Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

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OPINION
OF
GARY K. KING
Attorney General

Opinion No. 11-01

By: Elaine P. Lujan
Assistant Attorney General

To: The Honorable Al Park
New Mexico State Representative
7605 Mountain Road NE
Albuquerque, NM 87110

QUESTION:

Are same-sex marriages performed in other jurisdictions valid in New Mexico?

CONCLUSION:

While we cannot predict how a New Mexico court would rule on this issue, after review of the law in this area, it is our opinion that a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico.

FACTS:

At least five states and Washington D.C. are currently issuing marriage licenses to same-sex couples and many other states are actively considering doing the same. This increases the likelihood that New Mexico residents of the same sex who married while traveling or who move to New Mexico after marrying in a jurisdiction that allows same-sex marriages will seek to have their marriages recognized in this state.

ANALYSIS:

Federal and Other State's Laws

Pursuant to federal law, states are not compelled to recognize a same-sex marriage from another jurisdiction. The federal Defense of Marriage Act ("DOMA") provides that:

> [n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.

28 U.S.C. § 1738C.[1]

In accord with DOMA, a majority of states expressly bar recognition of out-of-state same-sex marriages. *See, e.g.,* Ga. Code Ann § 19-3-3.1(b) (1996) ("Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state."); Ind. Code § 31-11-1-1(b) (1997) ("A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."); Minn. Stat. § 517.03(1)(b) (1997) ("A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state . . ."); *see generally* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2165-94 (2005) (determining that 40 states bar recognition of same-sex marriages). The remainder of states, including New Mexico, do not explicitly address the recognition of same-sex marriages from other jurisdictions.

The Principle of Comity

The legal analysis in this area is generally guided by the principle of comity. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Sam v. Sam*, 2006-NMSC-22, ¶ 19, 139 N.M. 474, 134 P.3d 791 (internal quotation marks and citation omitted). Ordinarily, as a matter of comity, a marriage valid when and where celebrated is valid in New Mexico. *Leszinske v. Poole*, 110 N.M. 663, 667-68, 798 P.2d 1049,

[1] For purposes of federal law, DOMA also defines "marriage" to mean "only a legal union between one man and one woman," and "spouse" to refer "only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Therefore, to the extent that a particular situation is governed by federal law, DOMA's definition of marriage and spouse may affect how an out-of-state same-sex marriage is treated.

1053-54 (1990). This principle has long been codified in this state. *See* NMSA 1978, § 40-1-4 (1862-1863). Under Section 40-1-4:

> [a]ll marriages celebrated beyond the limits of the 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.

There is a general exception to the principle of comity if a marriage is contrary to a state's public policy. New Mexico applies this exception and will recognize a valid out-of-state marriage pursuant to Section 40-1-4 as long as the marriage does not offend a sufficiently strong or overriding public policy. *See Leszinske*, 110 N.M. at 668, 798 P.2d at 1054; *Gallegos v. Wilkerson*, 79 N.M. 549, 552-53, 445 P.2d 970, 973-74.

Leszinske involved a custody dispute where, in awarding primary custody to a mother, the district court took into consideration a planned marriage between the mother and her uncle. 110 N.M. at 664-65, 798 P.2d at 1050-51. The district court went so far as to condition the custody award on the mother entering into a valid marriage with her uncle. *Id* at 665, 798 P.2d at 1051. The mother subsequently married her uncle in Costa Rica and was awarded primary custody. *Id.* On appeal, the Court of Appeals determined that the district court did not err in considering the uncle-niece marriage in its custody award. *Id.* at 667, 798 P.2d at 1053. The Court recognized that such incestuous marriages are considered void pursuant to NMSA 1978, Section 40-1-7 and are also a crime pursuant to NMSA 1978, Section 30-10-3, and are thus contrary to the public policy of New Mexico. *See id.* at 667, 669, 798 P.2d at 1053, 1055. Nevertheless, the Court stated that the "the dispositive question is whether the marriage offends a *sufficiently strong public policy* to outweigh the purposes served by the rule of comity." *Id.* at 669, 798 P.2d at 1055 (emphasis added). The Court concluded that New Mexico's public policy against incestuous marriages was not sufficiently strong to preclude the district court from considering the uncle-niece marriage in its custody award. *Id.* at 669-670, 798 P.2d at 1055-56.

Common law marriages have also been upheld pursuant to Section 40-1-4 despite the fact that New Mexico does not recognize common law marriage. *See Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968) (interpreting prior version of Section 40-1-4). In *Gallegos*, our state Supreme Court upheld a common law marriage from Texas. *Gallegos*, 79 N.M. at 552, 445 P.2d at 973. The appellant argued that public policy precluded the court from recognizing a common law marriage between two New Mexico residents that was consummated in Texas. *Id.* at 552-53, 445 P.2d at 973-74. In reviewing a prior, substantively identical version of Section 40-1-4, our Supreme Court pointed out that the statute does not contain language that would exclude New Mexico residents from the benefit of having their lawful out-of-state marriage recognized. *See id.* at 553, 445 P.2d at 974. In other words, Section 40-1-4 applies to New Mexico residents

who effectively evade state law that would otherwise preclude their marriage. *See id.* The Court also said that the "fact that we do not permit common law marriages to be entered into in New Mexico," is not indicative of "such an *overriding public policy* as to require that we hold invalid this marriage, legal in Texas where contracted." *Id.* (emphasis added).

The public policy exception in the context of same-sex marriages was recently addressed by the Attorney General of Maryland. Like New Mexico, Maryland does not explicitly prohibit or permit the recognition of a same-sex marriage from another jurisdiction. *See* 95 Op. Md. Att'y Gen. 3 (2010). However, Maryland law, unlike New Mexico's, expressly prohibits same-sex marriages. *See* Md. Code Ann., Fam. Law § 2-201 (1973) ("Only a marriage between a man and a woman is valid in this State."). Despite this statute, the Maryland Attorney General determined that a Maryland court would likely recognize a same-sex marriage from another jurisdiction. 95 Op. Md. Att'y Gen. at 50 (2010).

According to the Maryland Attorney General, the statute barring same-sex marriage reflects a policy against same-sex marriages, but other considerations make it unlikely that a Maryland court would rely on the statute in employing the public policy exception. 95 Op. Md. Att'y Gen. at 50. For example, similar to New Mexico, restrictions in Maryland's marriage statutes, such as the prohibition of an uncle-niece marriage, did not prevent the Maryland Court of Appeals from recognizing an out-of-state uncle-niece marriage. *Id.* at 50, 53-54. In addition, other developments in Maryland law, including the decriminalization of homosexual sexual activity and the prohibition of discrimination based on sexual orientation, suggest that Maryland's public policy regarding same-sex relationships is shifting. *Id.* at 38-39, 50. Overall, the Attorney General pointed out that the public policy exception is very limited, seldom invoked, and would not likely be invoked when dealing with out-of-state same-sex marriages. *Id.* at 54.

As discussed above, the federal DOMA authorizes states to prohibit the recognition of out-of-state, same-sex marriages. While many states have enacted such a prohibition, New Mexico has not. Without an explicit statute, the principle of comity, codified in New Mexico in Section 40-1-4, would likely guide the analysis in this area. In *Leszinske* and *Gallegos*, New Mexico courts recognized out-of-state marriages pursuant to Section 40-1-4, despite state laws that would have precluded those marriages from being performed in New Mexico. Likewise, the Attorney General of Maryland concluded that Maryland would likely recognize an out-of-state, same-sex marriage despite a state law that precludes same-sex marriages. Although such state laws indicate an adverse public policy against certain marriages, they are not enough to invoke the public policy exception.

Although New Mexico does not expressly prohibit same-sex marriages, a previous Attorney General issued an advisory letter on this issue. *See* N.M. Att'y Gen. Advisory Letter from Attorney General Patricia A. Madrid to State Senator Timothy Z. Jennings (Feb. 20, 2004). According to the letter, state statutes that refer to a "husband" and a "wife" and the state marriage application form requiring a male and female applicant, suggested that the law in New Mexico contemplates that marriage will between a man and a woman. In light of *Leszinske*, *Gallegos*, and the general law surrounding the public policy exception, we do not believe that the reasoning in the advisory letter is enough to establish a strong or overriding public policy against same-sex marriages in New Mexico. Without an identifiable adverse public policy in this area, we conclude that a court addressing the issue would likely hold, pursuant to Section 40-1-4, that a valid same-sex marriage from another jurisdiction is valid in New Mexico.

GARY K. KING
Attorney General

ELAINE P. LUJAN
Assistant Attorney General