IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ROSE GRIEGO ET AL.
PLAINTIFFS-REAL PARTIES IN INTEREST,

v. No. 34, 306

MAGGIE TOULOUSE OLIVER ET AL.
DEFENDANTS-REAL PARTIES IN INTEREST

AND

STATE OF NEW MEXICO, EX REL.,
NEW MEXICO ASSOCIATION OF COUNTIES
INTERVENORS-PETITIONERS,

SUPREME COURT OF NEW MEXICO
FILED

SEP 23 2013

AND

HON. ALAN MALOTT,
RESPONDENT.

CITY OF SANTA FE'S AMICUS BRIEF

Filed Conditionally Pending Court's Ruling on City's Motion for Leave to File

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SUMMARY OF PROCEEDINGS

The New Mexico Association of Counties/County Clerks ("Petitioners") has accurately stated the summary of the proceedings.

ARGUMENT

New Mexico law does not define marriage as between a man and a woman. The definition of marriage in New Mexico is gender-neutral. This means that county clerks have full authority to issue opposite-gender or same-gender marriage licenses. Some county clerks, however, as stated in Petitioners' Writ of Superintending Control, are not issuing same-gender marriage licenses and are instead relying on the legal myth that they cannot act until the state legislature amends the marriage application form.

Assuming arguendo the Court does not rule that New Mexico statutes, on their face, permit same-gender marriage, the City agrees with Judge Alan Malott's *Final Declaratory Judgment* and its analysis that the state constitution permits same-gender marriage. The City's Governing Body has stated that a prohibition of same-gender marriage would "violate the New Mexico Constitution, which requires equality under law regardless of sex." City of Santa Fe, N.M., Resolution No. 2013-44 (Apr. 24, 2013).

I. The Court Should Exercise the Power of Superintending Control

The City concurs with the Petitioners that this Court has jurisdiction over this matter. The Court may exercise its power of superintending control when "it is deemed to be in the public interest to settle the question involved at the earliest moment." State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, ¶ 8, 118 N.M. 619, 904 P.2d 1044. Questions "of great public interest and importance" may require this Court to use its power of superintending control." Id. (citing to State Racing Comm'n v. McManus, 82 N.M. 108, 110, 476 P.2d 767, 769 (1970)).

A. Marriage Equality is of Great Public Interest to the City as an Employer.

The City has approximately one thousand two hundred and forty permanent employees who have approximately three thousand dependents. According to the UCLA Law School's Williams Institute, Santa Fe County (which contains the City) ranks number seven in all counties in America in same-gender couples on a per capita basis with 18.44 per 1,000 households. See Gary Gates and Abigail Cooke, "U.S. Census Snapshot 2010", UCLA School of Law Williams Institute, pp.1-7 (2011). This ranking is in between major counties such as Washington D.C. (which is considered a county in the study) and DeKalb County (which contains parts or all of Atlanta) in the study. See id. According to Petitioners' Writ of Superintendent Control, two hundred seventy-five (275) marriage licenses have been already issued to same-gender couples in Santa Fe County. See Petitioners' Writ of Superintending Control, p. 17, ¶ 38. The City, as an employer, will need to

be able to answer questions for these couples regarding benefits, payroll (i.e. IRS Rule 2013-17 stating same-gender married couples may be subject to different tax paycheck withholdings) and insurance issues. The City, already, is aware of at least two city employees who have obtained marriage licenses.

B. Marriage Equality is a Matter of Great Public Interest to New Mexicans.

According to Petitioners' Writ of Superintending Control, nine hundred and fifteen (915) marriage licenses have been already issued to same-gender couples in New Mexico. See id. According to the UCLA Law School's Williams Institute, New Mexico ranks number six in all states in America in same-gender couples on a per capita basis. See Gary Gates and Abigail Cooke, "U.S. Census Snapshot 2010", UCLA School of Law Williams Institute at p.5. Many of these couples may have children, adopted children or have children from former relationships. The couples may also have brothers, sisters, aunts, uncles, mothers and fathers that love them. The couples may interact with doctors, accountants, health care givers, and government agencies throughout New Mexico and everyone needs to know how to proceed in life and financial planning.

C. Marriage Equality is a Matter of Great Public Interest to Couples who were Married in Another Jurisdiction, but Now Live in New Mexico.

It is our understanding that same-gender marriages from other states are already recognized in New Mexico. See NMSA 1978, § 40-1-4 (1862-1863) ("[a]ll marriages celebrated beyond the limits of the state...shall be likewise valid

in this state....”); see also N.M. Att'y Gen. Op. No. 11-01 (2011). These married couples have a right to know if this recognition will be honored. Other couples who will be moving to New Mexico need to know if their requests for recognition will be honored.

II. Same-Gender Marriage is Statutorily Permitted Under New Mexico Marriage Laws

A. Chapter 40, Article 1 of New Mexico Statutes Annotated contains gender-neutral language.

Many states offer same-gender marriage licenses because they have express constitutional or statutory language authorizing the issuance of these licenses. Another group of states do not offer such licenses because they have express constitutional or statutory language that defines marriage as between a man and a woman. See e.g., J.L.M. v. S.A.K., 18 So. 3d 384, 389 (Ala. Civ. App. 2008) (recognizing that Alabama prohibits same-gender marriage because it defines marriage as a “unique relationship between a man and a woman.”). Cf. Commonwealth of Pennsylvania v. Hanes (No. 379 M.D.) (Sept. 12, 2013) (county clerk could not issue same-gender marriage licenses without the Pennsylvania legislature deleting its express statutory prohibition on these marriages). It is our understanding that New Mexico is one of the few states that does not have an express authorization or an express prohibition.

Chapter 40, Article 1 covers approximately twenty sections governing the marriage licensure process. See NMSA 1978, §§ 40-1-1 to -20 (1862-63, amended through 2013). New Mexico's statutory definition of marriage is gender-neutral and does not define marriage as between a man and a woman. See NMSA 1978, § 40-1-1 (1862-63).

Some elected officials have argued that New Mexico's territorial leaders could not have contemplated a world of same-gender marriages and thus these licenses should not be allowed. See Petitioners' Writ of Superintending Control, Exhibit 3, p.2 ("Given this historical context, the likelihood that the Territorial Legislature contemplated, much less authorized, same-sex unions is highly unlikely."). We think this logic should be flipped. New Mexico's territorial leaders wrote a definition of marriage that does not refer to the gender of the parties. It emphasizes the consent of the parties and their ability to enter into a contract. "Marriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." NMSA 1978, § 40-1-1 (1862-63). "Unless ambiguity exists, this Court must adhere to the plain meaning of the language." State v. Maestas, 2007-NMSC-001, ¶14, 140 N.M. 836, 149 P.3d 933. Therefore, the one hundred and fifty year old definition of marriage in New Mexico is gender-neutral and it does not include the

restrictive prohibition of "one man and one woman."[1] Recent legislatures could have changed this definition and made the definition as between a man and a woman, but the legislative branch has spoken by not passing such bills.

Chapter 40, Article 1 continues to use similar gender-neutral terms, such as "parties" and "couple", throughout the chapter. For example, one section reads: "If the parties should live together until they arrive at the age under which marriage is permitted…." Id. § 40-1-9 (1876, amended through 2013) (emphasis added). The gender-neutral language format continues today. The 2013 legislature used the term "couple"—as opposed to husband and wife—when it recently amended language in this chapter. See id. § 40-1-10 (1905, amended through 2013) (emphasis added) ("Each couple desiring to marry pursuant to the law of New Mexico….").

B. Although New Mexico Statutes Explicitly Prohibit Certain Marriages, Same-Gender Marriage is not One of Them.

Chapter 40, Article 1 has a section titled: "Prohibition marriages." See NMSA 1978, § 40-1-9 (1876, amended through 2013). It lists a "marriage between relatives within the prohibited degrees…." Id. It lists a marriage "between or with persons under the prohibited ages…." Id. The Court of Appeals has acknowledged the exclusiveness of these two items. See Rivera v. Rivera,

[1] Petitioner acknowledges: "None of the fourteen (14) substantive sections first passed by the Territorial Legislature between 1860 and 1909 contained any gender-specific references…." Petitioners' Writ of Superintending Control, p. 8, ¶ 5.

2010-NMCA-106, ¶18, 149 N.M. 66, 243 P.3d 1148 ("This was not an attempt to circumvent the laws of this state by engaging in a marriage that would otherwise be contrary to New Mexico's statutory scheme that prohibits incestuous marriages and marriages between or with minors without parental consent."). The 2013 legislature could have added more prohibitions, but did not, when it recently amended language in this chapter.

C. It is a Legal Myth that the County Clerks Cannot Issue Same-Gender Licenses Unless the State Legislature Amends Marriage Application Form.

A marriage application form, like the one found in Section 40-1-18, can be changed, has been changed in other states and has even been changed (or partially ignored) in New Mexico. Yet, some elected officials point out that the 1961 legislature wrote Section 40-1-18, which inserts the term "male" and "female" applicant in the form. See NMSA 1978, § 40-1-18 (1961). Some clerks apparently believe this form is immutable absent legislative change. Some legal officials have supported and fed into this myth. See N.M. Att'y Gen. Advisory Letter (Feb. 20, 2004) ("The New Mexico legislature has adopted a marriage application form that requires a male applicant and a female applicant.").

This position omits a crucial word in Chapter 40, Article 1. It reads: "the form of application, license and certificate shall be substantially as provided in Section 40-1-18 NMSA 1978...." NMSA 1978, § 40-1-17 (1905, amended

through 2013) (emphasis added). Substantially does not mean identical. Substantially does not mean immutable. In fact, the term "substantially" is still in the law, even though the 2013 legislature could have changed it, but did not, when it recently amended language in this chapter.

1. The County Clerks in Maryland have Changed their Equivalent Form without Legislative Approval.

Maryland has a marriage form, which is also placed into statute, which has a lot of similar language. See Md. Code Ann. Family Law § 2-403 (2003). It has a provision that the form "shall read substantially as follows...." Id. § (a)(1) (emphasis added). The form has a space for "intended husband" and "intended wife." Id. This form is still on the books in Maryland.

In 2012, the legislature in Maryland amended another section of law to authorize same-gender marriages. (In November 2012, the voters affirmed this action via a public referendum vote). The legislature, however, did not simultaneously alter the marriage application form in Section 2-403.

Nevertheless, Maryland county clerks are issuing same-gender marriage licenses. They have not refused to act until the Maryland legislature amends Section 2-403. (As stated above, Section 2-403 is still on the books). In fact, on September 13, 2013, we called a county clerk (Allegany County) in Maryland who confirmed that the county clerks have--on their own--changed the marriage form to read "person 1" and "person 2."

Similarly, New Mexico county clerks should abandon the myth that they cannot act because they cannot stray an iota from Section 40-1-18 as written. The "substantially" language in Section 40-1-17 instructs them otherwise. They do not need to wait for the legislature. The wait has gone on too long.

2. The New Mexico Attorney General's Office has Previously Advised County Clerks to Ignore Portions of the Marriage Application Form—and They Have Done So.

In 1995, a district attorney asked for an Attorney General's Opinion ("Opinion") on the premarital testing requirement stated in the form and its related language in NMSA 1978, Section 40-1-11. See N.M. Att'y Gen. Op. No. 95-02 (1995). The Opinion pointed out: "Until recently, DOH [Department of Health] regulations required premarital testing for syphilis and rubella." Id. The Opinion continued: "[B]ased on studies questioning the effectiveness of such screening and after holding public hearings on the issue, DOH repealed the regulation....As a result, DOH now has no requirements for premarital medical tests or screening." Id. "This [DOH action] has raised concerns among county clerks about their statutory responsibility" in fulfilling the form in Section 40-1-18. Id. The New Mexico legislature, however, did not respond to DOH's actions and did not amend Section 40-1-11 or 40-1-18.

The Opinion advised the county clerks to ignore this part of the form. The Opinion noted the statutes, if "taken literally", could be viewed as a pre-

requirement to issuing a marriage license and (without a test) no one would be eligible to fill out the form. See id. This was not appropriate, however, because an "interpretation of statute must not render its application absurd, unreasonable or unjust." Id. It is our understanding that county clerks, based on this advice, have been ignoring the above-cited parts of Section 40-1-18 for nearly twenty years.[2]

D. This Court has Previously Ruled that One Gender Reference does not Exclude the Opposite Gender from Enjoying the Same Right.

In 2012, the Court was faced with a case where a woman wanted to fall within the term "man" in a statute. See Chatterjee v. King, 2012-NMSC-019, ___ N.M. ___, 280 P.3d 283. In other words, she wanted the term "man" to read to be gender-neutral. In that case, two women were a long-term couple and adopted a child from Russia. Ms. King was the only party listed on the official papers out of concern that Ms. Chatterjee's ethnic sounding surname may cause complications with Russian officials. The couple raised the child together "for a number of years before their commitment to each other foundered and they dissolved their relationship." Id. at ¶ 1. "After they ended their relationship, King moved to

[2] The 2013 legislature finally repealed Section 40-1-11 and added language to Section 40-1-17 that "provided that the medical evaluation language shall not be printed on the application until such time as the secretary of health deems such evaluation necessary through the issuance of rules." 2013 N.M. Session Laws, ch. 144, §12. The legislature, however, did not delete the language from the form in Section 40-1-18. Therefore, if a male legislator and female legislator wished to get married tomorrow, they would be given a form that does not identically match what is printed in Section 40-1-18.

Colorado and sought to prevent Chatterjee from having any contact" with the child. Id.

Chatterjee filed court documents to assert her legal rights under the New Mexico Uniform Parentage Act to have visitation and custody. In order to assert these rights as a woman she had to establish "by proof of her having given birth to the child" or as "an adoptive parent." NMSA 1978, § 40-11-4 (1986, replaced by New Mexico Uniform Parentage Act (2009)). A man could assert these rights if he "openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child...." Id. § 40-11-5(A)(4) (1986, replaced by New Mexico Uniform Parentage Act (2009)). She asked the district court to qualify her under this latter provision.

The State District Court dismissed her claim. The Court of Appeals agreed with the District Court that the law used masculine and feminine terms and the ordinary reading of the terms excluded her from falling under the masculine term in the law. See Chatterjee v. King, 2011-NMCA-012, ¶ 27, 149 N.M. 625, 253 P.3d 915. The Court of Appeals appeared to be concerned that her argument would render parts of the statutory framework meaningless.

This Court reversed the lower court. The Court's decision was based on a combination of policy concerns and statutory provisions regarding the concept of "practicability." The ruling was significant because the Court wrote that the

crucial statute was "based on a person's conduct, not a biological connection, a woman is capable [like a man] of holding out a child as her natural child...." Chatterjee v. King, 2012-NMSC-019, ¶ 15, ___ N.M. ___, 280 P.3d 283. The Court continued: "In this case, the Court of Appeals' reading would yield different results for a man than for a woman in precisely the same situation." Id. at ¶ 18. "As such, Chatterjee should not be disqualified ...simply because she is a woman." Id. at ¶ 36. The Court concluded that: "We avoid this ... treatment...with a plain and simple application ... to both men and women...." Id. at ¶18.

In conclusion, Chatterjee was allowed to qualify under the statute even though the statute used the masculine term "man" in the text. Therefore, the use of the terms "male applicant" and "female applicant" are not sufficient bases for overriding the gender-neutral definition in the form and for denying two applicants of the same gender the right to marry. The Court's logic should apply throughout the statutes whenever it reads "husband" or "wife" or "man" or "female" on property issues and divorce issues. A person's *conduct* in a contractual relationship has always been more important than a person's *biology*.

III. The New Mexico Constitution Guarantees Equal Rights

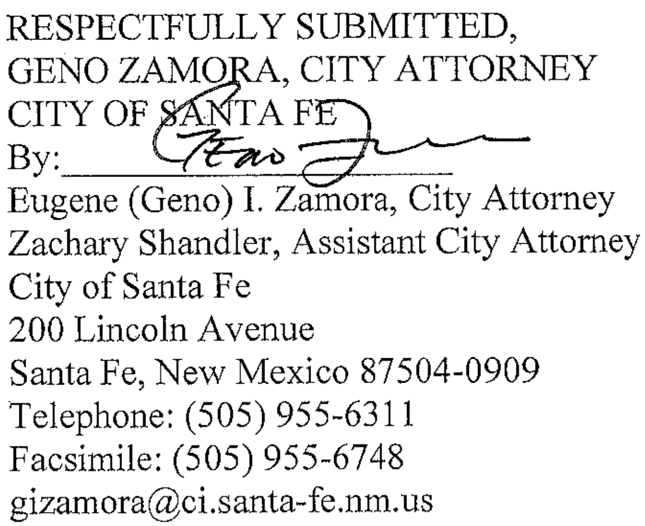
Assuming arguendo the Court does not rule that New Mexico statutes permit same-gender marriage, then the Court should rely on analysis in Judge Alan Malott's *Final Declaratory Judgment* regarding the New Mexico Constitution and

the guarantee to equal rights. New Mexico has important protections under its human rights provisions. American jurisprudence has developed since the days prior to Loving v. Virginia when the government would insist it had an interest in picking who a person could or could not marry. See Loving v. Virginia, 386 U.S. 1 (1967). The government, with the assistance of the judicial branch, appears to be very rapidly getting out of this business. See Hollingsworth v. Perry, 570 U.S. ___ (2013) (ruling on constitutional issues involving California proposition 8); United States v. Windsor, 570 U.S. ___ (2013) (ruling on constitutional issues involving DOMA) (when a state has "a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code."). Those county clerks who continue to want to decide who gets married should get out of this business, too.

IV. Conclusion

New Mexico law does not define marriage as between a man and a woman and does not prohibit same-gender marriage—the definition of marriage in New Mexico is gender-neutral. Accordingly, the City of Santa Fe respectfully requests that this Court conclude that same-gender marriage is legal in New Mexico. If this Court schedules an oral argument session, the City would request an allotment of

time to make oral argument regarding the above-cited arguments in order to assist in the resolution of these constitutional and statutory issues.



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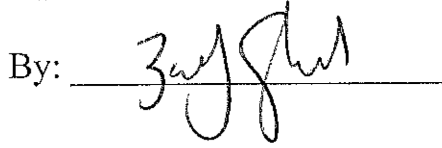
I hereby certified that a true and correct copy of the foregoing pleading was served by email on the parties on this 23 day of September 2013.



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