VOLUME NO 37 OPINION NO. 159

MARRIAGE AND DIVORCE - Denial of marriage license because of default in support obligation; LICENSES - Denial of marriage license because of default in support obligation; SUPPORT - Denial of marriage license because of default in support obligation; PARENT AND CHILD - Denial of marriage license because of default in support obligation; PRIVACY - Requirement of disclosure of information on marriage license application as invasion of; DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Authority to require diclosure of vital statistics; VITAL STATISTICS - Requirement of disclosure of information on marriage license application as invasion of right of privacy; UNIFORM LAWS - Authorization of Department of Health and Environmental Sciences to prescribe marriage license application form by the Uniform Marriage and Divorce Act; CIVIL RIGHTS - Requirement of disclosure of information on marriage license application as violation of; DISCRIMINATION - Requirement of disclosure of information on marriage license as discrimination; REVISED CODES OF MONTANA, 1947 - Sections 48-305, 48-148, 66-4401, 66-4402; 1972 MONTANA CONSTITUTION - Article II, section 3 and section 10; MONTANA ADMINISTRATIVE CODE, 16-2.6(6)-S6100.

HELD: 1. A judicial opinion concerning the constitutionality of section 48-148 should be sought before denying a license to marry under that section.

2. An applicant for a marriage license can be required to disclose information concerning his or her dependants race, education and support obligations.

18 September, 1978

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Dear Gentlemen:

I have combined and restated your requests for opinions in the following manner:

1. Can a marriage license be denied an applicant by reason of a default in a prior obligation to support dependants?

2. Is an applicant for a marriage license required to supply information concerning his or her race and education and information concerning default of an obligation to support dependants?

As to your first question, section 48-148, R.C.M. 1947, is entitled "Applicants Delinquent in Support Obligations" and states:

> No license to marry shall be issued...if either of the applicants...is or has been failing to support lawful dependants..., unless a judge...after hearing shall determine that despite such failure said applicant is financially able to discharge the duty to support existing dependants and those resulting from the contemplated marriage and shall authorize the clerk to issue the license.

An applicant for a marriage license who is behind in support payments for dependant children cannot get a license unless a judge specifically finds that he is financially able to comply with the existing and future support obligations.

The United States Supreme Court in Zablocki v. Redhail, 98 S.Ct. 673 (1978), found a similar Wisconsin statute to be a denial of equal protection of the law as provided in the Fourteenth Amendment to the United States Constitution. The Wisconsin statute provided that an applicant for a marriage license who had minor issue to whom he had an obligation to support could not receive a marriage license except upon a court order. Under that Wisconsin statute a court could not issue the license unless the applicant submitted proof that the issue to whom he owed the obligation of support were not then nor were they likely to become public charges.

Although worded differently, the Montana statute and the Wisconsin statute are quite similar. Both attempt to prevent marriage of a certain class of people, of applicants who are not supporting or will not in the future support dependants. In Zablocki the Supreme Court held that the right to marry is part of the fundamental right of privacy. Id. at 681. (The 1972 Montana Constitution specifically sets out the right of privacy and requires that it not be infringed without a compelling state interest. Art. II, section 10.) The Court in Zablocki said reasonable regulations that do not significantly interfere with the decision to enter into a marital relationship may be legitimately imposed but the Wisconsin statute at issue clearly did interfere directly and substantially with the right. Id. at 681.

Like the Wisconsin statute the Montana statute prevents some people from entering into a marriage because they cannot prove that they are financially able to discharge their duty to support. Even those who can satisfy the requirement of proof may be so burdened by having to do so that they will in effect be coerced into forgoing their right to marry. Id. at 681. When a statutory classification significantly interferes with the exercise of a fundamental right it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to affect these interests. 98 S.Ct. 673, 682.

The welfare and support of the dependants to whom the applicant owes a support obligation is a legitimate state interest. However, in effect section 48-148 is a device for collection of support. There are other collection devices available to the state which do not interfere with the right to marry.

Although there is a difference between the Montana statute and the Wisconsin statute, the rule established in Zablocki

may be applicable to the Montana statute. In Montana only those applicants who are in default in their support payments are denied the marriage license without court order. The Wisconsin statute denied a license without a court order to all applicants who have support obligations. This distinction, however, only reinforces the applicability of the rule. Section 48-148 acts as an absolute prohibition to the indigent and is a substantial infringement on the right to marry to all those who are in default in their support obligations. As previously stated this state has enacted other means of collecting support which do not infringe on the right to marry.

Under Zablocki a serious question is raised whether section 48-148 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, as well as Article II, section 3 of the 1972 Montana Constitution. A logical conclusion of the above analysis would be a declaration of the constitutional invalidity of section 48-148, R.C.M. 1947. However such a declaration is solely within the authority of the judicial, not the executive branch. I recommend that you seek a judicial determination before you advise the clerk not to issue a license to marry under the circumstances of section 48-148.

As an officer of the executive branch I do not consider it within my power to declare a statute unconstitutional unless the act is in reliance upon an adjudication in which the particular statute or an identical statute has been subject to the scrutiny of judical review by an appropriate appeals court and specifically found to be constitutionally defective. The presumption of the constitutionality of section 48-148 is seriously in doubt.

The Zablocki decision should be brought to the attention of the court in any case where a judge is petitioned to find that an applicant in default on his support payments is financially able to comply with existing and future support payments. The similarity between the Wisconsin and Montana statutes is pronounced and the court may and likely will apply the Zablocki rule to the provisions of the Montana statute.

Referring to your second question, the marriage license application supplied to clerks of court in Montana by the Department of Health and Environmental Sciences contains questions requiring applicants to divulge their race and educational background as well as information concerning default of any obligation to support dependents.

The Department of Health and Environmental Sciences is required to gather vital statistics. Section 69-4402, R.C.M. 1947, requires the Department of Health and Environmental Sciences to establish a statewide system of vital statistics and to adopt rules for gathering, recording, using and preserving vital statistics. Vital statistics are defined to include:

> [T]he registration, preparation, transcription, collection, compilation, and preservation of data pertaining to births, adoptions, legitimations, deaths, fetal deaths, marital status, and incidental supporting data.

Section 69-4401, R.C.M. 1947.

In addition to this authorization to gather vital statistics the Department of Health and Environmental Sciences is directed by the Uniform Marriage and Divorce Act to prescribe the form for an application for marriage license. Section 48-305, R.C.M. 1947. Section 48-305 requires that the license application include the name, sex, address, date and place of birth of each party, information concerning any previous marriage, information concerning the parents of each party, and any information concerning any children born to the parties prior to making the application.

Therefore, as part of the department's power, under both the Uniform Marriage and Divorce Act and the statutes dealing with vital statistics, the department has devised a marriage application form which includes disclosure of information concerning race, education and support obligations. See Montana Administrative Codes 16-2.6(6)-S6100.

The question then becomes, is the requirement of disclosure of this information a violation of some constitutional right? Requirements regarding race, of course, raise the spectre of the Thirteenth Amendment of the Federal Constitution and statutory provisions attendant thereto. However, there is no allegation of discrimination based on race. The applicants are not denied a marriage license because of their race. The designation of race, just as sex or religious denomination, may serve a useful purpose and the procurement and compilation of such information cannot be outlawed per se. The securing and chronicling of data for identification or statistical use violates no constitutional privilege. Hamm v. Virginia State Board of Elections, 230 F.Supp. 156 (D.C. Va. 1964), aff'd, per curiam, Tancil et al. v. Woolls et al., 379 U.S. 19 (1964). Because the

information is not used to discriminate on the basis of race there is no intrusion of constitutional provisions based on discrimination.

However, the right of privacy, as set forth in the 1972 Montana Constitution, Art. II, section 10, and as established under the Federal Constitution, does create a question as to the validity of requiring disclosure of such information. Undoubtedly, many matters required to be disclosed are personal in nature. The question is, are they overcome by a governmental interest? In other contexts, the disclosure of extremely personal data has consistently been upheld. In U.S. v. Little, 321 F.Supp. 388 (D.C. Del. 1971) a defendant, charged criminally for failure to disclose information as required by the census, defended on grounds that the questions were an unconstitutional invasion of his right to privacy. The court found that the authority to gather reliable statistical data reasonably related to governmental purposes is a necessity of modern government, if modern government is to legislate intelligently and effectively. Requiring disclosure of personal information in order to provide accurate statistical reports is not an unconstitutional invasion of the right to privacy. Id. at 392. Even in the highly sensitive area of abortions, requirements that personal data of patients be disclosed have been upheld as part of the compelling state interest to gather vital statistics. Schulman v. New York City Health and Hospital Corporation, 75 Misc.2d 150, 346 N.Y.Supp.2d 920 (1973); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

THEREFORE, IT IS MY OPINION:

1. A judicial opinion concerning the constitutionality of section 48-148 should be sought before denying a license to marry under that section.

2. An applicant for a marriage license can be required to disclose information concerning his or her dependants race, education and support obligations.

Very truly yours,

MIKE GREELY
Attorney General