A Clear and Deliberate Step: Chapter 721 Brings Domestic Partnerships Closer to Marriage

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Code Sections Affected

Family Code §§ 297.1, 298.7 (new), §§ 297, 2320 (amended).
SB 651 (Leno); 2011 STAT. Ch. 721.

I. INTRODUCTION

The battle over the rights of same-sex partners in California has two major fronts: same-sex marriage and domestic partnership. While the right for gay and lesbian couples to marry has been hotly contested, the rights incorporated in domestic partnerships have incrementally expanded. Although part of Chapter 721 deals with the dissolution of same-sex marriages, it is a clear and deliberate step in the expansion of domestic partnership rights in California.

In 2000, Californians voted on Proposition 22. Proposition 22 proponents sought to add a new section to the California Family Code that would define marriage as being only between a man and a woman. In the 2000 Voter Information Guide, proponents argued that the initiative did not take away the right of inheritance or hospital visitation. Opponents argued that Proposition 22 would become a tool to deny civil rights to gay and lesbian couples and their families. The initiative passed, reserving the title of “marriage” for opposite-sex couples only. In the same year, the California Secretary of State received 4,894 Declarations of Domestic Partnership.

2. CAL. FAM. CODE. § 297 (amended by Chapter 721); id. §§ 297.1, 298.7 (enacted by Chapter 721); id. § 2320 (amended by Chapter 721).
4. Id. (enacting FAM. § 308.5).
7. Cal. Proposition 22 (enacting FAM. § 308.5).
8. E-mail from Nicole Winger, Deputy Sec’y of State, Comm’ns, to author (June 9, 2011, 10:27:33 CST) [hereinafter Winger E-mail] (on file with the McGeorge Law Review). The California Family Code
On February 4, 2004, at the order of then-mayor Gavin Newsom, the City of San Francisco began issuing marriage licenses to same-sex couples despite Proposition 22. On March 11, 2004, the California Supreme Court ordered city officials to enforce the marriage licenses already issued, and to stop issuing more to same-sex couples. By the time the court issued the order, San Francisco had issued eighteen thousand marriage licenses. The ensuing legal battle culminated in May 2008, when the California Supreme Court declared Proposition 22 unconstitutional.

In November 2008, California voters passed Proposition 8 to amend the California Constitution. The ballot measure added a small section to Article I declaring “[o]nly marriage between a man and a woman is valid or recognized in California,” which was virtually the same language featured in Proposition 22. In the 2008 Voter Information Guide, the arguments over Proposition 8 included a stronger focus on the legal differences between domestic partnerships and marriages. Proponents of Proposition 8 argued that no legal difference between a domestic partnership and a marriage existed, while the opponents maintained that legal differences did exist.

After voters passed Proposition 8, opponents sought to repeal what they argued was an invalid revision to the State Constitution. On May 26, 2009, the California Supreme Court upheld the validity of Proposition 8, by a six-to-one
majority. The court determined that withholding from same sex couples the rights present in marriage was not constitutionally permissible, but withholding the marriage nomenclature was. In the concurring opinion, Justice Werdegar then commented on the relationship between constitutional guarantees and the strength of domestic partnerships. Justice Werdegar wrote: “all three branches of state government continue to have the duty, within their respective spheres of operation, today as before the passage of Proposition 8, to eliminate the remaining important differences between marriage and domestic partnership, both in substance and perception.”Chapter 721 addresses some of the remaining differences.

II. LEGAL BACKGROUND

A. Domestic Partnerships: Creating the Legal Relationship

In 1999, the legislature passed Chapter 588, recognizing a new legal relationship: the domestic partnership. To properly register a domestic partnership with the California Secretary of State, both partners need to consent to the partnership, be at least eighteen years old, cannot be related by blood, and cannot already be married or in a domestic partnership. The law also required that the couple be mutually financially supportive and have a common residence. Partners could satisfy the common-residence requirement even if the
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residence was not under both partners’ names.31 Partners could also satisfy the requirement despite one of them leaving for an extended period of time.32

According to Chapter 588 (1999), a domestic partnership would terminate upon the death or marriage of either party, upon one party serving a letter or notice of termination to the other party, or upon the parties ceasing to share a common residence.33

B. Domestic Partnerships: Creating the Legal Rights

In 2001, Governor Gray Davis signed Chapter 893, which granted twelve rights to domestic partners previously held only by married couples.34 The rights spanned California’s legal system, including the right to sue for wrongful death,35 make important medical decisions,36 act as conservator for a medically incapacitated partner,37 file for stepparent adoption,38 and act as a deceased partner’s estate administrator.39 In the same year, the Attorney General’s office issued an opinion concerning domestic partnerships, concluding that the common residence addresses on file were subject to public disclosure, much like the public disclosure of marriage licenses.40 A year later, Chapter 447 amended rules of intestate succession under the California Probate Code to include domestic partners.41

31. Id. (enacting FAM. § 297(c)) (“’Have a common residence’ means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.”).

32. Id.

33. Id. (enacting FAM. § 299).

34. 2001 Cal. Stat. ch. 893 (amending CAL. CIV. CODE § 1714.01; amending CAL. CIV. PROC. CODE § 377.60; amending FAM. §§ 297, 299.5, 9000, 9002, 9004, 9005; amending CAL. GOV’T CODE § 22871.2; enacting id. § 31780.2; enacting CAL. HEALTH & SAFETY CODE §1374.58; enacting CAL. INS. CODE § 10121.7; amending CAL. LAB. CODE § 233; enacting CAL. PROB. CODE §§ 37, 1813.1; enacting id. §§ 4716, 6122.1; amending id. §§ 1460, 1811, 1812, 1820–22, 1829, 1861, 1863, 1871, 1873–74, 1891, 1895, 2111.5, 2212–13, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681–82, 2687, 2700, 2803, 2805; amending id. §§ 6122, 6240; amending id. §§ 8461–62, 8465; enacting CAL. REV. & TAX CODE § 17021.7; amending CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256, 2705.1).


Chapter 421 further enhanced the rights then incorporated in domestic partnerships. Sources generally agree that Chapter 421 contained sweeping language, but it left differences between domestic partnerships and marriage. Chapter 421 equated domestic partners to spouses, former domestic partners to former spouses, and surviving domestic partners to widows and widowers. It also led courts to extend the putative spouse doctrine to the domestic partner context. Additionally, Chapter 421 directed state agencies to include domestic partner designations on official forms where they had previously offered only spousal designations. Chapter 421 changed the requirements for domestic partnership dissolution as well. While a common residence was still required to create a domestic partnership, failing to maintain a common residence no longer terminated the relationship.

43. Knight v. Super. Ct., 128 Cal. App. 4th 14, 30, 26 Cal. Rptr. 3d 687, 699 (3d Dist. 2005) (“Contrary to petitioners’ suggestion, the Legislature has not created a ‘marriage’ by another name or granted domestic partners a status equivalent to married spouses.”); Grace Ganz Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective, 51 UCLA L. Rev. 1555, 1568 (2004) (“Vis-à-vis opposite-sex couples, the Act creates parity, although not full equality, for same sex couples” and “dignifies their registered relationships with recognition and respect.”); see also Keeva Terry, Separate and Still Unequal? Taxing California Registered Domestic Partners, 39 U. Tol. L. Rev. 633, 637 (2008) (“There are almost 100,000 domestic partners in California. . . . A.B. 205 was sweeping civil rights legislation intended to place domestic partnerships on separate but equal footing with married persons under California state law.”). But see Kaiponanea T. Matsumura, Reaching Backward While Looking Forward: The Retroactive Effect of California’s Domestic Partner Rights and Responsibilities Act, 54 UCLA L. Rev. 185, 191 (2006) (focusing on the differences between domestic partnerships before and after the bill, rather than the differences between domestic partnerships and marriage: “the framers created a substantial equivalent to marriage”).
44. 2003 Cal. Stat. ch. 421 (enacting CAL. FAM. CODE § 297.5(a)); FAM. § 297.5(a) (West 2004).
45. 2003 Cal. Stat. ch. 421 (enacting FAM. § 297.5(a)).
46. Id. (enacting FAM. § 297.5(c)).
47. 32 CAL. JUR. 3d, Family Law § 93 (“The Family Code does not define putative marriage. It requires only that the status of putative spouse be declared by a court considering a petition for a judgment of nullity following a determination: (1) that the marriage is void or voidable; and (2) that either or both parties believed in good faith that the marriage was valid.”).
48. See Velez v. Smith, 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642 (4th Dist. 2006) (holding that a domestic partnership not formally registered with the state was not entitled to protection under the putative spouse doctrine); Ben Johnson, Putative Partners: Protecting Couples from the Consequences of Technically Invalid Domestic Partnerships, 95 Calif. L. Rev. 2150 (2007) (arguing for a legislative move to extend the putative spouse doctrine’s protection to domestic partners). But see In re Domestic Partnership of Ellis, 162 Cal. App. 4th 1000, 1008, 76 Cal. Rptr. 3d 401, 406 (4th Dist. 2008) (“There is no sound reason under California statutory law to deprive domestic partners of the rights granted to registered domestic partners if they reasonably believed they were so registered.”).
51. FAM. § 297(b)(1) (West 2004). The current state of the law is actually not clear; while section 299 no
Even after Chapter 421, however, domestic partnerships differed from marriages in several ways. Domestic partnerships still lacked uniform recognition by the federal government and by other states. California also lacked any confidential domestic partnership to parallel the confidential marriage. Furthermore, while Californians could bypass the age requirement for marriage, they could not do so when creating a domestic partnership. Finally, couples needed to share a common residence to file for a domestic partnership.

In 2005, the year that Chapter 421 took effect, the California Supreme Court decided *Koebke v. Bernardo Heights Country Club*. In *Koebke*, the California Supreme Court held that a country club’s failure to extend the same rights and privileges to a same sex couple could violate the Unruh Civil Rights Act. Lambda Legal, a national legal organization dedicated to furthering gay rights, calls *Koebke* an “enormous victory for domestic partners in California” because the court recognized that domestic partnerships, are comparable to marriage.

longer states that ceasing to live together terminates a domestic partnership, Justice Werdegar concluded the opposite in a footnote to his *Strauss v. Horton* concurrence. 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591 (2009) (Werdegar, J., concurring). He wrote that the existence of the common residence requirement was an “important difference” between domestic partnership and marriage because failing to retain the common residence terminated the partnership. Id. at 482, 93 Cal. Rptr. 3d at 687. Justice Werdegar cited California Family Code section 299.3(a), enacted by the Domestic Partner Rights and Responsibilities Act, which requires the California Secretary of State to send a letter to registered domestic partners informing them that if they did not wish to obtain the rights outlined by Chapter 421, they could terminate the partnership by ceasing to share a common residence. Id. at 482 n.7, 93 Cal. Rptr. 3d at 687 n.7 (citing FAM. § 299.3(a); 2003 Cal. Stat. ch. 421).

Whether California Family Code section 299.3(a) states the current law is initially doubtful, but Justice Werdegar, citing subsequent case law, appears to think that it does. Id. Thus, in Justice Werdegar’s terms, the common residence requirement may fall under the existing category of “important differences” between domestic partnership and marriage. Id.
III. CHAPTER 721

Chapter 721 makes three substantive changes to the Family Code regarding domestic partnerships, and one regarding marriage. First, Chapter 721 removes the common residence requirement and definition. Second, Chapter 721 substantively changes the Family Code by allowing minors to file for domestic partnerships. Third, Chapter 721 creates the confidential domestic partnership. Finally, Chapter 721 makes one change to the Family Code regarding marriage, allowing for dissolution of same-sex marriages in California if certain requirements are met.

Chapter 721 allows minors to file for a domestic partnership. The new law establishes that a minor who has the written consent of his or her parent or guardian may obtain a court order allowing for the formation of a domestic partnership. If consent by a parent or guardian is not possible, the court may still make the order.

Chapter 721 also creates the “confidential domestic partnership.” The confidential partnership mirrors its marriage-based counterpart: the “confidential marriage.”

Finally, Chapter 721 allows the “dissolution, nullity, or legal separation of a marriage” for same-sex couples, regardless of whether the members of the marriage are domiciled in California. This provision only applies where neither couple lives in a jurisdiction that will dissolve the marriage, and requires the couple to register their marriage with the California Secretary of State. When the spouses live in a jurisdiction that does not recognize the marriage, the rebuttable presumption is that the second requirement has been met. The amended section provides that the court where the marriage was entered into is establishing a domestic partnership under the Domestic Partnership Act and who have registered under that law, the Legislature has granted legal recognition comparable to marriage both procedurally and in terms of the substantive rights and obligations granted to and imposed upon the partners, which are supported by policy considerations similar to those that favor marriage.”

64. C A L. FAM. CODE § 297 (amended by Chapter 721); id. §§ 297.1, 298.7 (enacted by Chapter 721); id. § 2320 (amended by Chapter 721).

65. Id. § 297 (amended by Chapter 721).

66. Id. § 297.1 (enacted by Chapter 721).

67. Id. § 298.7 (enacted by Chapter 721).

68. Id. § 2320(b)(1)(A) (amended by Chapter 721); see also supra text accompanying note 51.

69. FAM. § 297.1 (enacted by Chapter 721).

70. Id.

71. Id.

72. Id. § 298.7 (enacted by Chapter 721).

73. Id. §§ 500–11 (West 2004).

74. Id. § 2320 (enacted by Chapter 721).

75. Id. § 2320(b)(1)(A)–(B) (enacted by Chapter 721).

76. Id. § 2320(b)(1)(B) (enacted by Chapter 721).
IV. ANALYSIS

Between 2000 and 2010, the California Secretary of State received more than sixty thousand Declarations of Domestic Partnership. Legislation since the advent of domestic partnerships expanded the rights and responsibilities that came with them, but statutory differences between marriage and domestic partnership still existed. As introduced, the purpose of Chapter 721 was to eliminate those differences.

A. Removal of the Common Residence Requirement

Chapter 721 will have little or no effect for existing domestic partnerships. For those who are already in an existing partnership, sharing a common residence is not likely to be a major legal concern because Chapter 421 abrogated the need to share a common residence in order to maintain a domestic partnership.

Chapter 721 will have a greater effect on couples filing for a domestic partnership because couples will need to meet one less procedural requirement. Previously, couples that were separated by great distances or incarceration were unable to file Declarations of Domestic Partnerships because they, by definition, could not share a common residence. Couples seeking marriage have not traditionally had this difficulty. For instance, where one person in a heterosexual couple is imprisoned, the couple may still get married. Chapter 721 will make such unions possible in the domestic partnership context, bridging a procedural gap with marriage.

77. Id. § 2320(b)(1)(B)(2) (enacted by Chapter 721).
78. Winger E-mail, supra note 8; Terry, supra note 43.
79. FAM. § 297 (amended by Chapter 721).
80. See 2011 Cal. Stat. ch. 721 (as introduced on Feb. 18, 2011) (“It is the intent of the Legislature to enact legislation to eliminate statutory differences between marriage and domestic partnerships . . . .”).
81. FAM. § 297 (amended by Chapter 721).
82. Id. § 299 (West 2004); see supra text accompanying note 51.
83. Id.
86. Id.
87. Id.; FAM. § 297 (amended by Chapter 721).
B. Creation of the Minority Provision

While the language is slightly different, Chapter 721’s provision allowing minors to form domestic partnerships mirrors similar Family Code sections that allow minors to marry. As with the removal of the common residence requirement, the provision allowing minors to form domestic partnerships will not likely affect current domestic partners because the change applies to the requirements of forming a domestic partnership, not to maintaining one. Its effect on gay or lesbian minors, however, will be significant, as minors may now be allowed to form a domestic partnership if the minors meet the requirements of the statute.

C. Creating a Confidential Domestic Partnership

Chapter 721 creates the confidential partnership. Although Chapter 721 lacks an array of statutes pertaining to confidential domestic partnerships, the legislature and the courts have consistently analogized domestic partnerships to marriage.

In *People v. Hassan*, the court pointed out that cohabitation creates the assumption of marriage, an assumption that a couple may want to preserve. The purpose of a “confidential marriage,” as explained in *Hassan*, is to protect cohabitating individuals from public realization that they had been living together unmarried. This protection is offered to facilitate the societal benefit of legalizing the relationship. The law of confidential marriage is, in this way, not strictly a law that applies to marriage. Therefore, the most important
requirement for obtaining a confidential marriage is cohabitation in a way that suggests marriage. The “confidential domestic partnership,” which will also be kept from the public, is similar.

The provision of Chapter 721 regarding confidential domestic partnerships will affect domestic partnerships formed after it took effect, not domestic partnerships formed prior to its effect. This section, therefore, affects those who are already living as domestic partners, but who have not yet filed a Declaration of Domestic Partnership.

Though the original text of Chapter 721, which stated that the author’s intent was to remove all legal differences between domestic partnerships and marriage, has been pared down to specific legal changes, the changes amount to a step in that direction. The increasingly parallel position of domestic partnerships with marriage suggests that courts will apply existing confidential marriage case law to confidential domestic partnerships.

D. Dissolution of Same-Sex Marriages

Chapter 721’s marriage termination provision currently applies to a narrow group of people, but may have a broader application in the future. Chapter 721 allows for same-sex spouses to terminate their marriages under specific circumstances. Since this provision only applies to marriages entered into in California, and same-sex marriage was only legal from February to March 2004, this provision applies to a narrow group of people.

The marriage provision may have broader applicability if same-sex marriage becomes legal in California. In 2010, a federal district court in California held Proposition 8 unconstitutional. Because the Ninth Circuit upheld the decision,
it is possible that same-sex marriage will soon become legal in California. If this happens, then Chapter 721 will have already provided for termination of same-sex marriages.

V. CONCLUSION

Recent California history has seen domestic partnerships develop toward legal equality with marriage through clear and deliberate legislative steps, of which Chapter 721 is just one of the latest. The first legislative step created the domestic partner relationship. The second legislative step broadened the rights and responsibilities of domestic partners, and recognized domestic partnerships as the equivalent of marriage. Chapter 721 is another legislative step in which the legislature has removed some of the remaining differences between the two parallel relationships. If Justice Werdegar’s exhortation to equalize the two designations is truly the legislature’s goal, then Chapter 721 helps achieve it.

The Ninth Circuit Court of Appeals has upheld the District Court’s ruling that Proposition 8 is unconstitutional. The future of the domestic partnership relationship in California is therefore uncertain. If the United States Supreme Court determines that Proposition 8 is constitutional, it is likely the legislature will pass laws similar to Chapter 721 until marriage and domestic partnerships differ only in name and country-wide recognition. If the Ninth Circuit decision stands, however, domestic partnerships may become as antiquated a memory as racial segregation, carrying with it the same historical stigma.

(9th Cir. 2012) (upholding the district court’s decision).

109. FAMILY CODE § 2320 (amended by Chapter 721).
113. FAMILY CODE §§ 297, 2030 (amended by Chapter 721); id. §§ 297.1, 298.7 (enacted by Chapter 721).
114. Strauss, 46 Cal. 4th at 482–83, 93 Cal. Rptr. 3d at 687 (Werdegar, J., concurring); FAMILY CODE § 297 (amended by Chapter 721); id. §§ 297.1, 298.7 (enacted by Chapter 721).
115. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (upholding the ruling of Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)).
116. Id.
117. Strauss, 46 Cal. 4th at 482–83, 93 Cal. Rptr. 3d at 687 (Werdegar, J., concurring).
118. See generally In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2009) (making repeated references to the similarities of same-sex marriage arguments and historical arguments against interracial marriage and for racial segregation). It is unlikely that Family Code section 297 would be repealed, as it would still provide for the formation of domestic partnerships for couples of which one member is over the age of sixty-two. FAMILY CODE § 297(b)(5)(B) (amended by Chapter 721).
Chapter 721 presents relatively narrow changes in filing for domestic partnerships. Chapter 721 affects same-sex couples who are physically separated from one another, minors, same-sex couples already living together as domestic partners who wish to file confidentially, and same-sex couples who were legally married in California and now want to dissolve the marriage. Narrow though they might be, in the context of Justice Werdegar’s exhortation to bring domestic partnerships onto equal legal footing with marriage, Chapter 721 makes logical changes. As the legal battle over same-sex relationships plays out, the California legislature has determined to secure rights and offer legal avenues for same-sex couples parallel to those offered to opposite-sex couples. Whether securing rights for domestic partners or preparing for the eventual legalization of same-sex marriage, Chapter 721 furthers the goal of expanding rights to same-sex couples.

119. Fam. §§ 297, 2030 (amended by Chapter 721); id. §§ 297.1, 298.7 (enacted by Chapter 721).
120. Id. § 297 (amended by Chapter 721); id. § 297.1 (enacted by Chapter 721); id. § 298.7 (enacted by Chapter 721); id. § 2030 (amended by Chapter 721).
121. Strauss, 46 Cal. 4th at 482–83, 93 Cal. Rptr. 3d at 687 (Werdegar, J., concurring).
122. Id.