

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALEXANDER HANNA and YON HUDSON,

Petitioners,

v.

No. 34, 216

**GERALDINE SALAZAR, in her official
Capacity as Santa Fe County Clerk**

SUPREME COURT OF NEW MEXICO
FILED

Respondent.

JUL 22 2013



**CITY OF SANTA FE'S AMICUS BRIEF IN SUPPORT OF PETITIONERS'
REQUEST FOR WRIT OF MANDAMUS**

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

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SUMMARY OF PROCEEDINGS

Petitioners have accurately stated the summary of the proceedings.

ARGUMENT

New Mexico law does not define marriage as between a man and a woman and does not prohibit same-sex marriage. The definition of marriage in New Mexico is gender-neutral. The City of Santa Fe's Governing Body has stated: "same sex-marriage is legal in our State and that our State Citizens have the right to marry the partner of their choice" and prohibition of such 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 has Authority to Hear this Petition for Writ of Mandamus

The Court has "exercised its original jurisdiction in mandamus" when a "petitioner presents a purely legal issue concerning a non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55. "The Court may invoke original jurisdiction even when a matter might have been brought first in

the district court.” State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 15, 125 N.M. 343, 961 P.2d 768. The Court may factor in whether the legal issue “would have come eventually to this Court even if proceedings had been initiated in the district court.” State ex rel. Clark v. Johnson, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995). The Court will hear requests for Writ of Mandamus against counties. See El Dorado at Santa Fe, Inc., v. Board of County Commissioners of Santa Fe County Comm’n, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976) (“A county is but a political subdivision of the State....”). The Court may also choose mandamus over a declaratory judgment, even when declaratory judgment is “theoretically an option.” State ex rel. King v. Lyons, 2011-NMSC-004, ¶ 26, 149 N.M. 330, 248 P.3d 878.

A. Marriage Equality is a Matter of Great Public Importance.

In addition to Petitioners’ excellent analysis on how their petition satisfied the above-stated elements, the City adds that marriage equality is a matter of great public importance and immediately affects the rights of citizens in the City and County of Santa Fe, as well as citizens throughout the State of New Mexico. See Petitioners’ Verified Petition for Writ of Mandamus, pp. 4-6. According to the UCLA Law School’s Williams Institute, Santa Fe County ranks number seven in all counties in America in same-sex (hereinafter “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.

B. Petitioners’ Claims Directly Affect other New Mexico Citizens.

According to the Williams Institute, New Mexico ranks number six in all states in America in same-gender couples on a per capita basis. See id. at p.5. Many of these couples may have adopted children or have children from former opposite-gender 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 that may be unclear on what information they can say to whom. This Court has previously ruled: “[S]ince the conclusion of this case affects numerous citizens and the efficient administration of [government programs] ...an immediate hearing of these issues benefits all concerned parties. Therefore, it is both necessary and proper for this Court to exercise original jurisdiction in this case.” State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768. “This Court has never ‘insisted upon...a technical approach [to the application of mandamus] where there is involved a question of great public import’ and where other remedies might be

inadequate to address that question.” State ex rel. Clark v. Johnson, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995) (citations omitted).

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

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

Thirteen states and the District of Columbia have legalized same-gender marriage). 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). Another group of states, however, do not offer licenses to same-gender couples because these states have constitutionally or statutorily defined 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.”).

Chapter 40, Article 1 covers approximately twenty sections governing the marriage licensure process. See NMSA 1978, S§§ 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). Gender-neutral language “means language that does not

expressly or implicitly refer to one gender to the real or apparent exclusion of the other and expressly or implicitly refers to both genders without distinguishing between them.” 2013 N.M. Session Laws, ch. 141, § (1)(A).

New Mexico’s definition of marriage does not refer to the gender of the parties. Rather, 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). Thus, the definition of marriage in New Mexico is gender-neutral and does not include the restrictive definition of “one man and one woman.”

Chapter 40, Article 1 uses 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). “Each couple desiring to marry pursuant to the law of New Mexico....” Id. § 40-1-10 (1905, amended through 2013) (emphasis added).

One could argue Chapter 40, Article 1, however, has never been fully gender-neutral. Section 40-1-5 used the masculine term “he” and Section 40-1-6 used the masculine term “his” in the text. See id. § 40-1-5 (1862-63, repealed in 2013); § 40-1-6 (1876, amended through 2013). Section 40-1-18 uses the term

“male” and “female” applicant. See id. § 40-1-18 (1961). However, the Uniform Statutory Construction Act states that “use of a word of one gender includes corresponding words of the other genders.” NMSA 1978, § 12-2A-5(B) (1997). We were unable to locate any New Mexico judicial decision holding that only men (and not women) could rely on Sections 40-1-5, -6. Nevertheless, without a decision from this Court, there is still legal dispute on the interpretation of Section 40-1-18. 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.”).

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, 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.”). There is no statutory prohibition of same-gender marriage. Even assuming *arguendo* that the

New Mexico legislature would try to add same-gender marriages to this list, this action would likely be prohibited by the New Mexico Constitution. See Petitioners' Brief, pp. 11-27; see also Section III (below).

C. 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 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.

D. The Attorney General’s Office has Previously Advised County Clerks to Ignore Portions of the Marriage Application Form When the Result was Unreasonable.

Petitioners’ brief noted that the marriage application form contains the words: “Date of Premarital Physical Examination: Bride _____ Groom _____.” See Petitioners’ Verified Petition for Writ of Mandamus, pp. 9-10 (citing to NMSA 1978, § 40-1-18). However, when Petitioners went to fill out their marriage application in Santa Fe County in June 2013, these words and this apparent requirement, was likely ignored. In fact, the Attorney General’s Office is on record stating that this part of Section 40-1-18 should be ignored.

In 1995, a district attorney asked for an Attorney General’s Opinion (“Opinion”) on this requirement 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.¹ Similarly, it would be unjust to deny two persons of the same gender the right to

¹ 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 Section 40-1-18. Interestingly, the application form that is given to couples after June 14, 2013 will not match what is printed in Section 40-1-18.

marry simply because the form only accommodates applicants of the opposite gender.

III. The New Mexico Constitution Guarantees Equal Rights

Assuming arguendo the Court does not rule that New Mexico statutes permit same-gender marriage on their face, then the Court should rely on analysis submitted by Petitioners regarding the New Mexico Constitution and the guarantee to equal rights.

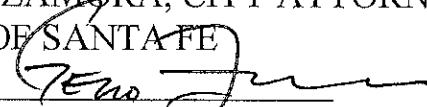
American jurisprudence has developed since the days prior to Loving v. Virginia when the government would insist it had an interest in picking who a person could or could not marry. See Loving v. Virginia, 386 U.S. 1 (1967). The government, with the assistance of the judicial branch, appears to be very 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.”).

We conclude that, under any level of review, there is not a government interest/basis/rationale that can justify the status quo in New Mexico. See also

Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008); In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodrich v. Department of Public Health, 798 N.E. 2d 941 (Mass. 2003). Similarly, there is not an interest/basis/rationale for reading or writing inequality into New Mexico’s laws.

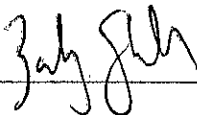
IV. Conclusion

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. The Court has acknowledged: “[t]he law needs ... in light of current realities to keep up with the changing demographic of American families....” Chatterjee v. King, 2012-NMSC-019, ¶ 34, ___ N.M. ___, 280 P.3d 283. Accordingly, the City of Santa Fe respectfully requests that this Court conclude that same-gender marriage is legal in New Mexico and grant Petitioners’ Writ of Mandamus. 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.

RESPECTFULLY SUBMITTED,
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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 22nd day of July 2013.

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