OPINION

OF Opinion No. 00-05

PATRICIA A. MADRID

Attorney General

BY: Elizabeth A. Glenn

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TO: The Honorable Timothy Z. Jennings

State Senator

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QUESTION:[1]

Is an amendment to the Indigent Hospital and County Health Care Act (NMSA 1978, ch. 27, art. 5) ("IHCHC Act") enacted by 1999 N.M. Laws, ch. 37 ("Chapter 37") valid and in effect?

CONCLUSION:

Yes. Although the amendment was not codified in the New Mexico Statutes Annotated ("NMSA") pursuant to the statutory rules governing the compilation of laws, the amendment is valid and in effect.

FACTS:

Chapter 37, among other things, amended Section 27-5-4 of the IHCHC Act. See 1999 N.M. Laws, ch. 37, § 1. Section 27-5-4 was also amended by another law enacted in 1999, specifically, 1999 N.M. Laws, ch. 270 ("Chapter 270"), § 4. The Governor signed Chapter 37 on March 15, 1999. Chapter 270 was signed on April 8, 1999. Aside from the amendments to Section 27-5-4, the two laws enact and amend different statutory provisions.

Pursuant to the statutory rules governing the compilation of statutes, only the amendments to Section 27-5-4 made by Chapter 270 were codified. This left the validity of the amendments made by Chapter 37 open to question.

ANALYSIS:

To address questions arising when two acts amending the same section of a statute are passed during the same legislative session, the legislature has enacted a law that provides, in pertinent part:

In carrying out the duties provided by law and contract, absent an expressed contrary legislative intent, the secretary of the New Mexico compilation commission … shall be governed by the following rules:

A. if two or more acts are enacted during the same session of the legislature amending the same section of the NMSA [New Mexico Statutes Annotated], regardless of the effective date of the acts, the act last signed by the governor shall be presumed to be the law and shall be compiled in the NMSA. The history following the amended section shall set forth the section, chapter and year of all acts amending the same section. A compiler's note shall be included in the annotations setting forth the nature of the difference between the acts or sections….

NMSA 1978, § 12-1-8 (1977).

Under this rule, the determination of which of two or more acts amending the same statutory provision is the law for purposes of codification generally depends solely on which act the Governor signed last. The rule will apply unless (1) the legislature has expressly stated its intent to the contrary or (2) there are other valid reasons, beyond the fact that the acts amend the same section of the NMSA, that convincingly rebut the presumption set forth in Section 12-1-8(A) that only the act last signed by the Governor is the law.

There are obvious benefits to adhering to a bright line rule like Section 12-1-8(A). When Section 12-1-8 is not followed, it creates uncertainty and confusion regarding the applicable law. This is demonstrated by the Supreme Court's decision in Quintana v. New Mexico Dep't of Corrections, 100 N.M. 224, 668 P.2d 1101 (1983), which involved the proper application of two laws enacted in 1977 that governed eligibility for parole. One law, Chapter 216, repealed a 1955 law that governed parole eligibility, enacted a plan that eliminated parole eligibility for all but capital felonies, and mandated a minimum prison term for such felonies of thirty years before parole eligibility. The other law, Chapter 217, amended the 1955 law, but retained that law's parole eligibility requirements, which made a person serving a life sentence eligible for parole after ten years. In 1980, a law was passed that repealed the 1955 law as amended by both Chapter 216 and Chapter 217 and that essentially reiterated the provisions of Chapter 216. The 1980 law contained an emergency clause that made it effective on February 22, 1980. 100 N.M. at 226.

Although not discussed in the Quintana decision, Chapter 217, as the enactment last approved by the governor, was evidently compiled in the New Mexico Statutes Annotated pursuant to Section 12-1-8. See Devine v. New Mexico Dep't of Corrections, 866 F.2d 339, 340-41 (10th Cir. 1989). The compiler's notes to Chapter 217, as codified, generally described Chapter 216's provisions and explained the reasons behind the codification of Chapter 217. Id. Nevertheless, the New Mexico Supreme Court ruled that it was not bound by Section 12-1-8 in determining whether Chapter 216 or Chapter 217 applied to the case before it. According to the Court, Section 12-1-8 was "not dispositive in the present case…. Section 12-1-8 applies to rules of construction governing the compilation of statutes." 100 N.M. at 226.

The Court then proceeded to decide that Chapter 217 could not apply because Chapter 216 repealed the 1955 law that Chapter 217 purported to amend: "it is not logical for the Legislature to repeal the law and then amend it." Id. As a result, the Court concluded that a defendant serving a life sentence for a crime committed after July 1, 1979 would be entitled to a parole hearing after serving at least thirty years pursuant to Chapter 216 rather than ten years pursuant to Chapter 217. Id. at 227. The Court also concluded that Chapter 217 would apply to parole eligibility for crimes committed before July 1, 1979.

The ruling in Quintana was overturned by the United States Court of Appeals for the Tenth Circuit in Devine v. New Mexico Dep't of Corrections, 866 F.2d 339 (10th Cir. 1989). Specifically, the Court of Appeals held that "the New Mexico Supreme Court violated the due process clause of the Fourteenth Amendment because the manner in which it applied New Mexico parole statutes to Devine was unforeseeable and the decision retroactively enhanced Devine's punishment." Id. at 339.[2] In concluding that the result reached in Quintana was unforeseeable, the United States Court of Appeals focused on the absence of any notice to the defendant in the statutes:

The official compilation of the statutes of New Mexico stated that the mandatory prison term on a life sentence was ten years. The only indication to the contrary was an oblique reference in the compiler's notes that an inconsistent provision had been passed by the 1977 legislature. That provision was not codified, nor were its specific terms available to a reader of the New Mexico Statutes Annotated.

Even an in-depth inquiry by a dedicated and educated student of New Mexico law would have revealed nothing to foreshadow the New Mexico Supreme Court decision. An examination of the two acts passed by the 1977 legislature, and the statute governing their respective stature in the official compilation of the laws of New Mexico, would have shown that because chapter 217, § 3 was signed into law by the governor after chapter 216, § 12, "it [is] presumed to be the law." N.M. Stat. Ann. § 12-1-8 (1978).

Id. at 345 (emphasis added). The Court of Appeals also pointed to the 1980 law, which indicated that the legislature considered Chapter 217 "to have sufficient force of law to warrant repealing by passage of another legislative act." Id. at 345-46. Thus, according to the Court of Appeals, Chapter 217, not Chapter 216, applied.

The United States Court of Appeals did not generally prohibit a New Mexico court from applying the rules of statutory construction to laws otherwise subject to Section 12-1-8, as long as it does not "make its interpretations retroactive when they are unforeseeable." 866 F.2d at 346. However, the Devine case underlines the purpose and effect of Section 12-1-8 in notifying the general public of what the legislature considers to be the applicable law. Devine also cautions against interpreting laws contrary to Section 12-1-8 particularly where, as here, they have already been compiled in the New Mexico Statutes Annotated.

In this case, neither Chapter 37 nor Chapter 270 contains any express legislative intent regarding which act's amendments to Section 27-5-4 of the IHCHC Act should be the law or whether Section 12-1-8(A) should apply. We also have not been informed of any other facts beyond the face of the acts that refute the presumption established in Section 12-1-8(A). Therefore, because Governor Johnson signed Chapter 270 almost a month after he signed Chapter 37, the amendments made by Chapter 270 are presumed to be the law for purposes of compilation in the NMSA.

Although they have not been compiled, the amendments to Section 27-5-4 of the IHCHC Act made by Chapter 37 are not necessarily invalid. Both Chapter 270 and Chapter 37 were passed by a majority vote of both houses of the legislature, enrolled and engrossed, and approved by the Governor. This is all the state constitution requires to enact an otherwise valid law. See N.M. Const. art. IV, §§ 17, 20, 22. Accordingly, further analysis of the legality of the provisions of Chapter 37 at issue requires review under general rules of statutory interpretation.

As indicated above, the amendments to Section 27-5-4 effectuated by Chapter 37 were not expressly repealed by Chapter 270. Repeal by implication also is not favored. See, e.g., Hall v. Regents of Univ. of N.M., 106 N.M. 167, 168, 740 P.2d 1151 (1987). As a result, unless two laws covering the same subject matter are incompatible, the rules of statutory construction require that they be harmonized and construed together, if possible, "in a way that facilitates their operation and the achievement of their goals." State ex rel. Quintana v. Schnedar, 115 N.M. 573, 575-76, 855 P.2d 562 (1993).

Section 27-5-4 of the IHCHC Act sets forth the definitions of significant terms used in the Act. In addition to a few minor changes in the provision, Chapter 37 made two more substantive amendments. Specifically, it expanded the definition of "health care provider" in Section 27-5-4(N) to include "services provided in a hospital or outpatient setting by a licensed medical doctor, osteopathic physician, dentist, optometrist or expanded practice nurse that are necessary for

such conditions that endanger the life of or threaten permanent disability to an indigent patient," and added a paragraph defining the term "commission" to mean "the New Mexico health policy commission." Chapter 270 made a couple of the same minor changes as Chapter 37 and made additional changes to some of the existing definitions. See annotations to NMSA 1978, Section 27-5-4 explaining the history of the 1999 amendments.

Aside from the identical changes effectuated by both Chapter 37 and Chapter 270, the amendments to Section 27-5-4 made by the two laws do not overlap, and the two laws do not appear to conflict. Therefore, under the usual rules of statutory construction, we conclude that the amendments to Section 27-5-4 made by both Chapter 270 and Chapter 37 are valid and effective.

Practically speaking, applying the amendments made by Chapter 37 may be problematic, given the holding in the Devine case. In other words, it may be difficult to enforce the amendments against a person who did not follow them if the person reasonably relied on the compilation of Chapter 270. In light of this difficulty, we believe it is important for the compiler of the NMSA to comport with both the spirit and the letter of the directives of Section 12-1-8 and set forth in as much detail as is practicable in the compiler's notes following Section 27-5-4 the precise amendments to Section 27-5-4 that were included in Chapter 37 but not compiled. We would therefore respectfully suggest that it is not adequate, in our judgment, to cite merely to subsection or paragraph numbers or letters. We understand that time, staffing and cost constraints may make this difficult, but we believe the provisions of the amendments should be set forth in sufficient detail so that readers of the NMSA can know what was enacted in Chapter 37 that is not officially compiled in Section 27-5-4, i.e., "the nature of the difference between the acts," as Section 12-1-8(A) requires.

Of course, to ensure adherence to Chapter 37's amendments and avoid confusion regarding their applicability, the best solution would be a new amendment to Section 27-5-4 that would expressly include all the amendments made by Chapter 37. By the same token, if Section 27-5-4 is amended again in the future and the noncompiled provisions of Chapter 37 from the 1999 session laws are not included and enacted in the new law, then we will conclude that those provisions will not be the law from that time forward.

As a final matter, we note that Chapter 37 has three sections that amend various provisions of the IHCHC Act. As discussed above, Section 1 was not compiled because of amendments made to the same provision of the IHCHC Act by the later-signed Chapter 270. However, the remaining two sections of Chapter 37 were not affected by Chapter 270, were compiled and are currently in effect. See NMSA 1978, §§ 27-5-5.1, 27-5-6 (1999).

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[1] This Attorney General Opinion was initially issued as an informal advisory letter dated August 30, 2000. The opinion is re-issued here as a formal Attorney General Opinion in accordance with

NMSA 1978, § 8-5-2(D) (as amended through 1975). While the procedural format has changed, the substance of the opinion remains the same.

[2] Devine was one of the defendants in the Quintana case.