City of Santa Fe, New Mexico

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CITY ATTORNEY'S OFFICE OPINION
FOR PUBLIC DISTRIBUTION & INCLUSION IN CITY COUNCIL PACKETS

To: Members of the Governing Body

From: Geno Zamora, City Attorney
Jamison Barkley, Assistant City Attorney

Re: Same-Sex Marriage in New Mexico

Date: March 19, 2013

Overview

New Mexico's statutory definition of marriage is gender-neutral. Since New Mexico does not define marriage as between a man and a woman, New Mexico does not prohibit same-sex marriage, New Mexico already recognizes same-sex marriages from other states, and the New Mexico Constitution requires equal treatment on the basis of sex, same-sex marriage is permitted in New Mexico.

Background

As of the date of this memorandum, nine states and the District of Columbia offer marriage licenses to same-sex couples: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Another group of states constitutionally or statutorily defines marriage as between a man and a woman. See J.L.M. v. S.A.K., 18 So.3d.384, 389 (Ala. Civ. App. 2008) (recognizing that Alabama prohibits same-sex marriage because it defines marriage as a "unique relationship between a man and a woman"). 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).

New Mexico Already Recognizes Same-Sex Marriages from Other States

New Mexico already recognizes marriages performed in other states, without regard to the sex of the parties:

> All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.

Section 40-1-4; see also In re Bivians' Estate, 98 N.M. 722, 726, 652 P.2d 744, 748 (Ct. App. 1982) ("New Mexico applies the rule of comity, that the law of the place of contract governs the validity of a marriage."); N.M. AG Op.No. 11-01 (2011) (concluding that a valid same-sex marriage performed in another state is valid in New Mexico). Hence, same-sex marriages performed in any of the jurisdictions where they are valid are recognized in New Mexico to the same degree as any New Mexico marriage.

New Mexico Does Not Define Marriage as Between a Man and a Woman

New Mexico's definition of marriage does not refer to the gender of the parties. Rather, it emphasizes the consent of the parties: "[m]arriage 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 "one man and one woman." Id.

A Marriage License May Not be Denied Based on the Sex of the Couple

County Clerks are mandated under New Mexico law to issue marriage licenses. The only bases on which marriage licenses can be denied are when the potential spouses are relatives to a close degree and when one of them is a minor. See § 40-1-9. Same-sex marriage is not among the categories of prohibited marriages in New Mexico.

The New Mexico Constitution Guarantees Equal Rights on the Basis of Sex

Although the statutory marriage application form is described in terms of male and female applicants, the form is trumped by the specific language of the marriage statute, which does not require that the applicants be of the opposite sex. Moreover, the New Mexico Constitution requires equality of rights under the law. The Equal Rights Amendment states:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

N.M. Const. art. II, § 18. Because the New Mexico Constitution trumps state statute, the requirements of the Equal Rights Amendment are controlling.

Substantial Compliance and Waiver of Form Are Permitted

A county clerk could substantially comply with the statutory form provided even if the marrying parties are same-sex couples. See NMSA 1978, § 40-1-17 to -18 ("The form of application, license and certificate provided herein shall be substantially as follows . . . ."). Further, Section 40-1-12 allows sections of the marriage code to be waived. Therefore, in addition to the form not conforming with the more specific marriage statute, and being trumped by the Equal Rights Amendment, same-sex applicants and County Clerks may substantially comply with the form or request a waiver of the form.

Same-Sex Couples May Petition for a Writ of Mandamus if Denied a Marriage License

If its application for a marriage license is denied, a couple should petition the district court for a writ of mandamus directing the County Clerk to issue the license because the gender of the applicants is not a statutory ground for denial. N.M. Const. art. VI, § 3; § 44-2-4 (1884).

Conclusion

New Mexico law does not define marriage as between a man and a woman. Nor does New Mexico law prohibit same-sex marriage. New Mexico already recognizes same-sex marriages performed in other states and our Constitution requires equal treatment on the basis of sex. Same-sex marriage is legal in New Mexico.