

RESOLUTION 05-04-2007

DIGEST

Marriage: Definition

Amends Family Code sections 300, 301 and 302 and adds section 403 to re-define marriage as the lawful union of two persons.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 01-07-2005, which was approved.

Reasons:

This resolution amends Family Code sections 300, 301, and 302 and adds section 403 to re-define marriage as the lawful union of two persons. This resolution should be approved in principle because it would grant same-gender couples the same right to marry as heterosexual couples.

“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness to free men.” (*Loving v. Virginia* (1967) 388 U.S. 1, 12.) Just as marriage may not be denied to people based on race, it should not be denied to people based on their sexual orientation. There is no reason to deny loving same-gender couples the same rights enjoyed by opposite sex couples.

Similar legislature was approved by the Legislature in 2005, but was vetoed by the Governor. Current Assembly Bill 43 (2007-2008 Reg. Sess.), which is similar to this resolution, was referred out of the Judiciary Committee on April 10, 2007 and passed out of the Appropriations Committee on May 31, 2007.

The constitutionality of Family Code section 308.5, adopted by initiative (Proposition 22, approved by the voters in 2000), and Family Code section 300 is currently under review by the California Supreme Court. (*Campaign for California Families v. Newsom (In Re Marriage Cases)*, No. S147999.) The outcome of the case will have a great effect on the legislature’s ability to act. Article II, Section 10, subdivision (c) of the California Constitution provides that any initiative statute can be amended or repealed by another statute, but that statute will not become effective unless approved by the voters. Notwithstanding the proponent’s statements, this resolution would change the scope and effect of the initiative statute and thus would require voter approval, because it would make same-gender marriages valid. But if the original initiative statute is determined to be unconstitutional by the California Supreme Court, then voter approval is unnecessary.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Sections 300, 301, and 302 of, and to add Section 403 to, the Family Code to read as follows:

1 §300

2 (a) Marriage is a personal relation arising out of a civil contract between ~~a man and a~~
3 ~~woman~~ two persons, to which the consent of the parties capable of making that contract is
4 necessary. Consent alone does not constitute marriage. Consent must be followed by the
5 issuance of a license and solemnization as authorized by this division, except as provided by
6 Section 425 and Part 4 (commencing with Section 500).

7 (b) Where necessary to implement the rights and responsibilities of spouses under
8 the law, gender-specific terms shall be construed to be gender-neutral, except with respect to
9 Section 308.5.

10 (c) For purposes of this part, the document issued by the county clerk is a marriage
11 license until it is registered with the county recorder, at which time the license becomes a
12 marriage certificate.

13

14 §301

15 ~~An~~ Two unmarried male persons of the age of 18 years or older, ~~and an unmarried~~
16 ~~female of the age of 18 years or older, and who are~~ not otherwise disqualified, are capable of
17 consenting to and consummating marriage.

18

19 §302

20 (a) An unmarried ~~male or female~~ person under the age of 18 years is capable of
21 consenting to and consummating marriage upon obtaining a court order granting permission
22 to the underage person or persons to marry.

23 (b) The court order and written consent of the parents of each underage person, or of
24 one of the parents or the guardian of each underage person shall be filed with the clerk of the
25 court, and a certified copy of the order shall be presented to the county clerk at the time the
26 marriage license is issued.

27

28 §403

29 No priest, minister, or rabbi of any religious denomination, and no official of any
30 nonprofit religious institution authorized to solemnize marriages, shall be required to
31 solemnize any marriage in violation of his or her right to free exercise of religion guaranteed
32 by the First Amendment to the United States Constitution or by Section 4 of Article I of the
33 California Constitution.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

Existing Law: Provides that marriage is a personal relation arising out of a civil contract between a man and a woman.

This Resolution: Amends the Family Code to provide that civil marriage is a personal relation arising out of a civil contract between two persons and makes conforming changes with regard to the consent to civil marriage. Additionally, this resolution protects the civil nature of California's marriage laws, as distinct from religious marriage rites, by providing that religious authorities are not required to solemnize any marriage.

The Problem: The California Supreme Court, in a case regarding interracial marriage prohibitions, held that "marriage is ... something more than a civil contract subject to regulation by the state; it is a fundamental right of free men ... Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws" (Perez v. Sharp (1948) 32 Cal.2d 711, 714-715). "[T]he right to marry is the right to join in marriage with the person of one's choice" (Id., at p. 715). By excluding same-sex couples from marriage, California's family law discriminates against members of same-sex couples based on their sexual orientation and based on their gender. California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to all Californians. The existing discriminatory law serves no legitimate government interest and is contrary to the public policies of California.

Civil marriage is recognized by the state in order to promote stable relationships and to protect individuals who are in those relationships. The institution of marriage also provides important protections for the families of those who are married.

California's domestic partnership statutes create a status which is not treated as marriage in jurisdictions with gender neutral marriage laws. California's discriminatory marriage law harms California's same-sex couples when they travel to other jurisdictions by preventing them from having access to the rights, benefits, and protections those jurisdictions provide only to married couples.

Section 308.5 of the Family Code, which prohibits California from treating as valid or otherwise recognizing marriages of same-sex couples contracted outside of California. Proponents believe that this act does not amend or modify Section 308.5 of the Family Code because this resolution addresses civil marriages contracted in California.

In 2005, legislation similar to this resolution was approved by the California legislature, but vetoed by the Governor. Proponents believe that this resolution will garner continued support in the legislature and that the Governor should be given the opportunity to take a different position on this issue.

STATEMENT OF IMPACT ON OTHER LAWS

The resolution does not affect any other laws, statutes or rules.

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