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FISCAL IMPACT REPORT

SPONSOR Vaughn ORIGINAL DATE 02/02/09
LAST UPDATED _____ HJR 2
SHORT TITLE Marriage Defined, CA SB _____
ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

House Joint Resolution 2 relates to House Bill 21, the "Domestic Partner Rights and Responsibilities Act."

SOURCES OF INFORMATION

LFC Files

Responses Received From
Commission on the Status of Women (CSW)

No Response
Attorney General's Office (AGO)
Governor's Office (GOV)

SUMMARY

Synopsis of Bill

This House Joint Resolution proposing an Amendment to Article 20 of The Constitution of New Mexico to define marriage as between one man and one woman. The resolution reads as follows.

Be it resolved by the Legislature of The State of New Mexico:

Section 1. It is proposed to amend Article 20 of the constitution of New Mexico by adding a new section to read:

"Marriage in this state shall consist only of the union of one man and one woman."

Section 2. The amendment proposed by this resolution shall be submitted to the people for approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

FISCAL IMPLICATIONS

There is no appropriation contained in this bill.

SIGNIFICANT ISSUES

The following material is an Attorney General's Office staff analysis in response to the LFC's request following a previous introduction of a bill proposing this constitutional amendment. It is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter.

- Although New Mexico does not have a law specifically providing that marriage must be between persons of different genders, or laws specifically prohibiting marriages between persons of the same gender, provisions governing marriage licenses in state law refer to a "bride" and "groom", and require a "male" and "female" applicant. See Sections 40-1-17, 40-1-18 1978. Other provisions in state law refer to "husband" and "wife". See Sections 40-2-1 et seq.; 40-3-1 et seq. This joint resolution would specifically define marriage as only a union between a man and a woman, which would be consistent with existing state law.
- The Legislature is also considering legislation enacting laws affording "domestic partners" substantially the same rights as those afforded married persons. This joint resolution may preclude or conflict with the enactment of such laws. Even though it does not specifically ban domestic partnerships, civil unions, etc. between persons of the same gender, which would not be considered marriages, the joint resolution states that marriage shall consist *only* of the union of one man and woman. That language might be interpreted as intending to prevent the legislature from granting marital rights to couples of the same gender.

In February 2004 the former New Mexico Attorney General issued an advisory opinion in which she ruled that marriage in New Mexico is limited to a man and a woman. This opinion was issued in response to the Sandoval County Clerk issuing marriage licenses to persons of the same sex. A District Court Judge issued a Temporary Restraining Order prohibiting the Clerk from issuing such licenses in March, 2004. The Clerk then filed a petition in the New Mexico Supreme Court against the Attorney General and the District Judge who issued the restraining order, asking the Supreme Court to require that those officials allow her to issue marriage licenses "without interference or discrimination based on sex, sexual orientation, or gender". *Dunlap v. Madrid and McDonald*, No.28, 730. On July 8, 2004 the Supreme Court denied the Clerk's petition, effectively letting stand the opinion of the Attorney General that "same-sex" marriages are not authorized by New Mexico state law.

The lack of a specific law defining marriage based upon gender has caused the State of Massachusetts to conclude that New Mexico residents of the same sex may obtain marriage licenses in that state.

On September 21, 1996, President Bill Clinton signed the federal "Defense of Marriage Act" (1 U.S.C. sec. 7; 28 U.S.C. 1738C) which prohibited the federal government from recognizing

House Joint Resolution No. 2 – Page 3

same-sex or polygamous marriages for any purpose, even if concluded or recognized by one of the states. That Act also defined “marriage” for federal purposes as a legal union between one man and one woman as husband and wife, and the word ‘spouse’ as a person of the opposite sex who is a husband or a wife.

The Act also provided that states, territories, possessions, or Indian Tribes need not recognize a marriage between persons of the same sex, even if the marriage was concluded or recognized in another jurisdiction. Although not specifically stated, this joint resolution might have the effect of precluding New Mexico from recognizing marriages between persons of the same gender which are legal in other states, in spite of NMSA Section 40-1-4 (1978) which currently provides: “*All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.*” It remains an open question in New Mexico as to whether marriages between persons of the same gender which are legal in the jurisdiction in which they are performed (e.g. Massachusetts) are currently recognized in New Mexico.

Even if the resolution is approved by the voters, it would be uncertain whether its provision is “self-executing” (effective without enabling legislation), or whether it is merely a declaration of principle or policy requiring legislation in order to become effective as state law, or if not “self-executing” whether existing state law is sufficient to give it effect. See *Jaramillo v. City of Albuquerque*, 64 N.M.427 (1958).

RELATIONSHIP

House Bill 21 would enact a “Domestic Partner Rights and Responsibilities Act” which would confer substantially the same rights under state law on “domestic partners” as are available to married persons, regardless of gender.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The voters will not be asked to decide whether the New Mexico Constitution should be amended to provide that “Marriage in this state shall consist only of the union of one man and one woman.”

CH/mt