

RESOLUTION 01-01-2019

DIGEST

Family Law: Litigation Privilege

Amends Civil Code section 47 to eliminate the divorce proviso so that parties in family law proceedings receive the same privilege afforded to other civil litigants.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend section 47 of the Civil Code as follows:

1 § 47

2 A privileged publication or broadcast is one made:

3 (a) In the proper discharge of an official duty.

4 (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official
5 proceeding authorized by law, or (4) in the initiation or course of any other proceeding
6 authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of
7 Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

8 ~~(1) An allegation or averment contained in any pleading or affidavit filed in an action for
9 marital dissolution or legal separation made of or concerning a person by or against whom no
10 affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to
11 the person making the allegation or averment within the meaning of this section unless the
12 pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable
13 and probable cause for believing the truth of the allegation or averment and unless the allegation
14 or averment is material and relevant to the issues in the action.~~

15 ~~(12)~~ This subdivision does not make privileged any communication made in furtherance
16 of an act of intentional destruction or alteration of physical evidence undertaken for the purpose
17 of depriving a party to litigation of the use of that evidence, whether or not the content of the
18 communication is the subject of a subsequent publication or broadcast which is privileged
19 pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified
20 in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter
21 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

22 ~~(23)~~ This subdivision does not make privileged any communication made in a judicial
23 proceeding knowingly concealing the existence of an insurance policy or policies.

24 ~~(34)~~ A recorded lis pendens is not a privileged publication unless it identifies an action
25 previously filed with a court of competent jurisdiction which affects the title or right of
26 possession of real property, as authorized or required by law.

27 (c) In a communication, without malice, to a person interested therein, (1) by one who is
28 also interested, or (2) by one who stands in such a relation to the person interested as to afford a
29 reasonable ground for supposing the motive for the communication to be innocent, or (3) who is
30 requested by the person interested to give the information. This subdivision applies to and
31 includes a communication concerning the job performance or qualifications of an applicant for
32 employment, based upon credible evidence, made without malice, by a current or former
33 employer of the applicant to, and upon request of, one whom the employer reasonably believes is
34 a prospective employer of the applicant. This subdivision authorizes a current or former

35 employer, or the employer’s agent, to answer whether or not the employer would rehire a current
36 or former employee. This subdivision shall not apply to a communication concerning the speech
37 or activities of an applicant for employment if the speech or activities are constitutionally
38 protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other
39 provision of law.

40 (d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a
41 judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the
42 course thereof, or (E) of a verified charge or complaint made by any person to a public official,
43 upon which complaint a warrant has been issued.

44 (2) Nothing in paragraph (1) shall make privileged any communication to a public
45 journal that does any of the following:

46 (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

47 (B) Breaches a court order.

48 (C) Violates any requirement of confidentiality imposed by law.

49 (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was
50 lawfully convened for a lawful purpose and open to the public, or (2) the publication of the
51 matter complained of was for the public benefit.

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

STATEMENT OF REASONS

The Problem: Civil Code section 47 creates a privilege for communications in the course of judicial proceedings. It was designed to avoid chilling a party’s constitutional right of free speech, and to ensure ability to pursue meritorious legal claims without fear of defamation suits. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056; *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 426-427.) In 1927, in connection with the “fault” divorce laws, the Legislature added the “divorce proviso” to section 47, providing a statement about third parties in divorce filings is not automatically privileged. That was because to obtain a divorce, a spouse had to allege and prove an affair, and name a third party. In 1970 California adopted no-fault divorce. A spouse no longer had to prove fault to divorce, only a general allegation of irreconcilable differences. Allegations of fault are inadmissible. They days of proving infidelity are long over. However, the divorce proviso has lingered in Civil Code section 47. Parties to a dissolution proceeding are thus not afforded the same privilege for speech in their pleadings as other civil litigants. This can create a chilling effect in pleadings, which does not exist in any other area of law.

The Solution: To ensure equal protection of law and fairness to family law litigants, legislation is required to amend Section 47 to remove the divorce proviso.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

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RESOLUTION 01-02-2019

DIGEST

Family Law: Corroborating Evidence Considered Before Applying Child Custody Presumption
Amends Family Code section 3044 to consider corroborating evidence of abuse before denying custody to a party alleged to have engaged in domestic violence.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Family Code section 3044, to read as follows:

1 § 3044

2 (a) Upon a finding by the court that a party seeking custody of a child has perpetrated
3 domestic violence against the other party seeking custody of the child or against the child or the
4 child's siblings within the previous five years, there is a rebuttable presumption that an award of
5 sole or joint physical or legal custody of a child to a person who has perpetrated domestic
6 violence is detrimental to the best interest of the child, pursuant to Section 3011. This
7 presumption may only be rebutted by a preponderance of the evidence. As a prerequisite to
8 considering allegations of abuse and the application of the rebuttable presumption affecting
9 custody, the court may require substantial independent corroboration of abuse, including, but not
10 limited to, written reports by law enforcement agencies, child protective services or other social
11 welfare agencies, courts, medical facilities, or other public agencies or private nonprofit
12 organizations providing services to victims of sexual assault or domestic violence.

13 (b) In determining whether the presumption set forth in subdivision (a) has been
14 overcome, the court shall consider all of the following factors:

15 (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or
16 joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In
17 determining the best interest of the child, the preference for frequent and continuing contact with
18 both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as
19 set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the
20 presumption, in whole or in part.

21 (2) Whether the perpetrator has successfully completed a batterer's treatment program
22 that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

23 (3) Whether the perpetrator has successfully completed a program of alcohol or drug
24 abuse counseling if the court determines that counseling is appropriate.

25 (4) Whether the perpetrator has successfully completed a parenting class if the court
26 determines the class to be appropriate.

27 (5) Whether the perpetrator is on probation or parole, and whether he or she has complied
28 with the terms and conditions of probation or parole.

29 (6) Whether the perpetrator is restrained by a protective order or restraining order, and
30 whether he or she has complied with its terms and conditions.

31 (7) Whether the perpetrator of domestic violence has committed any further acts of
32 domestic violence.

33 (c) For purposes of this section, a person has "perpetrated domestic violence" when he or
34 she is found by the court to have intentionally or recklessly caused or attempted to cause bodily

35 injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent
36 serious bodily injury to that person or to another, or to have engaged in any behavior involving,
37 but not limited to, threatening, striking, harassing, destroying personal property or disturbing the
38 peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to
39 protect the other party seeking custody of the child or to protect the child and the child's siblings.

40 (d) (1) For purposes of this section, the requirement of a finding by the court shall be
41 satisfied by, among other things, and not limited to, evidence that a party seeking custody has
42 been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any
43 crime against the other party that comes within the definition of domestic violence contained in
44 Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime
45 described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the
46 Penal Code.

47 (2) The requirement of a finding by the court shall also be satisfied if any court, whether
48 that court hears or has heard the child custody proceedings or not, has made a finding pursuant to
49 subdivision (a) based on conduct occurring within the previous five years.

50 (e) When a court makes a finding that a party has perpetrated domestic violence, the court
51 may not base its findings solely on conclusions reached by a child custody evaluator or on the
52 recommendation of the Family Court Services staff, but shall consider any relevant, admissible
53 evidence submitted by the parties.

54 (f) In any custody or restraining order proceeding in which a party has alleged that the
55 other party has perpetrated domestic violence in accordance with the terms of this section, the
56 court shall inform the parties of the existence of this section and shall give them a copy of this
57 section prior to any custody mediation in the case.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Domestic violence, particularly when it is not perpetrated in front of and/or against a minor child that is the subject of the child custody proceeding, has sweeping and detrimental effects on the custody rights of a perpetrator. If there is no nexus between the abuse and the abuser's parenting abilities, this code section as written provides too great a penalty to the perpetrator and an incentive for the victim to exaggerate or fabricate allegations to gain an advantage for purposes of custody, which can then benefit the person making the allegations regarding child support. Abuse is broadly defined and can be the result of only one act, which does not require physical injury or threat of physical assault. The act of abuse may not have any bearing on the party's ability to make legal custody decisions or ability to provide physical care on a "frequent and continuing contact to the child" as stated in Family Code § 3020(b) as this state's public policy. Evidence in a family law domestic violence trial is often only that of the victim and perpetrator's testimony.

The Solution: The additional language explicitly authorizes the court to require corroborating evidence of abuse before limiting a party's child custody rights, particularly when only testimonial evidence of abuse exists and that evidence is weak, contradictory, or suspect and the limitation on the alleged perpetrator's custodial rights can be lasting and overbroad.

This language mirrors language found in Family Code §§ 3011(b)(3) and 3011(d), which each authorize the court to require corroborating evidence when making allegations of abuse or substantive/alcohol/prescription medication misuse/abuse, respectively.

The permissive language, as opposed to a mandatory requirement for corroborating evidence, protects victims that are too fearful to report to third parties or do not have the resources or wherewithal to report.

This addition removes, to some degree, the incentive by victims to bolster or fabricate domestic violence to gain an advantage in a custody proceeding.

To encourage reporting by alleged victims to law enforcement, social workers, medical providers, etc. will help eliminate the he-said, she-said evidence dichotomy in domestic violence trials and hearings.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 01-03-2019

DIGEST

Family Law: Required Filing of Respondent's Preliminary Declaration of Disclosure

Amends Family Code section 2104 to require service of Respondent's Preliminary Declaration of Disclosure within 60 days of when Response to Petition is due, even if no response is filed.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2104 as follows:

1 §2104

2 (a) Except by court order for good cause, as provided in Section 2107, or when service of
3 the preliminary declaration of disclosure is not required pursuant to Section 2110, in the time
4 period set forth in subdivision (f), each party shall serve on the other party a preliminary
5 declaration of disclosure, executed under penalty of perjury on a form prescribed by the Judicial
6 Council. The commission of perjury on the preliminary declaration of disclosure may be grounds
7 for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing
8 with Section 2120), in addition to any and all other remedies, civil or criminal, that otherwise are
9 available under law for the commission of perjury. The preliminary declaration of disclosure
10 shall include all tax returns filed by the declarant within the two years prior to the date that the
11 party served the declaration.

12 (b) The preliminary declaration of disclosure shall not be filed with the court, except on
13 court order. However, the parties shall file proof of service of the preliminary declaration of
14 disclosure with the court.

15 (c) The preliminary declaration of disclosure shall set forth with sufficient particularity,
16 that a person of reasonable and ordinary intelligence can ascertain, all of the following:

17 (1) The identity of all assets in which the declarant has or may have an interest and all
18 liabilities for which the declarant is or may be liable, regardless of the characterization of the
19 asset or liability as community, quasi-community, or separate.

20 (2) The declarant's percentage of ownership in each asset and percentage of obligation for
21 each liability when property is not solely owned by one or both of the parties. The preliminary
22 declaration may also set forth the declarant's characterization of each asset or liability.

23 (d) A declarant may amend his or her preliminary declaration of disclosure without leave
24 of the court. Proof of service of any amendment shall be filed with the court.

25 (e) Along with the preliminary declaration of disclosure, each party shall provide the
26 other party with a completed income and expense declaration unless an income and expense
27 declaration has already been provided and is current and valid.

28 (f) The petitioner shall serve the other party with the preliminary declaration of disclosure
29 either concurrently with the petition for dissolution or legal separation, or within 60 days of
30 filing the petition. When a petitioner serves the summons and petition by publication or posting
31 pursuant to court order and the respondent files a response prior to a default judgment being
32 entered, the petitioner shall serve the other party with the preliminary declaration of disclosure

33 within 30 days of the response being filed. The respondent shall serve the other party with the
34 preliminary declaration of disclosure either concurrently with the response to the petition, or
35 within 60 days of the deadline for filing the response, which is 30 days following service of the
36 petition (pursuant to Family Code section 2020) unless the petition was served by posting or
37 publication, regardless of whether respondent files a response to the petition. The time periods
38 specified in this subdivision may be extended by written agreement of the parties or by court
39 order

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: The current language in Section 2104(f) permits a Respondent to choose to not file a Response to the Petition and avoid the PDOD requirements of 2104(a). This loophole is inconsistent with the Legislature’s policy set forth in Section 2100(a):

“It is the policy of the State of California (1) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution, (2) to ensure fair and sufficient child and spousal support awards, and (3) to achieve a division of community and quasi-community assets and liabilities on the dissolution or nullity of marriage or legal separation of the parties as provided under California law.”

Family Code section 2104(f) was amended in 2012, effective on January 1, 2013, to include a deadline of 60 days from the date of the filing of the Petition for Petitioner’s PDOD and 60 days from the filing of the Response for Respondent’s PDOD. However, many dissolutions are uncontested where both parties participate but a Respondent may choose not to file a Response to the Petition. The current language of Section 2104(f) would permit a Respondent to avoid submitting a PDOD.

The Solution: This proposed amendment to Family Code section 2104(f) would provide an explicit mechanism for a Petitioner in a family law action to obtain information from the Respondent about assets, debts, income, expenses, and legal fees incurred. Clear language in Section 2104(f) that is understandable by self-represented parties would further the public policy set forth in Section 2100. This amendment also would provide the basis for a Petitioner to enforce a request for a PDOD under Family Code section 2107.

IMPACT STATEMENT

This resolution does not affect any other law or statute.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 01-04-2019

DIGEST

Child Support: Waiver of Right to Seek Reimbursement

Amends Family Code section 4063 to set deadline for notice of request for reimbursement of child support costs.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 4063, to read as follows:

1 §4063

2 (a) When making an order pursuant to paragraph (2) of subdivision (a) of Section 4062,
3 the court shall:

4 (1) Advise each parent, in writing or on the record, of his or her rights and liabilities,
5 including financial responsibilities.

6 (2) Include in its order the time period for a parent to reimburse the other parent for the
7 reimbursing parent's share of the reasonable additional child support costs subject to the
8 requirements of this section.

9 (b) Unless there has been an assignment of rights pursuant to Section 11477 of the
10 Welfare and Institutions Code, when either parent accrues or pays costs pursuant to an order
11 under this section, that parent shall provide the other parent with an itemized statement of the
12 costs within a reasonable time, but not more than 30 days after accruing the costs.

13 (c) Unless there has been an assignment of rights pursuant to Section 11477 of the
14 Welfare and Institutions Code, the parent who accrues or pays costs pursuant to an order under
15 this section, shall provide the other parent with a written itemized statement of the costs within
16 not more than 30 days. If the parent who accrues or pays costs pursuant to an order under this
17 section fails to do so, the parent who accrues or pays costs pursuant to an order under this section
18 is deemed to have waived any right to reimbursement.

19 (d) Reimbursements requested under Subsection (b) shall then be paid as follows:

20 (1) If a parent has already paid all of these costs, that parent shall provide proof of
21 payment and a request for reimbursement of his or her court-ordered share to the other parent.

22 (2) If a parent has paid his or her court-ordered share of the costs only, that parent shall
23 provide proof of payment to the other parent, request the other parent to pay the remainder of the
24 costs directly to the provider, and provide the reimbursing parent with any necessary information
25 about how to make the payment to the provider.

26 (3) The other parent shall make the reimbursement or pay the remaining costs within the
27 time period specified by the court, or, if no period is specified, within a reasonable time not to
28 exceed 30 days from notification of the amount due, or according to any payment schedule set by
29 the health care provider for either parent unless the parties agree in writing to another payment
30 schedule or the court finds good cause for setting another payment schedule.

31 (4) If the reimbursing parent disputes a request for payment, that parent shall pay the
32 requested amount and thereafter may seek judicial relief under this section and Section 290. If
33 the reimbursing parent fails to pay the other parent as required by this subdivision, the other
34 parent may seek judicial relief under this section and Section 290.

35 ~~(e)~~ Either parent may file a noticed motion to enforce an order issued pursuant to this
36 section. In addition to the court's powers under Section 290, the court may award filing costs and
37 reasonable attorney's fees if it finds that either party acted without reasonable cause regarding
38 his or her obligations pursuant to this section.

39 ~~(f)~~ There is a rebuttable presumption that the costs actually paid for the uninsured
40 health care needs of the children are reasonable, except as provided in subdivision ~~(g)~~.

41 ~~(g)~~ Except as provided in subdivision ~~(i)~~:

42 (1) The health care insurance coverage, including, but not limited to, coverage for
43 emergency treatment, provided by a parent pursuant to a court order, shall be the coverage to be
44 utilized at all times, consistent with the requirements of that coverage, unless the other parent can
45 show that the health care insurance coverage is inadequate to meet the child's needs.

46 (2) If either parent obtains health care insurance coverage in addition to that provided
47 pursuant to the court order, that parent shall bear sole financial responsibility for the costs of that
48 additional coverage and the costs of any care or treatment obtained pursuant thereto in excess of
49 the costs that would have been incurred under the health care insurance coverage provided for in
50 the court order.

51 ~~(h)~~ Except as provided in subdivision ~~(i)~~:

52 (1) If the health care insurance coverage provided by a parent pursuant to a court order
53 designates a preferred health care provider, that preferred provider shall be used at all times,
54 consistent with the terms and requirements of that coverage.

55 (2) If either parent uses a health care provider other than the preferred provider
56 inconsistent with the terms and requirements of the court-ordered health care insurance coverage,
57 the parent obtaining that care shall bear the sole responsibility for any nonreimbursable health
58 care costs in excess of the costs that would have been incurred under the court-ordered health
59 care insurance coverage had the preferred provider been used.

60 ~~(i)~~ When ruling on a motion made pursuant to this section, in order to ensure that the
61 health care needs of the child under this section are met, the court shall consider all relevant
62 facts, including, but not limited to, the following:

63 (1) The geographic access and reasonable availability of necessary health care for the
64 child which complies with the terms of the health care insurance coverage paid for by either
65 parent pursuant to a court order. Health insurance shall be rebuttably presumed to be accessible if
66 services to be provided are within 50 miles of the residence of the child subject to the support
67 order. If the court determines that health insurance is not accessible, the court shall state the
68 reason on the record.

69 (2) The necessity of emergency medical treatment that may have precluded the use of the
70 health care insurance, or the preferred health care provider required under the insurance,
71 provided by either parent pursuant to a court order.

72 (3) The special medical needs of the child.

73 (4) The reasonable inability of a parent to pay the full amount of reimbursement within a
74 30-day period and the resulting necessity for a court-ordered payment schedule.

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

PROPOSER: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Under the current law, there is language which suggests reimbursement requests must be made within 30 days of accruing or paying the cost; however, there is no language to establish that if a parent sits on their right to reimbursement, they waive their right to seek such reimbursement.

The Solution: Add language to FCS 4063 establishing a waiver of a right to reimbursement if notice is not given in accordance with the code. The Courts do not apply FCS 4063 strictly, and consequently, there is ambiguity as to whether the Court will allow for such reimbursements. This adds to a “gamble” on the side of the litigant seeking the reimbursement, and potentially unnecessary litigation costs for both parties, as well as valuable judicial resources. The ambiguity also allows litigants to believe they can seek reimbursements on claims which date as far back as the litigant wishes to go, often testifying that notice was provided by US postal mail, when it cannot be proven that it occurred. In the technological age of text messages and email, there is no reason to maintain the ambiguity in the law. A parent’s right to reimbursement should rise and fall on whether the parent has sound evidence that the code was followed, and proper notice was provided to the other parent within the 30 days required by the code.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

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RESPONSIBLE FLOOR DELEGATE: Lisa J. Mendes

RESOLUTION 01-05-2019

DIGEST

Marriage: Ban child marriage in California

Deletes Family Code, sections 302, 303, 304 and amends Family Code sections 308, 2210, 7002 and Penal Code, sections 261.5, 311.1, 311.2, 311.4, 312.3 to ban child marriage in California.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to delete Family Code, sections 302, 303, 304 and amend Family Code sections 308, 2210, 7002 and Penal Code, sections 261.5, 311.1, 311.2, 311.4, 312.3 to read as follows:

1 ~~§302~~

2 ~~(a) An unmarried person under 18 years of age is capable of consenting to and~~
3 ~~consummating marriage upon obtaining a court order granting permission to the underage person~~
4 ~~or persons to marry.~~

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

8

9 ~~§303~~

10 ~~If it appears to the satisfaction of the court by application of a minor that the minor~~
11 ~~requires a written consent to marry and that the minor has no parent or has no parent capable of~~
12 ~~consenting, the court may make an order consenting to the issuance of a marriage license and~~
13 ~~granting permission to the minor to marry. The order shall be filed with the clerk of the court and~~
14 ~~a certified copy of the order shall be presented to the county clerk at the time the marriage~~
15 ~~license is issued.~~

16

17 ~~§304~~

18 ~~As part of the court order granting permission to marry under Section 302 or 303, the~~
19 ~~court shall, if it considers it necessary, require the parties to the prospective marriage of a minor~~
20 ~~to participate in premarital counseling concerning social, economic, and personal responsibilities~~
21 ~~incident to marriage. The parties shall not be required, without their consent, to confer with~~
22 ~~counselors provided by religious organizations of any denomination. In determining whether to~~
23 ~~order the parties to participate in the premarital counseling, the court shall consider, among other~~
24 ~~factors, the ability of the parties to pay for the counseling. The court may impose a reasonable~~
25 ~~fee to cover the cost of any premarital counseling provided by the county or the court. The fees~~
26 ~~shall be used exclusively to cover the cost of the counseling services authorized by this section.~~

27

28 ~~§308~~

29 ~~A marriage contracted outside this state that would be valid by laws of the jurisdiction in~~
30 ~~which the marriage was contracted is valid in California, unless one of the parties to the marriage~~
31 ~~was a minor on the date that the marriage was contracted.~~

32

33 ~~§2210~~

34 A marriage is voidable and may be adjudged a nullity if any of the following conditions
35 existed at the time of the marriage:

36 (a) The party who commences the proceeding or on whose behalf the proceeding is
37 commenced was under 18 years of age, ~~unless the party entered into the marriage pursuant to~~
38 ~~Section 302 or 303.~~

39 (b) The spouse of either party was living and the marriage with that spouse was then in
40 force and that spouse (1) was absent and not known to the party commencing the proceeding to
41 be living for a period of five successive years immediately preceding the subsequent marriage for
42 which the judgment of nullity is sought or (2) was generally reputed or believed by the party
43 commencing the proceeding to be dead at the time the subsequent marriage was contracted. (c)
44 Either party was of unsound mind, unless the party of unsound mind, after coming to reason,
45 freely cohabited with the other as his or her spouse.

46 (d) The consent of either party was obtained by fraud, unless the party whose consent was
47 obtained by fraud afterwards, with full knowledge of the facts constituting the fraud, freely
48 cohabited with the other as his or her spouse.

49 (e) The consent of either party was obtained by force, unless the party whose consent was
50 obtained by force afterwards freely cohabited with the other as his or her spouse.

51 (f) Either party was, at the time of marriage, physically incapable of entering into the
52 marriage state, and that incapacity continues, and appears to be incurable.

53
54 §7002

55 A person under the age of 18 years is an emancipated minor if any of the following
56 conditions is satisfied:

57 ~~(a) The person has entered into a valid marriage, or has established a valid domestic~~
58 ~~partnership, regardless of whether the marriage or the domestic partnership has been dissolved.~~

59 (ba) The person is on active duty with the Armed Forces of the United States.

60 (eb) The person has received a declaration of emancipation pursuant to Section 7122.

61
62 §261.5

63 (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a
64 ~~person who is not the spouse of the perpetrator, if the person is a minor.~~ For the purposes of this
65 section, a “minor” is a person under the age of 18 years and an “adult” is a person who is at least
66 18 years of age.

67 (b) Any person who engages in an act of unlawful sexual intercourse with a minor who is
68 not more than three years older or three years younger than the perpetrator, is guilty of a
69 misdemeanor.

70 (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is
71 more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony,
72 and shall be punished by imprisonment in a county jail not exceeding one year, or by
73 imprisonment pursuant to subdivision (h) of Section 1170.

74 (d) Any person 21 years of age or older who engages in an act of unlawful sexual
75 intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a
76 felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by
77 imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

78 (e)(1) Notwithstanding any other provision of this section, an adult who engages in an act
79 of sexual intercourse with a minor in violation of this section may be liable for civil penalties in
80 the following amounts:

81 (A) An adult who engages in an act of unlawful sexual intercourse with a minor less than
82 two years younger than the adult is liable for a civil penalty not to exceed two thousand dollars
83 (\$2,000).

84 (B) An adult who engages in an act of unlawful sexual intercourse with a minor at least
85 two years younger than the adult is liable for a civil penalty not to exceed five thousand dollars
86 (\$5,000).

87 (C) An adult who engages in an act of unlawful sexual intercourse with a minor at least
88 three years younger than the adult is liable for a civil penalty not to exceed ten thousand dollars
89 (\$10,000).

90 (D) An adult over the age of 21 years who engages in an act of unlawful sexual
91 intercourse with a minor under 16 years of age is liable for a civil penalty not to exceed twenty-
92 five thousand dollars (\$25,000).

93 (2) The district attorney may bring actions to recover civil penalties pursuant to this
94 subdivision. From the amounts collected for each case, an amount equal to the costs of pursuing
95 the action shall be deposited with the treasurer of the county in which the judgment was entered,
96 and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is
97 hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention
98 Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by
99 the Legislature.

100 (3) In addition to any punishment imposed under this section, the judge may assess a fine
101 not to exceed seventy dollars (\$70) against any person who violates this section with the
102 proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however,
103 take into consideration the defendant's ability to pay, and no defendant shall be denied probation
104 because of his or her inability to pay the fine permitted under this subdivision.

105
106 §311.1

107 (a) Every person who knowingly sends or causes to be sent, or brings or causes to be
108 brought, into this state for sale or distribution, or in this state possesses, prepares, publishes,
109 produces, develops, duplicates, or prints any representation of information, data, or image,
110 including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy,
111 videotape, video laser disc, computer hardware, computer software, computer floppy disc, data
112 storage media, CD-ROM, or computer-generated equipment or any other computer-generated
113 image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute
114 or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to,
115 or exchanges with, others, any obscene matter, knowing that the matter depicts a person under
116 the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in
117 Section 311.4, shall be punished either by imprisonment in the county jail for up to one year, by
118 a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment, or by
119 imprisonment in the state prison, by a fine not to exceed ten thousand dollars (\$10,000), or by the
120 fine and imprisonment.

121 (b) This section does not apply to the activities of law enforcement and prosecuting
122 agencies in the investigation and prosecution of criminal offenses or to legitimate medical,
123 scientific, or educational activities, or to lawful conduct between spouses.

124 (c) This section does not apply to matter which depicts a child under the age of 18, which
125 child is legally emancipated, ~~including lawful conduct between spouses when one or both are~~
126 ~~under the age of 18.~~

127 (d) It does not constitute a violation of this section for a telephone corporation, as defined
128 by Section 234 of the Public Utilities Code, to carry or transmit messages described in this
129 chapter or perform related activities in providing telephone services.

130
131 §311.2

132 (a) Every person who knowingly sends or causes to be sent, or brings or causes to be
133 brought, into this state for sale or distribution, or in this state possesses, prepares, publishes,
134 produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute,
135 distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a
136 misdemeanor. If the person has previously been convicted of any violation of this section, the
137 court may, in addition to the punishment authorized in Section 311.9, impose a fine not
138 exceeding fifty thousand dollars (\$50,000).

139 (b) Every person who knowingly sends or causes to be sent, or brings or causes to be
140 brought, into this state for sale or distribution, or in this state possesses, prepares, publishes,
141 produces, develops, duplicates, or prints any representation of information, data, or image,
142 including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy,
143 videotape, video laser disc, computer hardware, computer software, computer floppy disc, data
144 storage media, CD-ROM, or computer-generated equipment or any other computer-generated
145 image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute
146 or to exhibit to, or to exchange with, others for commercial consideration, or who offers to
147 distribute, distributes, or exhibits to, or exchanges with, others for commercial consideration, any
148 obscene matter, knowing that the matter depicts a person under the age of 18 years personally
149 engaging in or personally simulating sexual conduct, as defined in Section 311.4, is guilty of a
150 felony and shall be punished by imprisonment in the state prison for two, three, or six years, or
151 by a fine not exceeding one hundred thousand dollars (\$100,000), in the absence of a finding that
152 the defendant would be incapable of paying that fine, or by both that fine and imprisonment.

153 (c) Every person who knowingly sends or causes to be sent, or brings or causes to be
154 brought, into this state for sale or distribution, or in this state possesses, prepares, publishes,
155 produces, develops, duplicates, or prints any representation of information, data, or image,
156 including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy,
157 videotape, video laser disc, computer hardware, computer software, computer floppy disc, data
158 storage media, CD-ROM, or computer-generated equipment or any other computer-generated
159 image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute
160 or exhibit to, or to exchange with, a person 18 years of age or older, or who offers to distribute,
161 distributes, or exhibits to, or exchanges with, a person 18 years of age or older any matter,
162 knowing that the matter depicts a person under the age of 18 years personally engaging in or
163 personally simulating sexual conduct, as defined in Section 311.4, shall be punished by
164 imprisonment in the county jail for up to one year, or by a fine not exceeding two thousand
165 dollars (\$2,000), or by both that fine and imprisonment, or by imprisonment in the state prison. It
166 is not necessary to prove commercial consideration or that the matter is obscene in order to
167 establish a violation of this subdivision. If a person has been previously convicted of a violation
168 of this subdivision, he or she is guilty of a felony.

169 (d) Every person who knowingly sends or causes to be sent, or brings or causes to be
170 brought, into this state for sale or distribution, or in this state possesses, prepares, publishes,
171 produces, develops, duplicates, or prints any representation of information, data, or image,
172 including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy,
173 videotape, video laser disc, computer hardware, computer software, computer floppy disc, data
174 storage media, CD-ROM, or computer-generated equipment or any other computer-generated
175 image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute
176 or exhibit to, or to exchange with, a person under 18 years of age, or who offers to distribute,
177 distributes, or exhibits to, or exchanges with, a person under 18 years of age any matter, knowing
178 that the matter depicts a person under the age of 18 years personally engaging in or personally
179 simulating sexual conduct, as defined in Section 311.4, is guilty of a felony. It is not necessary to
180 prove commercial consideration or that the matter is obscene in order to establish a violation of
181 this subdivision.

182 (e) Subdivisions (a) to (d), inclusive, do not apply to the activities of law enforcement
183 and prosecuting agencies in the investigation and prosecution of criminal offenses, to legitimate
184 medical, scientific, or educational activities, or to lawful conduct between spouses.

185 (f) This section does not apply to matter that depicts a legally emancipated child under
186 the age of 18 years or to lawful conduct between spouses when one or both are under the age of
187 18 years.

188 (g) It does not constitute a violation of this section for a telephone corporation, as
189 defined by Section 234 of the Public Utilities Code, to carry or transmit messages described in
190 this chapter or to perform related activities in providing telephone services.

191
192 §311.4

193 (a) Every person who, with knowledge that a person is a minor, or who, while in
194 possession of any facts on the basis of which he or she should reasonably know that the person is
195 a minor, hires, employs, or uses the minor to do or assist in doing any of the acts described in
196 Section 311.2, shall be punished by imprisonment in the county jail for up to one year, or by a
197 fine not exceeding two thousand dollars (\$2,000), or by both that fine and imprisonment, or by
198 imprisonment in the state prison. If the person has previously been convicted of any violation of
199 this section, the court may, in addition to the punishment authorized in Section 311.9, impose a
200 fine not exceeding fifty thousand dollars (\$50,000).

201 (b) Every person who, with knowledge that a person is a minor under the age of 18 years,
202 or who, while in possession of any facts on the basis of which he or she should reasonably know
203 that the person is a minor under the age of 18 years, knowingly promotes, employs, uses,
204 persuades, induces, or coerces a minor under the age of 18 years, or any parent or guardian of
205 a minor under the age of 18 years under his or her control who knowingly permits the minor, to
206 engage in or assist others to engage in either posing or modeling alone or with others for
207 purposes of preparing any representation of information, data, or image, including, but not
208 limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser
209 disc, computer hardware, computer software, computer floppy disc, data storage media, CD-
210 ROM, or computer-generated equipment or any other computer-generated image that contains or
211 incorporates in any manner, any film, filmstrip, or a live performance
212 involving, sexual conduct by a minor under the age of 18 years alone or with other persons or
213 animals, for commercial purposes, is guilty of a felony and shall be punished by imprisonment in
214 the state prison for three, six, or eight years.

215 (c) Every person who, with knowledge that a person is a minor under the age of 18 years,
216 or who, while in possession of any facts on the basis of which he or she should reasonably know
217 that the person is a minor under the age of 18 years, knowingly promotes, employs, uses,
218 persuades, induces, or coerces a minor under the age of 18 years, or any parent or guardian of
219 a minor under the age of 18 years under his or her control who knowingly permits the minor, to
220 engage in or assist others to engage in either posing or modeling alone or with others for
221 purposes of preparing any representation of information, data, or image, including, but not
222 limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser
223 disc, computer hardware, computer software, computer floppy disc, data storage media, CD-
224 ROM, or computer-generated equipment or any other computer-generated image that contains or
225 incorporates in any manner, any film, filmstrip, or a live performance
226 involving, sexual conduct by a minor under the age of 18 years alone or with other persons or
227 animals, is guilty of a felony. It is not necessary to prove commercial purposes in order to
228 establish a violation of this subdivision.

229 (d)(1) As used in subdivisions (b) and (c), “sexual conduct” means any of the following,
230 whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral
231 copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina
232 or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or
233 rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act
234 as defined in Section 288, or excretory functions performed in a lewd or lascivious manner,
235 whether or not any of the above conduct is performed alone or between members of the same or
236 opposite sex or between humans and animals. An act is simulated when it gives the appearance
237 of being sexual conduct.

238 (2) As used in subdivisions (b) and (c), “matter” means any film, filmstrip, photograph,
239 negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software,
240 computer floppy disc, or any other computer-related equipment or computer-generated image
241 that contains or incorporates in any manner, any film, filmstrip, photograph, negative, slide,
242 photocopy, videotape, or video laser disc.

243 (e) This section does not apply to a legally emancipated minor ~~or to~~
244 ~~lawful conduct between spouses if one or both are under the age of 18.~~

245 (f) In every prosecution under this section involving a minor under the age of 14 years at
246 the time of the offense, the age of the victim shall be pled and proven for the purpose of the
247 enhanced penalty provided in Section 647.6. Failure to plead and prove that the victim was under
248 the age of 14 years at the time of the offense is not a bar to prosecution under this section if it is
249 proven that the victim was under the age of 18 years at the time of the offense.

250
251 §312.3

252 (a) Matter that depicts a person under the age of 18 years personally engaging in or
253 personally simulating sexual conduct as defined in Section 311.4 and that is in the possession of
254 any city, county, city and county, or state official or agency is subject to forfeiture pursuant to
255 this section.

256 (b) An action to forfeit matter described in subdivision (a) may be brought by the
257 Attorney General, the district attorney, county counsel, or the city attorney. Proceedings shall be
258 initiated by a petition of forfeiture filed in the superior court of the county in which the matter is
259 located.

260 (c) The prosecuting agency shall make service of process of a notice regarding that
261 petition upon every individual who may have a property interest in the alleged proceeds. The
262 notice shall state that any interested party may file a verified claim with the superior court stating
263 the amount of their claimed interest and an affirmation or denial of the prosecuting agency's
264 allegation. If the notice cannot be given by registered mail or personal delivery, the notice shall
265 be published for at least three successive weeks in a newspaper of general circulation in the
266 county where the property is located. All notices shall set forth the time within which a claim of
267 interest in the property seized is required to be filed.

268 (d)(1) Any person claiming an interest in the property or proceeds may, at any time
269 within 30 days from the date of the first publication of the notice of seizure, or within 30 days
270 after receipt of actual notice, file with the superior court of the county in which the action is
271 pending a verified claim stating his or her interest in the property or proceeds. A verified copy of
272 the claim shall be given by the claimant to the Attorney General or district attorney, county
273 counsel, or city attorney, as appropriate.

274 (2) If, at the end of the time set forth in paragraph (1), an interested person has not filed a
275 claim, the court, upon motion, shall declare that the person has defaulted upon his or her alleged
276 interest, and it shall be subject to forfeiture upon proof of compliance with subdivision (c).

277 (e) The burden is on the petitioner to prove beyond a reasonable doubt that matter is
278 subject to forfeiture pursuant to this section.

279 (f) It is not necessary to seek or obtain a criminal conviction prior to the entry of an order
280 for the destruction of matter pursuant to this section. Any matter described in subdivision (a) that
281 is in the possession of any city, county, city and county, or state official or agency, including
282 found property, or property obtained as the result of a case in which no trial was had or that has
283 been disposed of by way of dismissal or otherwise than by way of conviction may be ordered
284 destroyed.

285 (g) A court order for destruction of matter described in subdivision (a) may be carried out
286 by a police or sheriff's department or by the Department of Justice. The court order shall specify
287 the agency responsible for the destruction.

288 (h) As used in this section, "matter" means any book, magazine, newspaper, or other
289 printed or written material or any picture, drawing, photograph, motion picture, or other pictorial
290 representation, or any statue or other figure, or any recording, transcription or mechanical,
291 chemical or electrical reproduction, or any other articles, equipment, machines, or materials.
292 "Matter" also means any representation of information, data, or image, including, but not limited
293 to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc,
294 computer hardware, computer software, computer floppy disk, data storage media, CD-ROM, or
295 computer-generated equipment or any other computer-generated image that contains or
296 incorporated in any manner any film or filmstrip.

297 (i) This section does not apply to a depiction of a legally emancipated minor ~~or to lawful~~
298 ~~conduct between spouses if one or both are under the age of 18.~~

299 (j) It is a defense in any forfeiture proceeding that the matter seized was lawfully
300 possessed in aid of legitimate scientific or educational purposes.

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

PROPOSERS: Kelsey Blegen, Michael Fern, Maggie Grover, Shaun Jacobs, Christopher Long, Jack Osborn, Ujvala Singh, Darin Wessel, Martin White, Cathleen Yonahara.

STATEMENT OF REASONS

The Problem: The US recognizes that child marriage harms children. Ending child marriage globally is a US foreign policy priority. (<https://www.state.gov/discoverdiplomany/explorer/issues/170039>). But the problem persists domestically. Only Delaware and New Jersey ban child marriage.

California has no minimum marriage age -- a child of any age can marry a child or adult of any age with parental consent and court order. (Family Code, sections 302-304). A married child automatically becomes an emancipated minor (Family Code, section 7002), treated as an adult for most purposes (Family Code, section 7050). Although automatically emancipated, the child married to an adult remains dependent on the adult spouse.

The requirement of a court order is illusory, because a child is not likely to speak up to contradict the wishes of the parents who give the consent, and because child marriages valid in other jurisdictions are valid in California (Fam. Code § 308), even if the other jurisdiction does not require a court order. (See, e.g., *In re J.S.* (2011) 199 Cal.App.4th 1291, 1296; see also *McDonald v. McDonald* (1936) 6 Cal.2d 457, 459). *In re J.S.* involved an abusive mother who took her pregnant teenage daughter to Nevada and consented to her marriage under Nevada law. The child was in the middle of juvenile dependency proceedings in California, but her marriage emancipated her, and the court lost jurisdiction over her. This was not a good outcome for the child, because the state was unable to provide needed care and services. The juvenile dependency courts protect children who are abused and neglected, but the abusers and neglecters can prevent the courts from protecting these children by consenting to their marriage, even in another state with no judicial oversight.

Child marriage allows statutorily sanctioned exploitation of children. Some examples: An exception to child pornography allows otherwise criminal acts to go unpunished if the child is married to the perpetrator. (Penal Code, section 311.3(c)). Child marriage is an exception to statutory rape (Penal Code, section 261.5); a married child cannot be a victim of statutory rape, even though spousal rape is a crime (Penal Code, section 262), and spousal rape law considers the age of the victim a factor for duress (Penal Code, section 262(b)).

Most child marriages, even in the US, involve a minor girl married to an adult man. “Studies show that girls in the US who marry as children have lower education attainment, are at greater risk of living in poverty and suffer adverse health consequences.” (<https://ph.ucla.edu/uclachildmarriage>); see also the 2018 study by UCLA Fielding School of Public Health, “Child Marriage in the United States: How Common is the Practice, and Which Children Are at Greatest Risk?” Child marriage is often a vehicle for forced marriage, child abuse, domestic violence and trafficking. Those who argue that child marriage is a solution for teenage pregnancy ignore these realities. California has an obligation to protect children, not allow them to be harmed.

The Solution: Align the minimum age of marriage with the age of majority, without exceptions.

IMPACT STATEMENT

While the author has identified other statutes and rules which refer to child marriage or spouses under 18, it is possible that the author has inadvertently missed identifying all such statutes and rules. Therefore, further research is required to identify and amend all statutes and rules that refer to marriage of a minor and/or minor spouses.

CURRENT OR PRIOR RELATED LEGISLATION

None known that would completely ban child marriage.

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