

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on January 27, 2005 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Carol Doel, Committee Secretary

Conferees:

Rep. Tim Owens
Rep. Jan Pauls
Rep. Ward Loyd
Rep. Mike O'Neal
Dennis Hodgins, Legislative Research Department

Others attending:

See attached list.

Chairman Edmonds opened the meeting for bill introductions. There were no bill introductions.

Material regarding *Areas of Law that Would be Affected by Recognition of Same-Sex Marriage and Non-Marital Unions* which Representative Burroughs had previously requested from staff was presented for committee review with Dennis Hodgins, Legislative Research Department giving a briefing. (Attachment 1)

Representative Burroughs explained that he had requested this information because he felt it was necessary do to the discussion at the previous meeting regarding economic impact that could occur in reference to businesses within the state and the potential for resources to come to our state or vacate our state depending on which side of the issue one was on. He stated that he felt it was imperative that the committee understand the benefits of marriage.

Chairman Edmonds advised the committee that there would be a briefing on **SCR 1601** by four attorneys who were House Members and introduced as the first to speak Representative Tim Owens.

Representative Owens, related that he is not giving formal legal advice, but is speaking only as an attorney legislator and out of respect to the Chairman and his invitation. Representative Owens gave his previous background. He is in his fourth year of the legislature and he served twenty-four years as a city counsel member in Overland Park, three years as general counsel for the Kansas Department of Social and Rehabilitation Services, two years as the city prosecutor and assistant city attorney in Overland Park. He has been in general private practice for most of the last thirty-one years. In the 2003 and 2004 legislature, he served as the rules chair for the house and he has also served as a municipal judge and judge pro-tem in all of the different types of district courts in Johnson County. He is a retired colonel from the U.S. Army Reserve. In the varying capacities in which he has served, he has always been called upon to address issues that related to constitutional questions. Representative Owens stated that the observations that he will offer will be rendered in the same manner and approach as he took as rules chairman, non-partisan, non-personal, and analytical of the issue as he sees it.

Representative Owens related that the obvious issue is whether to put to the vote of the people the proposal to amend Article 15 of the State Constitution to incorporate a new section 16 defining marriage as between one man and one woman and declaring all other marriages to be void and against public policy of the state as is already the language in **KSA 23-101** and declaring that no relationship other than a marriage shall be recognized by the state as entitling the parties to "the rights and incidents" of marriage. He further stated that if the matter is taken before a court, the courts are going to look at the strict language of any laws that they are dealing with and the definitions. Representative Owens says that as nearly as he can tell, in his research Kansas Law of, Kansas does not define what the right and incidents are. There are a lot of questions about

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how to define "the rights and incidents" of marriage. He further related there are other issues which are of concern such as federal versus state. The next area of consideration has to do with Article 4 of the U.S. Constitution dealing with full faith and credit. Representative Owens stated given the topic that is being dealt with, the Defense of Marriage Act (DOMA) needs to be looked at. It is an act, it is not constitutional. It has not been challenged throughout the entire system yet. There has been no ruling on whether or not it is constitutional. If this act is upheld on the challenge, then it would be his opinion, that no further legislation is needed to protect marriage in Kansas. Another area of concern is equal rights and equal protection. The above are the basic areas that are cause for concern, with the legislation, proposed in terms of how it will be treated if it goes to court. (No Testimony)

Chairman Edmonds introduced Representative Pauls as the next attorney to brief the committee on **SCR 1601**. Representative Pauls stated that she does support the resolution, however she was going to focus on an unbiased legal opinion. She stated that she graduated from law school and she started practice in Hutchinson for a Legal Aid Society which provides legal services for the poor. She did this for a number of years and then was in private practice for two year, followed by Assistant County Attorney in Reno County for two years doing prosecutions and juvenile court and then for four years she was a District Judge in Reno County. After that she went back into private practice and has now been in the Legislature since 1991.

Representative Pauls stated that she appreciates questions about protection against abuse laws. In 1998 it was redefined to make the act more clear. It makes it clear that people can get protection with a restraining order against someone else due to threats of physical abuse or certain types of threats. These people are described as an intimate partner, or household member meaning persons who are or have been in a dating relationship, persons who reside together or have formerly resided together or persons who have a child in common. That was drafted very carefully to pick up anyone who had lived together or had a dating relationship which is defined as a social relationship of a romantic nature. The only proof that a person has to have to get a restraining order is that they have lived in a household together. Representative Pauls continued with the fact that talk about Civil Rights has been heard again. In Kansas sexual orientation has never been included as a protection class under Civil Rights. One other protection that we afford people in Kansas due to Federal Law is that you cannot discriminate against someone that you think has AIDS. Apart from that there is no protection under Kansas Law or Federal Law regarding sexual orientation.

Representative Pauls related that there was a question about benefits and it was indicated that some corporations in Kansas may be withholding tax benefits that we have options as state employees to have withheld, but they are doing it for same sex couples. Currently there is no specific authority under State Law to do that. If they are making that decision, they might be subject to challenge now under current tax law whether this amendment gets passed or not.

Another question was regarding the faith of marriage, paragraph A. The courts interpretation is that "other marriages" is something other states call marriage and we don't. Rep. Pauls spoke also on the two subject rule as well as defining the concept of "rights and incidents" of marriage. If a person, meets the Kansas definition of marriage, they would be entitled to benefits.

Next to brief the committee on **SCR 1601** was Representative Ward Loyd who has been in general practice of law since 1968 and has made a number of appearances before the Kansas Supreme Court. Representative Loyd stated that it is his belief that sometimes in the pursuit of what we believe to be just and right, we wind up doing the wrong thing. It is his fear that **SCR 1601** may fit into that category.

Representative Loyd summarized the concerns with the first being that he doesn't think this resolution is necessary as the current Kansas Law, **K.S.A. 23-110**, defines the nature of marriage relation as one which exists "between two parties who are of opposite sex". This has been the law since 1867.

Another area of concern which Representative Loyd touched on, was the question of whether Kansas will at some point under the doctrine of "full faith and credit" be required to recognize a same-sex marriage legalized in Massachusetts. However, if it is necessary to fix this, it can be done by legislative enactment, without the necessity of an amendment of our Kansas Constitution.

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Representative Loyd related that a new element of difficult definition in **SCR 1601** is Section (b), "No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage." He has not had the opportunity to research the potential effect of Section (b), but it is his concern that he cannot define this phrase, or its application. He further stated that without certainty in such definition, we may be placing at risk may currently recognized relationships. existing at law not intended by the sponsors of this measure to be impacted. (Attachment 2)

Representative O'Neal came before the committee to give briefing on **SCR 1601**. He stated that this is his 21st session in the legislature and in his real life he practices law. He does explicitly medical mal practice defense. He does not do a lot of cases involving constitutional law, but he related some past experiences in that area. He further stated that he would be as objective as he could, but he wished to confess from the beginning that he is a strong proponent of passage of the constitutional amendment.

Representative O'Neal related the reasons for making the amendment to the State Constitution when Kansas already has a statute on this subject. He stated that we cannot always take solace in the fact that we have a good strong statue on the books that has been upheld by the highest court in our state, that we need to look only to the recent death penalty cases to know that is not necessarily true. There is the argument that we should not amend the constitution "willy nilly". However, something is not forever unless the people support it forever. The issue in **SCR 1601**, the institution of marriage, is a very important issue. Marriage is a matter of public concern.

Representative O'Neal spoke on the meaning of "rights or incidents of marriage". If you have any document that generally says spouse or whatever, you cannot replace that word with something else such as civil unions. Anything in law that gives a right or incident or is implied by case law is obligation. If a person dies intestate, without any provision, the law presumes that if you have a surviving spouse, your property will automatically go to the spouse. By this we have not deprived same-sex individuals in a committed loving relationship from inheriting. They cannot inherit intestate succession as a spouse, however, they can do estate planning.

The Representative also commented on full faith and credit.

Chairman opened the floor for consideration of **SCR 1601**.

Representative Myers moved **SCR 1601** be passed out favorable for passage. The motion was seconded by Representative Brunk.

Representative Craft offered a substitution motion to amend **SCR 1601** to strike subsection (b). The motion was seconded by Representative Mah.

Representative Craft issued a copy of the proposed resolution change to each member for review. (Attachment 3)

Vote was taken on the substitution motion to amend **SCR 1601**. Motion failed.

Returning to the original motion by Representation Myers, vote was taken. Motion passed.

With no further business before the committee, Chairman Edmonds adjourned the meeting.

VII. AREAS OF LAW THAT WOULD BE AFFECTED BY RECOGNITION OF SAME-SEX MARRIAGES AND NON-MARITAL UNIONS

More than one thousand rights and responsibilities are automatically accorded to couples based on marital status. In 1997, the Government Accounting Office (GAO) conducted a computerized search of the United States Code to determine the federal rights, responsibilities, and privileges that were accorded to married couples and denied to same-sex couples.⁹⁸ The study identified at least 1,049 federal statutes in which marital status was factor.

This study was updated in 2004, and the number statutes involving rights, responsibilities, and privileges that appeared to be related to marriage increased to 1,138.⁹⁹

At least five states (California,¹⁰⁰ Colorado,¹⁰¹ Hawaii,¹⁰² Massachusetts,¹⁰³ and Vermont¹⁰⁴) have conducted similar studies to enumerate the rights, benefits, and responsibilities associated with marriage. Draft studies have been done in Ohio¹⁰⁵ and Maryland.¹⁰⁶

Some of these rights and responsibilities can be replicated partially by private agreements, such as the right to make medical decisions for a partner, but most such rights and responsibilities cannot. For example, couples may not enter into a private agreement to create a statutory right to sue for the wrongful death of a partner.

Although cataloguing these hundreds of rights and responsibilities is difficult, the following list provides an overview of rights and responsibilities automatically accorded to married spouses.

Family Law

- Distribution of property upon divorce (particularly marital or community property)
- Right to seek spousal support (alimony, maintenance)
- Right to seek custody, visitation, or parenting time
- Automatic presumption of parentage for children born during marriage
- Right to adopt, including stepparent adoptions
- Application of common law marriage (in states that recognize common law marriage)
- Right to enter into premarital agreements
- Right to change name at time of marriage or restore former name upon termination of marriage
- Domestic violence laws, including restraining orders and right to occupy home

- Duty to support spouse during marriage
- Liability for family expenses
- Automatic coverage of spouse under most auto policies

Taxation

- Right to file jointly
- Tax rates
- Availability of exemptions
- Transfer of property between partners without tax consequences, including at time of divorce (gift tax or estate tax)

Health Care Law

- Surrogate decision-making (authorizing treatment or withdrawal of treatment) for partner or partner's children
- Access to medical records
- Right to visit in hospital
- Right to share room with spouse at adult-care facility
- Consent to organ donation
- Consent to autopsy
- Right to make funeral arrangements or dispose of remains
- Family health insurance, including rights under COBRA

Probate

- Intestate succession (rights to property when person dies without a will)
- Protection from being disinherited (right to challenge will if not receiving a certain proportion of estate)
- Preferential status to be named guardian, conservator, or executor/executrix

Torts

- Right to seek compensation for wrongful death
- Right to seek compensation for loss of consortium
- Right to seek compensation for intentional infliction of emotional distress

Government Benefits and Programs

- Survivor benefits (Social Security)
- Military benefits (survivor, housing, commissary, education for children)

- Eligibility (and consideration of family income) for welfare benefits
- Disqualification from programs because of status of family member (e.g., health-care fraud and abuse laws that prohibit reimbursement of health-care expenses to provider if provider is married to person who owns interest in certain entities through which reimbursement is sought)

Private Sector Benefits; Labor Law

- Family health insurance, including rights under COBRA
- Eligibility for life insurance (such group coverage for spouse/partner)
- Eligibility for disability insurance
- Right to take sick leave to care for seriously ill partner (federal Family Medical Leave Act)
- Qualified Domestic Relations Orders (QDROs); state law counterparts
- Ability to roll over spouse's 401(k) or other retirement accounts; tax deferral on income distributed by the deceased spouse's estate
- Discrimination based on marital (or relationship) status
- Eligibility for family memberships and discounts

Real Estate

- Eligibility for tenancy by the entirety (traditionally only available to husbands and wives — a form of tenancy in which the joint ownership and right of survivorship generally cannot be eliminated as a result of one partner transferring his or her interest to another)
- Need for partner's approval for real estate transaction

- Homestead rights (which can protect home from forced sale for collection of debts or grant favorable property tax treatment)
- Exemption from transfer tax for transfers between spouses
- Benefits and rules pertaining to family farms
- Rent-control protections (where available)

Bankruptcy

- Joint filing
- Preferential treatment for spouse for claims made under divorce decree or separation agreement, including nondischargeability of spousal support

Immigration

- Joint petitions to immigrate
- Preferred status for spouses or family members (immigrating separately)

Criminal Law

- Privilege not to testify
- Application of domestic violence laws and protections

Miscellaneous

- Native American's rights to tribal property
- Right to request and obtain absentee ballot
- Consideration of family income for purpose of student aid eligibility
- Access to campus housing for married students
- Economic disclosure requirements and regulation of receipt of gifts for public officials (and their family members)

Appendix A: Statutory Rights and Responsibilities of Same-Sex Couples Compared State-by-State

| | Alaska (A. S. §47.24.016 §39.50.200) | Arizona (A.R.S. §36-3231 §36-843) | California (ABs 26, 25, 2005, 2216, SB 1661) | Connecticut (P.A. 02-105, Comptroller Memo 200-13) | Delaware (Merit Rules 5.3.4, 5.3.6.2, 5.3.6.3, 19) | Hawaii (H.R.S. §572C) | Iowa (AFSCME contract) |
|---|---|--|--|--|--|---|--|
| Hospital and Nursing Home Visitation | No provision | No provision | Private visits in hospitals and nursing homes | Private visits in nursing homes | No provision | Hospital and nursing home visitation | No provision |
| Medical Decision-making | Priority in protective service decision-making above all but surviving spouse | Priority in anatomical gift and health care decisions behind that of a patient's spouse, adult child or parent | Health care and end-of-life decisions for incapacitated partner | Priority in anatomical gift decisions above all but surviving spouse | No provision | Health care decisions Consent to perform an autopsy | No provision |
| Civil Claims | No provision | No provision | Wrongful death of partner Negligent infliction of emotional distress when serious injury to partner observed | No provision (but survivor can file administrative claim when maker is homicide victim) | No provision | Wrongful death of partner Loss of consortium Tort liability | Protection under domestic violence laws No provision |
| Property Transfer Upon Death | No provision | No provision | Simple will form includes box to check to leave property to surviving partner Inheritance under the intestacy laws identical to surviving spouse | Assumption of motor vehicle ownership upon maker's death | No provision | Inheritance under the intestacy laws Property rights (including joint tenancy) Family and homestead allowances and exempt property amount Right of election against will | No provision |
| Appointment as Estate Administrator | No provision | No provision | Same priority as a surviving spouse | No provision | No provision | Same priority as surviving spouse | No provision |
| Employment | No provision | No provision | Unemployment benefits upon partner relocation Family and medical leave to care for ill partner or partner's child Health insurance coverage for domestic partners Health insurance continuation upon death for partner and partner's children (state employees only) Death benefits and survivor's allowances (certain county employees) | Health care and pension benefits for same-sex domestic partners of state retirees and employees and their eligible dependent children Employers must notify employees of emergency phone calls involving designees Employers cannot discipline designees for attending court proceedings as homicide victim's representative | Bereavement leave to same-sex and different-sex domestic partners of state employees Sick leave for attendance at doctor's appointments of domestic partners or for the serious illness or injury of a domestic partner | Workers compensation Family and bereavement leave Limited health insurance coverage Death and retirement benefits for certain state and local employees | State employees of largest union are eligible for health and dental benefits for their domestic partners and the children of their domestic partners |
| Taxation | No provision | No Provision | Money spent to cover domestic partner and partner's children under employer's health plan is not taxable as income | No provision | No provision | Gifts of certain real estate interests between reciprocal beneficiaries are exempt from transfer taxes | No provision |

| | Maine (L.D. 1579, M.R.S.A. Title 24-A § 2832-A; § 2741-A) | Massachusetts (Exec. Order 340) | Minnesota (collective bargaining) | Nevada (N.R.S. 449.715, 451.024) | New Mexico (Exec. Order No. 2003-010) | New Jersey (P.L. 2003) | New York (union contract) |
|---|---|---|---|---|---|--|---|
| Hospital and Nursing Home Visitation | No provision | No provision | No provision | Visits in hospitals and nursing homes only if designated in writing | No provision | Hospital and nursing home visitation for domestic partners and their children | No provision |
| Medical Decision-making | Preference in funeral, burial and cremation decisions Preference for medical or legal decisions for incapacitated domestic partner via guardianship or conservatorship | No provision | No provision | Rights to order burial of remains only if designated in writing | No provision | Medical or legal decisions for incapacitated domestic partner Consent to perform an autopsy Authorize donation of the deceased partner's organs | No provision |
| Civil Claims | Victim's compensation rights | No provision | No provision | No provision | No provision | No provision | No provision |
| Property Transfer Upon Death | Inheritance under the intestacy laws Right of election against will | No provision | No provision | No provision | No provision | No provision | No provision |
| Appointment as Estate Administrator | Same priority as a surviving spouse | No provision | No provision | No provision | No provision | No provision | No provision |
| Employment | Insurers and health care providers must offer coverage for domestic partners at same cost as for spouse | Bereavement and family sick leave for certain state employees | Previously offered health insurance benefits to domestic partners of state employees partners | No provision | Benefits extended to domestic partners of state employees to same extent as spouses | Dental and health insurance benefits for domestic partners Retirement benefits for domestic partners of state employees | State employees are eligible for health, vision and dental benefits for their domestic partners |
| Taxation | No provision | No Provision | No provision | No provision | No provision | Domestic partner exempt from State inheritance tax on same grounds as spouse Domestic Partner may be claimed as additional personal exemption for State income tax purposes if the partner does not file a separate income tax return | No provision |

| | Oregon (Or. Adm. R. 101-015-0005, 101-010-0005, 101-020-0020, 101-020-0035, 101-030-0005) | Pennsylvania (collective bargaining) | Rhode Island (R.I. Gen. Laws §36-12-1 et seq.) | Vermont (15 V.S.A. §1201 et. seq. and 18 V.S.A. §5160 et. seq.) | Washington (WAC §182-12-119) |
|---|---|--|---|---|---|
| Hospital and Nursing Home Visitation | No provision | No provision | No provision | Hospital and nursing home visitation rights parallel with spouses Rights to emergency notification | No provision |
| Medical Decision-making | No provision | No provision | No provision | Health care decisions Consent to perform autopsy Anatomical gift, burial and cremation decisions | No provision |
| Civil Claims | No provision | No provision | No provision | Wrongful death of partner Loss of consortium Infliction of emotional distress General tort liability Protection under domestic violence laws Victim's compensation rights Access to all domestic relations laws | No provision |
| Property Transfer Upon Death | No provision | No provision | No provision | Inheritance under the intestacy laws Waiver of will equivalent to surviving spouse Property rights (including tenancy by the entirety) Homestead rights of surviving spouse | No provision |
| Appointment as Estate Administrator | No provision | No provision | No provision | Same priority in appointment as surviving spouse | No provision |
| Employment | Medical, dental, life insurance and long-term care benefits available to domestic partners of state employees | Family and sick leave to care for domestic partners of some state employees and their children | Health insurance coverage and benefits for domestic partners of state employees | Group insurance for state employees Workers compensation Family leave benefits | Medical, dental and life insurance benefits available to domestic partners of State workers and retired State employees |
| Taxation | No provision | No Provision | No provision | Homestead property tax allowance Benefits of laws relating to taxes imposed by the state or a municipality other than estate | taxe No provision |

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEES

CHAIR: CORRECTIONS & JUVENILE JUSTICE

MEMBER: JUDICIARY

RULES AND JOURNAL

**Before the House Federal and State Affairs Committee
January 27, 2005
Testimony Regarding Senate Concurrent Resolution No. 1601
Representative Ward Loyd**

Honorable Chairman Edmonds and Committee Members:

Thank you for the opportunity to provide your committee with testimony regarding the measure currently under consideration, SCR No. 1601. Apart from having engaged in the general practice of law since 1968, including a number of appearances before our Kansas Supreme Court during that period, I profess no expertise with regard to constitutional law. I defer to those more qualified in that area. But I would offer the following for your consideration.

As a legislator it is my belief that sometimes in the pursuit of what we believe to be just and right, we wind up doing the wrong thing. My fear is that HCR 1601, like the measures from last year, may fit into that category. This for several reasons:

IT IS NOT NECESSARY

Current Kansas law, K.S.A. 23-101, defines the nature of marriage relation as one which exists "between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void." That has been our law dating from 1867.¹

¹*Current law, 23-101. Nature of marriage relation. (a) The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage*

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FEDERAL AND STATE AFFAIRS

Date 1-27-05
Attachment 2

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Proponents said the 2004 resolution (as well as SCR 1601) was primarily being offered to prevent our courts from declaring the Kansas law defining marriage unconstitutional, which was the outcome of Massachusetts' marriage law in a case there decided several months prior to the start of the 2004 session. This is Kansas, not Massachusetts, and especially not California. Our courts will not be persuaded by what happens in those states.

After all, Vermont in 1999 first ruled gay couples were entitled to the same benefits of marriage as heterosexual couples, and that has not changed Kansas law.

Furthermore, the Kansas Supreme Court already decided this issue in 2002, in favor of marriage between two parties who are of opposite sex. *In re Estate of Gardiner*, 273 Kan. 191, was decided in 2002. In considering K.S.A. 23-101, our current law, the Court expressly held that same-sex couples may not lawfully marry in Kansas.

[T]he legislature clearly viewed “opposite sex” in the narrow traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage between “two parties who are of the opposite sex,” and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. To conclude that [the parties are] of the opposite sex . . . would require that we rewrite K.S.A. 23-101. 273 Kan., at 215.

HCR 1601 would create a definition of a recognized marriage at variance with what is set forth in K.S.A. 23-101. Doing so will mean our Supreme Court would have a new law to construe and apply. I see absolutely no need to put at risk a law which has been upheld and applied the way we

ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

(b) The state of Kansas shall not recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age.

History: L. 1867, ch. 84, § 1; G.S. 1868, ch. 61, § 1; R.S. 1923, 23-101; L. 1980, ch. 106, § 1; L. 1996, ch. 142, § 1; L. 2002, ch. 143, § 1; July 1.

want it applied. To do so creates a risk.

If our traditional, statutory definition of marriage, which I fully endorse and support, is to be held unconstitutional by the United States Supreme Court, it will be because it is considered in violation of the Equal Protection Clause of the Bill of Rights to the United States Constitution. If so, that will occur whether we continue to rely on present, and judicially upheld, statutes, or an amendment to our state constitution.

IT MAY BE THE WRONG FIX

What may be a concern, as a result of the Massachusetts decision, is the question of whether Kansas will at some point be required, under the doctrine of “full faith and credit,” to recognize a same-sex marriage legalized in Massachusetts. Other state courts, such as Louisiana, have addressed that question since the Massachusetts decision, and refused to recognize in Louisiana the marriage which is lawful in Massachusetts.

Federal law, in what is referred to as the “defense of marriage” act (DOMA), provides that a state need not recognize another state’s permitted same-sex marriage.

Current law addresses the validity of marriages contracted outside of Kansas. K.S.A. 23-115² provides that “[a]ll marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.” (Emphasis added.) Like our statute defining marriage, this law has been on the books since 1867, and was noted and cited with approval by the *Gardiner* Court.

²23-115. Validity of marriages contracted without state. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

History: L. 1867, ch. 84, § 9; G.S. 1868, ch. 61, § 9; R.S. 1923, 23-115; L. 1996, ch. 142, § 3; July 1.

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If we are at risk under the Massachusetts decision, the risk is in not amending K.S.A. 23-115(a) to clarify that “all marriages [between two parties who are of opposite sex] contracted without this state. . . shall be valid . . . in this state.” But that is not what HCR 1601 does. If that fix is appropriate, it can be done by legislative enactment, without the necessity of an amendment of our Kansas Constitution.

A NEW ELEMENT OF DIFFICULT DEFINITION

SCR 1601 contains a Section (b), providing that: “No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”

I have not had the opportunity to either consider or research the potential effect of Section (b), but it is my concern that I cannot define this phrase, or its application. It may well be that you are able, without equivocation, to define the parameters of both the “rights of marriage” and the “incidents of marriage”. However, without certainty in such definition, we may be placing at risk many currently recognized relationships existing at law not intended by the sponsors of this measure to be impacted.

Senate Concurrent Resolution No. 1601

By Senators Huelskamp, Barnett, Brownlee, Donovan, Gilstrap, Jordan, Journey, Morris, O'Connor, Ostmeyer, Palmer, Petersen, Pine, Pyle, Taddiken, Umbarger and Wilson

1-11

11 A PROPOSITION to amend article 15 of the constitution of the state of
12 Kansas by adding a new section thereto, concerning marriage.

13
14 *Be it resolved by the Legislature of the State of Kansas, two-thirds of the*
15 *members elected (or appointed) and qualified to the Senate and two-*
16 *thirds of the members elected (or appointed) and qualified to the House*
17 *of Representatives concurring therein:*

18 Section 1. The following proposition to amend the constitution of the
19 state of Kansas shall be submitted to the qualified electors of the state
20 for their approval or rejection: Article 15 of the constitution of the state
21 of Kansas is amended by adding a new section thereto to read as follows:

22 "§ 16. **Marriage.** ~~[(a)]~~ The marriage contract is to be considered in
23 law as a civil contract. Marriage shall be constituted by one man
24 and one woman only. All other marriages are declared to be con-
25 trary to the public policy of this state and are void. /

26 ~~["(b) No relationship, other than a marriage, shall be recognized by~~
27 ~~the state as entitling the parties to the rights or incidents of marriage."]~~

28 Sec. 2. The following statement shall be printed on the ballot with
29 the amendment as a whole:

30 "Explanatory statement. There is currently no constitutional provision
31 regarding marriage. There is a statute, enacted by the legislature,
32 that defines marriage as a civil contract between two persons who
33 are of opposite sex and declares all other marriages to be contrary
34 to public policy and void.

35 "A vote for this proposition would amend the Kansas constitution to
36 incorporate into it the definition of marriage as a civil contract be-
37 tween one man and one woman only and the declaration that any
38 other marriage is contrary to public policy and void. ~~["The proposed~~
39 ~~constitutional amendment also would prohibit the state from rec-~~
40 ~~ognizing any other legal relationship that would entitle the parties~~
41 ~~in the relationship to the rights or incidents of marriage."]~~

42 "A vote against this proposition would not amend the constitution, in
43 which case the current statute that defines marriage would remain