IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

James Darby, *et al.*, Plaintiffs, v. David Orr, in his official capacity as Cook County Clerk, Defendant.	)	Case No. 12 CH 19718 Hon. Sophia H. Hall
Tanya Lazaro, *et al.*, Plaintiffs, v. David Orr, in his official capacity as Cook County Clerk, Defendant.	)	Case No. 12 CH 19719 Hon. Sophia H. Hall
State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, Intervenor, Christine Webb, in her official capacity as Tazewell County Clerk, and Kerry Hirtzel, in his official capacity as Effingham County Clerk, Intervenors.	)	

DECISION

This matter comes on to be heard on the motions to intervene brought by proposed intervenors Church of Christian Liberty and Grace-Gospel Fellowship (hereinafter, the "Churches") and proposed intervenor Illinois Family Institute ("IFI").

Plaintiffs in *Darby* and *Lazaro* challenge the constitutionality of certain sections of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) that prohibit marriage between two people of the same sex. Plaintiffs in both cases are same-sex couples who were denied marriage licenses by defendant or whose same-sex marriages from other states are not recognized in Illinois. The *Darby* and *Lazaro* plaintiffs are, where appropriate, collectively referred to herein as "plaintiffs."

Plaintiffs in *Darby* filed a three-count complaint challenging specified provisions of the IMDMA and seeking declaratory and injunctive relief. The *Darby* plaintiffs challenge the sections which authorize marriages "between a man and a woman" (750 ILCS § 5/201), expressly prohibit marriages "between 2 individuals of the same sex" (750 ILCS § 5/212(a)(5)), and the provision that states that marriages of same-sex couples are "contrary to the public policy of this State" (750 ILCS § 5/213.1). The *Darby* plaintiffs also point to the provision that provides that a marriage license will issue upon "satisfactory proof that the marriage is not prohibited" (750 ILCS § 5/203(2)).

The *Darby* plaintiffs challenge those provisions under various sections of the Illinois Constitution. Count I claims a violation of Article I § 2 as a deprivation of life, liberty and due process and § 6 against invasions of privacy. Count II claims a violation of Article I § 2 equal protection and §18 providing that the equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of government. Count III claims a violation of Article I §13 guarantee against special legislation. The *Darby* plaintiffs seek a declaratory judgment that those provisions are unconstitutional and that defendant be enjoined from preventing same-sex couples from obtaining marriage licenses.

Plaintiffs in *Lazaro* filed a four-count complaint for declaratory and injunctive relief, also challenging provisions of the IMDMA that prevent same-sex couples from obtaining a marriage license as violating the Illinois Constitution. Specifically, the *Lazaro* plaintiffs also challenge 750 ILCS § 5/212(a)(5) and 750 ILCS § 5/203, and in addition point to 750 ILCS § 5/215, which provides that any person that violates Section II of the IMDMA is guilty of a Class B misdemeanor. The *Lazaro* plaintiffs challenge those provisions in Count I, Article I § 2 due process, Count II, Article I § 2 equal protection based on sexual orientation, Count III, Article I § 18 equal protection based on sex, and Count IV, Art. I § 6 protections against invasions of privacy. The *Lazaro* plaintiffs seek a declaratory judgment that those sections of the IMDMA preventing same-sex couples from obtaining a marriage license are unconstitutional and that defendant be enjoined from preventing same-sex couples from obtaining such licenses.

Defendant Orr declined to defend the constitutionality of the challenged provisions. The Illinois Attorney General was granted leave to intervene as a matter of right, and declined to defend the constitutionality of the challenged provisions. The Clerks of Tazewell County and Effingham County were granted leave to intervene as defendants as of right.

The Churches seek to intervene as of right pursuant to 735 ILCS § 5/2-408(a)(2) or, in the alternative, seek permissive intervention pursuant to 735 ILCS § 5/2-408(b)(2). They argue that they have an interest in the litigation which is greater than the general public because, as religious institutions, they are affected by this case in ways different than the general public.

IFI seeks permissive intervention under 735 ILCS § 5/2-408(b)(2) because as a public interest group it spent much time and effort seeking passage of the challenged sections of the IMDMA.

Both the Churches and IFI request leave to file briefs *amici curiae*, in the event this Court denies their motions to intervene.

I
Churches – Intervention as of Right

This Court's decision is governed by § 2-408(a), which provides for intervention as of right.

> Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer.

735 ILCS § 5/2-408(a) (emphasis supplied).

In considering the Churches' motion to intervene as of right under § 2-408(a)(2), the Court considers the timeliness of the motion, the sufficiency of the applicant's interest, and the adequacy of representation of those interests in the case. *People ex rel. Alvarez v. Price*, 408 Ill. App. 3d 457, 464 (1st Dist. 2011), citing *Argonaut Ins. Co. v. Safway Steel Products, Inc.*, 355 Ill. App. 3d 1 (1st Dist. 2004)

The Illinois Supreme Court has defined the nature of a sufficient interest which supports intervention, whether an intervention as of right or by permission of the court. The Supreme Court has stated that a proposed intervenor need not have a direct interest in the pending suit. However, it must have an interest "greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit." *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 112 (1981) (citation omitted). The design of the intervention section is to liberalize intervention so as to avoid re-litigation of the same issues in the pending case, in a second suit. *Id.*

In the *Argonaut* case, decided in 2004, the Appellate Court explained the application of the intervention statute:

> To have such standing, a party must have "an 'enforceable or recognizable right,' and more than a general interest in the subject matter of the proceedings." *In re Marriage of Perkinson,* 147 Ill. App. 3d 692, 698, 498 N.E.2d 319, 101 Ill. Dec.

> 137 (1986), quoting *Board of Education, District No. 219 v. Board of Education, District No.* 225, 112 Ill. App. 3d 212, 221, 445 N.E.2d 464, 68 Ill. Dec. 16 (1983). An interest that is speculative or hypothetical is insufficient to support intervention. *Perkinson,* 147 Ill. App. 3d at 698. Moreover, where the interest, if favorably resolved, could merely be advantageous to the intervenor at some future date, it is insufficient to support intervention. *Perkinson,* 147 Ill. App. 3d at 699.

Argonaut, 355 Ill. App. 3d at 7.

Based on the statute and cases, this Court must consider whether the proposed intervenor will or may be bound by the direct legal operation of a decision in the case, whether its interest is greater than the general public, and whether the interest is speculative or hypothetical.

If the Court finds that there is a sufficient interest, the *Argonaut* court states that this Court then considers the adequacy of representation of the proposed intervenor's interest by the existing parties.

> In determining whether an intervenor could be adequately represented by the existing parties, courts consider a variety of factors. *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140, 145, 468 N.E.2d 428, 82 Ill. Dec. 166 (1984) (noting that determination of the adequacy of representation is not subject to "hard and fast rules"). These factors include: (1) the extent to which the interests of the applicant and of existing parties converge or diverge, (2) the commonality of legal and factual positions, (3) the practical abilities of existing parties in terms of resources and expertise, and (4) the vigor with which existing parties represent the applicant's interests. *John Hancock Mutual Insurance Co.*, 127 Ill. App. 3d at 145. Of this list, the most important factor is how the interest of the intervenor compares with that of the present parties. *John Hancock Mutual Insurance Co.*, 127 Ill. App. 3d at 145.

Argonaut, 355 Ill. App. 3d at 8.

Here, plaintiffs do not dispute that the Churches' motion to intervene is timely. Plaintiffs, however, challenge whether the Churches' interest in the case is sufficient so as to allow intervention as of right.

A.

The Churches, first, argue that they have a sufficient interest in this case that warrants intervention as of right under § 2-408(a)(2) because if the ban on same-sex marriages is found to be unconstitutional, they will be forced to perform same-sex marriage ceremonies. The Churches argue that being required to perform these ceremonies would interfere with their freedom to exercise their religious beliefs.

Plaintiffs respond that this interest is not sufficient to warrant intervention, because the Churches' claimed interest is not supported by law. Plaintiffs argue that the relief sought in this

case – that portions of the IMDMA prohibiting same-sex marriage be declared unconstitutional – would not result in the Churches being required to perform same-sex marriage ceremonies. Plaintiffs argue that the relief they seek is only to remove the IMDMA's prohibition of civil marriage of same-sex couples, and that they do not seek to force the Churches to marry any couple in violation of the Churches' religious beliefs.

The Churches do not point to any section in the IMDMA that requires a religious institution or official to perform a marriage ceremony. In fact, the IMDMA provides that a marriage *may* be solemnized by a religious officiant. 750 ILCS § 5/209(a). The IMDMA does not contain any provision requiring an officiant to perform a marriage ceremony when requested. A judgment for plaintiffs on the constitutionality of the provisions challenged in the instant case would not have the effect of forcing any religious officiants to perform a same-sex marriage ceremony.

Accordingly, this Court finds that the Churches' first claimed interest is not a sufficient basis to warrant intervention as of right. A decision on the constitutionality of the ban on same-sex marriage in the IMDMA provisions before the Court will not affect the Churches' existing right to decline to perform any marriage.

B.

The Churches' second basis for seeking intervention as of right is their concern that they might be subject to anti-discrimination suits under the Illinois Human Rights Act ("IHRA") if the challenged provisions of the IMDMA are struck down as unconstitutional. The IHRA prohibits discrimination on the basis of sexual orientation in "public accommodations." 735 ILCS §§ 5/1-103(Q); 5/5-101(A). The Churches state that they currently make their buildings available for weddings, which, the Churches admit are places of "public accommodations" under the IHRA, and Pastor Paul Calvin Lindstrom performs wedding ceremonies. The Churches argue that if same-sex marriages become legal, they might be sued for refusing to perform and provide space for same-sex wedding ceremonies.

Plaintiffs respond that a decision in this case will not bind the Churches regarding its defenses to a suit filed for violation of the IHRA because the IHRA provisions against discrimination based on sexual orientation are not before this Court. Rather, the issue in the instant case is whether the IMDMA provisions banning same-sex marriage are unconstitutional. The IHRA and IMDMA are separate and distinct statutes, and a judgment in this case on the IMDMA would not alter the Churches' obligations under the IHRA. In fact, as plaintiffs point out, the Churches could be subject to litigation now under the IHRA for refusal to rent out their space on the basis of sexual orientation. A decision in this case would not affect or expand the scope of the Churches' potential liability under the IHRA.

Most importantly, the Churches will continue to be protected by the Illinois and United States Constitutions from limitations on the exercise of their religious freedoms, and this freedom is not an issue in the instant case. This case is about civil marriages. As discussed above, the IMDMA, which presently authorizes religious officiants to perform marriages, does not contain any provision which requires them to do so. Accordingly, they may continue to

decline anyone's request that they perform a marriage ceremony. A decision in this case will not affect the Churches' exercise of their religious freedom or prevent them from raising such a defense to a suit for violation of the IHRA.

Plaintiffs further argue that the Churches' fear of litigation in the future is speculative, and, therefore, insufficient to warrant intervention of right. The Churches have not explained how a judgment in the instant case would have the direct effect of causing such lawsuits to be filed, and this proof is necessary to warrant intervention of right. Rather, the Churches have only pointed to hypothetical individuals who may bring suit against them if same-sex marriages become legal and the Churches refuse to provide space for them. The Churches' fear of increased litigation by the indirect effect of this lawsuit is speculative and hypothetical, and does not "rise to the level of an 'enforceable right' in the subject matter of this litigation." *See In re Marriage of Perkinson*, 147 Ill. App. 3d 692, 698-99 (4th Dist. 1986) (threat of theoretical future litigation not enough to support intervention).

In sum, this Court does not doubt that the Churches have deeply held views about the subject matter of this case, as do others in the general public. But, as detailed above, the two interests which the Churches have argued in their motion are not sufficient to satisfy the requirements of §2-402(a). First, the Churches will not be forced to perform a wedding ceremony by any decision in the instant case, because no provision of the IMDMA requires them to do so. Second, the IHRA is not a subject of the instant litigation, and, therefore, the application of that Act to the Churches will not be determined by this Court. Further, the possibility of litigation being filed against the Churches for violation of the IHRA is speculative. The Churches, therefore, have no interest greater than that of the general public, some of whom hold, as the Churches do, beliefs that oppose same-sex marriage and a desire to see the IMDMA provisions held to be constitutional.

Accordingly, for the foregoing reasons, this Court denies the Churches' motion to intervene as of right, and does not reach the issue of adequacy of representation.

II.
Churches – Permissive Intervention

§2-408(b) provides for the court to permit intervention in the exercise of the court's discretion.

> Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

735 ILCS § 5/2-408(b) (emphasis supplied).

In connection therewith, §2-408(e) provides that:

> In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

735 ILCS § 5/2-408(e).

The Illinois Supreme Court has stated that intervention should be permitted when the proposed intervenor has some enforceable or recognizable right to participate in the proceedings that is greater than that of the general public. The Supreme Court's statement in *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 112 (1981), and the Appellate Court in *Argonaut Ins. Co. v. Safway Steel Products, Inc.*, 355 Ill. App. 3d 1 (1st Dist. 2004) quoted above, applies again to the instant consideration. Also see *Maiter v. Chicago Bd. of Educ.*, 82 Ill. 2d 373, 382 (1980).

The Churches argue, under §2-408(b)(2), that their interest is sufficient to warrant permissive intervention, and that their "defenses" involve the constitutionality of the specified provisions of the IMDMA. The Churches posit that these defenses have a question of law in common with that of the main action. The Churches, further, argue that granting them leave to intervene would not cause undue delay or prejudice because the case is in its early stages and that they can work with the parties already in the case.

Plaintiffs, first, respond that the Churches should not be permitted to intervene because their interest in the outcome of the constitutionality of the challenged sections of the IMDMA is no greater than that of the general public. This Court, in its discussion above, has found that the two interests the Churches offer would not be directly affected by the legal operation of a judgment in this case. The Churches will not be forced to marry same-sex couples. Additionally, it is speculative whether the Churches might be sued for violation of the IHRA because of a judgment in this case since the IHRA is not the subject matter of the instant litigation and is different legislation involving different purposes. This leaves the Churches in the same position as members of the general public who oppose same-sex marriage and want the challenged provisions of the IMDMA found to be constitutional.

Plaintiffs, second, argue that the Churches' intervention would allow them to interject issues concerning the exercise of their right to religious freedom, an issue not in common with the main action. This freedom of religion argument does not involve a legal question in common with the main action, which challenges provisions of the IMDMA banning same-sex civil marriage on due process and equal protection grounds. The instant case does not involve the issue of the freedom to exercise religious beliefs, and addressing such unnecessary issues would delay the adjudication of this case.

Finally, plaintiffs argue, and the Court agrees, that adding unnecessary parties to the litigation would burden the Court and cause undue delay. Parties to a case drive the litigation by presenting motions, raising issues, requiring more participants to be considered in scheduling discovery, and in the management of a trial. Allowing the Churches, who have nothing additional to argue which is relevant to the issues herein, would needlessly burden the litigation.

The Court notes that granting permissive intervention to parties to defend the constitutionality of the challenged provisions of the IMDMA might be appropriate if no other parties had sought to intervene to defend the law after defendant Orr and the Illinois Attorney General refused to do so. In that instance, the Court would consider whether the lack of representation of the view defending the IMDMA might warrant permissive intervention. However, the Tazewell and Effingham County Clerks, who have been granted the right to intervene in this case, are defending the constitutionality of the challenged IMDMA provisions.

For the foregoing reasons, the Churches have presented no reason which would persuade this Court to exercise its discretion to permit them to intervene as a party defendant, and their motion is denied.

The Court will allow the Churches to file a brief *amicus curie* in support of the Tazewell and Effingham County Clerks.

III.
IFI – Permissive Intervention

IFI argues that it should be permitted to intervene under 735 ILCS § 5/2-408(b)(2) because its "defenses" to plaintiffs' claims present questions of law in common with the issues in this action. IFI is a public interest group that takes the position that the opposite-sex definition of marriage under the IMDMA is valid under the Illinois Constitution.

IFI argues that its interest is "greater than the general public" because it was the primary supporter of the challenged IMDMA provisions. IFI states that it supported passage of the law in 1996 by working with the law's sponsors, hiring a lobbyist, and communicating with constituents to garner support. IFI asserts it spent extensive time and resources to see those provisions codified. IFI further asserts that it represents a significant constituency of thousands of Illinois citizens who want to preserve traditional marriage. IFI argues that no undue delay or prejudice would result from its intervention because the case is still in its early stages.

Plaintiffs do not dispute that IFI's motion is timely. Plaintiffs argue that a "mere desire" to see a law constitutionally upheld does not create an interest greater than that of the general public. Plaintiffs argue that the interest in this case is what the State can rely upon to justify the prohibition of same-sex marriage, not the views and interests of IFI and its members. Further, plaintiffs argue that the views of IFI are more than capably represented by the Tazewell and Effingham County Clerks who are defendants in this case, and that allowing IFI to intervene would lead to unnecessary and duplicative efforts that would cause undue delay.

This Court finds that IFI has not established an interest in the case that would warrant permissive intervention. While IFI undoubtedly has an interest in the subject matter and expended considerable resources in getting the challenged law passed, it has no interest greater than the general public, nor has it shown that it would gain or lose by the direct legal operation and effect of a judgment in this suit. IFI's interest in the law as an advocacy group does not rise above that of other members of the public who believe the law should be upheld.

Further, as discussed above, adding unnecessary parties to the case would be burdensome and cause undue delay, and the interests of IFI in upholding the law are more than adequately represented by the Tazewell and Effingham County Clerks.

The Court will allow IFI to file a brief *amicus curie* in support of the Tazewell and Effingham County Clerks.

CONCLUSION

This Court denies the Churches' motion to intervene and IFI's motion to intervene. The Court grants the Churches' and IFI leave to file briefs *amicus curie* in support of the Tazewell and Effingham County Clerks.

Entered: _____
Judge Sophia H. Hall

Date: _____
NOV 30 2012

CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK