

VOLUME NO. 37

OPINION NO. 12

MARRIAGE AND DIVORCE - Marriage - Declaration of marriage without solemnization; LICENSES - Marriage - Declaration; FEES - Recording - Declaration of marriage; REVISED CODES OF MONTANA, 1947 - Sections 25-232, 48-101, 48-117, 48-130, 48-134, 48-146, 48-301, 48-306, 48-309, 48-314, 69-4432, 93-401-15, 93-401-16.

- HELD: 1. A marriage license is not a requirement for a valid marriage by written declaration.
2. No fee is to be charged for filing the declaration of marriage without solemnization pursuant to section 48-130, R.C.M. 1947.

4 April 1977

Donald E. White, Esq.
 Gallatin County Attorney
 Gallatin County Courthouse
 Bozeman, Montana 59715

Dear Mr. White:

You have requested my opinion on the following questions:

1. Whether a marriage license is required to be issued to parties filing a declaration of marriage before the marriage can be recognized as valid?
2. Whether a fee is to be charged for filing a declaration of marriage without solemnization pursuant to section 48-130, R.C.M. 1947?

An earlier opinion, 22 OP. ATT'Y GEN. NO. 49 (1947) held that under the declaration of marriage statute, a marriage license, premarital test certificate and recording fee were not required. Subsequent amendments to Title 48, R.C.M. 1947, however, mandate that a new opinion be issued.

At the time the opinion cited above was issued, the declaration of marriage statute read as follows:

Persons married without the solemnization provided in section 5710 must jointly make a declaration of marriage... . section 48-130, R.C.M. 1947 (section 5724, R.C.M. 1921).

The statute requiring a license stated:

Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained... . Section 48-117, R.C.M. 1947 (section 5711, R.C.M. 1921).

These two sections, along with other statutes relating to marriage, were originally borrowed from the California Civil Code. In 1895, the California Legislature passed an act designed to discontinue the recognition of "common law marriages" as valid. As part of this act, California's declaration of marriage statute was repealed. 1895 Cal. Stats, ch. 129, section 4.

Irrespective of California's legislative action, Montana continued to recognize "common law marriages" and the outgrowth of such marriages, the declaration of marriage, as valid.

Therefore at the time 22 OP. ATT'Y GEN. NO. 49 was written, the declaration was a separate procedure to formalize marriages for which no marriage license, or the license prerequisites, was required.

However, in 1959, section 48-130 was amended to read, in pertinent part, as follows:

Persons desiring to consummate marriage by written declaration in this state without the solemnization provided for in section 48-116 (now section 48-309) must prior to executing the declaration, secure the premarital test certificate required by section 48-134, which shall be firmly attached to the declaration and shall be filed by the clerk of the district court in the county where the contract was executed. Section 1, chapter 275, L.1959.

The headnotes to chapter 275 indicate that the purpose of the amendment was simply to require the attainment of the premarital test certificate. Chapter 275 does not speak to any necessity for a marriage license.

In interpreting statutes, it is necessary to determine what is in terms, or in substance, contained therein, and not to insert what has been omitted. Section 93-401-15, R.C.M. 1947; Dunphy v. Anaconda Company, 151 Mont. 76, 438 P.2d 660 (1968). Since the declaration of marriage statute is void of any provision requiring a marriage license, such a requirement cannot be inserted. Thus, a separate statutory means of formalizing marriage was retained.

However, in 1963, section 48-117, R.C.M. 1947, requiring a marriage license prior to solemnization, was repealed by section 12, chapter 232, L. 1963. That same act created section 48-146, which provides in pertinent part:

No Montana resident shall be joined in marriage within this state until a license has been obtained for that purpose... .

This would seem to indicate that after the enactment of section 48-146, R.C.M. 1947, the only way to enter into a valid marriage in Montana is to first obtain a marriage license. Such an interpretation of the section would require the discontinuance of Montana's recognition of "common law marriages." But the act, of which section 48-146, R.C.M. 1947, was a part, does not speak to such a reversal of public policy. In fact, its repealing clause deals only with those former sections of the code that set forth licensing procedures. Section 12, chapter 232, L. 1963.

Section 48-101, R.C.M. 1947, which is the basis of validity for "common law marriages," was in effect at the time of passage of chapter 232 and was not amended or repealed thereby. (Section 48-101, R.C.M. 1947, was repealed by the Uniform Marriage and Divorce Act, chapter 536, L. 1975.)

Additionally, section 48-146 goes on to say: "A license so issued shall authorize a marriage ceremony to be performed...."

Therefore, section 48-146, R.C.M. 1947, would seem to require a license only for those marriages which are to be solemnized.

In 1975, the Uniform Marriage and Divorce Act was enacted by the Legislature. Section 48-301 et seq., R.C.M. 1947. The Uniform Marriage and Divorce Act specifically retained section 48-130 allowing for declaration of marriages without solemnization. Section 48-314, R.C.M. 1947. In fact, the declaration section was amended to indicate these sections of the uniform act which were applicable to it. Section 48-314 also specifically stated that "common law marriages" are still a valid form of marriage in Montana.

The argument still lies that the declaration of marriage section, with its amendments, and the amendments to its companion sections, is only a way to allow solemnization of marriage without the necessity of a religious or civil ceremony. However, the Legislature, in enacting the Uniform Marriage and Divorce Act, included a provision for this very situation. Section 48-309, R.C.M. 1947, provides:

(1)... Either the person solemnizing the marriage, or, if no individual acting alone solemnized the marriage, a party to the marriage, shall complete the marriage certificate form and forward it to the clerk of the district court.

The American Bar Association Commission on Uniform Laws comment on this section in their commissioners' notes to the Uniform Marriage and Divorce Act:

The clause, "no individual acting alone," was designed to take account of the increasing tendency of marrying couples to want a personalized ceremony, without traditional church, religious or civil trappings. This provision authorizes one of the parties to such a marriage

ceremony to complete the marriage certificate form and forward it to the appropriate official for registration. 9 Uniform Laws Annotated 468.

To interpret the declaration section as nothing more than a means of informal solemnization of marriage would mean that the above quoted phrase of section 48-309 would only be a duplication. It is presumed the Legislature does not do useless acts. Helena Val. Irr. Dist. v. State Highway Commission, 150 Mont. 192, 433 P.2d 791 (1967). Additionally, the declaration of marriage section is entitled "Declaration of Marriage without solemnization." Section 48-130, R.C.M. 1947. Therefore, the declaration section is not merely a means of self-solemnization.

Supporting the conclusion, that declaration of marriage is excluded from licensing requirements, is the fact that the declaration statute itself provides a separate procedure for filing the premarital test certificate. That is, the certificate is to be filed with the declaration itself. Section 48-130, R.C.M. 1947. This is inconsistent with section 48-134 which requires the certificate to be filed at the time of application for a marriage license.

If a marriage license were required for a declaration of marriage the parties would have to file the premarital test certificate both with the declaration and prior to application for the marriage license. This, of course, is not physically possible.

Section 93-401-16, R.C.M. 1947, states that when a general and particular provision are inconsistent the particular provision is paramount. Therefore, the particular provisions of the declaration of marriage statute are paramount to the general marriage licensing statute.

The second question is whether a fee is to be charged for filing declarations of marriage under section 48-130, R.C.M. 1947.

The Montana Codes contain three statutes providing for the collection of marriage fees. First, section 25-232, R.C.M. 1947, sets forth the fees to be collected by district court clerks. The only fee listed in connection with marriage is a five dollar fee for issuance of a marriage license. The second statute, section 48-306, R.C.M. 1947, is in direct conflict with the former because it provides that a fifteen dollar fee is to be collected for issuing a license. Never-

theless, this contradiction can be resolved by reference to section 42 of chapter 532, Laws 1975, Uniform Marriage and Divorce Act, wherein it is stated:

Act supercedes other laws or regulations. If any provision of this act is in conflict with any other law of this state, or any rule or regulation promulgated thereunder, this act shall govern and control, and such other laws, rule or regulation shall be deemed superceded for the purposes of this act.

Since section 48-306, R.C.M. 1947, is a part of the Uniform Marriage and Divorcé Act, it is apparent that its provisions supercede the five dollar fee listed in section 25-232.

The third statute, section 69-4432, R.C.M. 1947, provides for the collection of a twenty-five cent (\$.25) fee for recording the marriage certificate. This fee is to be collected in addition to the fifteen dollar fee listed in section 48-306.

Under the rule of statutory construction "expressio unius est exclusio alterius" the express mention of one matter excludes other similar matters not mentioned. Helena Val. Irr. Dist. v. State Highway Commission, supra. The express mention of a fee for issuing a marriage license and recording the marriage certificate with no mention of other marriage fees, leads to the conclusion that the Legislature did not contemplate that a fee be charged for filing a written declaration of marriage.

THEREFORE, IT IS MY OPINION:

1. A marriage license is not a requirement for a valid marriage by written declaration.
2. No fee is to be charged for filing the declaration of marriage without solemnization pursuant to section 48-130, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General