

## First Supplement to Memorandum 99-82

### **Family Consent in Health Care Decisionmaking for Adults: Domestic Partners**

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In light of recent legislation concerning registered domestic partners, the Commission should give further consideration to the statutory surrogate rules in the draft recommendation on *Family Consent in Health Care Decisionmaking for Adults* (attached to Memorandum 99-82). Chapter 588 of the Statutes of 1999 (AB 26) sets up qualifications for domestic partners and a registration system in the Secretary of State's Office. (A copy of the bill is attached.) Family Code Section 297 sets out the definitions and requirements for domestic partner status. (See Exhibit p. 3.)

#### **Overlapping Definitions?**

The Commission's proposed Probate Code Section 4712(a) sets out the following presumptive priority scheme for statutory surrogates:

(a) ... a surrogate may be selected to make health care decisions for the patient from among the following adults with a relationship to the patient:

(1) The spouse, unless legally separated.

(2) An adult in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being and reside or have been residing together. This individual may be known as a domestic partner.

(3) Children.

(4) Parents.

(5) Brothers and sisters.

(6) Grandchildren.

(7) Close friends.

(The complete section and Comment are set out on pages 11-22 to 11-24 in the draft recommendation attached to the main memorandum.) There is no substantive conflict between the two provisions, but the language in Section

4712(a)(2) could be misleading to someone who tries to read it in light of the new domestic partners statute.

The first sentence of subdivision (a)(2) describes a class of persons who are closer than the friends in subdivision (a)(7) but who are not spouses listed in subdivision (a)(1). They are people who are likely to be best situated to know the patient's desires and values, and to assess the patient's best interests, in fulfillment of the surrogate's important duties under Probate Code Section 4714. The first sentence of subdivision (a)(2) was drawn from the New Mexico version of the Uniform Health-Care Decisions Act, as noted in the Comment. The second sentence was added in order to provide a useful reference to the common term for this type of person. The provision was not intended as a statutory definition of "domestic partner" nor did we intend to limit the scope of the rule by use of that language. There is no intent to extend the concept outside the coverage of the Health Care Decisions Law.

The new domestic partner legislation in AB 26 does not apply to health care decisionmaking, although it does address hospital visitation rights. (See uncodified Section 1, Exhibit p. 2; Health & Safety Code § 1261, Exhibit p. 9.)

The staff does not believe the language in Section 4712(a)(2) should be confusing, but it is difficult to anticipate what someone unfamiliar with the development of the Commission's recommendation might think. Since the reference to "domestic partner" is simply a shorthand for the standards in the first sentence, it is not really needed if it could cause confusion or complications. In view of this possibility, **the staff suggests removal of the second sentence of Section 4712(a)(2).**

If the second sentence is retained in this or a similar form, the Commission should consider adding the following language to the Comment, to make clear that it is independent of the AB 26 rules:

In the first sentence of subdivision (a)(2), the reference to "domestic partner" is included as a convenient shorthand for the substantive rule in the first sentence. The person described in subdivision (a)(2) may or may not satisfy the definition in Family Code Section 297. Qualification as a "domestic partner" under subdivision (a)(2) is intended only to apply to the surrogate decisionmaking rules in this division, the Health Care Decisions Law.

### **Special Treatment of Registered Domestic Partner?**

The question also arises whether proposed Probate Code Section 4712 should be revised to incorporate the registered domestic partner concept of AB 26. For example, the section could explicitly refer to a registered domestic partner in the same category as a spouse (subdivision (a)(1)). Then the second sentence of subdivision (a)(2), discussed above, could be deleted or revised to read “This individual may be known as nonregistered domestic partner.” Another approach would be to specify in subdivision (a)(2) that a registered domestic partner is deemed to satisfy the standard.

The staff does not recommend revisions along these lines. It is too early to begin slicing the concept expressed in subdivision (a)(2) into subcategories. We think the statute needs to be flexible and is clear enough as it stands. There is no substantive issue, so long as the domestic partner description in subdivision (a)(2) remains general and is not limited in any way to the more restrictive standards in AB 26. There would not be any substantive problem in referring to registered domestic partners in the spouse category, or between subdivision (a)(1) and (a)(2), although it could cause some controversy. The issue may arise later, because those interested in bolstering the status of domestic partner registrations might want to see registered domestic partners in the first category, along with spouses, and ahead of the more general nonregistered domestic partner in the second category.

Respectfully submitted,

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Assistant Executive Secretary

## Assembly Bill No. 26

### CHAPTER 588

An act to add Division 2.5 (commencing with Section 297) to the Family Code, to add Article 9 (commencing with Section 22867) to Chapter 1 of Part 5 of Division 5 of Title 2 of the Government Code, and to add Section 1261 to the Health and Safety Code, relating to domestic partners.

[Approved by Governor October 2, 1999. Filed  
with Secretary of State October 10, 1999.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 26, Migden. Domestic partners.

(1) Existing law sets forth the requirements of a valid marriage, and specifies the rights and obligations of spouses during marriage.

This bill would provide that a domestic partnership shall be established between 2 adults of the same sex or, if both persons are over the age of 62 and meet specified eligibility criteria, opposite sexes, who have a common residence and meet other specified criteria and would provide for the registration of domestic partnerships with the Secretary of State. The bill would also specify procedures for the termination of domestic partnerships. The bill would prohibit a person who has filed a Declaration of Domestic Partnership from filing a new declaration until at least 6 months has elapsed from the date that a Notice of Termination of Domestic Partnership was filed with the Secretary of State in connection with the termination of the most recent domestic partnership, except where the previous domestic partnership ended because one of the partners died or married.

The bill would require the Secretary of State to prepare forms for the registration and termination of domestic partnerships, distribute these forms to each county clerk, and require the Secretary of State to establish, by regulation, and charge fees for processing these forms. The bill would require these forms to be available to the public at the office of the Secretary of State and each county clerk. A Declaration of Domestic Partnership would be required to be accompanied by a specified declaration of veracity. Violation of this requirement would be a misdemeanor. By creating a new crime and by increasing the duties of the county clerk, the bill would impose a state-mandated local program.

The bill would also preempt, on and after July 1, 2000, any local ordinance or law that provides for the creation of a domestic partnership, as specified, except that a local jurisdiction may retain or adopt policies or laws that offer rights to domestic partners within

the jurisdiction and impose duties that are in addition to the rights and duties established by state law, as specified.

(2) Existing law does not specify requirements concerning patient visitation in all health facilities.

This bill would require a health facility to allow a patient's domestic partner and other specified persons to visit a patient, except under specified conditions.

(3) The existing Public Employees' Medical and Hospital Care Act authorizes the Board of Administration of the Public Employees' Retirement System to provide health benefits plan coverage to state and local public employees and annuitants and their family members.

This bill would authorize the state and local employers to offer health care coverage and other benefits to domestic partners, as defined, who have submitted certificates of eligibility or Declarations of Domestic Partnership to the board.

(4) 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, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, with regard to certain mandates, no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

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

SECTION 1. It is the intent of the Legislature to retain the right of hospitals and other health care facilities to establish visitation policies in reasonable and appropriate circumstances. In enacting this legislation, it is the intent of the Legislature to provide hospitals and other health facilities with the authority to administer those policies in a manner that applies equally to spouses, registered domestic partners, and other immediate family members.

SEC. 2. Division 2.5 (commencing with Section 297) is added to the Family Code, to read:

DIVISION 2.5. DOMESTIC PARTNER REGISTRATION

PART 1. DEFINITIONS

297. (a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.

(b) A domestic partnership shall be established in California when all of the following requirements are met:

(1) Both persons have a common residence.

(2) Both persons agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership.

(3) Neither person is married or a member of another domestic partnership.

(4) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.

(5) Both persons are at least 18 years of age.

(6) Either of the following:

(A) Both persons are members of the same sex.

(B) Both persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless both persons are over the age of 62.

(7) Both persons are capable of consenting to the domestic partnership.

(8) Neither person has previously filed a Declaration of Domestic Partnership with the Secretary of State pursuant to this division that has not been terminated under Section 299.

(9) Both file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division.

(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.

(d) "Basic living expenses" means, shelter, utilities, and all other costs directly related to the maintenance of the common household of the common residence of the domestic partners. It also means any other cost, such as medical care, if some or all of the cost is paid as a benefit because a person is another person's domestic partner.

(e) "Joint responsibility" means that each partner agrees to provide for the other partner's basic living expenses if the partner is unable to provide for herself or himself. Persons to whom these

expenses are owed may enforce this responsibility if, in extending credit or providing goods or services, they relied on the existence of the domestic partnership and the agreement of both partners to be jointly responsible for those specific expenses.

## PART 2. REGISTRATION

298. (a) The Secretary of State shall prepare forms entitled “Declaration of Domestic Partnership” and “Notice of Termination of Domestic Partnership” to meet the requirements of this division. These forms shall require the signature and seal of an acknowledgment by a notary public to be binding and valid.

(b) (1) The Secretary of State shall distribute these forms to each county clerk. These forms shall be available to the public at the office of the Secretary of State and each county clerk.

(2) The Secretary of State shall, by regulation, establish fees for the actual costs of processing each of these forms, and shall charge these fees to persons filing the forms.

(c) The Declaration of Domestic Partnership shall require each person who wants to become a domestic partner to (1) state that he or she meets the requirements of Section 297 at the time the form is signed, (2) provide a mailing address, (3) sign the form with a declaration that representations made therein are true, correct, and contain no material omissions of fact to the best knowledge and belief of the applicant, and (4) have a notary public acknowledge his or her signature. Both partners’ signatures shall be affixed to one Declaration of Domestic Partnership form, which form shall then be transmitted to the Secretary of State according to the instructions provided on the form. Violations of this subdivision are punishable as a misdemeanor.

298.5. (a) Two persons desiring to become domestic partners may complete and file a Declaration of Domestic Partnership with the Secretary of State.

(b) The Secretary of State shall register the Declaration of Domestic Partnership in a registry for those partnerships, and shall return a copy of the registered form to the domestic partners at the address provided by the domestic partners as their common residence.

(c) No person who has filed a Declaration of Domestic Partnership may file a new Declaration of Domestic Partnership until at least six months after the date that a Notice of Termination of Domestic Partnership was filed with the Secretary of State pursuant to subdivision (b) of Section 299 in connection with the termination of the most recent domestic partnership. This prohibition does not apply if the previous domestic partnership ended because one of the partners died or married.

### PART 3. TERMINATION

299. (a) A domestic partnership is terminated when any one of the following occurs:

(1) One partner gives or sends to the other partner a written notice by certified mail that he or she is terminating the partnership.

(2) One of the domestic partners dies.

(3) One of the domestic partners marries.

(4) The domestic partners no longer have a common residence.

(b) Upon termination of a domestic partnership, at least one former partner shall file a Notice of Termination of Domestic Partnership with the Secretary of State by mailing a completed form to the Secretary of State by certified mail. The date on which the Notice of Termination of Domestic Partnership is received by the Secretary of State shall be deemed the actual termination date of the domestic partnership, unless termination is caused by the death or marriage of a domestic partner, in which case the actual termination date shall be the date indicated on the Notice of Termination of Domestic Partnership form. The partner who files the Notice of Termination of Domestic Partnership shall send a copy of the notice to the last known address of the other partner.

(c) A former domestic partner who has given a copy of a Declaration of Domestic Partnership to any third party in order to qualify for any benefit or right shall, within 60 days of termination of the domestic partnership, give or send to the third party, at the last known address of the third party, written notification that the domestic partnership has been terminated. A third party who suffers a loss as a result of failure by the domestic partner to send this notice shall be entitled to seek recovery from the partner who was obligated to send it for any actual loss resulting thereby.

(d) Failure to provide the third-party notice required in subdivision (c) shall not delay or prevent the termination of the domestic partnership.

### PART 4. LEGAL EFFECT

299.5. (a) The obligations that two people have to each other as a result of creating a domestic partnership are those described in Section 297. Registration as a domestic partner under this division shall not be evidence of, or establish, any rights existing under law other than those expressly provided to domestic partners in this division and Section 1261 of the Health and Safety Code.

The provisions relating to domestic partners provided in this division and Section 1261 of the Health and Safety Code shall not diminish any right under any other provision of law.

(b) Upon the termination of a domestic partnership, the partners, from that time forward, shall incur none of the obligations to each

other as domestic partners that are created by this division and Section 1261 of the Health and Safety Code.

(c) The filing of a Declaration of Domestic Partnership pursuant to this division shall not change the character of property, real or personal, or any interest in any real or personal property owned by either domestic partner or both of them prior to the date of filing of the declaration.

(d) The filing of a Declaration of Domestic Partnership pursuant to this division shall not, in and of itself, create any interest in, or rights to, any property, real or personal, owned by one partner in the other partner, including, but not limited to, rights similar to community property or quasi-community property.

(e) Any property or interest acquired by the partners during the domestic partnership where title is shared shall be held by the partners in proportion of interest assigned to each partner at the time the property or interest was acquired unless otherwise expressly agreed in writing by both parties. Upon termination of the domestic partnership, this subdivision shall govern the division of any property jointly acquired by the partners.

(f) The formation of a domestic partnership under this division shall not change the individual income or estate tax liability of each domestic partner prior to and during the partnership, unless otherwise provided under another state or federal law or regulation.

## PART 5. PREEMPTION

299.6. (a) Any local ordinance or law that provides for the creation of a “domestic partnership” shall be preempted on and after July 1, 2000, except as provided in subdivision (c).

(b) Domestic partnerships created under any local domestic partnership ordinance or law before July 1, 2000, shall remain valid. On and after July 1, 2000, domestic partnerships previously established under a local ordinance or law shall be governed by this division and the rights and duties of the partners shall be those set out in this division, except as provided in subdivision (c), provided a Declaration of Domestic Partnership is filed by the domestic partners under Section 298.5.

(c) Any local jurisdiction may retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners as defined by Section 297 or as more broadly defined by the local jurisdiction’s ordinances, policies, or laws, or that impose duties upon third parties regarding domestic partners as defined by Section 297 or as more broadly defined by the local jurisdiction’s ordinances, policies, or laws, that are in addition to the rights and duties set out in this division, and the local rights may be conditioned upon the agreement of the domestic partners to assume the additional obligations set forth in this division.

SEC. 3. Article 9 (commencing with Section 22867) is added to Chapter 1 of Part 5 of Division 5 of Title 2 of the Government Code, to read:

Article 9. Domestic Partners

22867. It is the purpose of this article to provide employers the ability to offer health care coverage through this part to the domestic partners of their employees and annuitants.

22868. For this part only, and only for the purposes of providing health care coverage pursuant to this part, a domestic partner is an adult in a domestic partnership, as defined in Section 22869, with a person enrolled as an employee or annuitant of an employer contracting with the board for health benefits coverage, who has submitted to the system a certificate of eligibility pursuant to Section 22872 or a valid Declaration of Domestic Partnership filed pursuant to Division 2.5 (commencing with Section 297) of the Family Code.

22869. For purposes of this part, a “domestic partnership” shall be two people who meet all of the criteria set forth in Section 297 of the Family Code.

22871. Notwithstanding any other provision of law, a domestic partner shall be included in the definition of a family member for purposes of Sections 22777, 22778, subdivision (a) of Section 22791, Sections 22811, 22811.5, 22812, 22813, 22815, subdivision (c) of Section 22816, Sections 22816.3, 22817, 22819, 22823, subdivision (a) of Section 22825, subdivision (a) of Section 22825.1, Section 22825.7, paragraph (1) of subdivision (b) of Section 22840.2, subdivision (f) of Section 22840.2, subdivision (b) of Section 22856, and Section 22859.

22871.1. Notwithstanding Section 22871 or any other provision of law, a domestic partner shall not be included in the definition of a family member for purposes of subdivisions (e) and (f) of Section 22754, subdivision (a) of Section 22811.6, and Section 22821.

22871.2. Notwithstanding subdivision (f) of Section 22754 or any other provision of law, a domestic partner shall be considered to be a family member for purposes of Section 22810, except that a domestic partner shall not be considered a family member for purposes of continued health coverage eligibility upon the death of the employee or annuitant.

22871.3. If an employee or annuitant has a domestic partner who is an employee or annuitant, each domestic partner may enroll as an individual. No person may be enrolled both as an employee or annuitant and as a family member. A family member may be enrolled with respect to only one employee or annuitant.

22872. (a) In order to receive any benefit provided by this article, an employee or annuitant shall present the board with proof in a manner designated by the board that the employee or annuitant and his or her domestic partner have filed a valid Declaration of

Domestic Partnership pursuant to Division 2.5 (commencing with Section 297) of the Family Code.

(b) The employee or annuitant shall also provide a signed statement indicating that the employee or annuitant agrees that he or she may be required to reimburse the employer, their designated health services plan, and the system, for any expenditures made by the employer, their designated health services plan, and the system, for medical claims, processing fees, administrative charges, costs, and attorney's fees on behalf of the domestic partner if any of the submitted documentation is found to be incomplete, inaccurate, or fraudulent.

(c) The employee or annuitant shall notify the employer or CalPERS when a domestic partnership has terminated, as required by subdivision (c) of Section 299 of the Family Code.

22873. (a) Any employer or contracting agency may, at its option, offer health benefits pursuant to this article, to the domestic partners of its employees and annuitants.

(b) The employer or contracting agency shall notify the board, in a manner prescribed by the board, that it is electing to provide health care coverage through this article to the domestic partners of its employees and annuitants.

(c) The employer or contracting agency shall provide to the system any information deemed necessary by the board to determine eligibility under this article.

22874. Notwithstanding any other provision of law, this article shall not be construed to extend any vested rights to any person nor be construed to limit the right of the Legislature to subsequently modify or repeal any provision of this article.

22875. This article shall apply to any of the following:

(a) Represented state employees who are members of a bargaining unit or who retired from a bargaining unit only if (1) there is a signed memorandum of understanding between the state and the recognized employee organization to adopt the benefits accorded under this article and (2) the Department of Personnel Administration makes this article simultaneously applicable to all eligible annuitants retired from the bargaining unit. This article shall not apply to active state employees who are members of a state bargaining unit unless it also applies to eligible annuitants retired from that bargaining unit.

(b) Members of the Public Employees' Retirement System who are employed by the Assembly, the Senate, and the California State University only if the Assembly Rules Committee, the Senate Rules Committee, and the Board of Trustees of the California State University, respectively, make this section applicable to their employees.

(c) Members of the Public Employees' Retirement System who are state employees of the judicial branch, and judges and justices

who are members of the Judges' Retirement System or the Judges' Retirement System II, if the Judicial Council makes this section applicable to them.

(d) Employees excluded from the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1) upon adoption by the Department of Personnel Administration of regulations to implement employee benefits under this article for those state officers and employees excluded from, or not otherwise subject to the Ralph C. Dills Act. Regulations adopted or amended pursuant to this section shall not be subject to review and approval of the Office of Administrative Law pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2). These regulations shall become effective immediately upon filing with the Secretary of State.

22876. The board may establish a one-time special enrollment period to permit currently enrolled employees and annuitants whose domestic partners will be eligible for family member status pursuant to this article to enroll those domestic partners.

22877. An employer may require an employee or annuitant or his or her domestic partner to be financially responsible for any increased cost of covering the domestic partner that exceeds the normal employer contribution rate resulting from the decision of that employer to offer health coverage to domestic partners of employees and annuitants pursuant to this article.

SEC. 4. Section 1261 is added to the Health and Safety Code, to read:

1261. (a) A health facility shall allow a patient's domestic partner, the children of the patient's domestic partner, and the domestic partner of the patient's parent or child to visit, unless one of the following is met:

(1) No visitors are allowed.

(2) The facility reasonably determines that the presence of a particular visitor would endanger the health or safety of a patient, member of the health facility staff, or other visitor to the health facility, or would significantly disrupt the operations of a facility.

(3) The patient has indicated to health facility staff that the patient does not want this person to visit.

(b) This section may not be construed to prohibit a health facility from otherwise establishing reasonable restrictions upon visitation, including restrictions upon the hours of visitation and number of visitors.

(c) For purposes of this section, "domestic partner" has the same meaning as that term is used in Section 297 of the Family Code.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates

a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.