

Department of Legislative Services
2012 Session

FISCAL AND POLICY NOTE

House Bill 728 (Delegate Dwyer)
Judiciary and Health and Government
Operations

Maryland Marriage Protection Act

This bill proposes an amendment to the Maryland Constitution that establishes that only a marriage between a man and a woman is valid in this State.

Fiscal Summary

State Effect: None. It is assumed that the potential for increased costs to include any constitutional amendments proposed by the General Assembly on the ballot at the next general election will have been anticipated in the State Board of Elections' budget.

Local Effect: None. It is assumed that the potential for increased costs to notify voters of any constitutional amendments proposed by the General Assembly, and to include any proposed constitutional amendments on the ballot at the next general election, will have been anticipated in local boards of elections' budgets.

Small Business Effect: None.

Analysis

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. Same-sex marriage is also legal in the District of Columbia (2010) and five other states: Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); and New York (2011).

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. In 2010, a federal district court in California ruled that *Proposition 8* is unconstitutional under the Equal Protection Clause of the U.S. Constitution. That ruling, however, has been stayed pending appeal. In February a panel of the U.S. Court of Appeals for the 9th circuit ruled that California's ban was unconstitutional. That ruling may be appealed to the full U.S. Court of Appeals, or it may be directly appealed to the U.S. Supreme Court.

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.

Constitutional Amendments and Legislation

Forty-one states (including Maryland) have statutes 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. **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 promulgated regulations effective July 1, 2009, 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. As a result, State agencies have altered policies and actions to recognize same-sex spouses married in other jurisdictions who enter, visit, or reside in Maryland.

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

By regulatory action effective October 3, 2011, the State Retirement Agency is required to administer benefits for a same-gender spouse of a lawfully recognized marriage in the same manner as benefits are administered for an opposite-gender spouse, including the payment of spousal death or survivor benefits. However, the State Retirement Agency may not recognize a same-sex marriage in administering benefits if the recognition is inconsistent with requirements under the Internal Revenue Code, or when the recognition would violate other federal or State laws.

State Fiscal Effect: State costs of printing absentee and provisional ballots may increase to the extent inclusion of the proposed constitutional amendment on the ballot at the next general election would result in a need for a larger ballot card size or an additional ballot card for a given ballot (the content of ballots varies across the State, depending on the offices, candidates, and questions being voted on). Any increase in costs, however, is expected to be relatively minimal, and it is assumed that the potential for such increased

costs will have been anticipated in the State Board of Elections' budget. Pursuant to Chapter 564 of 2001, the State Board of Elections shares the costs of printing paper ballots with the local boards of elections.

Local Fiscal Effect: Local boards of elections' printing and mailing costs may increase to include information on the proposed constitutional amendment with specimen ballots mailed to voters prior to the next general election and to include the proposed amendment on absentee and provisional ballots. It is assumed, however, that the potential for such increased costs will have been anticipated in local boards of elections' budgets.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Higher Education Commission, Department of Health and Mental Hygiene, Maryland Insurance Administration, Comptroller's Office, Judiciary (Administrative Office of the Courts), Howard and Montgomery counties, Baltimore City, National Conference of State Legislatures, *Associated Press*, *Honolulu Star-Advertiser*, Department of Legislative Services

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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 New York 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 ³ 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 South Dakota Tennessee Texas	Delaware Hawaii Illinois New Jersey Rhode Island	California ³ Hawaii ³ Maine ³ Nevada ³ Oregon ³ Washington ³ Wisconsin ³

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
		Utah Virginia Washington West Virginia Wisconsin Wyoming		

¹The District of Columbia also enacted a provision to recognize 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.

³California, Nevada, Oregon, and Washington provide nearly all state-level spousal rights to domestic partnership couples. Hawaii, Maine, and Wisconsin 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. The proposition was overturned by a federal District Court in California. The decision has been stayed pending appeal. On February 7, 2012, a federal appeals panel ruled that the same-sex marriage ban in Proposition 8 violated the equal protection provisions of the U.S. Constitution.

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 traditional marriage (although the statutes have been overturned in 2 states); 5 authorize civil unions; 7 states authorize domestic partnerships; and 6 states and the District of Columbia authorize same-sex marriage. The District of Columbia and 9 states (Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont) 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 and Vermont 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.

Source: National Conference of State Legislatures; *Honolulu Star-Advertiser*; Department of Legislative Services