

Department of Legislative Services
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 116

(Senator Garagiola, *et al.*)

Judicial Proceedings

Religious Freedom and Civil Marriage Protection Act

This bill alters the definition of a valid marriage by repealing the reference to a man and a woman and specifying instead that only a marriage between two individuals who are not otherwise prohibited from marrying is valid in Maryland. The bill may not be construed to invalidate any other provision in the Marriage Title of the Family Law Article. An official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to the free exercise of religion as guaranteed by the United States and Maryland Constitutions.

Fiscal Summary

State Effect: General fund expenditures increase minimally due to additional payroll taxes. Potential increase in State expenditures for additional retirement and death benefits to State employees. Any additional copies of marriage/divorce certificates generated by the bill is absorbable within existing resources of the Department of Health and Mental Hygiene (DHMH). Any revision of insurance forms required by the bill is absorbable within the existing resources of the Maryland Insurance Administration.

Local Effect: Minimal increase in revenues due to additional marriages that may be licensed and performed under this bill. Some local tax revenues may be minimally affected by the bill. Significant increase in local expenditures to provide health and retirement benefits to additional households.

Small Business Effect: Potential meaningful.

Analysis

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

Title 2 of the Family Law Article establishes certain restrictions and requirements governing marriages in this State. Individuals within certain degrees of relationships are prohibited from marrying. An individual under the age of 15 may not marry. An individual 15 years old may not marry without the consent of a parent or guardian and a certificate from a licensed physician that the woman to be married is pregnant or has given birth. An individual 16 or 17 years old must have either parental consent or a physician's certificate. An individual may not marry in this State without a marriage license and must wait a specified period after the license is issued before the ceremony may be performed.

Once parties are legally married, many rights, responsibilities, and benefits accrue to the married couple due to the federal and State governments' interest in encouraging and promoting marriage. In *Conaway v. Deane*, 401 Md. 219 (2007) the Court of Appeals observed:

...we are directed to 339 Maryland laws that provide for benefits, conditioned on marital status, which grant rights and responsibilities to married couples, to the effective exclusion of same-sex couples. They include, but are not limited to, the areas of taxation, business regulation, secured commercial transactions, spousal privilege and other procedural matters, education, estates and trusts, family law, decision-making regarding spousal health care, insurance, labor and employment, child care and child rearing, pensions, and the responsibilities attendant to spousal funeral arrangements. This is but a partial list of the benefits provided in Maryland to married couples and denied to same-sex couples prohibited from marriage. *Id.* at 239, *fn.* 6.

The Court of Appeals also noted that the Government Accounting Office compiled a list of 1,138 federal laws that grant rights, responsibilities, and privileges to married heterosexual couples that are not provided to same-sex couples.

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 legal in the District of Columbia (2010) and four other states: Connecticut (2008); Iowa (2009); Vermont (2009); and New Hampshire (2010).

Because of the District of Columbia's unique jurisdictional status, its law authorizing same-sex marriage was subject to a mandatory Congressional review period. That period expired without the successful passage of Congressional legislation to repeal the same-sex marriage law. In January 2011, the U.S. Supreme Court announced that it would not consider a challenge to the District of Columbia's law, thereby affirming a decision by the D.C. Court of Appeals that upheld the law.

Consideration 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. 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. Those couples married before the referendum's passage are still regarded as married under California law. In 2010,

a federal district court ruled that California's *Proposition 8* is unconstitutional under the Equal Protection Clause of the U.S. Constitution. That ruling, however, has been stayed pending appeal. 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.

State courts that have considered challenges from same-sex couples claiming that matrimony is a constitutional right have yielded conflicting results. For example, the highest courts in California and Connecticut overturned state laws prohibiting same-sex marriage, and the New Jersey Supreme Court determined that same-sex couples are constitutionally entitled to receive the same benefits and protections as married couples. The New Jersey legislature extended those rights through the creation of civil unions. On the other hand, the highest courts in Maryland, Washington, and New York found no constitutional right to marriage or its benefits for same-sex couples.

Thirty-nine states (including Maryland) have laws that either prohibit same-sex marriages or deny recognition of same-sex marriages solemnized in another jurisdiction. Thirty states have adopted constitutional amendments defining marriage as a union between a man and a woman.

Maryland Court of Appeals Ruling in Conaway, et. al 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.

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 State 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 begun to alter 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.

State Fiscal Effect: According to the latest information available from the American Community Survey from the U.S. Census Bureau, about 0.5% of Maryland households are comprised of same-sex partners. About 10,476 same-sex households exist, compared to an estimated total of 2,095,122 households in Maryland. It is estimated that in 177 to 300 of Maryland same-sex households, one or both wage earners are employed by the State.

Department of Health and Mental Hygiene: DHMH advises that any fiscal impact from the provisions of the bill can be absorbed with existing resources. Additional issuances of certified copies of marriage certificates and other records related to marriages and divorces are expected to occur under this bill. The Vital Statistics Administration in DHMH advises that each certified copy costs \$12.

State Employee Health and Retirement Benefits: A Department of Legislative Services (DLS) analysis of regulations that expand health insurance benefits (excluding enrollment in health maintenance organization plans) to same-sex domestic partners as of July 1, 2009, estimated additional enrollment costs of \$3.0 million to \$5.1 million (60% general funds/20% federal funds/20% special funds). This estimate also included the impact of additional future liabilities generated by any new beneficiaries added to the program.

Total spending on the State health insurance plan is about \$1.2 billion annually. DLS advises that the additional costs of health insurance enrollment of same-sex married partners from this bill have been absorbed within existing resources. Although the State regulations apply to same-sex domestic partners, the fiscal estimate for this bill assumes that this population elects to marry as authorized under this bill.

The State Retirement Agency advises that general fund expenditures may increase to pay State pension system spousal death and survivor benefits, including “line of duty death” benefits to same-sex spouses who would not be eligible for these benefits under existing law. Another potential impact of the bill relates to a special spousal provision that allows a spouse to choose collection of retirement benefits for a deceased spouse on a monthly basis, rather than a lump sum, if the spouse is the sole primary beneficiary of a State employee who is retired. The expansion of this benefit to same-sex married partners may cause some additional general fund expenditures.

DLS advises that State general fund expenditures for FICA taxes may increase minimally by \$49,500 to \$83,900 in fiscal 2012 for the additional 177 to 300 households with State employees that may elect to marry under the provisions of this bill. On an annualized basis, State general fund expenditures may increase by \$66,000 to \$111,900. While health insurance premiums for State employees are taken out of pre-tax income for those who are married and claim spousal benefits, the premiums are not taken out of pre-tax income for married individuals of the same-sex as they are still not recognized as married under federal law.

State expenditures may also minimally increase for sick and bereavement leave to the extent that State employees, who do not qualify to use this leave for their partners under current law, qualify to use this leave for spouses under the provisions of this bill.

Medicaid: Under this bill, an uncertainty would arise with regard to the issuance of Medical Assistance. Federal law does not recognize same-sex persons who are married under this bill, therefore federal Medicaid funding could not be used to provide benefits. For same-sex spouses, Medicaid may be provided with State-only dollars. However, since Medicaid is financed through an equal partnership with the federal government, it is unclear whether the federal government is likely to authorize the issuance of Medicaid benefits to married persons of the same sex, even if entirely financed by the State.

State Taxes: The Office of the Comptroller advises that there is no impact on State income tax revenues from the bill’s provisions. Individuals who enter a same-sex marriage under this bill are not entitled to file a joint State income tax return because the State income tax system is linked to the federal income tax system. Since federal law does not recognize same-sex marriages for purposes of joint filing, absent an amendment to State law that specifically authorizes joint filing for State income taxes, same-sex married couples will continue to file separate income tax returns, as is required under existing law.

The Office of the Comptroller also advises that the bill’s provisions have no impact on State inheritance and estate tax collections.

Insurance Administration: Any expenditure increase to revise rates and forms under the bill is assumed to be absorbable within existing resources. Certain continuing insurance benefits that are extended under current law to surviving spouses of deceased employees and divorced spouses can be extended to same-sex spouses. Contracts may need to be refiled to comply with the bill. Small group contracts may also need revision.

Higher Education Financial Aid: The Maryland Higher Education Commission advises that general fund expenditures may minimally increase under this bill due to additional people that may become eligible for scholarships from two programs: the Veterans of the Afghanistan and Iraq Conflicts Scholarship (VAICS) and the Edward T. Conroy Memorial Scholarship. VAICS is open to U.S. armed forces personnel and family members, including spouses. The Conroy program is open to surviving spouses (who have not remarried) of deceased public safety personnel or victims of the September 11, 2001 terrorist attacks.

Local Fiscal Effect: Local expenditures to provide health and retirement benefits to additional households may increase significantly. Local government revenues may minimally increase to the extent that additional same-sex households which do not currently qualify for marriage apply for marriage licenses. Local governments may be required to expend additional funds to address any increased demand for marriage licenses that result from this bill. Any such impact is likely to be minimal. Also, some local tax revenues may be minimally impacted under this bill to the extent individuals alter their tax classifications after becoming married.

Small Business Effect: Those businesses that are eligible for coverage under a small employer contract may incur additional expenses to the extent that same-sex households apply for coverage after becoming eligible under the provisions of this bill.

Additional Comments: It should be noted that the creation of same-sex marriage at the State level does not affect eligibility for benefits at the federal level. The Federal Defense of Marriage Act defines marriage as a union between a man and a woman. The Act also authorizes states to refuse to recognize partnerships that do not conform to their public policies regarding marriage. Accordingly, federal health and retirement benefits may not be available to those of the same sex who are married and the status of these marriages may or may not be recognized in other states.

DLS advises that the eligibility of students applying for financial aid may be affected to the extent that they are members of same-sex households. Some students may qualify for less aid, while some may become ineligible due to any additional financial resources from the marriage.

Additional Information

Prior Introductions: SB 582 of 2010 was heard in the Senate Judicial Proceedings Committee, but received no further action. HB 808 of 2010 was heard in the House Judiciary Committee, but received no further action. SB 565 of 2009 was heard in the Senate Judicial Proceedings Committee, but received no further action. Its cross file, HB 1055, was heard in the House Judiciary Committee but received no further action. SB 290 of 2008 was heard by the Senate Judicial Proceedings Committee but received no further action. HB 351 of 2008 was heard by the House Judiciary Committee but received no further action.

Cross File: None designated, however, HB 55 (Delegate Simmons, *et al.*) – Judiciary and HB 175 (Delegate Barve, *et al.*) – Judiciary are identical.

Information Source(s): Baltimore City, Montgomery County, Department of Budget and Management, Department of Human Resources, Maryland Higher Education Commission, Department of Health and Mental Hygiene, Maryland Insurance Administration, Comptroller's Office, Judiciary (Administrative Office of the Courts), Office of the Attorney General, Maryland State Retirement Agency, Maryland Supplemental Retirement Plans, *Associated Press*, National Conference of State Legislatures, U.S. Census Bureau, *The Washington Post*, *The Baltimore Sun*, University of Minnesota, U.S. Internal Revenue Service, Department of Legislative Services

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