

RESOLUTION 10-07-2008

DIGEST

Marriage: Gender neutral terms

Amends Family Code sections 300, 301 and 302 and adds Family Code section 403 to remove gender specific terms in the discussion and treatment of marriage.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to resolutions 05-04-2007, 01-07-2005 and 06-07-2004, all of which were approved.

Reasons:

This resolution amends Family Code sections 300, 301 and 302 and adds Family Code section 403 to remove gender specific terms in the discussion and treatment of marriage. This resolution should be approved in principle because there is no longer a legal basis for limiting marriage to members of the opposite sex and because this resolution is consistent with *In re Marriage Cases* (Case No. S147999, issued 15 April 2008) that overturned a statutory scheme that discriminates against same sex people who wish to marry.

This resolution is consistent with the holding in *In re Marriage Cases* by removing the gender specific terms that until recently limited marriage to a civil union between a man and a woman. The California Supreme Court has stated that such a statutory scheme, as is embodied in the Family Code, is a violation of the California Constitution's equal protection provision and that a statutory scheme cannot deny rights to some people that are allowed for others similarly situated. The revised code sections do not require members of religious denominations which hold beliefs that are antithetical to marriage between people of the same sex to solemnize marriages. The resolution offers same-sex couples the rights, responsibilities, privileges and burdens associated with the contract of marriage as previously only enjoyed by men and women who marry. This resolution strengthens the institution of marriage by offering the opportunities and benefits of marriage to all consenting and capable people. The resolution specifically reverses the policy of the State of California, as written in Family Code section 308.5, that marriage is only between a man and a woman.

SECTION/COMMITTEE REPORTS

FAMILY LAW SECTION

NO POSITION TAKEN

The Family Law Section Executive Committee has reviewed this proposed resolution and has elected not to take any position on this resolution consistent with the prior history of this Committee on the issue of redefining marriage as the lawful union of two people.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar Board of Governors or overall

membership and is not to be construed as representing the position of the State Bar of California.

Membership in the Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.

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~~
3 ~~a woman~~ two persons, to which the consent of the parties capable of making that contract
4 is 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
6 by 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
9 to 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
17 of 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
22 permission to the underage person or persons to marry.

23 (b) The court order and written consent of the parents of each underage person, or
24 one of the parents or the guardian of each underage person shall be filed with the clerk of
25 the court, and a certified copy of the order shall be presented to the county clerk at the time
26 the 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
32 guaranteed by the First Amendment to the United States Constitution or by Section 4 of
33 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: 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.

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 and 2007, 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. 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.

This resolution amends Family Code sections 300, 301, and 302 and adds section 403 to redefine 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.

STATEMENT OF IMPACT ON OTHER LAWS

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

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