

IN THE NEW MEXICO SUPREME COURT

No.

**VICTOR A DUNLAP,
Sandoval County Clerk,**

Petitioner,

v.

PATRICIA A. MADRID, N.M. Attorney General,

and

**HON. LOUIS P. McDONALD,
District Court Judge, 13th Judicial District,**

Respondents.

VERIFIED PETITION FOR AN EXTRAORDINARY WRIT

Victoria Dunlap, Sandoval County Clerk hereby petitions for an Extraordinary Writ (Mandamus, Prohibition, or Superintending Control) ordering Attorney General Patricia A. Madrid and Thirteenth Judicial District Judge Louis P. McDonald to allow the issuance of marriage licenses by the County Clerk without interference or discrimination based on sex, sexual orientation, or gender. The laws of New Mexico favor, rather than prohibit, marriages between couples of the same gender. The Sandoval County Clerk respectfully requests this Court dismiss the Temporary Restraining Order and quash the Scheduling Order, thereby allowing her to perform her duties as County Clerk without prohibited bias and discrimination.

JURISDICTION

1. This Court has original jurisdiction over these matters pursuant to Art. VI, Section 3 of the New Mexico Constitution.

2. This case involves matters of great public importance that demand an expedited ruling. Attorney General's March 30, 2004, Petition, citing, *State ex rel. Clark v. Johnson*, 120 N.M. 562, 569 (1995). (EXHIBIT 1).

3. This case should be decided by the State Supreme Court rather than a lower court because it involves matters of public importance and because it requires clarification of the Supreme Court's Order of March 31, 2004. (EXHIBIT 2).

4. Furthermore, the marriage license rights of two men or two women concern matters of great interest, importance, and joy to the people of New Mexico. (EXHIBIT 3).

THE PARTIES

5. Petitioner is Victoria Dunlap, Sandoval County Clerk. Pursuant to her duties as County Clerk, Ms. Dunlap issued same-sex marriage licenses to people who applied for them on February 20, 2004. (EXHIBIT 4).

6. That same day, Attorney General Patricia Madrid wrote an advisory letter stating her opinion that marriages in New Mexico must be limited to one man and one woman. According to Attorney General Madrid, gay marriages are not "valid" in the State of New Mexico. (EXHIBIT 5).

7. When the County Clerk promised to again issue licenses without gender discrimination on March 23, 2004, the Sandoval County Commissioners and the Attorney General sought a Temporary Restraining Order. (EXHIBIT 6).

8. Although they failed to request a preliminary injunction, the County Commissioners and Attorney General also petitioned for a Permanent Injunction. (EXHIBIT 7).

9. Respondent is Hon. Louis P. McDonald, Chief Judge of the Thirtieth Judicial District Court, who was appointed to hear the case. In the eight weeks he has presided over the case, Judge McDonald has refused to hold any hearings or allow Ms. Dunlap any opportunity to be heard. Judge McDonald has held only one "status conference;" that "status conference" was held on May 7, 2004. (EXHIBIT 8).

THE FACTS

10. On February 19, 2004, Ms. Dunlap received a written opinion from Sandoval County Attorney David Mathews suggesting that she was required to issue same-sex marriage licenses upon request. (EXHIBIT 9).

11. On February 20, 2004, Ms. Dunlap issued 66 marriage licenses without discriminating between who was a "man" and who was a "woman." She stopped when she was informed of the advisory letter from Attorney General Madrid stating gay marriages and gay marriage licenses are invalid. (EXHIBIT 4).

12. After careful consideration of the law and the Attorney General's letter, on March 22, 2004, Ms. Dunlap again promised to issue valid marriage licenses without discrimination.

13. Without any public meeting, discussion, or vote, on Tuesday morning, March 23, 2004, the Sandoval County Commissioners, joined by Attorney General Madrid, asked for a Temporary Restraining Order ("TRO"). (EXHIBIT 6).

4. The TRO issued by Judge Kenneth Brown was defective in a number of ways. Although no marriage licenses were issued and no same-sex marriage applicants remained in the old County Courthouse that morning, County Attorney Mathews and Assistant Attorney General Chris Coppin falsely informed Judge Brown that the issuance of licenses needed to be halted and that the applicants for marriage licenses constituted a danger and a risk to employees at the Courthouse. Even though Ms. Dunlap was available, she was not given any notice or opportunity to be heard and was not present. It is unclear whether or not Judge Brown was assigned to the case at the time he issued the TRO. Despite the seriousness of the issues, no record was made. (EXHIBIT 10).

15. Six days later, on March 29, 2004, with the TRO due to expire on April 2, Judge Brown abruptly recused himself. (EXHIBIT 11).

16. The next day the Attorney General filed her Petition for a Writ of Mandamus in this case, alleging that the County Clerk was acting in excess of her jurisdiction and in violation of law. (EXHIBIT 1).

17. This Court denied the Attorney General's Petition on March 31, at the same time extending the TRO.

IT IS FURTHER ORDERED that the Temporary Restraining Order issued in the Thirteenth Judicial District Court's Case No. D-1329-CV-2004-292 is

he hereby EXTENDED until such time as the matter can be heard on the merits by the district court.

(EXHIBIT 2).

18. On May 7, 2004, District Judge McDonald held a "status conference" at which he denied Defendant Dunlap's Motion to Dismiss the TRO and extended the TRO until such time as there is a trial on the Petition for Permanent Injunction. (EXHIBIT 8).

19. On June 3, 2004, the Sandoval County Commissioners withdrew from the case.

20. At the request of the Attorney General, Judge McDonald adopted as a "final order" a scheduling order prepared by the Assistant Attorney General without consultation with other counsel that provides for the Attorney General to amend the complaint, encourages intervention by unnamed and presently unidentified parties, requires a 60-day mediation effort, and stays discovery. The "Scheduling Order" was filed over Defendant's objections on June 3, 2004. (EXHIBIT 12)

21. With respect to the TRO, Judge McDonald denied the County Clerk's motion to dismiss the TRO and entered that Order on June 3, 2004, over Defendant's objections. (EXHIBIT 13).

GROUND FOR RELIEF

22. The County Clerk's Motion to Dismiss the TRO was fully briefed: On March 29, 2004, Defendant Dunlap filed a Motion to Dismiss the TRO; on April 7 Plaintiff responded to the Defendant's motion; and on April 16, Defendant filed a Reply

Brief. Following the appointment of Judge McDonald, the County Clerk requested an immediate hearing on the TRO; and on May 6, 2004, filed another brief supporting the contention that the TRO was before the Court and should be heard.

23. With respect to the "Scheduling Order," there was no Rule 1-016 conference, the Attorney General did not confer with the Defendant or present or file any motion with the district court, and there was no legal or factual basis for the entry of orders providing for amendment, intervention, mediation and stay of discovery.

24. The district court has a mandatory, non-discretionary duty to hear the case that is before it; the district court cannot create a new case, involving new claims, new parties, and new procedures, by adopting a "Scheduling Order" prepared and presented by the Assistant Attorney General.

25. Both the Attorney General and the district Judge are required to comply with the Rules of Civil Procedure. An Extraordinary Writ dismissing the TRO and quashing the improperly entered scheduling order is the appropriate remedy for the Respondents' failures to comply with the Rules of Civil Procedure.

Improper Injunctive Relief

26. To obtain a preliminary injunction, plaintiffs must show 1) that irreparable injury will be suffered unless the injunction is granted; 2) the threatened injury outweighs any damage the injunction might cause; 3) issuance of the injunction will not be adverse to the public's interest; and 4) there is a substantial likelihood plaintiff will prevail on the merits. It is the duty of the trial court to weigh the equities and hardships. *LaBalbo v.*

Hymes, 1995 N.M. 314, 318; 850 P.2d 1017, 1021 (Cl. App. 1993); *Tri-State v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986).

27. A TRO is generally described as an extraordinary remedy reserved for emergencies. *Geiger v. Espy*, 885 F.Supp. 231, 232 (D. Kan. 1995). Rule 1-066, New Mexico Rules of Civil Procedure sets out the requirements for obtaining a TRO, and provides due process protections against wrongful issuance of injunctive orders.

28. In this case, however, the Attorney General cannot seriously contend that Ms. DeLap's issuance of marriage licenses constitutes irreparable injury, that denial of marriage licenses is in the public interest, that any hardship or inequity would result, or that there is any likelihood of success on the merits of her claim that the reference to "male applicant" and "female applicant" on the application form for marriage licenses requires violation of the Equal Rights Amendment of the New Mexico Constitution, (see, Article II, Section 18 - "Equality of rights under law shall not be denied on account of the sex of any person"); the constitutional right of New Mexicans to fair and equal treatment and to safety and happiness, (see, Article II, Section 4 - "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness"); the consistent gender neutrality of the State's marriage laws (see, Sec. 40-1-1, NMSA, "Marriage is . . . a civil contract, for which the consent of the contracting parties . . . is essential;" and the State's Human Rights laws (e.g., 28-1-2 and 28-1-7, NMSA).

28. The New Mexico Legislature has repeatedly and consistently refused to discriminate in matters relating to gender identity and sexual orientation. The Legislature has rejected measures designed to restrict gay marriage rights on no less than seven occasions: 1996, SJR 10; 1997, HB 640 and SJM R08; 1998, SJR4 (proposed Constitutional Amendment); 1999, HB 201 and SB 186; 2000, SB 189 and SJR 18; 2001, HB 733 and SJR 19; 2003, SJR 27. In the 2004 Legislature there was no "Defense of Marriage Act" legislation introduced.

30. New Mexico case law firmly supports the concept of gender-neutrality and non-discrimination. *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788; 1999 N.M.S.C. 5 ("We view New Mexico's Equal Rights Amendment as the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this State.").

31. Nor is there any reasonable basis for the Attorney General's contention that the County Clerk is either exceeding her authority or acting outside of her proper authority when she issues non-discriminatory marriage licenses. (See, Sec. 40-1-10, NMSA, "Each couple desiring to marry in New Mexico shall obtain a license from a county clerk . . . the failure of any county clerk to perform his duty under this section shall be grounds for the removal of the county clerk from office").

32. Nor was there any justification for the conduct of Judge Brown in issuing an *ex parte* temporary restraining order in violation of Rule 1-066, New Mexico Rules of Civil Procedure ("A temporary restraining order may be granted without written or oral

notice to the adverse party or his attorney only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and . . . etc.’) and the Code of Judicial Conduct (Sec. 21-300, “A judge shall not initiate, permit, or consider *ex parte* communications, etc.”) and then recusing himself without explanation. (See, Sec. 21-300 Code of Judicial Conduct: “A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.”)

33. Judge McDonald’s refusal to hear and dismiss the TRO falls under the same provision of the Code of Judicial Conduct requiring a judge to “hear and decide matters assigned to the judge” and calls into question his obligation to “perform judicial duties without bias or prejudice . . . based on race, sex, . . . marital status, (or) sexual orientation.” and to “not be swayed by partisan interests, public clamor or fear of criticism.”

A TRO Cannot Be Extended by Amendment

34. The Assistant Attorney General conceded at the “status conference” on May 7th that the TRO was hastily obtained and needed to be amended. (“We will certainly admit that under the circumstances it was hastily drawn up and filed with the Court. There are some additional claims that the Attorney General wants to put in the Complaint.”).

35. The law, moreover, includes no provision for extending a TRO by amending it. To the contrary, Rule 1-066 provides that the TRO "shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes."

36. Furthermore, Rule 1-066 expressly provides that:

The motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

37. Finally, the Rule provides that:

On two days' notice to the party who obtained the temporary restraining order . . . the adverse party may appear and move its dissolution or modification and in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

County Clerk Dunlap has repeatedly given such notice, and the Court's failure to "proceed to hear and determine such motion as expeditiously as the ends of justice require" is all the more striking as a result of the length of time that has expired since issuance of the TRO.

The TRO is Expired

38. Rule 1-066 states a TRO "shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period," or unless the party against whom the order is obtained consents to a longer time or there is a disqualification of the judge who was to hear the matter. None of the conditions for extending a TRO having

been satisfied, and notwithstanding the Court's finding that the Defendant's Motion to Dismiss is denied, the TRO should be deemed to have expired "by its terms."

39. The provision replacing a TRO with a preliminary injunction is plainly intended to preclude the unlimited extension of a TRO in circumstances where injunctive relief is necessary and appropriate. Here there has been no request for a Preliminary Injunction, there is no reason to believe injunctive relief is either necessary or appropriate, and more than ten weeks have gone by since the TRO was issued.

The TRO Cannot be "Translated" into an Injunction Without a Hearing

40. The Attorney General and Judge McDonald contend that the TRO has been converted, or translated, into a Preliminary Injunction or a Permanent Injunction by the Supreme Court's Order extending the TRO "until the matter can be heard on the merits by the district court."

41. Despite the Supreme Court's somewhat ambiguous reference to "the matter" the only matters then before the Court were the Attorney General's Petition for a Writ of Mandamus and Stay, both of which were unambiguously denied, and the TRO, which could not be heard until there was a judge assigned to the case.

42. In reaching their conclusion that the Supreme Court intended to change the over-ripe TRO into an unlimited injunction, the district court and Attorney General ignore fundamental principles of due process and equal protection, as well as the legal and

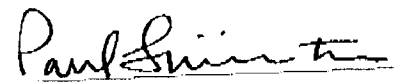
equitable principles that support the law and justice in the United States and the State of New Mexico.

45 The Plaintiffs' failure to either assert or proceed to litigate a claim for preliminary injunctive relief, combined with the District Court's "hearing" of Dunlap's motion to dismiss the TRO on Friday, May 7, 2004, and the expiration, by its own terms, of the TRO in this case should leave the Sandoval County Clerk free to act in accordance with the laws and constitution of the State of New Mexico without restraint or injunction based on sex, gender identity, or sexual orientation of the couples desiring to marry.

REQUESTED RELIEF

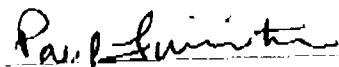
Petitioner respectfully requests that the Court dismiss the temporary restraining order and quash the scheduling order, thereby allowing the County Clerk to proceed to issue gender-neutral, non-discriminatory marriage licenses free of improper restraint or injunction.

Respectfully submitted,



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I hereby certify that ^{hand delivered} ~~I sent~~ copies of the foregoing by U.S. Mail on ~~Tuesday~~ ^{Wed} ~~June 8, 2004~~ ^{June 9, 2004}, to Assistant Attorney General Chris Coppin + JUDGE McDONALD



Paul Livingston

