted]

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This matter is before the Court pursuant to an invocation of the marital privilege by Defendant, Bobbie Jo Clary ("Defendant"), and pursuant to a motion by Geneva Case to quash a subpoena served upon her by the Commonwealth. For the reasons stated below, the Court **denies** both motions.

FACTS

The Defendant is charged with Murder, Robbery in the First Degree and Tampering with Physical Evidence for events surrounding the death of George Murphy on or about October 29, 2011. On December 3, 2004, the Defendant and Geneva Case were united in a civil union in Bennington, Vermont. At some point, both individuals came to Kentucky, although at the time of the crime, the Defendant and Ms. Case were not residing together. It is alleged by the Commonwealth that shortly after the murder of George Murphy, the Defendant called Geneva Case to pick her up, told Ms. Case what she had done, and enlisted Ms. Case's help in obtaining products to clean up blood from a van. The Commonwealth desires to call Ms. Case as a witness at trial to testify to these matters.

Both the Defendant and Ms. Case argue that the civil union which they entered into in Vermont afforded them the rights, benefits and responsibilities of a married couple, that Vermont now offers marriage to same sex couples, and that there is no distinction between Vermont civil unions and Vermont same-sex marriages. They assert that Kentucky's failure to recognize same sex-marriages from Vermont violates the United States and Kentucky Constitutions, and violates due process. They argue that the denial of recognition of the marriage of Ms. Case and Ms. Clary is a denial of

their right to marry on an arbitrary basis – the couple's gender or sexual orientation. They also argue that Kentucky's failure to recognize the Defendant's and Ms. Case's marital privilege violates the Full Faith and Credit Clause of the United States Constitution, as it fails to provide full faith and credit to the public act of Vermont marrying the Defendant and Ms. Case. Additionally, they argue that the state's failure to recognize the marital privilege would violate the equal protection clauses of both the state and federal constitution.

Both the Defendant and Ms. Case cite to the recent Supreme Court decisions under *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). *Windsor* struck down Section 3 of the Defense of Marriage Act which codified non-recognition of same-sex marriages for all federal purposes, including insurance benefits for government employees, social security survivors' benefits, immigration, bankruptcy, and the filing of joint tax returns. *Hollingsworth* essentially left in place a federal district court ruling that held that the attempt to forbid recognition of same-sex marriage in California by way of an amendment to the State Constitution, after it had been previously permitted, was unconstitutional. Ms. Case argues that it follows from these decisions that it is unconstitutional to create a system where a same-sex marriage is legal in the state where consummated, recognized by the federal government, but not recognized by the state in which the same-sex couple resides, and that Kentucky seeks to create that environment by its refusal to recognize a legitimate marriage from another state.

CONCLUSIONS

Kentucky Rule of Evidence ("KRE") 504 is entitled "Husband-wife privilege," and states, in pertinent part:

> (a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

"As used and recognized in the law of the Commonwealth, 'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life,

for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Ky. Rev. Stat. ("KRS") § 402.005. Pursuant to KRS § 402.020:

> (1) Marriage is prohibited and void:
>
> (a) With a person who has been adjudged mentally disabled by a court of competent jurisdiction;
>
> (b) Where there is a husband or wife living, from whom the person marrying has not been divorced;
>
> (c) When not solemnized or contracted in the presence of an authorized person or society; [and]
>
> (d) Between members of the same sex[.]

Pursuant to KRS § 402.040:

> (1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy.
>
> (2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.

Perhaps anticipating that public opinion would one day shift in Kentucky as it has in other states, the Kentucky General Assembly in 2004 caused to be put on the ballot a proposed constitutional amendment, providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky," and that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." That amendment was ratified by the voters of the state and became effective that same year. Ky. Const. § 233A.

It is abundantly clear that under black-letter Kentucky law, same-sex marriages or their equivalent cannot be performed in this state, and if solemnized outside this state in a jurisdiction which permits them, will not be recognized as valid marriages or unions within this state. It is also abundantly clear, as pointed out in both briefs on behalf of the movants, that the legal, social and moral landscape against which this issue is playing out is rapidly changing and progressing, that acceptance of same-sex marriage is growing, and that an increasing number of citizens of this country and this state believe

that extension of basic rights taken for granted by heterosexual couples to same-sex couples will not result in the destruction of civilization, but in the enrichment of it. However, as pointed out by the Kentucky Court of Appeals in *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky.App. 2008):

> It is not this or any court's role to judge whether the Legislature's prohibition of same-sex marriage, or common law marriage, or bigamous marriage, or polygamous marriage, is morally defensible or socially enlightened. Nor is it this or any court's role, in the absence of constitutional repugnance, to craft any means by which the legal consequences of such a prohibition may be negated or avoided. It is simply the law.

Id. at 835. Additionally, this Court is not required to further examine whether these Kentucky laws are constitutionally repugnant, because the arguments of the Defendant and Ms. Case fail not simply because they are not considered married in Kentucky, but because they are not considered married in Vermont.

The Defendant and Ms. Case entered into a civil union on December 3, 2004. At that time, same-sex marriage was not available in Vermont. Couples in same-sex civil unions were extended the same state rights and benefits enjoyed by heterosexual married couples, in a scheme that has been characterized as "separate but unequal," because those rights did not transfer if the couple left the state unless the receiving state granted those same rights by statute, and because it was not a "marriage," with all the gravitas and history the word conveys. In 2009, the Vermont Legislature enacted 15 V.S.A. § 8, authorizing same-sex marriage. Subsequently, the statute governing the issuance of marriage licenses, 18 V.S.A. § 5131, was amended to provide for the issuance of marriage licenses to couples who were already in a civil union. Those couples can, but are not required, to dissolve their civil unions prior to their marriage. It does not appear from the proof that the Defendant and Ms. Case ever applied for a marriage license or solemnized their marriage. In Vermont, as in most states that have enacted legislation authorizing same-sex marriages, existing civil unions are not

automatically converted to marriages in the eyes of the law, but require some further action by the parties.[1]

Pursuant to 18 Vermont Statutes Annotated § 5131:

> (4)(A) Parties to a civil union certified in Vermont may elect to dissolve their civil union upon marrying one another but are not required to do so to form a civil marriage. The department shall clearly indicate this option on the civil marriage application form required by subdivision (2) of this subsection. If a couple elects this option, each party to the intended marriage shall sign a statement on the confidential portion of the civil marriage license and certificate form stating that he or she freely and voluntarily agrees to dissolve the civil union between the parties.

(B) Dissolution pursuant to this subdivision shall become effective upon solemnization of the marriage between the parties, and the parties shall not be required to file a petition for an uncontested dissolution with the family division of the superior court pursuant to 15 V.S.A. § 1206(d). Without application for a marriage license, and solemnization of the marriage, the Defendant and Ms. Case remain in a civil union recognized by the state of Vermont, but not recognized under Kentucky law.

> Privileges are to be narrowly construed.
>
> The exceptions provided in KRE 504(c)(2) reflect the fact that the marital privilege is considered by many to be in disfavor as a result of abuses which prevent ascertaining the truth.... The courts have approached the privilege by narrowly and strictly construing it because it has the potential

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[1] E.g. *N.H. Rev. Stat. Ann. § 457:46* ("Notwithstanding the provisions of RSA 457-A, no new civil unions shall be established on or after January 1, 2010. Two consenting persons who are parties to a valid civil union entered into prior to January 1, 2010 pursuant to this chapter may apply and receive a marriage license and have such marriage solemnized pursuant to RSA 457, provided that the parties are otherwise eligible to marry under RSA 457 and the parties to the marriage are the same as the parties to the civil union. Such parties may also apply by January 1, 2011 to the clerk of the town or city in which their civil union is recorded to have their civil union legally designated and recorded as a marriage, without any additional requirements of payment of marriage licensing fees or solemnization contained in RSA 457, provided that such parties' civil union was not previously dissolved or annulled. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded with the division of vital records administration. Any civil union shall be dissolved by operation of law by any marriage of the same parties to each other, as of the date of the marriage stated in the certificate."); *DE LEGIS 19 (2013), 2013 Delaware Laws Ch. 19 (H.B. 75)* ("Notwithstanding any provision of chapter 1 of this title, on or after July 1, 2013, and prior to July 1, 2014, both parties to a civil union entered into pursuant to this chapter may apply to the clerk of the peace in the county in which their civil union license was issued, for a marriage license, in accordance with procedures established by such clerk of the peace, to have their civil union legally converted to a marriage by operation of law without requirement of solemnization, provided that such civil union has not been previously dissolved or annulled and is not subject to a pending proceeding for dissolution, annulment or legal separation. Upon application for a marriage license in accordance with such procedures, such parties shall be issued a certificate of marriage and the civil union of such parties shall be converted to a marriage by operation of law. For all purposes of the laws of this State, the effective date of such marriage shall be deemed to be the date of solemnization of such original civil union. Alternatively, on or after July 1, 2013, and prior to July 1, 2014, both parties to a civil union entered into pursuant to this chapter may apply to the clerk of the peace, in the county in which their civil union license was issued, for a marriage license pursuant to chapter 1 of this title and such parties may have such marriage solemnized, prior to July 1, 2014, pursuant to chapter 1 of this title, provided that such persons are otherwise eligible to marry under § 101 of this title, such civil union has not been previously dissolved or annulled, and such civil union is not subject to a pending proceeding for dissolution, annulment or legal separation. Upon the solemnization of such marriage, the civil union of such parties shall be converted at such time to a marriage by operation of law. For all purposes of the laws of this State, the effective date of such marriage shall be deemed to be the date of solemnization of such original civil union.")

> for shielding the truth from the court system. Many courts have determined that when the reason supporting the privilege, marital harmony, no longer exists, then the privilege should not apply to hide the truth from the trier of fact.

Gonzalez De Alba v. Com., 202 S.W.3d 592, 596 (Ky. 2006) (quoting *Mullins v. Commonwealth*, 956 S.W.2d 210, 212 (Ky. 1997). At a minimum, the privilege granted by the Commonwealth of Kentucky would require that the parties be actually married. Ms. Case and the Defendant are not, under the law of either Kentucky or Vermont. The fact that Vermont may extend the marital privilege to couples who have entered into a civil union does not require Kentucky to do so. "No state is required to adopt the statutes of another state which are in conflict with their own in the absence of a statute of that forum requiring them to do so." *Pyles v. Russell,* 36 S.W.3d 365, 367 (Ky. 2000).

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the motion to invoke the marital privilege by the Defendant, Bobbie Jo Clary, and the motion by Geneva Case to quash a subpoena served upon her by the Commonwealth are both **DENIED.**

DATE: 9/23/13

SUSAN SCHULTZ GIBSON, JUDGE

cc: Stacy Greive/Lisa Cartier-Giroux
Amy Hannah/Angela Elleman

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
SEP 23 2013
BY _____ DEPUTY CLERK