

Department of Legislative Services
 Maryland General Assembly
 2008 Session

FISCAL AND POLICY NOTE

House Bill 848 (Delegate Schuler)
 Judiciary

Family Law - Domestic Partnerships

This bill replaces the institution of marriage with the institution of domestic partnership and defines a valid domestic partnership as one that takes place between two individuals who are not otherwise prohibited from entering a domestic partnership.

The bill has prospective application.

Fiscal Summary

State Effect: General fund revenues increase \$4,600 in FY 2009 due to providing domestic partnership certificates. Out-years assume stable caseload and fees and include annualization. Total State expenditures increase \$2.2 million (\$1.3 million general funds/\$0.4 million special funds/\$0.4 million federal funds) for the State Employee Health and Retirement Benefits plan. General fund expenditures increase \$166,900 in FY 2009 due to additional payroll taxes. Out-years for benefits and tax payments assume a stable number of eligible personnel and include annualization to provide health and retirement benefits to additional households. General fund expenditure increase of \$480,200 for FY 2009 only in the Department of Health and Mental Hygiene to modify computer programming for the collection, storing, and issuance of domestic partnership and dissolution records. Minimal general fund expenditure increase to revise rates and forms in the Maryland Insurance Administration.

(in dollars)	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
GF Revenue	\$4,600	\$6,100	\$6,100	\$6,100	\$6,100
GF Expenditure	1,952,100	1,962,500	1,962,500	1,962,500	1,962,500
SF Expenditure	435,000	580,000	580,000	580,000	580,000
FF Expenditure	435,000	580,000	580,000	580,000	580,000
Net Effect	(\$2,817,500)	(\$3,116,400)	(\$3,116,400)	(\$3,116,400)	(\$3,116,400)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Minimal increase in revenues due to additional domestic partnership licenses and performance of ceremonies. Significant increase in local expenditures to provide health and retirement benefits to additional households. Minimal increase in expenditures to convert existing marriage licenses to domestic partnership licenses. **This bill could impose a mandate on local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: In those statutes that specify requirements for a valid marriage and establish marriage licensing and ceremony performance requirements, the term “marriage” is repealed and replaced with the term “domestic partnership.” Accordingly:

- an authorized official (that is, an official of a religious order, judge, clerk, or deputy clerk) performs a domestic partnership ceremony;
- the degrees of relationship which void a marriage apply to domestic partnerships;
- the prohibition on entering into marriage for parties who are ages 15, 16, or 17 unless specified conditions are met apply to domestic partnerships;
- the prohibition on anyone under age 15 entering into a marriage applies to a domestic partnership;
- the requirement that a license be issued by a clerk of the circuit court applies to domestic partnerships;
- to enter into a valid domestic partnership, at least one of the parties (except in Cecil County, both parties) must appear before the clerk and apply for a license (or an affidavit if the parties are not county residents) by providing specified personal identifying information, Social Security numbers, and information on the marital or partnership status of each party;
- a clerk questions applicants for a domestic partnership in the same manner as for a marriage and must withhold the domestic partnership license if the clerk finds a legal reason why the applicants should not enter into a domestic partnership;

- the effectiveness of a license on 6 a.m. on the second day after a license is issued and the authority for a judge to waive the waiting period for State residents who are members of the armed forces applies to domestic partnerships;
- the requirement for the Department of Health and Mental Hygiene to provide birth control and family planning information applies to domestic partnerships;
- the six-month validity of a license and the license fee (at least \$10) and performance fee (\$30 in Cecil County and \$25 in all other counties) apply to domestic partnerships;
- the recordkeeping duties of the clerk that apply to marriages and divorces apply to domestic partnerships and the dissolution of domestic partnerships; and
- the criminal penalties that apply to any violation of the provisions for license application, validity of the license, performance, payment for and recording of the license, and performance of the ceremony apply to domestic partnerships.

A foreign marriage, that is a marriage entered into in another jurisdiction, is deemed a domestic partnership in this State and is subject to all domestic partnership laws and regulations. The bill repeals the provisions that establish the requirements for a premarital course and the authorization for the clerk to discount the license fee for those couples that complete a premarital course.

The bill establishes that parties to a domestic partnership have all the same benefits, protections, and responsibilities as are granted to spouses in marriage, whether they are derived from law, court rules, regulations, policy, common law, or any other source of civil law.

The term “domestic partner” is included in the Maryland Code wherever the terms spouse, family, immediate family, dependent, next of kin, or any other term that denotes a spousal relationship is used. Wherever the term “marriage” is used in the Maryland Code, the term “domestic partnership” is included.

The dissolution of a domestic partnership follows the same procedures and is subject to the same substantive rights and obligations as set forth to the statutory provisions for divorce, including any residency requirements.

Current Law: Under State law, only a marriage between a man and a woman is valid. State law does not establish provisions for domestic partnerships or any other union that could involve individuals of the same sex.

State law establishes the requirements for parties to be married, establishes the elements of a valid license application and the fee, the effective period of a license, designates those officials that are authorized to perform marriage ceremonies and sets the fee for performance of a marriage ceremony, and provides for the recording of a marriage. A clerk may discount the license fee if the parties complete a premarital preparation course as specified in statute.

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 *Deane v. Conaway*, 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.

That the Maryland General Assembly may affirmatively establish civil unions or provide for same-sex marriage was confirmed by the Court of Appeals in *Deane v. Conaway*, although the court upheld the constitutionality of the State's definition of a valid marriage. In that decision, the Court of Appeals stated:

In declaring that the State's legitimate interests in fostering procreation and encouraging the traditional family structure in which children are born are related reasonably to the means employed by Family Law § 2-201, our 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. *Id.* at 325.

Background: 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 and only state to issue marriage licenses to same-sex couples.

Spurred by the decisions in Hawaii and Massachusetts, legislatures and courts around the country grappled with the issue of whether to grant the right to marry or the protections of marriage to same-sex couples.

State Court Decisions: State courts that have considered challenges from same-sex couples claiming that matrimony is a constitutional right have yielded conflicting results. For example, the New Jersey Supreme Court recently determined that same-sex couples are constitutionally entitled to receive the same benefits and protections as married couples. On the other hand, the highest courts in Washington and New York found no constitutional right to marriage or its benefits. Legal challenges are currently pending in California, Connecticut, and Iowa.

Constitutional Amendments: 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 rushed to amend their constitutions to limit marriage to couples of the opposite sex. To date, 27 states have adopted constitutional amendments defining marriage as only between a man and a woman. Only the state of Arizona has rejected a ballot initiative to ban same-sex marriage.

Civil Unions and Domestic Registries: In 2005, Connecticut became the second state to enact a law establishing civil unions. Similarly, in response to the state’s high court ruling, the New Jersey legislature adopted legislation in 2006 authorizing civil unions. New Hampshire passed similar legislation, which will take effect January 1, 2008. California enacted a law in 1999 authorizing couples to register as domestic partners and claim all

the state benefits conferred on husbands and wives. Oregon has also adopted a domestic registry. Hawaii, Maine, and Washington have domestic registries that allow same-sex couples to claim only certain benefits, including hospital visitation rights and inheritance without a will. Unlike traditional marriages, civil unions and domestic registries do not provide the marriage benefits available under federal law in numerous areas, such as Social Security, family medical leave, federal taxation, and immigration policies.

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 valid under State law. *Tyma v. Montgomery County*, 369 Md. 497 (2002).

Federal Law: The federal Defense of Marriage Act of 1996 defines marriage as a legal union between a man and a woman only and allows a state to deny recognition of a public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state.

Appellate Ruling Upholds Traditional Marriage in Maryland: 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 plaintiffs alleged violation of the prohibition against discrimination based on sex under the Maryland Declaration of Rights, along with violations of due process and equal protection rights. On January 30, 2006, the Circuit Court for Baltimore City held that the State statute defining marriage is unconstitutional and violates Article 46 of the Maryland Declaration of Rights because it discriminates based on gender against a suspect class and is not narrowly tailored to serve any compelling governmental interests. Article 46 of Maryland's Declaration of Rights is commonly referred to as Maryland's "Equal Rights Amendment" and prohibits abridgment of equal rights under State law because of sex. The ruling was stayed pending an appeal, which the Office of the Attorney General immediately filed with the Court of Special Appeals. Before the intermediate court could decide the appeal, the Court of Appeals issued a writ of *certiorari*, and, on September 18, 2007, issued an opinion reversing the judgment of the circuit court and upholding the State's marriage statute. *See Conaway, et. al v. Deane, et. al.*, 401 Md. 219 (2007).

The Court of Appeals held that the Equal Rights Amendment was intended to prevent discrimination based on gender, not sexual orientation. The court found that the marriage statute does not discriminate on the basis of gender because it prohibits equally 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." *Id.* at p. 325.

State Fiscal Effect:

Department of Health and Mental Hygiene: General fund expenditures could increase \$480,246 in fiscal 2009 only for the computer programming changes required for creating domestic partnership records and the collection, indexing, storage, and issuance of domestic partnership and dissolution of partnership records. The Vital Statistics Administration would be required to receive a copy of each domestic partnership license recorded by a clerk of the circuit court and receive a copy of each dissolution of a domestic partnership granted by the circuit court.

State general fund revenues could increase by \$4,554 in fiscal 2009, accounting for the bill's October 1 effective date and \$6,072 annually thereafter to issue certified copies of domestic partnership certificates and other records related to domestic partnerships. The estimate assumes no changes in caseload or fees. The Vital Statistics Administration in the Department of Health and Mental Hygiene advises that each certified copy costs \$12.

State Employee Health and Retirement Benefits: The 2006 American Community Survey from the U.S. Census Bureau indicates there are 1,523 same-sex households in Maryland where at least one of the members is employed by State government. Not all of these households would cause additional State expenditures through the increased use of State benefits. First, not all individuals who cohabit would elect to become domestic partners. Secondly, some people who do enter into a domestic partnership may opt to switch from State benefits to the benefits issued by a private employer. This estimate assumes that 506 additional households could be added to State benefits plan enrollment due to the provisions of this bill, which represents 0.5% of November 2007 health insurance plan enrollment, according to DBM.

The bill could have a significant impact on State finances due to employee and retiree benefits provided to State employees.

Total State expenditures could increase by \$2,175,000 in fiscal 2009 (\$1,305,000 general funds/\$435,000 special funds/\$435,000 federal funds) for additional households that qualify for health insurance and retirement benefits, accounting for the bill's October 1 effective date. DBM advises that the addition of same-sex marriages and children to the

State health insurance plan would cost about \$7,007 per family unit. The State would subsidize 82% of the total cost per household; accordingly, State expenditures for health insurance would be about \$5,745 per household. Annualized costs would be \$2,900,000 (\$1,740,000 general funds/\$580,000 special funds/\$580,000 federal funds).

DBM advises that State general fund expenditures for FICA taxes would increase by \$166,871 in fiscal 2009 for an additional 506 households. On an annualized basis, State general fund expenditures would increase by \$222,495. 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 would not be taken out of pre-tax income for domestic partners of the same sex as they would still not be recognized as married under federal law.

Legislative Services also advises that additional liabilities could be contributed by new beneficiaries added to the State Employee and Retiree Health and Welfare Benefits Program. Although a precise estimate of the additional liabilities contributed by a single new retiree or beneficiary is not available, the actuary for the Blue Ribbon Commission on Funding Health Care for State Retirees has estimated that a new member adds approximately \$280,000 in liabilities to the State plan, assuming the retiree also covers a domestic partner.

State expenditures could also increase for sick leave to the extent that individuals, who do not qualify under current law for family sick leave, would qualify under the provisions of this bill.

Medicaid: Under this bill, an uncertainty would arise with regard to the issuance of Medical Assistance. Federal law would not recognize domestic partners of the same sex, therefore, federal Medicaid funding could not be used to provide benefits. For same-sex domestic partners, Medicaid could possibly 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 would authorize the issuance of Medicaid benefits to domestic partners, even if entirely financed by the State.

State Taxes: While this bill could cause some fluctuations in the attainment of State general fund revenues from income taxes, any such impact is assumed to be negligible. Individuals who enter into a domestic partnership under this bill would be entitled to file a joint State income tax return, but could choose to continue filing individual returns. The State receives about \$7.4 billion in income tax revenues annually. To the extent that joint income tax filings increase due to domestic partnerships, State general fund revenues could decline slightly. Revenues could also decline slightly to the extent that a taxpaying domestic partner could claim his/her partner with no income as an exemption on the joint return. The decline in State tax revenues could be offset to the extent that

individuals with large losses who pay no taxes end up paying more taxes if the losses are combined with the income from a domestic partner.

Any effect on Maryland inheritance and estate tax collections cannot be reliably estimated at this time but is assumed to be insignificant.

Insurance Administration: Minimal general fund expenditure increase to revise rates and forms under the bill. Certain continuing insurance benefits that are extended under current law to surviving spouses of deceased employees and divorced spouses would be extended to same-sex spouses. Contracts would need to be refiled to comply with the bill. Small group contracts would also need to be revised.

Local Fiscal Effect: Local government expenditures to provide health and retirement benefits to additional households could increase significantly. Also, local government revenues could minimally increase to the extent that additional same-sex households which do not currently qualify for marriage would apply for domestic partnership licenses. Clerks of the circuit courts would be required to revise marriage license applications and certificates to reflect domestic partnerships. Coordination with the Vital Statistics Administration in DHMH would be required to ensure that licenses are adequately recorded. Local governments may be required to expend additional funds to address any increased demand for domestic partnership licenses that could result from this bill. Circuit courts would also incur additional expenses to convert marriage licenses into domestic partnership licenses. Any such impact is likely to be minimal.

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

Additional Comments: It should be noted that the creation of a domestic partnership at the State level would 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 same-sex domestic partners and the status of domestic partners may or may not be recognized in other states.

The Maryland Higher Education Commission advises that the eligibility of students applying for financial aid could be affected to the extent that they are members of same-sex households. If joint income returns are filed, then the combined incomes could be considered when determining eligibility for financial aid. Some students could qualify

for less aid, while some may become ineligible due to any additional financial resources from the domestic partnership.

Additional Information

Prior Introductions: None.

Cross File: SB 689 (Senators Raskin and Madaleno) – Judicial Proceedings.

Information Source(s): Department of Human Resources, Judiciary (Administrative Office of the Courts), Comptroller's Office, Department of Health and Mental Hygiene, Maryland Insurance Administration, Maryland Higher Education Commission, Department of Budget and Management, U.S. Census Bureau, Department of Legislative Services

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