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RECENT DEVELOPMENT

PORT V. COWAN: WHEN APPLYING MARYLAND'S DOMESTIC DIVORCE LAW, A VALID SAME-SEX MARRIAGE PERFORMED OUT-OF-STATE IS RECOGNIZED AS LEGITIMATE IN MARYLAND UNDER THE DOCTRINE OF COMITY.

By: Errin K. Roby

The Court of Appeals of Maryland held that an otherwise void out-of-state same-sex marriage was valid for the purpose of obtaining a divorce under Maryland law. *Port v. Cowan*, 426 Md. 435, 455, 44 A.3d 970, 982 (2012). Applying the doctrine of comity, the court held that a valid marriage performed in another state must be legally recognized in Maryland unless that marriage violated public policy or was expressly prohibited by statute. *Id.* at 455, 44 A.3d at 982.

Jessica Port (“Port”) and Virginia Cowan (“Cowan”) were legally married in California in 2008. The couple separated in 2010. Port, who resided in Maryland at that time, filed a complaint for absolute divorce in the Circuit Court for Prince George’s County. Cowan filed a “no contest” answer. Although Port met the statutory requirements for an absolute divorce based upon the grounds of voluntary separation, the circuit court denied her divorce complaint. The court declared that Port and Cowan’s marriage was not valid under Maryland law and violated Maryland’s public policy.

Port and Cowan individually appealed the circuit court’s ruling to the Court of Special Appeals of Maryland. Both parties argued that their California marriage should be recognized in Maryland, and that Maryland’s divorce laws should apply to the dissolution of their union. Before the Court of Special Appeals of Maryland could consider the appeal, the Court of Appeals of Maryland issued a writ of certiorari upon its own initiative.

The Court of Appeals of Maryland began its analysis by examining the common law doctrine of comity. *Port*, 426 Md. at 444, 44 A.3d at 975. Under the doctrine of comity, Maryland courts defer and acknowledge the decisions made by other states’ courts as a sign of respect. *Id.* at 444, 44 A.3d at 975 (citing *Wash. Suburban Sanitary Comm’n v. CAE-Link Corp.*, 330 Md. 115, 140, 622 A.2d 745, 757 (1993)). When applied to a foreign marriage, Maryland courts use the choice-of-law rule known as *lex loci celebrationis* (“*lex loci*”) and evaluate the validity of the marriage based on the law where the marriage was performed. *Port*, 426 Md. at

444, 44 A.3d at 975-76 (citing *Jackson v. Jackson*, 82 Md. 17, 28, 33 A. 317, 318 (1895)).

The court explained that Maryland's recognition of foreign marriages under *lex loci* has two significant exceptions. *Port*, 426 Md. at 444, 44 A.3d at 976. The foreign marriage cannot be "repugnant" to Maryland public policy, and it may not be explicitly prohibited by the General Assembly. *Id.* at 444-45, 44 A.3d at 976 (citing *Henderson v. Henderson*, 199 Md. 449, 459, 87 A.2d 403, 409 (1952)). These exceptions are rare, as Maryland has generally recognized out-of-state marriages as valid, including unions forbidden in the State. *Port*, 426 Md. at 445, 44 A.3d at 976.

The trend towards recognizing out-of-state marriages is directly tied to the status of marriage as a symbol of stability in society. *Port*, 426 Md. at 445, 44 A.3d at 976. For example, Maryland courts have recognized out-of-state common law marriages, even though such marriages cannot be formed in Maryland. *Id.* at 445-46, 44 A.3d at 976-77 (citing *Henderson*, 199 Md. at 458-60, 87 A.2d at 408-09). The court also accepted as valid a marriage between an uncle and a niece performed in Rhode Island, even though an uncle-niece marriage was void in Maryland and classified as a misdemeanor. *Port*, 426 Md. at 446, 44 A.3d at 977 (citing *Fensterwald v. Burk*, 129 Md. 131, 137-38, 98 A. 358, 360 (1916)).

The Court of Appeals of Maryland then applied the principles of *lex loci* to the instant case. *Port*, 426 Md. at 446, 44 A.3d at 977. The court began by examining the current statutory language in order to determine the intent of the General Assembly regarding marriage recognition. *Id.* at 447, 44 A.3d at 977-78. Section 2-201 of the Family Law Article of the Maryland Code states "[o]nly a marriage between a man and a woman is valid in this State." *Id.* at 447, 44 A.3d at 977 (citing Md. Code Ann., Fam. Law, § 2-201 (West 2006), *repealed by* Civil Marriage Protection Act, 2012 Md. Laws Ch. 2 (H.B. 438)). The plain wording of the statute does not specifically forbid the recognition of same-sex marriages performed in other states. *Port*, 426 Md. at 447, 44 A.3d at 977-78. Additionally, same-sex marriages are not included in the statutory list of void marriages in Family Law Article section 2-202. *Id.* at 447, 44 A.3d at 978. After examining the current statutes, the court determined that the statutory prohibition exception did not apply. *Id.* at 447-48, 44 A.3d at 977-78.

Turning to the second exception under *lex loci*, the court examined the parties' marriage in the instant case in order to determine if their marriage was "repugnant" to Maryland public policy. *Port*, 426 Md. at 449, 44 A.3d at 978-79. Conduct that harms general society violates public policy. *Id.* at 449, 44 A.3d at 979 (citing *Md.-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 282 Md. 588, 605-06, 386 A.2d 1216, 1228 (1978)). The threshold required to meet the repugnancy

standard is purposefully set “very high.” *Port*, 426 Md. at 450, 44 A.3d at 979. For example, the repugnancy standard was mentioned in connection to inter-racial marriage, which was once prohibited by statute and deemed “an infamous crime.” *Id.* at 450, 44 A.3d at 979 (citing *Henderson*, 199 Md. at 459, 87 A.2d at 409). In contrast, a same-sex marriage performed in Maryland today would not carry a severe criminal penalty, and therefore would not meet that high standard. *Port*, 426 Md. at 450, 44 A.3d at 979-80. Consequently, the court concluded the parties’ marriage in the instant case was not “repugnant” to Maryland public policy. *Id.* at 449, 44 A.3d at 978-79.

The court further clarified that judicial recognition of validly performed same-sex marriages comported with Maryland public policy. *Port*, 426 Md. at 451, 44 A.3d at 980. The General Assembly enacted laws prohibiting discrimination against same-sex couples in areas such as employment and housing. *Id.* at 451, 44 A.3d at 980. The court also expressly rejected arguments related to a party’s sexual orientation when deciding family law situations. *Id.* at 452, 44 A.3d at 980. Maryland also enacted policies designed to recognize out-of-state same-sex marriages. *Id.* at 452, 44 A.3d at 980-81. This was in response to the Attorney General’s 2010 opinion, which suggested that the Court of Appeals of Maryland should acknowledge such marriages as valid. *Id.* at 451-53, 44 A.3d at 980-81. Finally, Maryland’s recognition of validly performed out-of-state same-sex marriages would bring Maryland in line with other states, such as Wyoming and New Mexico, which have employed the doctrine of comity in analyzing their domestic divorce laws. *Id.* at 453-54, 44 A.3d at 981 (citing *Christiansen v. Christiansen*, 253 P.3d 153, 155-56 (Wyo. 2011); N.M. Op. Att’y Gen. 11-01, available at 2011 WL 111243 (N.M.A.G. Jan. 4, 2011)).

Because the same-sex marriage in the instant case did not fall within either of the two *lex loci* exceptions, the court recognized the marriage under the doctrine of comity. *Port*, 426 Md. at 455, 44 A.3d at 982. Under the principles of comity, Maryland courts must treat the parties’ same-sex marriage no differently than any other valid out-of-state marriage. *Id.* at 455, 44 A.3d at 982. Consequently, the court reversed the judgment of the Circuit Court for Prince George’s County and remanded the case with instructions to grant a final divorce to the parties. *Id.* at 455, 44 A.3d at 982.

In *Port*, the Court of Appeals of Maryland reaffirmed that a valid out-of-state marriage will only be rejected if it is repugnant to Maryland’s public policy. Same-sex marriage does not meet this high threshold. In fact, in 2012, the General Assembly passed, and the governor signed, a bill legalizing same-sex marriage in Maryland. Maryland voters affirmed the law during the general election on November 6, 2012. Beginning January 1, 2013, Maryland circuit courts will begin to issue civil marriage

licenses to same-sex couples. The court's decision in *Port*, coupled with the referendum's approval, will likely result in the further extension of marriage-related policies and privileges to same-sex couples, and reluctance of Maryland courts to draw legal distinctions between heterosexual and same-sex couples.