

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 852 (Senator Stone, *et al.*)
Judicial Proceedings

Same Sex Marriages - Foreign Jurisdictions - Invalidity

This bill provides that a marriage between two individuals of the same sex that is validly entered into in another state or in a foreign country is not valid in Maryland. A foreign marriage is defined as being between a man and a woman.

Fiscal Summary

State Effect: The bill does not affect governmental operations or finances as it reflects current practice.

Local Effect: None.

Small Business Effect: Potential minimal.

Analysis

Current Law: Only a marriage between a man and a woman is valid in this State. “Foreign marriage” means a marriage ceremony performed outside of Maryland and in which one or both of the parties were or are citizens of Maryland.

Background:

Full Faith and Credit and Maryland Developments

Under the Full Faith and Credit Clause of the U.S. Constitution, states are required to give full faith and credit to the public acts, records, and judicial proceedings of every other state. Therefore, Maryland will recognize foreign marriages that are validly entered

into in another state. For example, Maryland will recognize a common law marriage from a foreign jurisdiction, although common law marriages are not valid in Maryland. *Henderson v. Henderson*, 199 Md. 449 (1952).

However, the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy. See *Nevada v. Hall*, 440 U.S. 410 (1979). Similarly, the *Henderson* court stated that Maryland is not bound to give effect to marriage laws that are "repugnant to its own laws and policy." 199 Md. at 459.

Since 1973, Maryland law has provided that only a marriage between a man and a woman is valid in this State. The Office of Attorney General informally advised in 2004 that the Maryland law prohibiting same-sex marriage could create a valid public policy exception to the general rule that marriages valid where performed are valid anywhere (*Advice of Counsel Letter to the Honorable Joseph. F. Vallario, Jr., Chairman, House Judiciary Committee*, February 24, 2004).

However, on February 23, 2010, the Attorney General issued a formal opinion on the recognition of same-sex marriages in Maryland and concluded that although not free of all doubt, the Court of Appeals "... is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction." (*See* 95 Op. Att'y Gen. 3 (2010) at 54.). That formal opinion advised that in light of evolving State public policies that favor, at least for some purposes, domestic partnerships and same-sex intimate relationships and in light of other past actions the Court of Appeals has taken to recognize other marriages that clearly were against public policy, the Court would probably be reluctant to invoke the public policy rule exception for the entire class of same-sex marriages. A major consideration would be the uncertainty that could be created by invoking such an exception for those same-sex spouses and their families who visit or pass through Maryland if some event occurs which causes them to extend their connection with Maryland. The extent to which the Attorney General's opinion will alter State agency policies and actions toward same-sex spouses who enter, visit or reside in Maryland remains to be seen.

Federal Defense of Marriage Act and Other States

The federal Defense of Marriage Act of 1996 defines marriage as a legal union between a man and a woman and provides that states are not required to recognize same-sex marriages performed in other states. Five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) and the District of Columbia authorize marriage for couples of the same sex. The District of Columbia law was enacted in 2009 and the jurisdiction plans to issue same-sex marriage licenses beginning in March 2010, barring any prohibition by Congress. While the California Supreme Court decision establishing same-sex marriage was overturned in 2008 by passage of the Proposition 8 referendum,

those couples married before the referendum's passage are still regarded as married under California law.

While same-sex marriage is not recognized in New York, state agencies have been informally ordered by the governor to ensure that their actions are consistent with a state court decision that authorizes recognition of valid same-sex marriages entered into in foreign jurisdictions. Recent court challenges to that informal gubernatorial order have been dismissed by the New York State Court of Appeals, that state's highest court. A Rhode Island Attorney General opinion advising that same-sex marriages could be recognized in that state has been deemed inapplicable due to a Rhode Island Supreme Court decision ruling that a same-sex couple married in Massachusetts could not divorce in Rhode Island as the granting of a divorce would presuppose the validity of the marriage – a matter on which Rhode Island law is silent. However, the District of Columbia has enacted legislation that authorizes recognition of the same-sex marriages solemnized in other states or foreign countries.

Forty-one states (including Maryland) have passed laws that either prohibit same-sex marriages or deny recognition of same-sex marriages solemnized in another jurisdiction. Thirty states have adopted constitutional amendments defining marriage as a union between a man and a woman.

Local Fiscal Effect: The counties of Anne Arundel, Charles, Montgomery, and Somerset advise that the bill will not have a fiscal effect. In Montgomery County, the bill will not affect county benefits extended to same-sex couples since qualification for the benefits is not contingent on marital status.

Small Business Effect: A small business could be affected by this bill to the extent that a member of a same-sex marriage is a debtor of or employed by the business.

Additional Information

Prior Introductions: HB 693 of 2005 received an unfavorable report from the House Judiciary Committee. In 2004, HB 728 received an unfavorable report from the House Judiciary Committee. Its cross file, SB 746, was heard in the Judicial Proceedings Committee, but received no further action. Similar legislation was introduced in the 2001 and 1996 session.

Cross File: Although designated as a cross file, HB 90 (Delegate Burns) – Judiciary is not identical.

Information Source(s): Anne Arundel, Baltimore, Charles, Frederick, Montgomery, and Somerset counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); National Conference of State Legislatures; *wtop news radio*; Department of Legislative Services

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