
IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2006
No. 44

FRANK CONAWAY, *ET AL.*,

Defendants-Appellants,

v.

GITANJALI DEANE, *ET AL.*,

Plaintiffs-Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
M. BROOKE MURDOCK, JUDGE
PURSUANT TO A WRIT OF CERTIORARI TO THE COURT OF SPECIAL
APPEALS

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Appellants*
urging reversal.

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September 1, 2006

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STATEMENT OF THE CASE

This case involves a constitutional challenge to Maryland's statutory prohibition of same-sex marriages. The Circuit Court for Baltimore City declared Maryland's marriage law, Maryland Code Annotated, Family Law § 2-201 (LexisNexis current through June 02, 2006) violative of Article 46 of Maryland's Declaration of Rights. *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006). *Amicus* adopts Appellants' Statement of the Case.

QUESTIONS PRESENTED

- I. WHETHER THE COURT BELOW ERRED IN HOLDING THAT ACKNOWLEDGING THE TRADITIONAL DEFINITION OF MARRIAGE CONSTITUTES CIRCULAR REASONING?
- II. WHETHER THE COURT BELOW ERRED IN REJECTING THE STATE'S PROFFERED RATIONAL BASES EVEN THOUGH IT ADMITTED THAT SUCH BASES COULD BE BASED UPON SPECULATION?
- III. WHETHER THE COURT BELOW ERRED WHEN IT RELIED UPON *LAWRENCE V TEXAS* EVEN THOUGH *LAWRENCE* IS SELF-LIMITING?

STATEMENT OF THE FACTS

The Amicus Curiae adopts the Appellants' Statement of the Facts.

ARGUMENT

- I. **THE COURT BELOW STATED THAT LOOKING AT GENDER TO DECIDE WHETHER A MARRIAGE EXISTS IS GENDER DISCRIMINATION, BUT THE COURT'S REASONING IS CIRCULAR BECAUSE MARRIAGE, BY DEFINITION, IS THE LEGAL UNION OF ONE MAN AND ONE WOMAN.**

The court below accused the Washington Court of Appeals of unpersuasive

reasoning in *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) because that court held that “same-sex partners are not prohibited from marrying because of their genders, but due to the definition of marriage.” *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *4 (Md. Cir. Ct. Jan. 20, 2006). The court below stated that “it was the couples’ gender that placed them outside the definition of marriage” and that “it seems logically impossible to resolve the issue of whether an individual plaintiff and his/her partner fall within the definition of marriage without examining their relative genders.” *Id.* Further, the court below held that gender classification in marriage is unconstitutional. *Id.* at *8-9. The court below accused the *Singer* court (and other courts) of engaging in circular reasoning. *Id.* at *9. However, to say “marriage is not limited to opposite-sex couples because it is not” is at least as circular as saying “marriage is limited to opposite-sex couples because it is.” However, the real point here is that the *Singer* court and other courts that have relied on definitions are not engaged in circular reasoning at all.

First, we note the definition to which the court below objected. Among standard definitions of marriage are these: “[M]arriage’ is the legal union of one man and one woman as husband and wife.” *Baker v. State*, 744 A.2d 864, 868 (Vt. 1999). *See also The American Heritage Dictionary of the English Language* 1102 (3rd ed. 1996) (marriage is the “union of a man and woman as husband and wife.”); *Webster’s New International Dictionary* 1506 (2nd ed. 1955) (marriage is “being united to a person . . . of the opposite sex as husband or wife”); *Black’s Law Dictionary* 758 & 992 & 1628 (8th ed. 2004) (marriage is the “union of a couple as husband and wife[;]” a husband is “[a] married man;” a wife is “[a] married woman;”); *Black’s Law Dictionary* 986 (7th ed. 1999) (marriage is the “union of a man and woman as husband and wife.”); *Black’s Law Dictionary* 756 (1st ed. 1891) (marriage is “one man and one woman united in law for life”). “[A]s it has been recognized and defined for centuries—indeed, millennia—[marriage] necessarily excludes two persons of the same sex from entering into that relationship.” *Dean v. District of Columbia*, 653 A.2d 307, 362 (D.C. Cir. 1995).

Some—including the court below—would dismiss this and similar observations as

tautological, a “definitional or semantic substitute for meaningful analysis.” Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. Rev. 1, 38 (1996). *But see* Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. Pub. L. 309 (1988). If the sole argument was that marriage must remain the union of one man and one woman for no other reason than it has always been that way, such a dismissal might well be in order. The “definition” of marriage, however, is much more than a relatively meaningless “semantic.” A cogent analogy of marriage exists, not in words, but at the molecular level.

For millennia, the layman has known that sodium chloride (NaCl) is common table salt, or simply salt. The study of chemistry has established that a molecule of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine (Cl). Two atoms of chlorine may, nonetheless, join together and form Cl₂. Two atoms of sodium may also join together, forming Na₂. However, neither Cl₂ nor Na₂ are NaCl, nor can they ever be. At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly call Na₂ or Cl₂ “salt,” but neither will ever be, nor have the same features, dynamics, and effects as, NaCl. Likewise, one can call the union of two men or two women “marriage,” but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman. The chemical bonds of salt mimic the physical nature of marriage.

The United States Court of Appeals for the Ninth Circuit utilized this salt analogy in its recent ruling in *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2005). In that case, the same-sex couples challenged the California statutory prohibition on same-sex marriage and the Federal Defense of Marriage Act (DOMA). Although the court

ultimately decided the case based on abstention and standing, it considered the definitional issues along the way. *Id.* at 680 & n. 18, 683. Furthermore, during the oral argument, the judges relied upon a brief filed by your *Amicus* to specifically question counsel about the salt analogy. *Id.*, Transcript of Oral Argument, May 05, 2006, available at <http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2>. (After reaching this web site, enter the docket number, 05-56040. On the next web page, click on the link for the docket number and the audio file will play). Relying on the salt analogy, one of the judges made the point repeatedly that prohibiting same-sex marriage does not constitute discrimination; rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages.

A second, similar analogy can be drawn at a cellular level in reproductive science. One sperm and one oocyte (egg), when joined in a union (fertilization), will become a zygote. This is analogous to one man and one woman joining together to become “one flesh” or married. No matter how hard one might try to make two sperm come together to form a zygote, or to make two eggs come together to form a zygote, it is impossible.

And just as the term “salt” is given to the specific molecular union NaCl and the term “zygote” is given to the specific cellular union of a sperm and an egg, the term “marriage” is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na₂ or Cl₂ is not salt or that neither two sperm alone nor two eggs alone will never become a zygote. That is not circular reasoning; it is simply recognition that the union of two men or two women is not the union of one man and one woman. The reservation of the term “marriage” for the specific union of one man and one woman is therefore not tautological, but only employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.

As recognized throughout the ages, and more recently by the United States Congress, a man and a woman each contribute and produce something unique in that

particular union that cannot be duplicated by another union. *See, generally*, H.R. Rep. No. 104-664 (1996). “[T]he word ‘marriage,’ when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex ‘marriages’ are legally and factually—*i.e.*, definitionally—impossible.” *Dean*, 653 A.2d at 361. Therefore, relative gender of the parties only determines whether a “marriage” exists. Using gender to merely establish the basic classification of marriage does not rise to the level of gender discrimination. This Court should recognize the logic of the above argument and overrule the lower court’s decision.

II. THE COURT BELOW ERRED WHEN IT CONCLUDED THAT THE STATUTORY PROHIBITION AGAINST SAME-SEX MARRIAGE DOES NOT RATIONALLY RELATE TO A LEGITIMATE STATE INTEREST.

The court below analyzed Maryland’s marriage law, Family Law §2-201, under both strict scrutiny and the rational basis test. Because Amicus does not believe, as per Section I above, that §2-201 creates a gender-based classification, this brief will address errors in only the rational basis analysis. As articulated in numerous opinions of this Court, but perhaps most helpfully for present purposes, in *Murphy v. Edmonds*, 325 Md. 342, 355, 601 A.2 102, 108 (Md. 1992), under Maryland’s rational basis test, “a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational.” (internal quotations and citations omitted; alterations in original).

A. The Court Below Was Internally Inconsistent When It Declared Rational Speculation, Not Evidentiary Support, Was Sufficient Under The Rational Basis Test Then, Subsequently, Rejected The General Assembly’s Basis As Unsupported Generalizations.

The court below seemed to want to have it both ways. It admitted that the General Assembly did not need evidentiary support for its conclusions underlying its marriage statutes. *Deane*, 2006 WL 148145 at *8. The court below also admitted that rational speculation was a sufficient basis to support the General Assembly’s conclusions. *Id.*

However, it then declared that the General Assembly's basis was nothing more than "unsupported generalizations." *Id.* Of course, the court below never explained what it thought the difference is between rational speculation unsupported by evidence and unsupported generalizations. Amicus suggests that they are one-and-same and that, therefore, a valid basis exists for the General Assembly's conclusions. This in turn provides a rational basis for Maryland's marriage law.

Webster's Third New International Dictionary Unabridged 945 (1986) defines "rational" as "of, relating to, or based upon reason." *Id.* at 1885. "Speculation" is a "light, casual, or superficial mental examination or study: mere guesswork or surmise." *Id.* at 2189. Thus, merely a reasonable guess would qualify as rational speculation.

On the other hand, "unsupported" can be defined as "not . . . verified: unsubstantiated." *Id.* at 2512. And a generalization is the "result of generalizing" which is "to derive or induce (a general conception or principle) from particulars." *Id.* at 945. From these definitions, an unsupported generalization may be an oxymoron. To the extent that it is not, it would seem to be the induction of a general principle from some particulars but not from enough particulars to constitute (full) verification.

Using some particulars, if anything, may constitute a higher standard than mere reasonable guesswork. Be that as it may, the two standards are similar enough to be virtually identical. Certainly, either articulation is sufficient to pass muster under the rational basis test. After all, the whole point is that to pass laws, legislatures must always deal in generalizations, i.e., classifications. That is the teaching of the *Murphy* Court noted above: "a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational." 325 Md. 342 at 355, 601 A.2 at 108 (internal quotations and citations omitted; alterations in original).

B. Since the Legislature has a Rational Basis for Protecting the Definition of Marriage, this Court Should Follow the Rationale of the New York Court of Appeals: The Rational Basis Test is Satisfied because the Legislature Could Reasonably Have Interests to Protect.

The court below held that the defendants' argument that "promoting the traditional family unit, in which heterosexual parents are married, and encouraging procreation and child-rearing within this traditional unit, are not legitimate government interests served by §2-201." *Deane*, 2006 WL 148145 at *15. Further, the court below concluded "that prohibit[ing] same-sex marriage is not rationally related to the state interest in the rearing of biological children by married, opposite-sex parents." *Id.* However, the New York Court of Appeals decided:

[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

Hernandez v. Robles, No. 05239, 2006 WL 1835429, slip op. at *5-6 (N.Y. July 06, 2006). That court opined that the legislature could rationally offer the benefit of marriage to only to opposite-sex couples, because promoting stability in those relationships benefits children more than in cases of same-sex couples. *Id.* at *6.

The legislature could rationally believe that it is better . . . for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before its eyes, every day, living models of what both a man and a woman are like.

Id. The New York Court of Appeals did not balance the state interests or weigh the strength of the argument. Rather, the legislature's rational for opposite-sex marriage was sufficient to provide a rational basis for the law.

The court below determined that no rational basis existed in the legislature

for the prohibition of same-sex marriage. However, the court substituted its rationale for that of the legislature by determining that the legislature's rationale was not supported. The rational basis test asks only if the *legislature* could have had a "conceivable, rational basis" for enacting the legislation. The court below misapplied the rational basis test when it substituted its opinion for that of the General Assembly.

III. THE COURT BELOW USED *LAWRENCE V. TEXAS* INCORRECTLY BECAUSE *LAWRENCE* IS SELF-LIMITING IN ITS APPLICATION AND DOES NOT APPLY HERE.

The court below misused *Lawrence v. Texas*, 539 U.S. 558 (2003) to support its assertion that "expressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest." *Deane*, 2006 WL 148145, at *9. Not only is the *Lawrence* decision self-limiting with regards to government recognition of same-sex marriage, but also the *Lawrence* holdings concern private conduct where the state lacks legitimate interests to regulate those affairs.

The *Lawrence* Court admitted that its decision was limited in its scope; that the case is limited to private sexual conduct; and that its holding does not extend to all other laws. The *Lawrence* Court noted that "[the statute] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. This quote pertains directly to the case at hand. This case is about whether the government should give formal recognition to homosexual marriage; thus *Lawrence* is simply inapplicable.

The *Lawrence* Court additionally stated that the anti-sodomy law at issue related to private sexual conduct stating, "[t]he State cannot demean [the sexual actors'] existence or control their destiny by making their private sexual conduct a crime." *Id.* This statement further demonstrates *Lawrence's* inapplicability since the definition of marriage is not a private issue.

Finally, the *Lawrence* Court found that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the

individual.” *Id.* This further distinguishes the present case from the *Lawrence* decision. The state, in the case at hand, has legitimate interests for protecting procreation and interests of the child by guarding the definition of marriage. Since *Lawrence* is inapplicable on several levels, that case should not be utilized in the holdings of this case.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court find that the court below erred in granting the plaintiff’s Motion for Summary Judgment, and reverse that court’s Judgment.

Respectfully submitted
this first day of September, 2006

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RULE 8-504(A)(7) STATEMENT

The citation and verbatim text of the following pertinent statute is set forth below:

Md. Code Ann., Fam. Law § 2-201 (LexisNexis current through June 02, 2006):

Only a marriage between a man and a woman is valid in this State.

RULE 8-504(A)(8) STATEMENT

This brief was printed utilizing proportionally spaced font. The body and footnotes are printed in Times New Roman, 13 Point.

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APPENDIX

Relevant portions of the trial court opinion:

In *Singer v. Hara*, 11 Wash.App. 247, 252, 522 P.2d 1187, 1191-92 (1974), the Washington Court of Appeals denied that a statutory same-sex marriage ban in fact created a gender classification. [FN6] In *Singer*, the court held that same-sex partners are not prohibited from marrying because of their genders, but due to the definition of marriage--ie, the relationship the couple wishes to enter would not be a marriage. [FN7] *Id.* In distinguishing *Loving*, the court reasoned that striking down the statutory same-sex prohibition would require a change in "the basic definition of marriage as the legal union of one man and one woman," whereas permitting interracial couples to marry did not. *Id.*

This reasoning is unpersuasive. It makes little sense for the Washington court to deny that the same-sex prohibition created a gender-based classification; and, then to state that the "operative distinction" between *Loving* and the same-sex marriage case is the legal union of a man with a woman. *Id.* at 1191. *Singer* states that same-sex couples are barred from marriage not due to their genders, but owing to a definition of marriage that necessitates an opposite-sex couple. Despite the court's insistence that no gender classification exists, the relative genders of a same-sex couple are the very crux of the matter. Certainly, in *Singer*--it was the couples' gender that placed them outside the definition of marriage. It, therefore, seems logically impossible to resolve the issue of whether an individual plaintiff and his/her partner fall within the definition of marriage without examining their relative genders.

FN6. The equal application theory was not disturbed in Washington's subsequent same-sex marriage case, *Anderson v. King County*, No. 04-2- 04964-4-SEA, 2004 WL 1738447, at *8 (Wash.Super.Aug.4, 2004).

FN7. As the Supreme Court of Hawaii noted in *Baehr*, 74 Haw. at 567, 852 P.2d at 62 n. 23, the anti-miscegenation statutes *automatically voided* an interracial marriage without the necessity of any judicial involvement--another similarity between interracial marriages and same-sex marriages.

***Deane v. Conaway*, No. 24-C04-005390, 2006 WL 148145 at *4 (Md. Cir. Ct. Jan. 20, 2006)**

Defendants argue that promoting the traditional family unit, in which the heterosexual parents are married, and encouraging procreation and child-rearing

within this traditional unit, are legitimate government interests served by § 2-201. Plaintiffs do not contend that these are not legitimate state interests. Therefore, the analysis will be confined to whether § 2-201 is related to these goals. The Court concludes that the prohibition of same-sex marriages is not rationally related to the state interest in the rearing of biological children by married, opposite-sex parents.

Indeed, the prevention of same-sex marriages is wholly unconnected to promoting the rearing of children by married, opposite sex-parents. This Court, like others, can find no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions. *Massachusetts v. Goodridge*, 440 Mass. 309, 334, 798 N.E.2d 941, 963 (2003). This Court is similarly unable to find that preventing same-sex marriage rationally relates to the Maryland's interest in promoting the best interests of children. Courts finding such a rational relationship exists conclude that it is reasonable for the state to decide that children born and raised by two married, opposite-sex parents "will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children." *Standhardt v. Superior Court of Arizona*, 206 Ariz. 276, 288, 77 P.3d 451, 463 (2003). This Court is unable to agree to such broadly stated principles because the vast number of assumptions necessary to do so, exceeds the scope of reasonable legislative speculation.

***Deane*, 2006 WL 148145 at *7.**

Although the General Assembly does not need evidentiary support for its conclusions under the rational basis test, the conclusions must be based on rational speculation. [FN13] In reviewing a statute, a court need only assume those facts that "reasonably can be conceived" to sustain the classification. *Whiting-Turner Contract Co. v. Coupard*, 304 Md. 340, 352, 499 A.2d 178, 185 (1985). Section 2-201 fails rational basis review because the facts necessarily assumed by the Legislature to support it exceed "rational speculation." To support § 2-201, the Legislature would have to have concluded that children raised by opposite-sex married couples are better-off than children raised by same-sex married couples. To do so, the General Assembly may have assumed that opposite-sex marriages less frequently end in divorce, that opposite-sex couples are better parents, or that opposite-sex couples focus more on their children's education. But these assumptions are not rational speculation; they are broad unsupported generalizations that do not establish a rational relation between same-sex marriage and the State's interests in promoting procreation, child-rearing, and the best interests of children.

FN13. Classification "may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637,

2643, 125 L.Ed.2d 257 (1993).

Deane, 2006 WL 148145 at *8.

This Court has found that there is no other legitimate state interest rationally served by preventing same-sex marriage. Therefore, we need not engage in speculation as to whether § 2-201 was enacted out of prejudice or animus toward Maryland's homosexual population. Tradition and societal values alone cannot sustain an otherwise unconstitutional classification. The Court is not unaware of the dramatic impact of its ruling, but it must not shy away from deciding significant legal issues when fairly presented to it for judicial determination. As others assessing the constitutionality of preventing same-sex marriage note, justifying the continued application of a classification through its past application is "circular reasoning, not analysis," and that it is not persuasive. *Goodridge v. Department of Public Health*, 440 Mass. 309, 332, 798 N.E.2d 941, 961 n. 23 (Mass.2003); *Anderson v. King County*, No. 04-2- 04964-4-SEA, 2004 WL 1738447, at *8 (Wash.Super.Aug.4, 2004).

Deane, 2006 WL 148145 at *9.

Similarly, expressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest. *Lawrence v. Texas*, 539 U.S. 558, 582-583, 123 S.Ct. 2472, 2486, 156 L.Ed.2d 508 (2003).

Deane, 2006 WL 148145 at *9.

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief of *Amicus Curiae* of the National Legal Foundation in the case of *Conaway v. Deane*, No. 44 September Term, 2006, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on September 2nd, 2006, addressed as listed below.

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