

February 20, 2004: Same Sex Marriages

Senator Timothy Z. Jennings

P.O. Box 1797

Roswell, New Mexico 88202

Dear Senator Jennings:

I have been asked to render a legal opinion on whether New Mexico law allows same sex marriages. In order to expedite a response, I decline to issue a formal opinion but offer this advisory letter instead. The job of the Attorney General, as a member of the executive branch of government, is to defend the laws of New Mexico irrespective of my personal views or opinions. It is the job of the legislature and the governor to enact laws that express the public policies of the State. It is the duty of the courts to rule on the constitutionality of such laws.

New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman. The New Mexico legislature has adopted a marriage application form that requires a male applicant and a female applicant. See NMSA 1978, Section 40-1-18. The rights of married persons are set forth as applicable to a husband and a wife. See NMSA 1978, Sections 40-2-1 through 40-2-9. The property rights of married persons are expressed as existing between a husband and a wife. See NMSA 1978, Sections 40-3-1 through 40-3-17. The evidentiary privilege between spouses, as established by the New Mexico Supreme Court, is limited to communications that occur while the parties are husband and wife. See Rule 11-505 (B) NMRA. The generally accepted definition of "Husband" is a married man. Black's Law Dictionary, Sixth Edition. "Wife" is defined as a woman united to a man by marriage. *Id.* Thus, it appears that the present policy of New Mexico is to limit marriage to a man and a woman.

New Mexico's marriage laws may be changed through the deliberative process employed by the peoples' representatives in the New Mexico legislature and approved by the governor. Moreover, the laws may be challenged in the courts as possibly being unconstitutional. See *Lawrence et al. v. Texas*, ___ U.S. ___, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). Until the laws are changed through the legislative process or declared unconstitutional by the judicial process, the statutes limit marriage in New Mexico to a man and a woman.

Thus, in my judgment, no county clerk should issue a marriage license to same sex couples because those licenses would be invalid under current law.

Your request was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although I am providing you my legal advice in the form of a letter instead of an

Attorney General's Opinion, I believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Patricia A. Madrid

Attorney General