



# STATE AG TRACKER

VOL. 2, NO. 1, 2010

## Maryland AG Foresees Courts Recognizing Out-of-State Same-Sex Marriages

By Brendan McIntyre

Maryland Attorney General Douglas F. Gansler released a February 24th written opinion detailing his understanding that Maryland courts could recognize same-sex marriages performed in other states.<sup>1</sup>

In a 53-page opinion, Attorney General Gansler wrote that the Maryland General Assembly had legislated that “[o]nly a marriage between a man and a woman is valid in this State.”<sup>2</sup> This legislation, Gansler continued, was passed while there were “an increasing number of persons of the same sex . . . seeking marriage licenses.” The Attorney General believes that Maryland courts would hold that this statute does not speak to the issue of whether or not Maryland recognizes out-of-state same-sex marriages. According to Gansler, other sources of law must be controlling because the Maryland Code does not explicitly mention the formal requirements for the recognition of out-of-state marriages.

Gansler’s opinion included a brief analysis of the Defense of Marriage Act (DOMA), as signed into law by former President Bill Clinton. Gansler summarized DOMA as an act permitting states to determine whether or not they must recognize an out-of-state same-sex marriage. However, DOMA additionally provided that no state need recognize a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state. Under DOMA, the federal government defines marriage as a legal union exclusively between one man and one woman.

According to the Maryland Attorney General, there exists a legal “patchwork”

of laws in other states, surrounding the recognition of both in-state and out-of-state same-sex marriage. None of these laws, in Gansler’s estimation, would legally prevent the recognition of out-of-state same-sex marriage in Maryland. Thus, the Attorney General looked to case law for guidance.

Gansler wrote that Maryland courts would likely consider the case *Henderson v. Henderson* to be determinative of the issue at hand. The *Henderson* court held that “a marriage valid where contracted or solemnized is valid everywhere, unless it is contrary to the public policy of the forum.”<sup>3</sup> The court further stated that “the reason for this rule is that it is desirable that there should be uniformity in the recognition of the marital status, so that persons legally married according to the laws of one State will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another.”<sup>4</sup>

In *Conaway v. Deane*, the court reaffirmed the “continuing and vital” *Henderson* principle that “marriage is subject to the police power of the State.”<sup>5</sup> Attorney General Gansler addressed the *Deane* case in a footnote, writing that because the case did not explicitly reference out-of-state same-sex marriage, it would not have a significant impact on the analysis. Gansler thus looked to the holding in *Henderson* that “a marriage valid where contracted or solemnized is valid everywhere, unless it is contrary to the public policy of the forum,” to determine if same-sex marriage is against Maryland public policy.<sup>6</sup>

In his opinion, Attorney General Gansler wrote that public policy toward

I  
S  
S  
U  
E  
  
B  
R  
I  
E  
F

Produced  
by the  
FEDERALIST SOCIETY’S  
STATE COURTS  
PROJECT

gay marriage has been changing and that this change warrants his understanding that Maryland courts may recognize that out-of-state same-sex marriages are not contrary to public policy. Gansler believes that the most relevant statute to this matter, FL §2-201,<sup>7</sup> is unclear and, as a result, writes that interpreting same-sex marriage as contrary to public policy would be “wholly unreasonable.”<sup>8</sup>

The Attorney General noted that a 2004 Attorney General advice letter, written by his predecessor, J. Joseph Curran, Jr., outlined Curran’s view of the public policy issues surrounding the recognition of out-of-state same-sex marriage. In that letter, Curran concluded that if courts held that FL §2-201 was not clear, they would likely prohibit the state from recognizing out-of-state same-sex marriages, as they are against public policy. However, Attorney General Gansler wrote that Curran’s advice letters were less relevant to the analysis than the fact that, within the past fifteen years, several bills have been introduced in the General Assembly that would have explicitly permitted or prohibited the recognition of out-of-state same-sex marriages. He also noted that other areas of the law, outside of marriage, have “gradually shifted from one of condemnation to one of respect and in certain ways, support,” thereby no longer expressing a public policy of the state that “so condemns same-sex relationships as to create an exception.”<sup>9</sup>

The recent Maryland Attorney General opinion has received mixed reviews. Many proponents of same-sex marriage praise the opinion as recognizing what they see as a right that has been unjustly denied under Maryland law. At the same time, many critics of the opinion say that Gansler is ignoring Maryland law that explicitly limits marriage to a man and a woman and

that his public policy analysis is unnecessary, as the law speaks directly to this matter. Others say that he is incorrect in determining the state public policy to be this supportive of same-sex marriage.

\* *Brendan McIntyre is a legal associate in Washington, D.C.*

## Endnotes

1 95 Opp. Att’y Gen. 3 (2010).

2 *Id.*

3 *Henderson v. Henderson*, 199 Md. 449, 458 (1952).

4 *Id.*

5 *Conaway v. Deane*, 401 Md. 219 (2007).

6 199 Md. at 458.

7 MD. CODE ANN., Fam. Law § 2-201 states that “[o]nly a marriage between a man and a woman is valid in this state.”

8 95 Opp. Att’y Gen. 3, 33 (2010).

9 *Id.* at 43.

In an effort to increase dialogue concerning the role of state attorneys general, the Federalist Society’s STATE AG TRACKER highlights recent activities of attorneys general across several states. Some argue that state attorneys general overstep their roles by prosecuting cases and negotiating settlements with extraterritorial and sometimes national consequences. Others contend that they are simply serving the interests of their own citizens and filling a vacuum left by the failure of other state and federal agencies to address these issues. STATE AG TRACKER will draw attention to these matters by publishing submissions regarding recent activities of state attorneys general.

Opinions expressed herein do not necessarily reflect those of the Federalist Society. We invite readers to submit pieces for publication to [info@fed-soc.org](mailto:info@fed-soc.org).