

Issues I and II are superseded by the US Supreme Court
http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

LETTER OPINION
2013-L-06

December 12, 2013

Mr. Richard J. Riha
Burleigh County State's Attorney
514 E Thayer Ave
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter raising several questions relating to the effects a same-sex marriage, legally valid and entered in another state, has on an individual seeking a marriage license in North Dakota, where such a union is not recognized. You first ask whether a county recorder may issue a marriage license to an individual who had previously entered into a same-sex marriage which was valid in another state, did not obtain a divorce, and is now seeking to enter into a marriage legally recognized in North Dakota. You further ask whether such an individual would be committing a criminal violation by signing a marriage application, under oath, stating that he or she is "Single/Never Married." Finally, you ask whether the individual risks violating another state's bigamy statute if that individual obtains a marriage license in North Dakota, and moves back to a state in which the previous, same-sex marriage is valid and recognized.

For the reasons discussed below, it is my opinion because explicitly prohibited by state constitution and statutes, an individual's previously valid same-sex marriage in another state is not legally recognized in North Dakota and he or she may be issued a valid marriage license here. Further, it is my opinion that since the North Dakota Constitution prohibits the recognition of such a union, the individual would not be committing a criminal violation in this state by indicating he or she was "Single/Never Married" on a signed marriage application. Finally, I decline to opine on the interpretation of another state's law and defer to state legislatures to resolve this unique issue.

ANALYSIS

I.

I first address your question of whether a county recorder may issue a North Dakota marriage license to an individual who previously entered into a same-sex marriage, valid in another state, when that marriage is not recognized in this state, and our license application requires legal dissolution of a prior marriage.¹

In order to answer this question, I first turn to North Dakota's Constitution explicitly defining "marriage" to be between one man and one woman:

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.²

State statute contains similar restrictions:

Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife.³

North Dakota also prohibits recognition of a same-sex marriage that is valid in the jurisdiction in which it was contracted. North Dakota's recognition of foreign marriages is governed by N.D.C.C. § 14-03-08, which states:

Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.⁴

¹ N.D.C.C. § 14-03-06 "A marriage contracted by a person having a former husband or wife living, if the former marriage has not been annulled or dissolved, is illegal and void from the beginning unless such former husband or wife was absent and believed by such person to be dead for a period of five years immediately preceding such marriage."

² N.D. Const. art. XI, § 28 (emphasis added).

³ N.D.C.C. § 14-03-01 (emphasis added).

⁴ N.D.C.C. § 14-03-08 (emphasis added).

In interpreting this statute prior to the 1997 amendment, the Supreme Court of North Dakota held that marriages validly entered in other territories would be recognized in North Dakota unless expressly prohibited by law.⁵ North Dakota Constitution art. XI, § 28 and N.D.C.C. § 14-03-01, expressly prohibit a marriage between persons of the same-sex, and therefore North Dakota does not recognize a same-sex marriage, as codified in N.D.C.C. § 14-03-08.

The extent to which North Dakota must recognize the laws of another state is governed by the Full Faith and Credit Clause (“Clause”) of the United States Constitution. The Clause provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.”⁶ The United States Supreme Court, however, in applying the Full Faith and Credit Clause, made clear it “does not require a State to apply another State’s law in violation of its own legitimate public policy.” Nevada v. Hall, 440 U.S. 410, 422 (1979) (citing Pacific Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493 (1939)). The Court recognized marriage “has always been subject to the control of the legislature.” Maynard v. Hill, 125 U.S. 190, 205 (1888). Thus, the Clause does not require one state to recognize and abide by the legislative judgments of another state concerning the recognition and validity of marriage if doing so would be contrary to its own “public policy.”

North Dakota’s public policy to limit “marriage” to one man and one woman and prohibit recognition of same-sex marriages is articulated in, and supported by, the legislative history of N.D.C.C. §§ 14-03-01 and 14-03-08 and N.D. Const. art. XI, § 28.

In 1997, the Fifty-fifth Legislative Assembly amended state marriage statutes defining the relationship as being between one man and one woman.⁷ Amendments were passed defining spouse as being a person of the opposite sex who is a husband or wife.⁸ Further

⁵ See Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960) (North Dakota Supreme Court recognized a marriage valid and legally entered in another state, when such a marriage was not prohibited by the laws of North Dakota). See also, Pearson v. Person, 606 N.W.2d 128, 131 (N.D. 2000) (although common law marriage cannot be entered into in North Dakota, such a marriage validly entered into in Canada may be entitled to recognition in North Dakota under N.D.C.C. § 14-03-08, because North Dakota law does not expressly prohibit such a marriage). Since same-sex marriages are expressly prohibited and not recognized in North Dakota, a same-sex marriage validly entered into in another state is not afforded recognition under N.D.C.C. § 14-03-08.

⁶ U.S. Const. art. IV, § 1; see also 28 U.S.C. § 1738.

⁷ 1997 N.D. Sess. Laws ch. 145, § 1.

⁸ Id.

amendment of state statute regulating what foreign marriages this state will recognize was made:

14-03-08. Foreign marriages recognized – Exception. All Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section does not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.⁹

The legislature even went so far as to add the following effective date to the amendments:

If the legislature of another state enacts a law under which a marriage between two individuals, other than between one man and one woman, is a valid marriage in that state or the highest court of another state holds that under the law of that state a marriage between two individuals, other than between one man and one woman, is a valid marriage, the governor of this state shall certify that fact to the legislative council. The certification must include the effective date of the other state's legislation or the date of the court decision. Sections 1 and 2 of this Act are effective as of the earlier of the effective date of that law or the date of that decision.¹⁰

In a letter to the Senate Judiciary Committee, a Senate bill sponsor wrote:

This bill is needed in our State to combat recognition of marriages other than between a man and woman now happening in other states - - the most obvious, Hawaii.¹¹

A state Representative also testified before the committee:

This bill is a definition-of-marriage bill, not a gay-bashing bill. It would define marriage and spouse in Century Code for use in interpreting and applying laws. It would also allow the state to recognize marriages only between one man and one woman as husband and wife.

⁹ Id. § 2.

¹⁰ Id. § 3.

¹¹ Hearing on S.B. 2230 Before the S. Comm. on the Judiciary, 1997 N.D. Leg. (Feb. 5) (Statement of Sen. Watne).

This would specify the type of union that the state would recognize as a marriage and would eliminate platonic relationships being recognized as such. Seventeen states have passed similar legislation.¹²

An additional Senate bill sponsor gave the following testimony before the House Judiciary Committee:

As sponsor, I want to emphasize that the goal of this legislation is to treat people who may move here the same way we treat our own citizens --- the same way we have always treated our own citizens.

Our law, going way back to our early statehood, says we will not recognize marriages in North Dakota that are not between one man and one woman. Furthermore, if a resident leaves the state to enter into some other type of marriage, we will not recognize it. Since they made that clear, I am confident that it was the will of our founders that other types of marriages not be recognized if the partners are just moving here.

I do not consider our founders, who originated this section of law, to be homophobes or bigots. They had never even heard of aids [sic]. They wrote this section of law because they recognize the importance and sanctity of the institution of marriage and they recognized that the institution of marriage is a cornerstone of the type of orderly society that has been in North Dakota for over 100 years.¹³

It is clear the legislators' intent at the time of these amendments was to limit the state's recognition of foreign marriages to those between one man and one woman. The statutory language has remained unchanged. Further, the people of North Dakota voted in the general election of 2004 to add article XI, § 28 to the Constitution, which states, "[m]arriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." The amendment placed into our state constitution language makes it clear no other type of union can be recognized or given any legal effect.¹⁴

¹² Hearing on S.B. 2230 Before the S. Comm. on the Judiciary, 1997 N.D. Leg. (Feb. 5) (Statement of Rep. Sandvig).

¹³ Hearing on S.B. 2230 Before the H. Comm. on the Judiciary, 1997 N.D. Leg. (Mar. 11) (Statement of Sen. Christmann).

¹⁴ N.D. Const. art. XI, § 28.

Other federal law is relevant in my analysis. Congress, in enacting the federal Defense of Marriage Act¹⁵ (DOMA) legislatively addressed the issue of inter-state recognition of same-sex marriages. DOMA Section 2 provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁶

As DOMA articulates, there is no mandate under federal law for one state to recognize the same-sex marriage formed in another state.

With no federal mandate requiring North Dakota to recognize a same-sex marriage performed in another state, and a clear public policy of “marriage” being as between one man and one woman embedded into our state constitution, it is my opinion that, under the law, the State of North Dakota does not recognize a same-sex marriage legally performed in another state, and that non-recognition is not in violation of the Full Faith and Credit Clause.

Accordingly, under these facts, it is my opinion that, even if not legally dissolved, the individual’s previous marriage cannot be recognized in the State of North Dakota and a county recorder may issue a valid marriage license in accordance with N.D.C.C. ch. 14-03.

II.

Next, you question whether the individual in these facts would, when filling out a North Dakota marriage license application, states that he/she is “Single/Never Married” and signs that application under oath, be committing a criminal violation.

The answer to your first question is determinative of the answer to your second question. As previously discussed, state law explicitly does not recognize any marriage other than one between one man and one woman, nor does it recognize any rights associated with the union. While the marriage may be valid elsewhere, the North Dakota Constitution and

¹⁵ Pub. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

¹⁶ 28 U.S.C.A. § 1738C. I note that in United States v. Windsor, 133 S.Ct. 2675 (2013), the United States Supreme Court struck down Section 3 of DOMA which defined for federal purposes “marriage” as a legal union between one man and one woman and “spouse” as a person of the opposite sex who is a husband or a wife. Section 2 was not challenged and was not addressed by the Court.

statutes prohibit its legal recognition. As such, it is my opinion the individual would not be committing a criminal violation in this state by indicating he or she was "Single/Never Married" on a signed marriage application.

III.

Finally, you pose a scenario where the newly-married opposite-sex couple returns to a state that recognizes same-sex marriage and question whether the individual then risks violating that state's bigamy statute. As Attorney General of North Dakota, it would be inappropriate in a legal opinion to interpret the laws of other states.

Sincerely,

Wayne Stenehjem
Attorney General

nrm/slv/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁷

¹⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).