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OPINION
OF
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Opinion No. 95-02

BY: Elizabeth A. Glenn
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TO: The Honorable Thomas A. Rutledge
District Attorney
Fifth Judicial District
P.O. Box 1448
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QUESTION:

May the New Mexico Department of Health ("DOH") legally repeal regulations enacted pursuant to a statute (NMSA 1978, § 40-1-11 (Repl. Pamp. 1994)) requiring marriage license applicants to file with the county clerk a physician's certificate stating that the applicant has had the tests and examinations required by regulations issued by DOH?

CONCLUSION:

Yes. Section 40-1-11 does not preclude DOH from determining that no tests and examinations are required. The practical effect of the regulation's repeal means that county clerks do not have to obtain a physician's certificate from marriage license applicants unless and until DOH implements new regulations requiring premarital tests or examinations.

FACTS:

Until recently, DOH regulations required premarital testing for syphilis and rubella. However, based on studies questioning the effectiveness of such screening and after holding public hearings

on the issue, DOH repealed the regulation, effective January 23, 1995. See Regulation DOH 94-13 (PHD) (filed Jan. 23, 1995) (repealing Regulation HED 83-8 (HSD). As a result, DOH now has no requirements for premarital medical tests or screening. This has raised concerns among county clerks about their statutory responsibility for obtaining from marriage license applicants a physician's certificate confirming that the applicants have had the tests and examinations required by DOH.

ANALYSIS:

By statute, before a county clerk may issue a marriage license,

> each applicant for a marriage license shall file with the county clerk a certificate from a physician licensed to practice medicine, which certificate shall state that the applicant has had those tests and examinations as required by regulation of the [department of health]. . . . The certificate shall state that medical evaluation or that treatment, as indicated, has been made such that there is no bar to marriage, as specified by the regulations of the [department of health].

NMSA 1978, § 40-1-11(A). The statute further directs the Secretary of Health to "make rules and regulations and employ personnel necessary to effectuate the purposes of Sections 40-1-11 through 40-1-13 NMSA 1978," and provides that "[i]f regulations require a laboratory test, it shall be done in a laboratory approved by the secretary...." Id. § 41-1-11(C).

On its face, Section 40-1-11's direction to DOH is not couched in mandatory terms. The statute's apparent purpose is to require marriage license applicants to provide proof of premarital medical tests. However, it does not require any particular test or examination, but leaves it to DOH's discretion to determine what premarital tests are required or necessary. NMSA 1978, § 40-1-11(A), (C). Thus, the statute does not foreclose DOH from determining that premarital medical tests or examinations are not effective or justified.

DOH's failure to require any premarital testing is not an illegal attempt to repeal the statute by regulation. Cf. Jones v. Employment Servs. Div., 95 N.M. 97, 99, 619 P.2d 542 (1980) ("[a]n agency by regulation cannot overrule a specific statute"). As discussed above, the repealing regulation is not contrary to the purpose of Section 40-1-11 and is not inconsistent with DOH's discretionary authority to issue rules and regulations under the statute. Moreover, if and when DOH decides that medical tests or

examinations should be required for marriage license applicants, Section 40-1-11 will provide the necessary statutory authority for those regulations. See Matter of Proposed Revocation of Food and Drink Purveyor's Permit, 102 N.M. 63, , 691 P.2d 64 (Ct. App. 1984) (administrative bodies are creatures of statute and can act only on those matters which are within the scope of their delegated authority).

Finally, although the first sentence of Section 40-1-11(A), taken literally, might be interpreted otherwise, we believe that the absence of any DOH premarital screening requirements obviates the need for marriage applicants to file a physician's certificate with the county clerks. Requiring a physician's certificate even though DOH does not require any tests would require physicians, marriage license applicants and court clerks to engage in an essentially meaningless activity. Based on the rules of statutory construction, it is unlikely that a court would adopt a construction of Section 40-1-11 which would have such a result. See e.g., Dona Ana Sav. & Loan Ass'n v. Dofflemeyer, 115 N.M. 590, 593, 855 P.2d 1054 (1993) (interpretation of statute must not render its application absurd, unreasonable or unjust); Lopez v. Employment Sec. Div., 111 N.M. 104, 106, 802 P.2d 9 (1990) (legislative enactments are interpreted to accord with common sense and reason).

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