

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 28,730

VICTORIA DUNLAP,
SANDOVAL COUNTY CLERK,

Petitioner,

v.

PATRICIA A. MADRID
ATTORNEY GENERAL,

And

HON. LOUIS P. MCDONALD,
DISTRICT COURT JUDGE,
13th JUDICIAL DISTRICT,

Respondents.

**RESPONSE TO VERIFIED PETITION
FOR AN EXTRAORDINARY WRIT**

The Respondent, Attorney General Patricia A. Madrid (“Attorney General Madrid”), through counsel of record, files this response pursuant to the Court’s Order of June 21, 2004.

INTRODUCTION

Petitioner, County Clerk Victoria Dunlap (“Dunlap”), filed a petition seeking extraordinary relief, in the form of writs of superintending control, prohibition or mandamus, against Attorney General Madrid and the district court below to order Respondents to “allow the issuance of marriage licenses by the County Clerk without interference or discrimination based on sex, sexual orientation, or gender.” Petition at 1. Dunlap does not specify which form of writ should apply to either Respondent.

Dunlap fails to allege in her Petition the necessary elements for relief under any of the extraordinary writs she seeks. In fact, it is readily apparent from Dunlap's Petition that she is improperly asking this Court to amend an order issued in another case. *See* Petition, pg. 2, para. 3 (“[i]t requires clarification of the Supreme Court’s Order of March 31, 2004.”). In a prior case, Case No. 28,574, this Court extended a temporary restraining order against Dunlap until the case pending below could be heard on the merits. *See* State’s Exhibit 1. Dunlap did not appeal the March 31, 2004 order nor did she seek reconsideration pursuant to NMRA 12-404 within the time period allowed. Thus, the March 31, 2004 order is not subject to collateral attack in this case. Even if the March 31, 2004 order is reviewed, it is clear that the order was authorized pursuant to this Court’s power of superintending control.

I. RESPONSE TO ALLEGATIONS

The allegations and facts contained in the Petition are responded to as follows:

Paragraph 1: Denied. The allegations necessary to invoke the Court’s original jurisdiction are not alleged.

Paragraph 2: Denied. The Attorney General’s allegation in Case No. 28,574 that the matter was of great public importance was premised upon the fact that a temporary restraining order was going to expire before a new judge could be assigned to the case. This Court’s order of March 31, 2004, eliminated any concerns of public importance previously alleged by the Attorney General.

Paragraph 3: Denied.

Paragraph 4: Denied.

Paragraph 5: Denied. Petitioner has no duty to issue same-sex marriage licenses.

Paragraph 6: Admitted.

Paragraph 7: Admitted.

Paragraph 8: Denied. *See* State's Exhibit 2.

Paragraph 9: Admit that District Court Judge Louis P. McDonald is assigned to the case below. The remainder of the allegations are denied. Judge McDonald held an additional status conference on June 9, 2004, and a hearing on presentment of orders on June 3, 2004. The hearing on presentment of orders was held prior to Dunlap filing her Petition with this Court, thus, she was aware of the hearing prior to filing her Petition. It is false to allege that Dunlap has not had an opportunity to be heard. That allegation is proven to be false by Exhibit 8 to Dunlap's Petition, which is a transcript of a hearing wherein Dunlap was provided an opportunity to argue the issues of the temporary restraining order ("TRO") to the district court.

Paragraph 10: Denied. Nowhere in Exhibit 9 attached to Dunlap's Petition is Dunlap told that she is required to issue same-sex marriage licenses as Dunlap alleges.

Paragraph 11: Admitted.

Paragraph 12: It is denied that Dunlap gave careful consideration of the law but it is admitted that Dunlap made public statements that she intended to alter her course once again and issue same-sex marriage licenses.

Paragraph 13: It is denied that the Sandoval County Commissioners did not meet and discuss the topic of attempting to stop Dunlap from issuing same-sex marriage licenses. It is admitted that the Commissioners did not vote to order the County Attorney to file suit, but such votes are not routinely taken. It is admitted that the County joined with the Attorney General in asking for a TRO.

Paragraph 14: Denied.

Paragraph 15: It is admitted that Judge Brown recused himself. It is denied that the TRO was set to expire on April 2, 2004.

Paragraph 16: It is admitted that the Attorney General did file a petition for writ of mandamus with this Court. It is denied that the filing was “in this case.” The filing was made in Case No. 28, 574.

Paragraph 17: Admitted.

Paragraph 18: Admitted, except it is denied that Judge McDonald extended a TRO. Judge McDonald ruled that the New Mexico Supreme Court ordered that the TRO would remain in place until the lower court could hear the matter on the merits. *See* Petition, Exhibit 8, page 12, lines 18-19.

Paragraph 19: Admitted.

Paragraph 20: It is admitted that Judge McDonald did adopt and enter a scheduling order. It is admitted that the scheduling order sets a time limit to file a motion to amend the complaint; it sets a time limit for additional parties to file motions to intervene; it sets a time period for mediation; and it stays discovery. It is denied that the order is final. Judge McDonald specifically informed Dunlap that he would revisit the issues of mediation if requested to do so and that Dunlap could object to intervention or the amended complaint. *See* Petition, Exhibit 8, page 13, lines 16-18; page 14, lines 1-2. In addition, at the hearing on presentment of orders, the district court informed Dunlap that the stay of discovery could be reviewed again at a later date.

Paragraph 21: Admitted.

Paragraph 22: Admitted. It is affirmatively stated that Judge McDonald allowed Dunlap to argue her motion to dismiss the TRO at the status conference held on May 7, 2004. *See* Petition, Exhibit 8, pages 6-15.

Paragraph 23: Denied.

Paragraph 24: Denied.

Paragraph 25: Admitted that the district court and parties should follow the rules of civil procedure. It is denied that the rules were not followed.

Paragraph 26: The allegations contain assertions of legal standards. Although such allegations need not be responded to, the allegations generally follow the legal standard for issuing an injunction.

Paragraph 27: The allegations contain assertions of legal standards. Although such allegations need not be responded to, the allegations generally follow the legal standards for issuing temporary restraining orders. The rule cited applies to district courts, not appellate courts.

Paragraph 28: Denied.

Paragraph 29: Denied. The Legislature is charged with knowing the law and it is clear that the law does not contemplate same-sex marriage.

Paragraph 30: The allegations contain assertions of legal standards. Although such allegations do not need to be responded to, it is admitted that the New Mexico Constitution contains an Equal Rights Amendment.

Paragraph 31: Denied.

Paragraph 32: Denied.

Paragraph 33: Denied. As Dunlap's Exhibit 8 clearly demonstrates, Judge McDonald heard argument on Dunlap's motion to dismiss the TRO.

Paragraph 34: Admitted. It is affirmatively stated that Attorney General Madrid filed a motion to amend the complaint and Dunlap waived any objections to the filing of the motion by failing to respond to the motion and approved of the filing of an amended complaint in open court. *See State's Exhibit 3.*

Paragraph 35: Denied. The TRO was not extended by amendment as alleged by Dunlap. It was this Court's order of March 31, 2004, that extended the TRO.

Paragraph 36: Admitted.

Paragraph 37: Denied. The district court heard Dunlap's motion to dismiss the TRO.

Paragraph 38: Denied. Dunlap agreed to the extension of the TRO by this court because Dunlap never requested a rehearing or reconsideration of the Court's March 31, 2004 order extending the TRO nor did she appeal the order.

Paragraph 39: Denied.

Paragraph 40: It is admitted that this Court extended the TRO until the matter could be heard on the merits. The remainder of the allegations are denied.

Paragraph 41: Denied. There is no ambiguity to this Court's order of March 31, 2004.

Paragraph 42: Denied.

Paragraph 43: Denied.

Wherefore, Respondent Attorney General Madrid respectfully requests that the Verified Petition for Extraordinary Writ be denied.

II. ARGUMENT

A. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL PREVENT DUNLAP FROM ATTACKING THE MARCH 31, 2004 ORDER

On March 31, 2004, this Court entered an order in Case No. 28,574 ordering “[t]hat the Temporary Restraining Order issued in the Thirteenth Judicial District Court’s Case No. D-329-CV-2004-292 is hereby EXTENDED until such time as the matter can be heard on the merits by the district court.” The order was the result of a verified petition for a writ of mandamus and stay filed by Attorney General Madrid against Dunlap. The order also denied the petition and dismissed the case. *See* State’s Exhibit 1.

Pursuant to Rule 12-404 NMRA, a party has fifteen (15) days after the filing of the appellate court’s disposition to file a motion for rehearing. Dunlap did not file a motion for rehearing within the time allowed by the rules. Instead, Dunlap filed a new case calling the March 31, 2004 order ambiguous and asking for clarification of that order.

An order is final if it includes language that carries the decision into effect by ordering that something happen. *Kucel v. New Mexico Medical Review Com’n*, 2000-NMCA-026, Para. 16, 128 N.M. 691, 696, 997 P.2d 823, cert. denied 128 N.M. 688, 997 P.2d 820 (2000). It is without question that the March 31, 2004 order is a final order. The order dismissed the case and extended the TRO until the district court heard the matter on the merits. Dunlap’s options were to appeal the March 31, 2004 order to the United States Supreme Court or ask for a rehearing pursuant to Rule 12-404. The doctrines of res judicata and collateral estoppel prohibit Dunlap from bringing a new action to correct her failure to comply with the rules of appellate procedure.

Under the doctrine of res judicata, a judgment on the merits in a prior lawsuit bars a subsequent action involving the same parties and the same cause of action if the first and second lawsuits are identical in four ways: (1) parties or privies, (2) capacity or character of persons for or against whom the claim is made, (3) cause of action, and (4) subject matter. *Kepler v. Slade*, 119 N.M. 802, 804, 896 P.2d 482 (1995).

The parties and the character of the parties are identical as between Attorney General Madrid and Dunlap in Case No. 28,574 and the present case. Both cases invoke this court's original jurisdiction under Art. VI, Sec. 3 of the New Mexico Constitution, seeking writs of mandamus. The subject matter is identical in both cases: namely, the legal right and duty of Dunlap to issue same-sex marriage licenses and the stay of the issuance of said licenses. Although Dunlap requests writs of prohibition and superintending control in the present case, neither writ would apply to Attorney General Madrid because she is not a judicial officer subject to such writs. *See* Point C below. Dunlap had the opportunity to litigate the issue before this Court by following the rules of appellate procedure in seeking a rehearing. She failed to do so and she cannot now, two and one-half months later, seek to correct her error by filing a new lawsuit.

Dunlap's attempt to avoid her failure to appeal or ask for rehearing by suing the district court for a writ of superintending control and prohibition must be rejected under the doctrine of collateral estoppel. Collateral estoppel prevents the re-litigation of ultimate issues necessarily decided in a previous proceeding if (1) the party to be estopped was a party to the previous proceeding, (2) the cause of action before the court is different from the cause of action in the previous proceeding, (3) the issue was actually litigated in the previous proceeding, and (4) the issue was necessarily determined in the

prior proceeding. *Rex, Inc. v. Manufactured Hous. Comm. of NM*, 119 N.M. 500, 504, 892 P.2d 947 (1995). Dunlap was a party to the prior proceeding. The cause of action is different in that the prior proceeding did not involve a petition for writs of prohibition or superintending control. The issue of staying the issuance of same-sex marriage licenses by Dunlap was decided in the prior proceeding. If Dunlap believed the decision in the prior proceeding was incorrect, she had the opportunity to appeal or to ask for a rehearing. She did neither. She should not be allowed to bring a new action against the district court to attack an order issued by this Court months ago.

**B. MANDAMUS MUST ADDRESS CLEARLY ESTABLISHED RIGHTS
AND CANNOT INTERFERE WITH DISCRETIONARY ACTS**

Dunlap asks this Court to issue a writ of mandamus against Attorney General Madrid to order her to “allow the issuance of marriage licenses by [Dunlap] without interference or discrimination based on sex, sexual orientation or gender.” Petition at 1. Dunlap fails to assert proper legal grounds to support her request for relief against Attorney General Madrid.

“Mandamus is a drastic remedy to be invoked only in extraordinary circumstances.” *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, Para. 12, 124 N.M. 698, 954 P.2d 763. A writ of mandamus is available only to one who has a clear legal right to the performance sought. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 113 N.M. 276, 282, 824 P.2d 1078 (Ct. App. 1991). “[R]elevant rights and duties must be established before a writ of mandamus can issue.” *Schein v. Northern Rio Arriba Elec.*, 1997-NMSC-011, para. 22, 122 N.M. 800, 806, 932 P.2d 490. Although Dunlap alleges in her Petition that the laws of New Mexico authorize same-sex marriage,

the right to same-sex marriage is not a clear legal right. Dunlap did not begin issuing such licenses until nine months before her term in office was completed. Dunlap's term in office expires on January 1, 2005. Moreover, no other county clerk in the State has issued such licenses. Attorney General Madrid has issued an advisory letter outlining why same-sex marriage is not authorized under current law. *See* Petition, Exhibit 5. That issue will ultimately be decided when a party with standing brings an action challenging New Mexico's laws or if the Legislature changes the law. It should not be decided in the context of this case, involving a county clerk that is leaving office shortly.

Mandamus will only lie against a public official to compel performance of a mandatory, ministerial duty. The act sought to be compelled must not be within the discretionary authority of the official. “[D]iscretionary acts are beyond the reach of the writ.” *Cook v. Smith*, 114 N.M. 41, 42, 834 P.2d 418 (1992).

The authority of Attorney General Madrid to initiate legal action against Dunlap is clearly within her discretion. N.M.S.A. 1978, Section 8-5-2 (B) (1933) states that the Attorney General shall “[p]rosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, **in her judgment**, the interest of the state requires such action . . .” (emphasis added). This Court has interpreted this statute to authorize the attorney general to exercise her discretion to bring an action. “[T]he language of the statute grants the attorney general **discretion** in determining when the public interest requires him to bring a civil action on behalf of the state.” *State ex rel. Bingaman v. Valley Sav. & Loan*, 97 N.M. 8, 10, 636 P.2d 279 (1981) (emphasis added).

C. DUNLAP FAILS TO ALLEGE THE DISTRICT COURT LACKED JURISDICTION, THUS A WRIT OF PROHIBITION IS INAPPROPRIATE

Dunlap makes no distinction as to which Respondent she seeks a writ of prohibition against. A writ of prohibition cannot lie against Attorney General Madrid because it does not apply to state officers, but only against an inferior court. *Stanley v. Raton Board of Educ.*, 117 N.M. 717, 718, 876 P.2d 232 (1994), *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 281, 573 P.2d 213 (1977). Prohibition is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdiction. *General Atomic Co. v. Felter*, 90 N.M. 120, 560 P.2d 541, rev'd on other grounds, ___ U.S. ____, 98 S. Ct. 76, 54 L.Ed. 2d 199 (1977).

When filing an application for a writ of prohibition, the petitioner must recite the grounds for granting the relief sought. The person seeking the writ must prove the essential allegations of the petition. *State v. Zinn*, 80 N.M. 710,713, 460 P.2d 240 (1969). Dunlap fails to allege, nor could she, that the district court is without jurisdiction to hear the matter currently pending before it. Thus, Dunlap's request for a writ of prohibition against the district court must be rejected.

D. DUNLAP FAILS TO ALLEGE THE ELEMENTS NECESSARY FOR A WRIT OF SUPERINTENDING CONTROL

A writ of superintending control should not be exercised except under unusual circumstances and should not be invoked merely to perform the function of an appeal. *State Game Commission v. Tackett*, 71 N.M. 400, 404, 379 P.2d 54 (1962). Superintending control is to be invoked "[i]n cases where the remedy by appeal has been deemed inadequate, or where irreparable mischief; great, extraordinary or exceptional

hardship; costly delay, and unusual burdens of expense would probably result.” *Williams v. Sanders*, 80 N.M. 619, 620, 459 P.2d 145 (1969).

Dunlap’s Petition does not allege any of the elements necessary to seek the extraordinary relief of superintending control. Dunlap does not allege, nor could she, that the remedy on appeal is inadequate nor any of the other elements of hardship, delay or expense. Thus, Dunlap’s Petition must be dismissed.

Dunlap merely alleges that the district court has not ruled as she would like the court to rule. She cites no authority to substantiate her claims that the district court is not following the rules of civil procedure. In fact, when the rules are read, it is clear that the district court’s actions are fully authorized. For example, Dunlap complains about the entry of a scheduling order by the court that addresses intervention, amended pleadings, mediation and discovery. She complains that the court adopted a schedule proposed by the State over her objections. The authority of the district court to enter a scheduling order is not only inherent, it is specifically authorized by Rule 1-016 NMRA. The district court need not have the permission of a party to enter such an order as alleged by Dunlap. In addition, LR 13-505 E. authorizes the district court to order the parties to settlement discussions over the objections of any party. The scheduling order was fully discussed with the parties at the court’s status conference held on May 7, 2004. *See* Dunlap’s Exhibit 8. Dunlap was simply unprepared at the status conference to offer any suggestions as to how to proceed and only sought to argue against this Court’s March 31, 2004 order.

**E. THE MARCH 31, 2004 ORDER IS AUTHORIZED
UNDER SUPERINTENDING CONTROL**

The power of superintending control is exercised to maintain the integrity of the court system and the respect in which it is held. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 712-13, 410 P.2d 732 (1966). Superintending control is the power to control the course of ordinary litigation in inferior courts. *State v. Roy*, 40 N.M. 397, 412, 60 P.2d 646 (1936). The Court in *Roy* explained:

The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. *Id.* at 422.

Attorney General Madrid filed the petition for a writ of mandamus against Dunlap seeking a stay of the issuance of same-sex marriage licenses until this Court decided whether Dunlap was authorized to do so. Although the Court denied the Attorney General's petition, it ordered relief of a similar nature. The March 31, 2004 order maintained the status quo and stayed the issuance of same-sex marriage licenses until the district court ruled, in a final order subject to appeal, on Dunlap's authority to issue such licenses. This Court's order is not subject to the rules of civil procedure for district courts regarding temporary restraining orders as argued by Dunlap. Attorney General Madrid invoked this Court's original jurisdiction and, as the Court in *Roy* points out, this Court is unhampered in its authority to control the litigation below to uphold the integrity of the court system and the public respect and confidence in the system. This Court's order effectively controls the litigation below to insure that an orderly process will be

followed in this matter of public importance and controversy by maintaining the status quo until a decision on the merits is rendered.

F. DUNLAP'S CONSTITUTIONAL RIGHTS ARE NOT IMPLICATED

Dunlap alleges that her constitutional rights are violated by being restrained from issuing same-sex marriage licenses. Petition, page 11, para. 42. This Court long ago ruled that public officials do not have any personal or property rights associated with their official duties subject to constitutional protections. In *Board of Commissioners Guadalupe Co. v. Dist. Ct. 4th Judicial Dist.*, 29 N.M. 244, 259 (1924), this Court said:

The Nebraska court thus clearly points out the distinction between those cases involving a duty arising out of public office, trust, or station, in which it holds that no personal or property right is involved, and those cases involving a property right, and hold that in the former notice and hearing are not guaranteed by the constitutional provisions, and that in the latter the same must be afforded . . . but the distinction pointed out in the Nebraska case seems to be sound. A public officer, who is commanded to perform an official duty, suffers neither in his personal, nor his property rights, and these rights alone are safe-guarded by the constitution. It is therefore within the power and jurisdiction of the district court, under the statute quoted above, to issue the preemptory writ ex parte.

No constitutional rights are implicated by this Court ordering that the TRO issued below be extended until the matter is heard on the merits.

CONCLUSION

The district court's scheduling order and this Court's March 31, 2004 order were properly entered. Dunlap did not object to this Court's March 31, 2004 order and she has the right to appeal decisions made by the district court at the appropriate time. Dunlap fails to state any grounds for the issuance of an extraordinary writ. Attorney General Madrid respectfully requests that Dunlap's petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Response to Verified Petition For Extraordinary Writ was mailed to opposing counsel of record, Paul Livingston, by first class mail, postage pre-paid, on July 6, 2004.