Same-sex divorce may depend on state's definition of marriage

Commentary by Christopher R. Bruce

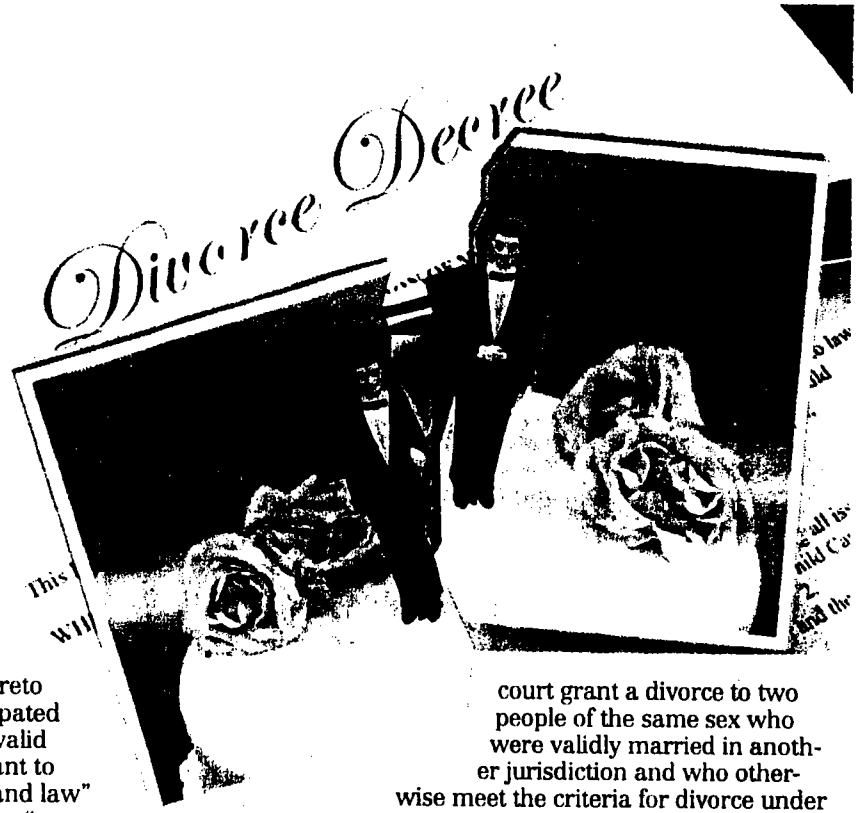
In the May 18, 2012 decision in *Port v. Cowan*, Maryland's high court ordered the divorce of a same-sex couple married in California before the state's voters enacted Proposition 8 — the widely publicized constitutional provision prohibiting same sex marriage. The Maryland court's decision ordering the divorce was made despite Maryland's laws only recognizing marriages between a man and a woman.

Bruce

Port v. Cowan highlights the developing issue of whether states can grant a divorce to same-sex couples when the state's law does not recognize same-sex marriages. This issue will become more relevant as states continue to grant more rights to same-sex couples and the constitutionality of the federal Defense of Marriage Act is reviewed by the Supreme Court.

The facts in *Port v. Cowan* were undisputed. Jessica Port and Virginia Anne Cowan were wed in a civil ceremony in California in October 2008. At the time, California recognized domestic same-sex marriage. Approximately eight months after marrying, the couple decided to separate. After the required period of separation, Port filed a complaint for divorce in Maryland, which was met with a "no contest" answer by Cowan. Notably, there was no dispute identified or decision sought by the parties regarding division of property, alimony or support.

The trial court received testimony at a final hearing establishing and corroborating a divorce on the grounds of mutual separation. The trial court's order concluded Port met Maryland's residency requirements for divorce and established the couple had no expectation of reconciliation. However, the trial court denied Port's request for a divorce solely based on the reasoning that the "same-sex marriage in which the parties hereto participated is not valid pursuant to Maryland law" and that "to recognize the alleged marriage would be contrary to the public policy of Maryland."



Thereafter, Port and Cowan, while technically being opposing parties, both argued on appeal that their California marriage should be recognized in Maryland for purposes of applying Maryland's divorce laws. Interestingly, there was no appearance by any person or group in opposition to the position that Port's request for a divorce should be granted.

Prior to the intermediate appellate court deciding the appeal, Maryland's highest court issued a writ of certiorari on its own initiative to decide the issue.

The legal question posed for consideration on appeal was: Must the circuit court grant a divorce to two people of the same sex who were validly married in another jurisdiction and who otherwise meet the criteria for divorce under Maryland law? The high court decided in the affirmative on the grounds of the common law doctrine of comity, thereby avoiding a decision addressing the constitutional issues of equal protection and due process raised in the parties' briefs.

The opinion in *Port v. Cowan* recognized that only a marriage between a man and a woman is valid in Maryland pursuant to Family Law Article 2-201, but that the state also had a "long list of enactments protecting gay persons and same-sex couples from discrimination." The court explained that Maryland courts are to honor foreign marriages as long as the marriage was valid in the state where performed, provided the marriage is not "repugnant" to Maryland's public policy. The court noted the state's liberal recognition of out-of-state marriages, including common law marriages, and even a marriage between an uncle and a niece that was likely subject to criminal prosecution.

BOARD OF CONTRIBUTORS

The crux of the court's decision to grant the divorce was the conclusion that same-sex marriage was not "repugnant" to Maryland "public policy." The court found this was the case as the Maryland statute limiting marriage to that of a union between a man and a woman did not expressly prohibit or void same-sex marriage. The court noted a similar result was reached in a 2011 Wyoming appellate decision and New Mexico attorney general opinion.

The scenario of *Port v. Cowan* will continue to replay in courts across the country as same-sex couples legally married in one jurisdiction move across state lines and seek divorce in jurisdictions with statutes or constitutional amendments that explicitly invalidate or refuse to recognize same-sex marriage.

If the reasoning of *Port v. Cowan* is followed, it could be difficult for a same sex couple to obtain a divorce in Florida. This is because Florida Statute § 741.212 specifically provides same-sex marriages are not to be recognized for any purpose in Florida, regardless of whether the marriage was valid in the place of the marriage.

But this issue could eventually become less contested as state and federal legislation restricting same-sex marriage continues to be scrutinized. Two weeks after the decision in *Port v. Cowan*, the U.S. Court of Appeals for the First Circuit unanimously declared portions of the federal Defense of Marriage Act unconstitutional. Furthermore, seven states or districts currently recognize same-sex marriage and at least ten other states have laws acknowledging domestic partnerships or civil unions.

Christopher R. Bruce is a partner of Nugent Zborowski & Bruce in North Palm Beach. The firm's practice is limited to mediation, litigation and appeals of divorce and family law matters.

dbr BUSINESS REVIEW
OFFICIAL COURT NEWSPAPER OF SOUTH FLORIDA
DailyBusinessReview.com
An ALM Publication VOL. 58, NO. 170 $2.00

INSIDE

LAW

PRACTICE FOCUS: FAMILY LAW
Divorce and family law attorney Christopher R. Bruce writes about the emerging issue of whether same-sex couples can seek a divorce in states not recognizing same-sex marriages. A8

FORECLOSURE CASES MAY NEED REVIEW
A Third District Court of Appeal ruling this week that a homeowner didn't have standing to fight a foreclosure case comes after the Fourth DCA ruled in a similar case that a homeowner did have standing. A2

COMMERCIAL REAL ESTATE

PROPERTY APPRAISER DRAWS RIVAL
State Representative Carlos Lopez-Cantera, the current majority leader in the Florida House of Representatives, qualified to run against Pedro Garcia, the county's first elected property appraiser. A2

DEAL OF THE DAY
A 60-room Miami Beach hotel built in 1939 at 1920 Collins Ave. sells for $7.5 million. A10

TRUMP PLANS HOMESTEAD FILM STUDIO
South Miami-Dade would become home to a film production studio built by Donald Trump, under a proposal [illegible] Tuesday. A10

FLORIDA SUPREME COURT Miami-Dade public defender continues appeal

Court ponders whether too many cases leads to ineffective counsel

by Adolfo Pesquera
apesquera@alm.com

Public defenders should not be able to refuse criminal cases, unless they can show they are so overwhelmed that they would never get to them, an attorney for the state told the Florida Supreme Court.

The Supreme Court on Thursday heard arguments from two Miami-Dade County cases brought on appeal by Miami-Dade Public Defender Carlos Martinez.

In 2008, then Public Defender Bennett Brummer — faced with a level of financial resources that didn't provide enough assistant public defenders to handle the case load — sought and obtained a court order from Miami-Dade Circuit Judge Stanford Blake to refuse future third-degree felony cases.

The order was never carried through because the State Attorney's Office obtained a reversal from the Third District Court of Appeal.

As Brummer's successor, Martinez appealed to the Supreme Court. Meanwhile, a second case was brought forward to develop evidence on a key issue that was criticized by the Third District in the first case — the actual impact of ineffective assistance of counsel.

The second case, *Antoine Bowens v. Florida*, focused on the defendant's public defender, Jay Kolsky, who moved to withdraw.

A.M. HOLT

Miami-Dade Public Defender Carlos Martinez followed his predecessor in seeking relief for his office, which says it lacks the resources to provide enough assistant public defenders to handle a groundswell of assigned cases.

Kolsky handled 736 felony cases for 637 clients in the 2008-09 fiscal year. He testified his excessive case load prevented him from meeting the rules for counsel set by

SEE DEFENDER, PAGE A4