

Office of the Attorney General
State of Washington

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October 5, 1971

Honorable Harold S. Zimmerman
State Representative
17th District
1432 N. E. 6th Avenue
Camas, Washington 98607

Dear Sir:

This is written in response to your recent letter, previously acknowledged, requesting our opinion on certain questions pertaining to the qualifications of ministers to perform marriages in this state. In your letter you first made reference to the following language of RCW 26.04.050, which provides as follows: "The following named officers and persons are hereby authorized to solemnize marriages, to wit: Justices of the supreme court, judges of the court of appeals, judges of the superior courts, any regularly licensed or ordained minister or any priest of any church or religious denomination anywhere within the state, and justices of the peace within their respective counties." (Emphasis supplied.) Then, with this statutory language in mind, you ask the following specific questions: "1. Does the authorization of this law include a person who has received in the mail, in response to his request, a piece of paper which states that said person is an 'ordained minister' in the 'Universal Life Church,' when such pieces of paper are available to anybody who requests them? "2. If so, and if the rationale for that answer is the principle of 'separation of church and state,' so that whoever a 'church' defines as a 'minister' is a minister for the purposes of this law, then is a person who says, 'I hereby establish _____ Church and hereby ordain myself a minister in it,' thereby qualified under the law to solemnize marriages? "3. Does the legislature, in view of the 'separation of church and state,' have the authority to amend this law by more clearly defining the terms 'regularly licensed or ordained minister or any priest,' at least for the purpose of recognizing marriages performed by said persons?" We answer each of these questions in the manner set forth in our analysis.

ANALYSIS

Questions (1) and (2):

We shall consider your first two questions together, because they both raise a single issue; namely, what standards or criteria are to be applied in determining whether a particular minister or other religious officer may solemnize a marriage.

In AGO 57-58 No. 167 [[to Prosecuting Attorney, Whatcom County on February 26, 1958]], copy enclosed, this office had under consideration essentially this same question, and in answering it we made note not only of RCW 26.04.050, supra, but of another statute, RCW 26.04.120, as well. This latter statute reads as follows:

"All marriages to which there are no legal impediments, solemnized before or in any religious organization or congregation, according to the established ritual or form commonly practiced therein, are valid, and a certificate containing the particulars specified in RCW 26.04.080 and 26.04.090, shall be made and filed for record by the person or persons presiding or officiating in or recording the proceedings of such religious organization or congregation, in the manner and with like effect as in ordinary cases."

*2 A third statute appearing in this RCW chapter, RCW 26.04.060, which was also noted in this prior opinion, provides as follows:

"A marriage solemnized before any person professing to be a minister or a priest of any religious denomination in this state or professing to be an authorized officer thereof, is not void, nor shall the validity thereof be in any way affected on account of any want of power or authority in such person, if such marriage be consummated with a belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. Illegitimate children become legitimate by the subsequent marriage of their parents with each other." Of these three statutes, we said:

"The three aforementioned statutes are clearly in pari materia and must be construed together. See State v. Houck, 32 Wn.2d 681. When they are so construed it is readily apparent that the legislative intention has been entirely liberal in this regard in keeping with Amendment Four of the state constitution dealing with religious freedom which reads, in part, as follows:

"Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual"

"It should also be noted that Washington is not included in the large number of states requiring religious officers to obtain some form of official sanction to solemnize marriages. 1 Vernier, American Family Laws 82.

"Thus, we conclude that the following standards may be followed in determining whether a particular minister or other religious officer is enabled to solemnize a marriage:

"(1) Is he, in the words of RCW 26.04.050, a ' . . . regularly licensed or ordained minister or any priest of any church or religious denomination? "

"According to common practice, we understand one to be 'licensed' who though not ordained as a minister has been invested with a similar but limited authority, generally on a temporary basis, by his particular church or religious denomination.

"(2) If he cannot be so described, is he the individual within a particular religious organization who by its established ritual or form is authorized to solemnize a marriage or attest to its solemnization as the presiding, officiating, or recording officer thereof?

"In the application of these standards, we believe that a rather broad and liberal interpretation should be accorded the term 'religious organization.' The lack of conformity with established religious belief and institutions would appear to be of no significance here. State ex rel. Bolling v. Superior Court for Clallam County, 16 Wn.2d 373."

In connection with the foregoing, note should also be made of the attitude which has been displayed by our state supreme court with regard to the solemnization of marriages. In Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (1909), construing essentially the same statutory provisions as are now codified as RCW 26.04.050, supra,

the court held that a marriage which had been performed by an Indian chief who believed himself to have the authority to perform marriages was not void. In reaching this conclusion the court, basically, manifested an attitude of attaching considerably more importance to the legal capacity and intent to enter into a marriage contract on the part of the man and woman involved than to the formalities of the marriage ceremony - including the identity or status of the person solemnizing the marriage. [FN1]

*3 RCW 26.04.010 expressly declares that:

"Marriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable: . . ."

Of course, it is very definitely necessary for the couple entering into this marriage contract to comply with our state's licensing laws prior to having their marriage solemnized. See, RCW 26.04.140-26.04.220, and, in particular, RCW 26.04.170, providing for a three-day waiting period, and RCW 26.04.210 requiring the following proof of the capacity of both parties to marry:

"The county auditor, before a marriage license is issued, upon the payment of a license fee as fixed in RCW 36.18.010 shall require each applicant therefor to make and file in his office upon blanks to be provided by the county for that purpose, an affidavit showing that such applicant is not feeble-minded, an imbecile, insane, a common drunkard, or afflicted with pulmonary tuberculosis in its advanced stages: Provided, That in addition, the affidavit of the male applicant for such marriage license shall show that such male is not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested credible person showing that neither of said persons is an habitual criminal, and that the applicants are the age of eighteen years or over: Provided further, That if the consent in writing is obtained of the father, mother, or legal guardian of the person for whom the license is required, the license may be granted in cases where the female has attained the age of seventeen years or the male has attained the age of seventeen years. Such affidavit may be subscribed and sworn to before any person authorized to administer oaths. Anyone knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this section shall be deemed guilty of perjury and punished as provided by the laws of the state of Washington."

Essentially, then, it will be seen that the approach of our existing laws with regard to marriage - in terms of the legal ingredients of its consummation - is one which emphasizes the capacity and intent of the parties themselves rather than the ceremony. In fact, in so far as the ceremony itself is concerned, it is notable that the legislature, by RCW 26.04.070 has provided that:

"In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife."

It is important to note also that there is no Washington statute or case that attempts to define what an organization must be in order to qualify as a church, or similarly what qualifications are necessary to be a minister. Therefore, the language of RCW 26.04.050 which refers to a "regularly licensed or ordained minister" does not mean "regularly" in terms of official state procedures but rather it refers to whatever procedures may be followed by the religion or church in question. In terms of your first question, it seems apparent that a person such as is referred to therein has complied with the regular procedure of the Universal Life Church in becoming an ordained minister and in doing so has complied with the statutory requirements of this statute. It is therefore our opinion that to disqualify such a person from performing marriages, it would be necessary to show that the Universal Life Church is in fact not a church and therefore cannot enjoy the protections of the constitution - both our own Article I, § 11 (Amendment 34) as referred to in AGO 57-58 No. 167, supra, [FN2] and Amendment 1 to the United States Constitution, which provides that:

*4 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

From the facts available to this office at this time, it is not possible to say that as a matter of law the Universal Life Church either is or is not a church. While facts could perhaps be marshalled to determine this, any attempt to do so would be extremely difficult. Cases under both federal and state constitutions relating to freedom of religion demonstrate that this is an extremely broad area and that the courts are loathe to strike down actions taken in the name of a religious order when, in the words of the Washington constitution, such practices are not ". . . inconsistent with the peace and safety of the state. . . ." [FN3] Nothing demonstrated at this time indicates that the actions taken by persons such as you have described present such an inconsistency; nor has it been shown that the procedures which you have questioned involve any failure to comply with the procedural requirements of the Washington marriage statutes pertaining to filing of documents and recording of marriages. Moreover, it is pertinent to note that regardless of what happens in the future, the marriages performed thus far by any of the individuals in question are (pursuant to RCW 26.04.060) valid if at least one of the parties thereto believed that the person who did so had the authority to solemnize their marriage.

As far as your question (2) is concerned; i.e., the individual who simply proclaims the existence of a church and his own status as a minister thereof, it is not possible to provide a definitive answer to this question because any answer is in large measure dependent upon the facts of the particular situation.

In interpreting Article I, § 11 (Amendment 34) of our state constitution, the language of which is considerably stronger than simply "separation of church and state," our supreme court has refused to infringe on professed religious beliefs and acts except ". . . to prevent grave and immediate danger to interests which the State may lawfully protect . . ." { State ex rel. Holcomb v. Armstrong, 39 Wn.2d 860, 864, 239 P.2d 545 (1952). [FN4]

By the language of RCW 26.04.050 referring to ". . . any regularly licensed or ordained minister . . .," it could be argued that more is contemplated and required than merely an individual sua sponte creating a religion and ordaining himself as its minister on each. Yet clearly there is historical precedent for precisely such action.

It is for this reason that an examination of the individual's beliefs and motives would be necessary before your question in this regard could be answered. If his beliefs were sincerely held, regardless of their lack of consistency with what might be termed conventional religion, and the marriage ceremony did not include "acts of licentiousness" or "practices inconsistent with the peace and safety of the state" and the proper statutory procedures were followed, a marriage performed by a one-man religion almost certainly would be upheld as well as the power of the individual to perform marriages.

*5 On the other hand, if the motives were fraudulent and the beliefs capable of being shown to be a sham, or window-dressing for the improper motives, such a one-man religion probably could be successfully denied the authority granted to ministers by RCW 26.04.050; however again, even here, the provisions of RCW 26.04.060 would preserve the validity of the marriage if at least one of the parties thereto believed that the person who performed the ceremony had the authority to do so.

Question (3):

Your third question inquires as to the constitutional ability of the legislature to change our existing statutes by attempting to define the term "regularly licensed or ordained minister or any priest" as used in RCW 26.04.050, so as to exclude such persons as are referred to in questions (1) and (2) from the performance of marriages.

As evidenced by the discussion of Article I, § 11 (Amendment 34) [Amendment 4], of our state constitution in AGO 57-58 No. 167, supra, this state constitutional provision relating to freedom of religion very definitely plays a substantial part in any determination of whether a particular person who represents himself as the minister of some religious body can be said to have the authority to solemnize a marriage - along with Amendment 1 to the United States Constitution, quoted above.

The essential thrust of these constitutional provisions is that neither the federal congress nor any state is to purport to recognize or otherwise grant sanctions to any particular religious establishment - to the exclusion of others. Moreover, a long line of authority from this and other jurisdictions holds that freedom of religion can be restricted only "to prevent grave and immediate danger to interests which the state may lawfully protect." State ex rel. Holcomb v. Armstrong, supra; State ex rel. School District No. 412 v. Superior Court King County, 55 Wn.2d 177, 346 P.2d 999 (1959); see, also, West Virginia State Board of Education v. Barnette, supra. Further explication of this concept is found in State ex rel. Bolling v. Superior Court for Clallam County, 16 Wn.2d 373, 133 P.2d 803 (1943), wherein the Washington court stated at pages 385-6:

"It is one of the most important duties of our courts to ever guard and maintain our constitutional guarantees of religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation, or because it may be considered that the enforcement of some law or regulation circumscribing religious liberty would be of little consequence as possibly affecting only a few persons, or because the consequences of the impingement upon the constitutional guarantees may appear insignificant."

By way of illustration of the impediments which these constitutional provisions respecting freedom of religion pose to any attempt by a legislature to regulate, restrictively, as to the qualifications of ministers to solemnize marriages, see, O'Neill v. Hubbard, 40 N.Y.S.2d 202 (1943); and In re Saunders, 37 N.Y.S.2d 341, 343 (1942). Both of these New York cases involved the constitutionality of a statute which declared that only the clergy affiliated with religions listed in the last federal census of religious bodies could solemnize marriages, and in both, the statute was held (by different courts) to be unconstitutional.

*6 In Saunders, the court expressed itself as follows:

"It seems to me to be clear that the requirement that a religion to be recognized be one 'listed in the last preceding federal census of religious bodies' is a legislative restriction upon the recognition of religious bodies, and that the act of the Legislature in basing the right to perform a marriage ceremony upon such restriction constitutes an invasion of an unwarranted interference by the state with that freedom of religion guaranteed by article I, section 3 of the New York State Constitution.

"It is more desirable by far to tolerate the abuses of a few charlatans than to give judicial approval and sanction to a legislative enactment patently repugnant to the principles of religious liberty."

And in O'Neill, the court said at page 204:

". . . Under the above quoted provision of our State Constitution, even an unorganized religious body or sect, though not enumerated by the census taker, is guaranteed the same degree of freedom in religious worship as is assured the larger denominations. 'The state has ever been jealous, since its organization, to protect against appearance of an encroachment upon the right of free worship of God as the conscience of the citizen may choose and direct.' Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715, 718. The untrammelled right to entertain any religious belief and to adhere to any religious dogma which does not violate positive enactments of law and which does not flout basic concepts of morality is thus guaranteed by organic law. The right to have a marriage solemnized by a minister of one's own faith is an incident of that guarantee. It may not be impaired by the Legislature in the manner here attempted."

With this New York experience in mind it will be seen, then, that any attempt by the legislature to amend or otherwise define the terminology of RCW 26.04.050, supra, for the purpose of restrictively regulating the matter of who may be deemed to be a minister for the purpose of solemnizing a marriage would be replete with constitutional difficulties; and, most certainly, any such legislation would be vulnerable to constitutional challenge if it purported to spell out any sort of list of "recognized" religious organizations for the purpose of permitting only the ministers of those organizations to perform marriage ceremonies in this state. However, although this proposition may offend some persons who are accustomed to focusing in upon marriage from a standpoint of the sanctity or formality of the ceremony, let us further suggest, in conclusion, a basic correctness in the existing manifestation of attitudes by both our court and the legislature - that the more important thing in a marriage is the capacity and intent of the parties thereto.

Moreover, although any attempt to restrict by legislation the categories of ministers who may perform marriages would thus be of probably unconstitutionality, this does not totally bar any legislative activity in this area. If instead, the legislature were merely to enact some sort of simple registration or licensing requirement for ministers who perform marriages in this state - for which any minister or priest would be eligible regardless of the identity or status of his church - the constitutional difficulties of restrictive legislation probably would not arise. According to 1 Vernier, American Family Laws, p. 82 (cited in AGO 57-58 No. 167, supra), some nineteen states or territories have such requirements and none have been held invalid on "freedom of religion" grounds so far as this text discloses. [FN5]

*7 We trust that the foregoing will be of assistance to you.

Very truly yours,

For The Attorney General

John H. Bright
Assistant Attorney General

[FN1]. See, also, Goldwater v. Burnside, 22 Wash. 215, 219, 60 Pac. 409 (1900), which discusses and applies a policy of presuming the legality of a marriage to the greatest extent possible ". . . in order to repel the conclusion of unlawful cohabitation." Accord, Thomas v. Thomas, 53 Wash. 297, 101 Pac. 865 (1909), wherein the court quoted with approval from 1 Bishop, Marriage & Divorce (5th ed.), § 457, as follows:

"It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in its nature matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it in each particular case, to sustain marriage and repel the conclusion of unlawful commerce."

[FN2]. Described therein as Amendment Four.

[FN3]. Article I, § 11 (Amendment 34), supra.

[FN4]. Quoting from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943).

[FN5]. The states or territories listed by Vernier are:

Arkansas, Delaware, District of Columbia, Hawaii, Kentucky, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Ohio, Oklahoma, Oregon, Rhode Island, Virginia, West Virginia, and Wisconsin.

Typical of those requirements is that of our neighbor state of Oregon, ORS § 106.120, which provides:

"(1) Marriages may be solemnized by any judicial officer of the state anywhere within his jurisdiction, or by congregations or organizations as indicated in subsection (2) of ORS 106.150, or by any minister of any church organized, carrying on its work and having congregations in this state, who is authorized by such church to solemnize marriages, and who has filed for record with the county clerk of the county in which he resides or in which the marriage is solemnized, evidence satisfactory to the county clerk that he has been so authorized. In the case of a nonresident minister, such filing shall be in any county in which he performs any marriage ceremony, but no minister shall be required to file such evidence of authority in more than one county.

"(2) The evidence of authority, if approved by the county clerk, shall be recorded by him in a book called 'Authority to Solemnize Marriages,' for which he shall charge 10 cents per folio for recording and indexing; but no charge shall be less than 25 cents. Whenever any minister who has filed such evidence of authority with one county clerk solemnizes any marriage in any other county, he shall attach to or indorse upon the certificate required by ORS 106.170, a statement over his signature showing his place of residence and the county clerk with whom his evidence of authority to solemnize marriages is recorded."

Wash. AGL0 1971 NO. 117, 1971 WL 123035 (Wash. A. G.)