Opinion No. 70-93

December 10, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Ernestine D. Evans Secretary of State State of New Mexico Legislative-Executive Bldg. Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

In view of the recent increase in ordinations of ministers by mail order seminaries and others who do not fall into the category of "established" religions, is there any standard to be applied by the county clerks in determining who is a legal minister for the purposes of solemnizing marriages in the State of New Mexico?

CONCLUSION

See Analysis.

OPINION

*{*160}* **ANALYSIS**

The question posed requires an interpretation of Section 57-1-2, N.M.S.A., 1953 Comp., which reads as follows:

Clergymen or civil magistrates may solemnize. -- It shall be lawful, valid and binding, to all intents and purposes, for those who may so desire, to solemnize the contract of matrimony by means of **any ordained clergyman whatsoever, without regard to the sect to which he may belong,** or by means of any civil magistrate. (Emphasis added.)

The underlined portion of Section 57-1-2, **supra,** was interpreted by the Supreme Court of the State of New Mexico as showing the intent of the legislature to broaden the class of persons who could validly perform a marriage ceremony. The court took this position on the theory that the legislature assumed that the only valid marriage prior to the statute was one celebrated by a Roman Catholic priest. **In re Gabaldon's Estate,** 38 N.M. 392, 34 P.2d 672 (1934). The question here asks, in effect, how broad is the class of persons within the category of "ordained clergymen whatsoever, without regard to sect." In ascertaining how the courts might construe the term "ordained" it is helpful to examine the broader use of sacramental or ecclesiastical terms in various pieces of legislation. In dealing with aspects of human behavior which are touched by "religion" the legislature has literally rushed in where even angels fear to tread. As further example in the laws on marriage, Section 57-1-2 refers to a person who may solemnize

"the contract of matrimony" and the statute prescribing the form for the marriage certificate refers to the fact that the person certifying did join the bride and groom in the "Holy Bonds of Matrimony." **§** 57-1-16, N.M.S.A., 1953 Comp. Although in popular usage, matrimony and marriage are probably synonymous, historically, matrimony has more of a religious connotation. See 6 Oxford English Dictionary 180-181, 237-38 (1933). The term "marriage" is used in the form for the marriage license and is consistent with the declaration by the legislature that "marriage is contemplated by the law as a civil contract." **§§** 57-1-1 and 57-1-16, N.M.S.A., 1953 Comp.

The legislature did use the broad, generic term "clergymen" in establishing or recognizing the law of evidence known as the privileged communication between priest and penitent. See **§** 20-1-12, N.M.S.A., 1953 Comp. On the other hand, only a "minister of the gospel" may be present at the execution of a death penalty by the state or allowed the option of being excused from jury service. See **§** 41-14-12, N.M.S.A., 1953 Comp. and **§** 19-1-2, N.M.S.A., 1953 Comp. (1969 Supp.). Of course, the term "gospel" is an old English translation of a Greek word used by the apostle Mark in the opening sentence of his writing of the life of Jesus of Nazareth.

How the courts have approached the interpretation of legislative use of the word minister of the gospel is illustrative of the approach we believe *{*161}* New Mexico courts would use in interpreting the word "ordained." For example, the Supreme Court of Nebraska has said that the words minister of the gospel evidently were intended to include all clergymen of every denomination and faith. **Haggin v. Haggin,** 35 Neb. 375, 53 N.W. 209 (1892). In interpreting the same language, an Ohio probate court said:

This law is to receive a liberal, and not a strict construction. Marriage is exclusively a civil contract, as viewed by the state. The statutes of Ohio undertake to prescribe the conditions of civil marriage, and provide a course of procedure for parties contracting it, and designate officers who may be authorized to officiate at its celebration and who are responsible to the state for the proper public registry of their official acts. In making these regulations, and especially in prescribing the qualifications of those who may solemnize the marriage ceremony, it makes no distinction or discrimination as to any particular religious form of ordination or religious belief or church affiliation. In designating the class who may receive the license to solemnize marriages, the section begins with the words 'any minister of the gospel.' Is this a description of exclusion or inclusion? If the section should be strictly and technically construed, on the generally received meaning of the expression 'minister of the gospel,' it would confine licensees exclusively to christian ministers. Yet reading the whole section, and considering for a single moment the real purpose of the law, it is clear it should not receive such a narrow construction. Such an interpretation would deny the license to the learned and reverend Jewish rabbi, and many other ministers of religion who, while not christian in name, look upon marriage as sacred and religious institution.

In re Reinhart, 9 Ohio Dec. 441, 444 (Cuyahoga Probate Ct. 1899).

In a very early case, involving a challenge to the validity of a marriage on the grounds that the celebrant lacked authority, the New Hampshire Supreme Court was faced with an interpretation of the word "ordained." In **Town of Londonberry v. Town of Chester,** 2 N.H. 268 (1820) the court surmised that the New Hampshire Legislature of 1791 probably thought only of ordination in the terms of the Congregationalist Cambridge Platform of 1649. The court concluded that this was certainly too narrow an interpretation to apply and that, likewise, in turning to the law of England, the law would limit the term to ordination under the auspices of the Church of England. Therefore, the court concluded that the term ordained must be interpreted to include those who are ordained in conformity to the customs of any Christian denomination.

Again turning to the Ohio Court, we find a common sense approach to the problem raised by the use of this term by the legislature.

It cannot be conceived that the use of the term 'ordained minister,' in the marriage laws of Ohio, has regard to any particular form of administering the rite, or any special form of ceremony. The moment an attempt is made to limit or restrict ordination to some special form or ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discriminations in any respect, between Catholic or Protestant, Greek, Gentile, Jewish or any other religious societies or denominations; much less do they attempt to prescribe any mode or form of ministerial ordination.

In re Reinhart, supra, 9 Ohio Dec. at 445.

We suggest that any interpretation which attempts to limit the use of the phrase "ordained clergymen whatsoever" would raise serious questions under the equal protection of the laws provision and the free exercise of religion provision of both the New Mexico and United States Constitutions. Part of the rationale of the New Hampshire court in **Town of Londonberry v. Town of Chester, supra,** was based upon an equal protection clause for Christian denominations found in the New Hampshire Constitution. In addition, one lower New York State court has held that an attempt to *{*162}* limit the persons authorized to solemnize a marriage to clergymen or ministers affiliated with a religion listed in the last preceding federal census of religious bodies was unconstitutional. **O'Neill v. Hubbard,** 180 Misc. 214, 40 N.Y.S.2d 202 (Sup.Ct. 1943).

An additional problem exists where a particular religious sect may authorize certain official ministers to perform a marriage ceremony but do not consider these persons fully ordained for all purposes. It appears that the courts are willing to look to the authority of the person solemnizing the marriage and not dwell on the question of whether or not he was ordained within that sect. For example, in **Baldwin v. McClinch,** 1 Me. (Greenleaf) 94 (1820), a tax case, the court found that a deacon in the Methodist Episcopal Church was ordained for the purpose of the exemption from taxation. Similarly in **Kibbe v. Antram,** 4 Conn. 134 (1821), an action in trespass for criminal conversation, the plaintiff had to prove that he was lawfully married. Again, a court

found that a deacon authorized to celebrate a marriage by the Methodist Episcopal Church was ordained for the purposes of the law requiring the person solemnizing the marriage to be ordained.

In short, we believe that the courts will give the broadest possible interpretation to Section 57-1-2 and recognize the validity of a marriage solemnized by any person with authority to solemnize the marriages from any religious sect. **cf. United States v. Ballard,** 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). Further legislative intent might also be found in Section 57-1-3, N.M.S.A., 1953 Comp., which authorizes a marriage to be performed in accordance with the rights and customs of any religious society, apparently without regard to the presence of an ordained clergymen. The broad interpretation by the courts in this field can be contrasted with the limited interpretation placed upon the exemption from draft laws for ministers by the federal courts. See e.g. **Magee v. United States,** 392 F.2d 187 (1st Cir. 1968); **Jones v. United States,** 387 F.2d 909 (5th Cir. 1968); **United States v. Willard,** 312 F.2d 605 (6th Cir. 1963) cert. denied, **sub nom Willard v. United States,** 372 U.S. 960 (1963); **Dickinson v. United States,** 346 U.S. 389, 98 L. Ed. 132, 74 S. Ct. 152 (1953).

In conclusion, we believe that the extremely broad interpretation which would be placed upon Section 57-1-2 effectively prevents the county clerk from questioning the authority of anyone certifying to the solemnization of a marriage who is willing to affirmatively assert his authority to do so as an ordained clergymen. The county clerk need not consider himself negligent in taking this approach in view of the fact that the presumption in favor of the validity of a marriage, although rebuttable, is one of the strongest presumptions known in the law. **Trower v. Board of County Comm'rs,** 75 N.M. 125, 401 P.2d 109 (1965). This presumption of validity has been applied in many instances in other jurisdictions on the question of the authority of the person solemnizing the marriage. See generally Annot. 77 A.L.R. 729, 735 (1932); Annot. 34 A.L.R. 464, 473 (1925).

By: Mark B. Thompson III

Assistant Attorney General