THE AEL ADVOCATE

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HEALTH INSURANCE COVERAGE FOR EMPLOYEES' DOMESTIC PARTNERS AND/OR SAME-SEX SPOUSES FROM MARRIAGES LEGALLY PERFORMED IN STATES ALLOWING SAME-SEX MARRIAGES

Nearly all aspects of the collective bargaining process embrace a policy of non-discrimination. This policy, however, has been abandoned by the BOE in the arena of health insurance coverage eligibility for employees' domestic partners and/or same-sex spouses (those validly married in other states allowing same-sex marriage). Although we have previously brought this matter to your attention (See AEL ADVOCATE, Fall 2008 Issue), sweeping changes in the law throughout the United States necessitate further discussion on the continuing fight for equality, relevant herein so that non-discrimination in health insurance benefits becomes a reality, rather than a promise not kept. It should be noted that these benefits are presently available to employees of the State of Maryland, the City of Annapolis and most school systems in surrounding Maryland Counties.

The following pages provide an update in the status of same-sex marriage throughout the United States, that is, which states allow it and which states recognize it, if validly performed in a state allowing it. In addition, the federal litigation from California will be discussed since, if appealed to the Supreme Court, it could impact the entire United States, not only Maryland.

I. UPDATE ON SAME-SEX MARRIAGES

Legislative Landscape

A. States Allowing Same-Sex Marriages

The following states currently allow same sex couples to marry: Massachusetts, Connecticut, Vermont, New Hampshire, and Iowa. The District of Columbia recently joined the aforesaid states in giving same-sex couples the right to marry. California allowed same-sex couples to marry for a short period of time and is now in the midst of a continuing and protracted legal battle over same-sex marriage. Because the outcome of the California litigation has potential universal application to all states, it will be addressed separately.

B.Other States' Legislative Approaches to Same-Sex Marriages

A large majority of states (approximately 40) not only prohibit same-sex couples from marrying, **but also** explicitly bar recognition of out of state same-sex marriages, either by state statute or state constitutional amendment. Maryland and Wyoming take a hybrid statutory approach, that is, although both states specifically define marriage as between a man and woman (by statute, not state constitutional amendment), neither explicitly bars recognition of out of state same-sex marriages. At the opposite end of the spectrum, four states, that is, Rhode Island, New Jersey, New Mexico and New York have "marriage statutes" that do not explicitly allow or proscribe same-sex marriage or address recognition of out of state same-sex marriages.

C.California

California voters can directly author state statues and/or state constitutional amendments through a system of "ballot propositions" voted on by California voters during general elections. To qualify for a ballot, propositions need valid petition signatures of 8% of the total votes cast for governor in the prior general election. California voters are very active in this regard, resulting in numerous ballot propositions in most state elections.

"Proposition 22" created a California state statute providing that "only marriage between a man and a woman is valid or recognized in California." This statute was subsequently struck down as unconstitutional under California's **State** Constitution and immediately thereafter, a multitude of same-sex couples were legally married in California.

In response, opponents of same-sex marriages initiated "Proposition 8", repeating the verbage of Proposition 22, but this time as a state constitutional amendment, not a statute. By changing the definition of marriage in the **State Constitution**, restricting it to opposite-sex couples, Proposition 8 would overturn the California Supreme Court ruling that the Proposition 22 state statute was unconstitutional under the California Constitution. Proposition 8 passed in the November, 2008 state elections, putting an end to future same-sex marriages. Proposition 8 did not affect domestic partnerships or same-sex marriages performed prior to the November elections.

After the November elections, same-sex couples and government entities filed numerous lawsuits, this time in **federal court**. Proponents of the Proposition 8 state constitutional amendment argued that exclusively heterosexual marriage was "an essential institution of society" and allowing same-sex marriages would "result in public schools teaching our kids that gay marriage is okay." Opponents argued that "the freedom to marry is fundamental to our society," that the California Constitution "should guarantee the same freedom and rights to everyone" and that Proposition 8 "mandates one set of rules for gay and lesbian couples and another set for everyone else." They also argued that "equality under the law is a fundamental constitutional guarantee under the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution." On August 4, 2010, in the case Perry v. Schwarzenegger, Judge Vaughn Walker overturned Proposition 8 as unconstitutional under the Fourteenth Amendment to the United States Constitution.

The California case is of utmost importance because it is the first time the issue of same-sex marriage is in **federal court** dealing with rights guaranteed by the **United States Constitution** (14th Amendment Equal Protection Clause), rather than challenges in state courts over rights under state constitutions. The California case has already been appealed to the 9th Circuit Court of Appeals and will most likely end up before the Supreme Court of the United States. A ruling by the Supreme Court will be binding on the entire United States.

If the Supreme Court rules that it is unconstitutional under the United States Constitution to deny same-sex couples the right to marry, all states will have to comply with the ruling, allowing same-sex couples the right to marry in each and every state. State statutes and/or state constitutions defining marriage as the union between a man and a woman will, therefore, be unconstitutional. If, on the other hand, the Supreme Court rules that the United States Constitution does not guarantee same-sex couples the right to marry, individual states will continue to decide this on a state by state basis, some states allowing it, some not. States can always expand on federal rights, but cannot restrict or diminish them. In other words, we will remain at present day status quo.

II. PROBLEMS CREATED BY LACK OF UNIFORMITY IN SAMESEX MARRIAGE LAWS BETWEEN THE STATES

The most obvious problem with some states allowing and some states prohibiting same-sex marriages arises when a same-sex couple, legally married in one state, moves to a state which does not recognize same-sex marriages. Are they still legally married in the eyes of the new state? Does spousal privilege in criminal and civil matters apply? That is, are confidential communications between the "spouses" privileged from discovery? Do they have the privilege of not having to testify against the other? What happens if they choose to divorce? There is no process for "divorce" in the new state if the state does not recognize the marriage and since they are no longer residents of the state where they were legally married, they lack the residency requirement to file for divorce there. If the partners, unable to legally divorce in the new state, simply "abandon the marriage," can they legally remarry (a person of the opposite sex) or would they be guilty of bigamy in the state where they were originally married?

Other problems inherent in this situation are qualification for health care benefits, health care decision rights, and disparities in taxation and estate matters. These issues are not always amenable to resolution by contracts between the parties as often claimed. For example, estate taxes are not imposed on the spouse of a decedent under many state laws. An unmarried same-sex partner of a decedent could be precluded, as a matter of law, from this benefit. Many states allow the spouse of a decedent to

“renounce” the decedent’s will if he or she feels unfairly treated and take, in its place, the spousal share prescribed by state law in cases where there is no will. Unmarried same-sex couples could be denied this benefit as well. Even property ownership can present disparate rights. Unmarried same-sex couples are excluded from the rights and benefits of spousal “tenants by the entirety” property ownership in states such as Maryland providing for that form of property ownership. (See following chart.)

Property Ownership	
Tenants by the Entirety	Joint Tenants with Right of Survivorship
Available only to married couples: property conveys automatically as a matter of law at the death of one spouse to the other spouse.	Available to any persons desiring property to convey as a matter of law at the death of one of the joint tenants to the other joint tenants.
If a money judgment is taken against one spouse, the judgment creditor **CANNOT** force a sale of that property to collect the judgment.	If a money judgment is taken against one joint tenant the judgment creditor **CAN** force a sale of that property to collect the judgment up to the value of the judgment debtor’s share.

All of the foregoing are examples of some of the problems that can arise when a samesex couple, legally married in one state, moves to a state not recognizing same sex marriages.

III. COMITY, FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, AND THE FEDERAL DEFENSE OF MARRIAGE ACT OF THE 1990’S

States generally recognize the validity of other states’ laws under the legal principal of “comity” and the Full Faith and Credit Clause of the United States Constitution (Article IV, Section 1). The exception to the general rule arises if one state’s law is found to be repugnant to or against a strong public policy of the other state.

In the mid 1990’s, Congress enacted the “Federal Defense of Marriage Act” in reaction to the possibility that a state might authorize same-sex marriage. This statute provides that one state is not

required to recognize a same-sex marriage validly performed in another state, deferring to state law for that decision on a state by state basis. The statute also limits marriage to heterosexual couples for purposes of federal law, not state law.

A. Would Maryland's Court of Appeals Recognize Same-Sex Marriages Validly Performed in Other States?

Since Maryland statutes do not specifically address the issue of whether Maryland would recognize same-sex marriages validly performed in other states, resolution of the matter would be left to the Court of Appeals, the highest Court in Maryland (unless the Supreme Court rules that it is unconstitutional under the 14th Amendment to the United States Constitution to deny same sex couples the right to marry).

Maryland courts follow the general rules of comity and the Full Faith and Credit Clause of the United States Constitution. They would, therefore, find that a same-sex marriage that is valid in the jurisdiction where it is contracted is valid in Maryland, unless it is contrary to the public policy of Maryland. Key to this analysis is whether same-sex marriage is repugnant to or against the strong public policy of this state. Public policy of a state is not static, but rather changes overtime. In discerning public policy as it relates to recognition of certain types of out of state marriages, consideration must be given to the state's criminal law as well as other statutes regulating the conduct of couples. Changes in those laws often signal a change in a state's public policy towards recognition of these out of state marriages.

The question of whether Maryland's Court of Appeals would recognize same-sex marriages validly performed in other jurisdictions was presented to the Attorney General for the State of Maryland, Doug Gansler, by certain legislators, resulting in the Attorney General's Opinion published February 23, 2010 (this Opinion predates the recent developments in federal court in California, which could, if the Supreme Court so rules, grant the right to same-sex couples to marry and have their marriages recognized in every state, including Maryland). Attorney General Gansler, after an exhaustive analysis of relevant law, including changes in Maryland's criminal and anti-discrimination statutes, concluded that recognition of same-sex marriages from other states would not be repugnant or contrary to Maryland's public policy. Accordingly, the Attorney General opined that the Court of Appeals would rule, if a case came before it, that Maryland recognizes same-sex marriages validly performed in other states. It should be noted that an Attorney General's published Opinion does not constitute law, and although courts consider it to be persuasive authority, they are not bound by it.

Reflective of A Change in Public Policy Towards Same-Sex Couples	
Criminal Law	Anti-Discrimination Laws

A. At one time, the public policy of Maryland, as expressed in its criminal laws, prohibited same-sex intimate sexual conduct. Enforcement of these statutes ceased quite a few years ago and in 2003, the United States Supreme Court ruled that such laws are unconstitutional. B. In 2005, the Maryland legislature amended "hate-crime" statutes to include violent crimes motivated by hatred toward a person's sexual orientation.	State law now prohibits discrimination based on sexual orientation in public accommodations, housing and employment and prohibits discrimination by all private entities regulated by the Department of Labor, Licensing and Regulation. In addition, current regulations now prohibit discrimination by individuals licensed by the state in the conduct of their professions or occupations.

Laws Providing Rights and Benefits for Domestic Partners
The Maryland Legislature recently enacted legislation recognizing domestic partnerships for the purpose of conferring many health insurance benefits, medical decision-making and hospital/nursing home visitation rights. Transfers of residential property between domestic partners are now exempt from recordation and transfer taxes.

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Did You Know? / Hard to Believe!

Until the mid-1960's Maryland law forbade interracial marriages – a prohibition enforced by criminal penalties. Within living memory, Maryland's Court of Appeals described interracial marriage as not only against the State's public policy, but also "repugnant" to it.

Maryland statutes criminalizing interracial marriages were not repealed until shortly before the United States Supreme Court ruled in 1967 that a similar Virginia statute was unconstitutional (Loving v. Virginia).

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