



# COMMONWEALTH OF VIRGINIA

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December 10, 2009

The Honorable John T. Frey  
Fairfax Circuit Court Clerk  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4048

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*.

## Issues Presented

You inquire about the status of certain marriages for which the parties did not obtain marriage licenses. Specifically, you ask whether a court may affirm such marriages when the marriages were performed by a religious or civil celebrant: (1) authorized to perform marriages in Virginia; or (2) not authorized to perform marriages in Virginia. Further, you ask whether a court may order the clerk of the circuit court ("clerk" or "circuit court clerk") to issue a marriage license retrospectively under these circumstances.

## Response

It is my opinion that a court does not have the statutory or equitable authority to affirm marriages that were not performed under a license of marriage. Further, it is my opinion that a court may not direct a circuit court clerk to issue marriage licenses retrospectively under these circumstances.

## Background

You advise that several couples have inquired about the status of their respective marriages. In each case, you note that the couple did not obtain a marriage license, but did participate in a religious ceremony of marriage. You state that some of the celebrants were authorized to perform marriages in Virginia, some were not, and the status of some celebrants is unknown.

## Applicable Law and Discussion

The *Virginia Code* is clear that a marriage license is required. "Every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided."<sup>1</sup> In each of the situations you present, the couple did not obtain a marriage license. Thus, the status of the celebrant is irrelevant with respect to the marital status of the couple. The Supreme Court of Virginia also has spoken

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<sup>1</sup>VA. CODE ANN. § 20-13 (2008).

clearly on this issue. “[N]o marriage or attempted marriage, if it took place in this State, can be held valid here, unless it has been shown to have been under a license, and solemnized according to [the] statutes.”<sup>2</sup> Therefore, in the situations you present, it is my opinion the marriages are not valid under Virginia law.

The centrality to marriage of a properly issued license is underscored by § 20-28, which provides criminal sanctions for celebrants who perform ceremonies without licenses being obtained.<sup>3</sup> Further, the General Assembly has placed numerous statutory duties upon a clerk or deputy clerk regarding the issuance of a marriage license<sup>4</sup> as well as responsibilities subsequent to such issuance.<sup>5</sup> A marriage performed “under a license issued in this Commonwealth” cannot be adjudged to be void “on account of any want of authority” in the celebrant, or by “any defect, omission or imperfection in such license.”<sup>6</sup> However, this statutory cure is limited to the status of the celebrant or errors in a properly issued license.<sup>7</sup> Section 20-13 presumes the issuance of a marriage license.<sup>8</sup>

Section 20-90 provides that:

When the validity of any marriage shall be denied or doubted by either of the parties, the other party may institute a suit for affirmance of the marriage, and upon due proof of the validity thereof, it shall be deemed to be valid, and such decree shall be conclusive upon all persons concerned.

Based on the facts you present, it appears that the parties could not provide “due proof of the validity”<sup>9</sup> because no marriage licenses were issued. Without the statutorily required proof, a court is without authority to decree the marriage to be valid.

Further, I find no authority for a court to exercise “equitable authority” to affirm marriages. The Court of Appeals of Virginia has held that “the law of Virginia *must* be applied to determine the question of validity of the marriage within this state.”<sup>10</sup> For a court to declare a “marriage” when no license was issued would not be an affirmation of a marriage. Such an action would be the creation of a marriage. I find no such broad grant of authority to Virginia’s courts.

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<sup>2</sup>Offield v. Davis, 100 Va. 250, 263, 40 S.E. 910, 914 (1902).

<sup>3</sup>“If any person knowingly perform[s] the ceremony of marriage without lawful license, or officiate[s] in celebrating the rites of marriage without being authorized by law to do so, he shall be confined in jail not exceeding one year, and fined not exceeding \$500.” Section 20-28 (2008).

<sup>4</sup>See § 20-14.2 (2008) (providing that certain health information be furnished to marriage applicants); § 20-15 (2008) (directing clerk to collect license tax); § 20-16 (2008) (requiring clerk to take oath).

<sup>5</sup>See § 20-20 (2008) (providing that clerk shall file and preserve returned licenses and certificates and index names of parties); § 20-21 (2008) (mandating that clerk compile list of all marriage licenses issued during calendar year that were not returned by celebrant and to furnish list to Commonwealth’s attorney).

<sup>6</sup>Section 20-31 (2008).

<sup>7</sup>See 1982-1983 Op. Va. Att’y Gen. 336, 337.

<sup>8</sup>I note that § 20-16.1 allows a clerk, under certain circumstances, to amend marriage records. However, § 20-16.1 also presumes the issuance of a license.

<sup>9</sup>Section 20-90 (2008).

<sup>10</sup>Hager v. Hager, 3 Va. App. 415, 416, 349 S.E.2d 908, 909 (1986) (emphasis added).

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Finally, you ask whether a court may order a clerk to issue a marriage license under these circumstances. A circuit court judge has the authority to issue a license only when “neither the clerk nor deputy clerk is able to issue the license.”<sup>11</sup> It is well settled that “the primary objective of statutory construction is to ascertain and give effect to legislative intent.”<sup>12</sup> When the language of a statute is plain and unambiguous, courts are bound by the plain meaning of that language.<sup>13</sup> Thus, a circuit court judge may issue a marriage license only when the clerk or deputy clerks are unable to issue the license. A court has no other statutory or equitable authority to issue or direct the issuance of a license.

### **Conclusion**

Accordingly, it is my opinion that a court does not have the statutory or equitable authority to affirm marriages that were not performed under a license of marriage. Further, it is my opinion that a court may not direct a circuit court clerk to issue marriage licenses retrospectively under these circumstances.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

6:310; 6:990; 1:941/09-072

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<sup>11</sup>Section 20-14 (2008).

<sup>12</sup>Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>13</sup>Cummings v. Fulghum, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001).