

**ANALYSIS OF AMENDED BILL**

Author: Leno, et al. Analyst: Deborah Barrett Bill Number: AB 19  
 Related Bills: See Legislative History Telephone: 845-4301 Amended Date: 05-12-2005  
 Attorney: Patrick Kusiak Sponsor: \_\_\_\_\_

<b>SUBJECT:</b>	Religious Freedom And Civil Marriage Protection Act
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**SUMMARY**

This bill would change the definition of marriage to a civil contract between two persons.

**SUMMARY OF AMENDMENTS**

The April 21, 2005, amendments added coauthors to the bill.

The May 12, 2005, amendments added intent language to declare that the act does not modify Section 308.5 of the Family Code as it pertains to marriages from other jurisdictions. Additional intent language provides, among other things, that the purpose of this act is to correct constitutional weaknesses in the Family Code and that the California Supreme Court is the body with authority to make a final determination regarding the meaning, validity, or invalidity of the Family Code Section.

Discussion in this analysis is limited to provisions of the measure that affect the department. The department has analyzed this bill based on the assumption that this bill could be interpreted to allow spouses in a same-sex marriage to file a joint state income tax return and be treated as spouses for purposes of state income tax laws.

**PURPOSE OF THE BILL**

According to the author's staff, the purpose of this bill is to end discrimination against same-sex couples and to ensure that the rights and responsibilities of spouses are secured without regard to gender.

**EFFECTIVE/OPERATIVE DATE**

This bill would be effective and operative as of January 1, 2006.

**POSITION**

Pending.

Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input type="checkbox"/> N	<input type="checkbox"/> OUA	<input checked="" type="checkbox"/> PENDING

Department Director

Will C. Bush

Date

08/29/05

## **ANALYSIS**

### FEDERAL/STATE LAW

Existing federal and state tax laws provide guidelines for determining a taxpayer's filing status when filing an income tax return. For example, federal law states a husband and wife can file a joint income tax return even though one of the spouses has no gross income or deductions, except in the following cases:

- One of the spouses was a nonresident alien at some time during the taxable year;
- The spouses have different taxable years, subject to exceptions; and
- Where one or both spouses died during the taxable year, subject to exceptions.

Subject to limitations, an individual who files a separate tax return for a taxable year where a joint return could have been filed may subsequently file a joint return with their spouse for that same taxable year.

For purposes of state income tax law, adjusted gross income (AGI) is defined by cross-reference to the Internal Revenue Code (IRC) as gross income, which includes all income from whatever source derived, minus specific deductions. For purposes of computing limitations based upon AGI, such as miscellaneous itemized deductions where only the portion that exceeds 2% of the AGI may be deducted, the taxpayer would use the AGI that is required to be shown on the federal tax return for the same taxable year for state return purposes.

Generally, under state law an individual must use the same filing status for their California income tax return that was used on their federal income tax return. If the Franchise Tax Board (FTB) determines that the taxpayer's federal filing status was incorrect, FTB may revise the state return to reflect the correct filing status. A husband and wife may file separate returns if, during the taxable year, either spouse was an active member of the armed forces or a nonresident with no California source income. Subject to limitations, an individual who files a separate tax return for a taxable year where a joint return could have been filed may subsequently file a joint return with their spouse for that same taxable year.

Under federal and state income tax law, spouses who file a joint tax return are each responsible for the accuracy of the return and for the full tax liability for that tax year. These obligations apply regardless of which spouse earns the income. The concept of obligating each spouse separately for all of the tax liability reflected on the joint return is called joint and several liability. Under certain circumstances individuals who file joint returns may be eligible for relief from joint and several liability.

California is a community property state, which gives each spouse an undivided half interest in community property. Married taxpayers filing separate tax returns must claim one half of the other spouse income on their returns and part of the community income. The terms taxpayer, individual, person, husband and wife, and the determination of marital status are clarified or defined within the state income tax law.

In 2003, California implemented the California Domestic Partner Rights and Responsibilities Act (Goldberg, Stats. 2003, Ch. 421) that extended the rights and duties of marriage to persons registered as domestic partners with the Secretary of State. This act gives registered domestic partners the same rights, protections, and benefits as married persons. This act also makes

registered domestic partners subject to the same responsibilities, obligations, and duties as imposed upon married persons. This act requires registered domestic partners to use the same filing status on their California income tax return as was used for federal income tax purposes. While AB 205 granted community property benefits to domestic partners, earned income of a domestic partner is not treated as community property for state tax purposes. Domestic partners need only to include one half of the unearned income of the other partner on their state return to report community income. This exception provides an additional benefit to domestic partners that are not afforded to married partners filing separate returns and reporting community income of the other partner.

Current federal law, under the Defense of Marriage Act, defines marriage as a legal union between a man and woman and uses the term spouse to refer only to a person of the opposite sex who is a husband or a wife. In addition, this Act provides that no state is required to give effect to any public act, record, or judicial proceeding of another state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that state.

State law, under the Family Code, defines marriage as a personal relation that arises out of a civil contract between a man and a woman. All real or personal property, wherever situated, that is acquired by a married person during the marriage while domiciled in California is considered community property. By application of community property rules for income tax purposes, each spouse is taxable on one half of the income that is considered community property.

### THIS BILL

This bill would do the following:

- Amend the definition of marriage under the Family Code from a personal relation arising out of a civil contract between a man and a woman to a personal relation arising out of a civil contract between two persons,
- Construe gender specific terms to be gender neutral where necessary to implement the rights and responsibilities of spouses, and
- Provide that a priest, minister, or rabbi of any religious denomination or an official of any nonprofit religious institution authorized to solemnize marriages are not required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the First Amendment of the U.S. Constitution and provisions of the California Constitution.

### IMPLEMENTATION CONSIDERATIONS

The department has identified the following implementation concerns. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

- Current state law requires a taxpayer to use the same filing status on the state tax return as used on the federal tax return. If this bill is intended to afford same sex couples the opportunity to file joint tax returns for state tax purpose, while using a different filing status for federal tax purposes, explicit language providing that result is necessary to prevent any confusion.

- California income tax laws follow federal tax laws for treatment of income and deductions. For same-sex couples, this bill would create differences between federal and California income tax laws that would not exist for different sex married couples. For example,
  1. Current state and federal law provides for the transfer of an asset between spouses without tax consequences. Since federal law does not recognize same sex marriages, upon enactment of this bill, such transfers would be subject to federal tax.
  2. Alimony reporting currently follows federal law, allowing alimony payments to be deductible by the payer and reportable as income to the payee. Since federal law does not recognize a same-sex marriage, federal law likely would not recognize a divorce or the subsequent division of assets of the same-sex marriage for tax purposes, which may result in increased capital gains tax for same sex couples.
- California personal income tax returns use the federal AGI to begin the calculation of state income tax and for computing limitations based upon AGI. Taxpayers use the federal AGI reflected on the federal tax return for the same taxable year for state income tax purposes. The federal AGI determines, among other tax items, the 2% floor on itemized deductions, the AGI floor on medical expenses, the state percentage of the federal child and dependent care credit, and the phase out of exemption credits. Since spouses in a same-sex marriage would file separate federal tax returns, it is unclear what the federal AGI figure would be in order to begin the calculations of state income tax for a married filing jointly return or what AGI figure to use for purposes of calculating the limitations.
- Current law requires the filing status of the taxpayer to be the same for state and federal filing. The department verifies joint return information contained in federal data using the primary taxpayer's information through an automated process. If taxpayers use a different filing status for state and federal purposes, the department would have to revise current match processes to accommodate the difference in filing status between federal and state tax returns. The department would expect a delay in the ability to match taxpayer data through the automated processes. The department systems would require additional programming and testing to associate separate federal returns with joint state returns.

## **LEGISLATIVE HISTORY**

AB 205 (Goldberg, Stats. 2003, Ch. 421) gave registered domestic partners the same rights, such as community property rights, that are granted to and imposed upon spouses in a civil marriage, with some exceptions.

AB 1967 (Leno 2003/2004) sought to change the definition of marriage to a civil contract between two persons. This bill was held in the Assembly Appropriations Committee.

## **OTHER STATES' INFORMATION**

*Vermont* allows eligible persons of the same sex with established relationship all the same legal benefits, protections, and responsibilities under law granted to married couples. For state income tax purposes, the parties to a civil union may file a joint income tax return and will be taxed in the same manner as married persons.

*Hawaii* defines domestic partners as reciprocal beneficiaries. Those partners who are legally registered receive some of the same rights and benefits of marriage. State income tax law does not provide reciprocal beneficiaries with income tax benefits or allow joint income tax returns.

*Massachusetts* recognizes the right of same-sex couples to be married. For tax periods ending on or after May 16, 2004, same-sex spouses may file either state joint returns or married filed separate returns.

## **FISCAL IMPACT**

Implementing this bill would require some changes to existing tax form instructions and information systems, which could be accomplished during the normal annual update. The department anticipates customer service contacts from taxpayers seeking clarification of the tax laws with respect to same-sex marriages would increase resulting in a cost of approximately \$67,000.

Additionally, the automated systems that compare federal and state tax information for audit purposes would need additional programming and testing. Costs to program and test the systems are estimated to be \$58,000.

## **ECONOMIC IMPACT**

### **Tax Revenue Estimate:**

Based on data and assumptions discussed below, the personal income tax and corporation tax revenue gain/loss from this bill would be as follows:

Estimated Revenue Impact of AB 19 as Amended 5/12/05 Effective On Or After January 1, 2005 Enactment Assumed After June 30,2005 (\$ millions per 5,000 same-sex couples)		
2005-06	2006-07	2007-08
a/	-\$1	-\$1

a/ Loss less than \$500,000

This bill does not consider the possible changes in employment, personal income, or gross state product that could result from this measure.

### **Revenue Discussion:**

It was assumed that under this bill, affected taxpayers would be required to file income tax returns as married filing joint or as married filing separate.

This rule-of-thumb estimate is based on the approximately 4,000 marriage licenses issued for same-sex partners in San Francisco between February 11 and March 12, 2004. This amount was grown by 10% annually to get a 2006 figure of approximately 4,900 licenses.

Statistics for state personal income tax returns show that if two people previously filing as single or as head of household are required to file as married filing joint or married filing separate, 59% would pay

less income tax, and 12% would pay more income tax, with the remaining people unaffected. The average tax change for those paying more would be an increase of about \$755. Those paying less would pay about \$475 less. Applying these amounts to the 4,900 couples results in an average revenue loss of about \$1 million annually:

4,900 (marriage licenses issued) X 59% = 2,900 (couples that would pay less tax)  
2,900 X \$475 (average tax savings) = -\$1.4 million (revenue loss)

4,900 (marriage licenses issued) X 12% = 580 (couples that would pay more tax)  
580 X \$755 (average tax increase) = \$ .4 million (revenue gain)  
Total Revenue Loss (-\$1.4 million + \$ .4 million) = -\$1.0 million

For every 5,000 same-sex couples whose filing status would change to married filing joint, the average loss of personal income tax revenue would be around \$1 million.

## **POLICY CONSIDERATIONS**

This bill could have an impact on federal income tax law since those laws rely on each state's laws regarding married persons and their property. Since California is a community property state, spouses who file separate federal income tax returns are required to split the incomes of each spouse to be claimed on each return. Depending on the individual circumstances of the taxpayer, this bill could result in same-sex married couples paying less federal income tax than if they filed separate returns and did not claim one half of community property income.

## **LEGISLATIVE STAFF CONTACT**

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