

AMENDED IN ASSEMBLY APRIL 9, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 43

Introduced by Assembly Members Leno, Laird, and Lieber

(Principal coauthors: Senators Kehoe, Kuehl, Migden, and Perata)

(Coauthors: Assembly Members Alarcon, *Beall*, Berg, Brownley, Coto, De Leon, *DeSaulnier*, Eng, Evans, Feuer, Hancock, Hayashi, Huffman, Jones, *Krekorian*, Levine, Ma, ~~Mullin~~, *Mendoza*, *Mullin*, *Nunez*, Portantino, Ruskin, Saldana, and ~~Soto~~ Soto, and Swanson)

(Coauthors: Senators Alquist, Calderon, Cedillo, Lowenthal, Oropeza, Romero, Steinberg, Torlakson, Wiggins, and Yee)

December 4, 2006

An act to amend Sections 300, 301, and 302 of, and to add Section 403 to, the Family Code, relating to marriage.

LEGISLATIVE COUNSEL'S DIGEST

AB 43, as amended, Leno. Gender-neutral marriage.

Existing law provides that marriage is a personal relation arising out of a civil contract between a man and a woman. Existing law provides for the issuance of marriage licenses and imposes duties on county clerks in that connection, as specified. Existing law, enacted by initiative measure, further provides that only marriage between a man and a woman is valid or recognized in this state.

This bill would enact the Religious Freedom and Civil Marriage Protection Act, which would instead provide that marriage is a personal relation arising out of a civil contract between 2 persons. The bill would make conforming changes with regard to the consent to, and solemnization of, marriage, and would make related findings and declarations.

By adding to the duties of county employees, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known and may be cited as the
2 Religious Freedom and Civil Marriage Protection Act.

3 SEC. 2. It is the intent of the Legislature that this act be
4 interpreted consistently with the guarantees of the First Amendment
5 to the United States Constitution and of Section 4 of Article I of
6 the California Constitution to free exercise of religion and
7 enjoyment of religion without discrimination or preference.

8 SEC. 3. The Legislature finds and declares as follows:

9 (a) Civil marriage is a legal institution recognized by the state
10 in order to promote stable relationships and to protect individuals
11 who are in those relationships. The institution of marriage also
12 provides important protections for the families of those who are
13 married, including not only any children or other dependents they
14 may have, but also members of their extended families.

15 (b) From 1850 to 1977, California's marriage statutes used
16 gender-neutral language, without reference to "man" or "woman,"
17 in providing that marriage is a personal relation arising out of a
18 civil contract to which the consent of the parties capable of making
19 the contract is necessary.

20 (c) In 1948, the California Supreme Court became the first state
21 court in the country to strike down a law prohibiting interracial
22 marriage. It was the only state supreme court to do so before the
23 United States Supreme Court invalidated all those laws in 1967.
24 The California Supreme Court held that "marriage is ... something
25 more than a civil contract subject to regulation by the state; it is a
26 fundamental right of free men ... Legislation infringing such rights

1 must be based upon more than prejudice and must be free from
2 oppressive discrimination to comply with the constitutional
3 requirements of due process and equal protection of the laws”
4 (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715). The California
5 Supreme Court explained that “the right to marry is the right to
6 join in marriage with the person of one’s choice” (*Id.*, at p. 715).

7 (d) In 1977, the Legislature amended the state’s marriage law
8 to replace the gender-neutral description of marriage with language
9 specifically limiting marriage to a “civil contract between a man
10 and a woman.” The Legislature’s express purpose for this
11 amendment was to prohibit same-sex couples from marrying. The
12 gender-specific description of marriage that the Legislature adopted
13 in 1977 specifically discriminated in favor of heterosexual couples
14 and discriminated against, and continues to discriminate against,
15 same-sex couples.

16 (e) *Other governments have recognized that fundamental*
17 *fairness requires that same-sex couples be permitted to marry on*
18 *the same terms as heterosexual couples. Massachusetts, Canada,*
19 *Spain, Belgium, the Netherlands, and South Africa permit same-sex*
20 *couples to marry. Israel recognizes the marriages of same-sex*
21 *couples entered into in foreign jurisdictions.*

22 ~~(e) Other jurisdictions have chosen to treat as valid or otherwise~~
23 ~~recognize marriages between same-sex couples. California’s~~
24 ~~discriminatory marriage law therefore also harms California’s~~
25 ~~same-sex couples when they travel to other jurisdictions by~~
26 ~~preventing them from having access to the rights, benefits, and~~
27 ~~protections those jurisdictions provide only to married couples.~~

28 (f) By excluding same-sex couples from marriage, California’s
29 marriage law discriminates against members of same-sex couples
30 based on their sexual orientation and based on their gender. The
31 exclusion of same-sex couples from marriage is based in significant
32 part on, and perpetuates, gender stereotypes about the roles of men
33 and women in families and in society.

34 (g) California’s discriminatory exclusion of same-sex couples
35 from marriage harms same-sex couples and their families by
36 denying those couples and their families specific legal rights and
37 responsibilities under state law and by depriving members of those
38 couples and their families of a legal basis to challenge federal laws
39 that deny access to the many important federal benefits and
40 obligations provided only to spouses (*Smelt v. County of Orange*

(9th Cir. 2006) 447 F.3d 673, 684-685). Those federal benefits include the right to file joint federal income tax returns, the right to sponsor a partner for immigration to the United States, the right to social security survivor's benefits, the right to family and medical leave, and many other substantial benefits and obligations.

(h) Other jurisdictions have chosen to treat as valid or otherwise recognize marriages between same-sex couples. California's discriminatory marriage law therefore also 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.

(i) California's discriminatory exclusion of same-sex couples from marriage further harms same-sex couples and their families by denying them the unique public recognition and validation that marriage confers.

(j) The Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners. Despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together and participate in their communities together, and many raise children and care for other dependent family members together. Permitting same-sex couples to marry would further California's interests in promoting family relationships and protecting family members during life crises. Lesbian, gay, and bisexual Californians have the same interests in marriage and in personal autonomy and privacy, including marrying the person of one's choice, as heterosexual Californians.

(k) Despite the intentions of California's domestic partnership statutes to reduce discrimination on the bases of sex and sexual orientation and to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article I of the California Constitution, relegating same-sex couples to the status of domestic partnership while prohibiting them from marrying (1) causes severe and lasting harms to same-sex couples, their children, and their extended families; (2) stigmatizes same-sex couples, their children, their

1 extended families and all gay, lesbian, and bisexual Californians
2 in violation of the California Constitution; (3) violates California
3 public policy by enabling and promoting discrimination by private
4 actors and institutions on the basis of sexual orientation, contrary
5 to California's compelling interest in eradicating discrimination
6 based on sexual orientation; and (4) puts same-sex couples and
7 their families at risk of illegal discrimination by state and local
8 government agencies and officials.

9 (l) It is the intent of the Legislature in enacting this act to end
10 the pernicious practice of marriage discrimination in California.
11 California's discriminatory exclusion of same-sex couples from
12 marriage violates the California Constitution's guarantees of due
13 process, privacy, equal protection of the law, and free expression
14 by arbitrarily denying equal marriage rights to lesbian, gay, and
15 bisexual Californians. California's exclusion of same-sex couples
16 from marriage serves no legitimate government interest and is
17 contrary to the public policies of California. The harms caused by
18 prohibiting same-sex couples from marrying in California cannot
19 be remedied, as required by the California Constitution, by any
20 measure short of permitting same-sex couples to marry in
21 California.

22 (m) This act is in no way intended to alter Section 308.5 of the
23 Family Code, which prohibits California from treating as valid or
24 otherwise recognizing marriages of same-sex couples solemnized
25 outside of California.

26 SEC. 4. Section 300 of the Family Code is amended to read:

27 300. (a) Marriage is a personal relation arising out of a civil
28 contract between two persons, to which the consent of the parties
29 capable of making that contract is necessary. Consent alone does
30 not constitute marriage. Consent must be followed by the issuance
31 of a license and solemnization as authorized by this division, except
32 as provided by Section 425 and Part 4 (commencing with Section
33 500).

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

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

40 SEC. 5. Section 301 of the Family Code is amended to read:

1 301. Two unmarried persons of the age of 18 years or older,
2 who are not otherwise disqualified, are capable of consenting to
3 and consummating marriage.

4 SEC. 6. Section 302 of the Family Code is amended to read:

5 302. (a) An unmarried person under the age of 18 years is
6 capable of consenting to and consummating marriage upon
7 obtaining a court order granting permission to the underage person
8 or persons to marry.

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

14 SEC. 7. Section 403 is added to the Family Code, to read:

15 403. No priest, minister, or rabbi of any religious denomination,
16 and no official of any nonprofit religious institution authorized to
17 solemnize marriages, shall be required to solemnize any marriage
18 in violation of his or her right to free exercise of religion guaranteed
19 by the First Amendment to the United States Constitution or by
20 Section 4 of Article I of the California Constitution.

21 SEC. 8. The Legislature finds and declares that this act does
22 not amend or modify Section 308.5 of the Family Code, as enacted
23 by an initiative measure, to the extent that Section 308.5 addresses
24 only marriages from other jurisdictions.

25 SEC. 9. If the Commission on State Mandates determines that
26 this act contains costs mandated by the state, reimbursement to
27 local agencies and school districts for those costs shall be made
28 pursuant to Part 7 (commencing with Section 17500) of Division
29 4 of Title 2 of the Government Code.