

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1176

(Delegate Conaway)

Judiciary

Marriage - Valid Between Consenting Adults

This bill proposes an amendment to the Maryland Constitution that establishes that a marriage between consenting adults is valid in this State.

Fiscal Summary

State Effect: None.

Local Effect: If approved by the General Assembly, this constitutional amendment will be submitted to voters at the 2010 general election. It should not result in additional costs for the local boards of election.

Small Business Effect: None.

Analysis

Bill Summary: The bill specifies that “consenting adults” may marry and may constitutionally authorize, in addition to same-sex marriage, polygamous as well as monogamous marriage.

Current Law: The Maryland Constitution does not define a valid marriage or a civil union. Under State law, only a marriage between a man and a woman is valid in this State.

While not altering or affecting the definition of marriage, State law establishes health care decision making rights for domestic partners and specifies that hospitals, nursing homes, and residential treatment centers must allow visitation by a patient’s or resident’s

domestic partner and members of the domestic partner's family. Also, persons in domestic partnerships or former domestic partnerships, as specified, may qualify for an exemption from recordation and State and county transfer taxes for residential property used as a common residence. Evidence of the domestic partnership or former domestic partnership must be submitted to qualify for the exemption. Chapter 602 of 2009 exempts from the State inheritance tax the receipt by a decedent's domestic partner of an interest in a joint primary residence that at the time of the death was held in joint tenancy by the decedent and the domestic partner.

Background:

Same-sex Marriage Legalized: In 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples after the state's highest court ruled that authorizing civil unions for same-sex couples while prohibiting them from marrying was unconstitutional. Same-sex marriage is legal in four other states: Connecticut (2008); Iowa (2009); Vermont (2009); and New Hampshire (2010). In addition, the District of Columbia passed legislation legalizing same-sex marriage in 2009. The jurisdiction is preparing to issue marriage licenses beginning in March 2010.

Although Maine legalized same-sex marriage in June 2009, the law was petitioned to referendum and Maine voters rejected the law in the November 2009 election. While the California Supreme Court decision establishing same-sex marriage was overturned in 2008 by passage of Proposition 8, those couples married before the referendum's passage are still regarded as married under California law.

The Issue of Same-sex Marriage in the States: In 1993, the legal status of individuals of the same sex who enter into familial relationships garnered national attention when the Hawaii Supreme Court ruled that its law denying same-sex couples the right to marry violated state constitutional rights. In 1998, voters in Hawaii adopted a constitutional amendment effectively overturning the decision by authorizing the legislature to reserve marriage to couples of the opposite sex.

In 2000, Vermont became the first state to recognize a parallel system of "civil unions," which provide to same-sex partners the same legal benefits, protections, and responsibilities under State law as married couples. Vermont has since authorized same-sex marriage. In 2003, the Supreme Judicial Court of Massachusetts held that barring an individual from the rights and obligations of civil marriage solely because that individual would marry a person of the same sex violates the Massachusetts Constitution. In 2004, the court ruled that authorizing civil unions for same-sex couples while prohibiting them from marrying also was unconstitutional. As a result, Massachusetts became the first state to issue marriage licenses to same-sex couples. In 2008, the Massachusetts legislature passed legislation preventing a proposed constitutional amendment banning

same-sex marriage from appearing on the November 2008 ballot. Also in 2008, the state high courts in California and Connecticut overturned state statutes prohibiting same-sex marriage. In California, voters subsequently approved *Proposition 8*, a ballot initiative that amended the state constitution to limit marriage to one man and one woman. The validity of the proposition is under court challenge. In the meantime, those same-sex couples that married before approval of Proposition 8 are regarded as married under California law.

Constitutional Amendments and Legislation: According to the National Conference of State Legislatures, 41 states (including Maryland) have laws that either prohibit same-sex marriages or deny recognition of same-sex marriages solemnized in another jurisdiction. However, because statutory bans have been viewed as providing only minimal protection against a constitutional challenge, after Massachusetts began issuing marriage licenses, many states amended their constitutions to limit marriage to couples of the opposite sex. To date, 30 states have adopted constitutional amendments defining marriage as only between a man and a woman. Florida and Arizona adopted constitutional amendments prohibiting same-sex marriage in 2008. No state has adopted a constitutional amendment that establishes that marriage may occur between two consenting adults. **Exhibit 1** shows the status of traditional marriage, same-sex marriage, civil unions, and domestic partnerships.

Maryland Court of Appeals Ruling in Conaway v. Deane, et al. In July 2004, nine same-sex couples filed suit in Baltimore City against the clerks of the circuit courts from five counties, contending that the State law banning same-sex marriage is unconstitutional. The Court of Appeals overturned a lower court ruling and instead held that the State law establishing that marriage is between one man and one woman does not discriminate on the basis of gender because it equally prohibits both men and women from marrying a person of the same sex. The court also determined that under constitutional principles, sexual orientation is not a suspect or quasi-suspect classification, nor is same-sex marriage a constitutionally protected fundamental right. Therefore, Maryland's statute will pass constitutional muster so long as it is rationally related to a legitimate governmental interest. The court held that the marriage statute is rationally related to the State's legitimate interest in fostering procreation and encouraging the traditional family structure. However, in conclusion, the court cautioned that the opinion "...should by no means be read to imply that the General Assembly may not grant and recognize for homosexual persons civil unions or the right to marry a person of the same sex." (*See Conaway, et. al v. Deane, et. al.* 401 Md. 219 (2007) at 325.)

Domestic Partner Benefits in Maryland: The Department of Budget and Management has promulgated regulations that extend health insurance benefits to State employees, retirees, and their dependents in same-sex domestic partnerships. The jurisdictions of

Montgomery County, Baltimore City, Greenbelt, and Takoma Park extend domestic partner benefits to their employees. In Montgomery County, the provision of domestic partner benefits is not contingent on the relationship status of the partners. Maryland law does not address civil unions. However, the Court of Appeals has held that the extension of health insurance benefits by a county to same-sex domestic partners of the county's employees is not invalid under State law. (See *Tyma v. Montgomery County*, 369 Md. 497 (2002).) The proposed amendment may affect the ability of the State and local governments to extend benefits to partners of the same sex since the amendment does not allow recognition of any relationship uniting people of the same sex.

Other Maryland Developments: On February 23, 2010, the Attorney General issued a formal opinion on the State recognition of same-sex marriages validated by other jurisdictions and concluded that although not free of all doubt, the Court of Appeals "... is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction." (See 95 Op. Att'y Gen. 3 (2010) at 54.) The formal opinion advised that in light of evolving State public policies that favor, at least for some purposes, same-sex intimate relationships, and in light of other past actions the Court of Appeals has taken to recognize other marriages that clearly were against public policy, the Court would probably be reluctant to prohibit recognition of same-sex marriages sanctioned in other states or jurisdictions. A major consideration would be the uncertainty that could be created by enforcing such a prohibition against those same-sex spouses and their families who visit or pass through Maryland if some event occurs which causes them to extend their connection with Maryland. The extent to which the Attorney General's opinion will alter State agency policies and actions toward same-sex spouses, married in other jurisdictions, who enter, visit or reside in Maryland remains to be seen.

As of July 1, 2009, Maryland extended health benefits to State employees, retirees, and their children that are in same-sex domestic partnerships by regulatory action.

Local Fiscal Effect: The Maryland Constitution requires that proposed amendments to the constitution be publicized either: (1) in at least two newspapers in each county, if available, and in at least three newspapers in Baltimore City once a week for four weeks immediately preceding the general election; or (2) by order of the Governor in a manner provided by law. State law requires local boards of elections to publicize proposed amendments to the constitution either in newspapers or on specimen ballots; local boards of elections are responsible for the costs associated with these requirements. It is anticipated that the budgets of local election boards will contain funding for notifying qualified voters about proposed constitutional amendments for the 2010 general election in newspapers or on specimen ballots.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore, Caroline Montgomery, and Prince George's counties; State Department of Assessments and Taxation; Office of the Attorney General; Department of Budget and Management; Department of Human Resources; Maryland State Department of Education; Department of Health and Mental Hygiene; Maryland Insurance Administration; Comptroller's Office; Judiciary (Administrative Office of the Courts); National Conference of State Legislatures; *Associated Press*; Department of Legislative Service

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Exhibit 1
Marriage and Other Unions in the United States

States Authorizing Same-Sex Marriage	States with Constitutional Language Specifying Traditional Marriage	States Statutes Specifying Traditional Marriage	State with Civil Unions	States with Domestic Partnerships
Connecticut Iowa Massachusetts New Hampshire Vermont <i>also</i> District of Columbia ¹	Alabama Alaska Arizona Arkansas California ³ Colorado Florida Georgia Hawaii ² Idaho Kansas Kentucky Louisiana Michigan Mississippi Missouri Montana Nebraska Nevada North Dakota Ohio Oklahoma Oregon South Carolina South Dakota Tennessee Texas Utah Virginia Wisconsin	Alabama Alaska Arkansas Arizona California ³ Connecticut ⁴ Colorado Delaware Florida Georgia Hawaii ² Idaho Illinois Indiana Iowa ⁴ Kansas Kentucky Louisiana Maine Maryland Michigan Minnesota Mississippi Missouri Montana New Hampshire ⁴ North Carolina North Dakota Ohio Oklahoma Pennsylvania South Carolina	New Jersey	California ³ Hawaii Maine Oregon ³ Washington

States Authorizing Same-Sex Marriage	States with Constitutional Language Specifying Traditional Marriage	States Statutes Specifying Traditional Marriage	State with Civil Unions	States with Domestic Partnerships
		South Dakota Tennessee Texas Utah Virginia Washington West Virginia Wisconsin Wyoming		

Source: National Conference of State Legislatures, Department of Legislative Services

¹The District of Columbia recognizes the same-sex marriages of other states.

²Hawaii’s constitutional amendment did not specifically prohibit same-sex marriage but reserved to the legislature the right to define marriage. The Hawaii legislature then passed a statute defining marriage as between one man and one woman.

³Only California and Oregon provide nearly all state-level spousal rights to domestic partnership couples. The other jurisdictions provide only some state-level spousal rights. While the California Supreme Court invalidated the state statute prohibiting same-sex marriage, *Proposition 8*, approved by voters in November 2008, amended the state constitution to limit marriage to one man and one woman.

To date, 30 states have constitutional language regarding how marriage should be defined (29 state constitutions retain traditional definitions of marriage and Hawaii’s reserved the power of definition to the legislature); 41 states have statutory definitions of marriage; 1 authorizes civil unions; 5 states authorize domestic partnerships; and 5 states authorize same-sex marriage. Five states (Massachusetts, New Jersey, New Mexico, New York and Rhode Island) do not have specific laws prohibiting same-sex marriage.

⁴The Connecticut and Iowa statutes specifying traditional marriage were overturned by those states’ highest courts. Connecticut authorized civil unions, but in response to a 2008 Connecticut Supreme Court ruling, began authorizing the issuance of licenses for same-sex marriage in 2009. Iowa began authorizing the issuance of same-sex marriage licenses in 2009. In addition to the existing statutory language specifying traditional marriage, New Hampshire enacted legislation authorizing the issuance of licenses for same-sex marriages which became effective in January 2010.