
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 404 **Hearing Date:** April 25, 2023
Author: Wahab
Version: March 22, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Prohibiting underage, unauthorized marriages*

HISTORY

Source: Author

Prior Legislation: AB 1286 (Petrie-Norris), held in Assem. Approps., 2022
SB 273 (Hill), Ch. 660, Stats. 2018

Support: Child USAAdvocacy

Opposition: Tahirih Justice Center (oppose unless amended)

PURPOSE

The purpose of this bill is to prohibit any person from solemnizing, sanctioning, or arranging a nonlegally recognized marriage between a minor and another person.

Existing law states that unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a “minor” is a person under the age of 18 years and an “adult” is a person who is at least 18 years of age. This crime is also known as statutory rape. (Pen. Code, § 261.5, subd. (a).)

Existing law punishes statutory rape as either a misdemeanor or felony depending on the age difference with the minor. (Pen. Code, § 261.5, subds. (b)-(d).)

Existing law states that it is unlawful for every person having a spouse living, who marries or enters into a registered domestic partnership with any other person, except as specified, and is punishable by a fine not exceeding \$10,000 and imprisonment in the county jail for up to one year or in the state prison. (Pen. Code, §§ 281-283.)

Existing law states that every person who takes any other person unlawfully, and against his or her will, and by force, menace, or duress, compels him or her to live with such person in an illicit relation, against his or her consent, or to so live with any other person, is guilty of a felony punishable by imprisonment in the county jail. (Pen. Code, § 266b.)

Existing law states that every person who knowingly and willfully marries or enters into a registered domestic partnership with the spouse of another is guilty of an alternate felony-misdemeanor, punishable by a fine not less than \$5,000, or by imprisonment in the county jail for up to one year, or 16 months, or two or three years. (Pen. Code, § 284.)

Existing law authorizes an unmarried person under 18 years of age, who is capable of consenting to and consummating marriage, upon obtaining a court order granting permission, to marry. Requires that the court order and written consent of at least one parent or guardian of each underage person be filed with the clerk of the court. (Fam. Code, § 302.)

Existing law provides that a minor may make a valid premarital agreement or other marital property agreement if the minor is emancipated or is otherwise capable of contracting a marriage. (Fam. Code, § 1501.)

This bill makes it a misdemeanor, punishable by a fine of not less than \$5000 and imprisonment in county jail for up to one year, for any person to knowingly and willfully solemnize, sanction, or arrange a religious union or other secular nonlegally recognized marriage between a minor and another person.

This bill states that the prohibition does not apply to a marriage or domestic partnership of a minor that has been authorized by a court, as specified.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Current law does not account for instances in which a third party arranges or officiates a marriage between a minor and another person that is not legally recognized. A non-legally recognized marriage includes religious or other secular marriage that does not require a marriage license. This gap in existing law puts children of all ages at risk of being coerced or forced into a marriage by a third party without the protection provided through the legal marriage licensing process.

I firmly believe that the state of California should make every effort to protect children from opportunities for abuse and coercion. SB 404 takes a step in the right direction by ensuring that the individuals responsible for officiating and arranging minor marriages occurring outside of the legal bounds of the law, and its associated guardrails, are halted. In a state that believes we should put “children on a path to a healthier future by focusing on their minds, bodies, and environments,” we all have a responsibility to ensure children maintain their rights to bodily and intellectual autonomy for healthy development.

2. Underage Marriages in California

According to a report by Unchained at Last, a national advocacy group dedicated to ending child marriage:

Nearly 300,000 minors, under age 18, were legally married in the U.S. between 2000 and 2018, this study found. A few were as young as 10, though nearly all were age 16 or 17. Most were girls wed to adult men an average of four years older.

Child marriage – or marriage before age 18 – is dangerous. Even at age 16 or 17, regardless of spousal age difference, child marriage:

1. Can easily be forced marriage, since minors have limited legal rights with which to escape an unwanted marriage (typically they are not even allowed to file for divorce);
2. Is a human rights abuse that produces devastating, lifelong repercussions for American girls, destroying their health, education, economic opportunities and quality of life; and
3. Undermines statutory rape laws, often covering up what would otherwise be considered a sex crime. Some 60,000 marriages since 2000 occurred at an age or spousal age difference that should have been considered a sex crime.

Unlike in countries where child marriage is illegal but persists anyway, the problem in the U.S. is the laws themselves. Most U.S. states still allow marriage before 18. . . (7 states have banned underage marriage).

(United States' Child Marriage Problem (April 2021), Unchained at Last < <https://www.unchainedatlast.org/wp-content/uploads/2021/08/Study-PDF-FINAL-1.pdf>> [as of Apr. 10, 2023].) The report estimated that 23,588 child marriages took place in California between 2000 and 2018. Those figures were based on U.S. Census Bureau data and the number of child marriages reported in other states. (*Id.* at pg. 14.)

In California, existing law authorizes an unmarried person under 18 years of age, who is capable of consenting to and consummating marriage, upon obtaining a court order granting permission, to marry. The law requires the court order and written consent of at least one parent or guardian of each underage person be filed with the clerk of the court. (Family Code Section 302.) Additionally, any emancipated minor is authorized to marry. (Fam. Code, § 1501.) Once an unemancipated minor is married, the minor becomes emancipated. (Fam. Code, § 7002.)

While there are legal avenues for a minor to be married, some minors get married through spiritual ceremonies that are not authorized by law. These nonlegally recognized marriages do not have the same protections as existing court-authorized marriages, such as the automatic emancipation of the minor or the assessment of whether potential force, threat, persuasion, fraud,

coercion, or duress by either of the parties or their family members or any known or suspected child abuse. (Fam. Code, §§ 304 and 7002.)

This bill would make it a crime for a person to solemnize, sanction, or arrange a nonlegally recognized marriage between a minor and another person. This crime would be a misdemeanor, punishable by a fine of not less than \$5,000 and imprisonment in the county jail for up to one year per incident.

3. Constitutional Considerations

Due Process

Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, no state shall “deprive any person of life, liberty, or property, without due process of law.” (U.S. Const., 14th Amend.) The liberties protected by the Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. (*Oberfell v. Hodges* (2015) 576 U.S. 644, 663.) It has been long recognized that marriage is a fundamental right under the Due Process Clause. (See *Turner v. Safely* (1987) 482 U.S. 78, 95.)

However, that right may be limited. For example, the prohibition on bigamy has been upheld as constitutional. (*Reynolds v. United States* (1879) 98 U.S. 145.) Existing law places limits on when a minor may marry by requiring, among other things, a court to approve of the marriage. Additionally, a minor who is emancipated is allowed to marry. This bill provides that anyone who solemnizes, sanctions, or arranges a marriage between a minor and another person outside of these legally recognized avenues is guilty of a misdemeanor.

This bill does not appear to unnecessarily infringe on that fundamental right, but instead enforces reasonable limits to ensure that minors are not being coerced into an extrajudicial marriage and resulting in abuse of the minor.

Free Exercise of Religion

The Free Exercise Clause of the First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Const., Amendment 1.)

Article I, section 4, of the California Constitution is the state's Free Exercise Clause. It provides, in pertinent part: “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State. The Legislature shall make no law respecting an establishment of religion.” (Cal. Const., art. 1, § 4.)

This bill may impact spiritual marriages that are not legally recognized, thus may raise a challenge based on First Amendment protections. A law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be

narrowly tailored to advance that interest. (*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah* (1993) 508 U.S. 520.)

This bill applies to any person who solemnizes, sanctions, or arranges a non-legally recognized marriage between a minor and another person. This does not prohibit marriages based on religious practice, rather it requires that any marriage involving a minor must comply with the existing judicial process. Thus, the law would be viewed as neutral and of general application and would be evaluated under a rational basis standard. Under this standard, the law would be upheld if the state has a rational or legitimate reason for it which, as stated above, is to protect minors from being coerced into a marriage where a court does not have the opportunity to assess the circumstances for abuse.

4. Argument in Support

Child USA Advocacy writes in support:

This legislation, if passed, would strengthen California's ability to protect its children from the trauma of child marriage. Currently, nearly every state in the United States permits child marriage in some form. While many states set a marriage age floor at age 18, their laws, like California's, still include an array of exceptions that "can in effect drop the true minimum marriage age much lower." These loopholes—most commonly including parental consent, judicial approval, the lack of official proof of age requirements, and pregnancy exceptions—endanger children.

Child Marriage is Pervasive in the U.S. with Devastating Domestic Consequences.

The above-mentioned legal loopholes may seem trivial on paper, but they result in tragic, life-altering consequences for children in the United States.

- Between 2000 and 2018, almost 300,000 adolescent minors were legally married in the U.S.—this is an average of 45 child marriages per day.
- An estimated 30,000–60,000 marriages occurred "at an age or spousal age difference that should have been considered a sex crime."
- The majority of U.S. states permit marriage as a defense to statutory rape.
- Between 70% and 80% of marriages involving a child in the United States end in divorce, and child marriage followed by divorce doubles the likelihood that child mothers will descend into poverty.
- Girls in the United States who marry before the age of 19 are also 50% more likely to drop out of high school and four times less likely to graduate from college.
- Victims of child marriage in the United States are acutely vulnerable to higher rates of psychiatric disorders as well as physical, emotional, or verbal abuse.

California does not escape these consequences. As evidenced in the graph above, California has some of the weakest child marriage laws in the nation. To protect

children and secure their futures, the practice of child marriage must be prohibited under the law. In the absence of a federal prohibition against child marriage, it falls to each state to establish marriage laws that close these loopholes and effectively ban child marriage.

5. Argument in Opposition

Tahirih Justice Center is opposed unless amended:

As-introduced, SB 404 would have addressed California's current status as one of only 6 states with no minimum marriage age and made it a leader in the movement to protect children, mostly girls, from the known harms of child marriage.

As amended, however, SB 404 will not prevent these harms. Instead, it may further harm the very children it was introduced to protect by criminalizing their families and communities. The survivors of forced marriage that we serve often have complicated relationships with the parents or communities who pressure them to marry. In many cases, even after facing significant abuse, they still love and value these social bonds and hope for reconciliation. These survivors do not typically want to see their families or communities criminalized, and those who face the intersecting harms that come from being a person of color or immigrant may be especially hesitant to involve law enforcement. For those clients who do want to call on law enforcement, they can generally do so based on existing criminal law addressing crimes like child abuse, family violence, trafficking, or kidnapping.

We hope to see SB 404 amended or re-introduced next session in a form that reverts back to [the] original approach of ending child marriage.

-- END --