

Feb. 18, 1957

Memorandum No. 1

Subject: Study No. 15 - Attorney's Fees and
Costs in Domestic Relations Actions

A letter to Mr. Stanton from Mr. Jack Hayes, Secretary of the State Bar, dated January 8, 1957 reported that the Committee on Administration of Justice had recommended that the following changes be made in the revision of Code of Civil Procedure Section 137.3 proposed by the Law Revision Commission (S.B. 29):

1. Strike the reference to an order to show cause or motion and to request for relief in the first sentence, but add, before the semicolon therein: "if such relief is requested in the complaint, cross-complaint or answer".
2. Change the first clause of the second sentence to read: "In respect to services rendered, or costs incurred, . . ."
3. Add a new sentence after the second sentence, to read: "An application for an award for services performed or costs incurred after judgment may be made, whether or not such relief was requested in the complaint, cross-complaint or answer."
4. Strike the references to "application", etc. in the second sentence.
5. Add at the end of the section:

"An application for an order making, augmenting or modifying an award of attorney's fees or costs or both shall be made by motion or by an order to show cause, except that it may be made without notice by an oral motion in open court: (a) At the time of the hearing of the cause on the merits; or (b) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or Section 586 of the Code of Civil Procedure. With respect to divorce actions, judgment as used in this section means interlocutory judgment."

The first and fourth of these recommendations already appear in the revision as drafted by the Commission (i.e., in S.B. 29) and we are, therefore,

mystified by them.

In the attached item we show, in parallel columns, the revision of existing law proposed by the Commission and the revision of the Commission's recommendation which would be effected if the second, third, and fifth recommendations of the CAJ were accepted by the Commission.

At its March meeting the Commission should consider whether to amend S.B. 29 as recommended by the CAJ. My own view on the CAJ recommendations is as follows:

The second recommendation, that "or costs incurred" be added in the first clause of the second sentence should not be accepted. It is not necessary because the authority given is to award "such costs and attorney's fees as may be reasonably necessary to maintain any subsequent proceeding therein etc." Moreover, if the words suggested were added the sentence might be interpreted to mean that the costs could be awarded only after they are incurred whereas it would seem to be preferable to give the court power to make an award to cover costs to be incurred in such subsequent proceedings.

The third recommendation, that a sentence be added to provide that it not be a condition precedent to the awarding of attorneys fees and costs in connection with proceedings subsequent to judgment that such relief be requested in the pleadings, should be adopted. I believe that it is implicit in the section as drafted but it might as well be made clear. Nor is notice in the pleadings necessary to protect the defendant in such cases for the revision proposed by the Commission requires that actual notice of an application for such relief be given by a motion or order to show cause in all cases.

Whether the fifth recommendation is well taken is open to some question. In part, it is directed simply to the form of the statute and I cannot see that any particular improvement in that regard has been made by the CAJ. The only

substantive change which the CAJ seemingly wishes to achieve is one from "may" to "shall". The amendment proposed is not really necessary for this purpose because in context the Commission's language makes it clear that (1) when the case does not fall within one of the exceptions some kind of notice is required and (2) such notice can be given only in one of the two ways specified. However, a change from "may" to "shall" may be justified in the interest of clarity. If the Commission decides that it is, however, we suggest that the last two sentences of the Commission's draft be revised to read as follows:

When An an application for an order making, augmenting or modifying an award of attorney's fees or costs or both may is made, it shall be made by a ^{on notice} [noticed] motion or by an order to show cause, except that it may be made without notice by an oral motion in open court; ~~No-application-or-notice,-other-than-an-oral-motion-in-open court,-is-necessary-when-attorney's-fees-or-costs-or-both-are awarded;~~ (a) At the time of the hearing of the cause on the merits; or (b) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or Section 586 of the Code of Civil Procedure. With respect to divorce actions, judgment as used in this subdivision section means interlocutory judgment.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

att.

REVISION PROPOSED BY COMMISSION

AMENDMENT OF COMMISSION'S REVISION
PROPOSED BY CAJ

SECTION 1. Section 137.3 of the Civil Code is amended to read:

137.3. During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the support, maintenance or education of children, ~~upon an order to show cause or motion, and if such relief is requested in the complaint, cross-complaint or answer,~~ the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees if such relief is requested in the complaint, cross-complaint or answer; and from time to time and before entry of judgment upon ~~application as aforesaid,~~ the court may augment or modify the original award, if any, for costs and attorney's fees as may

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be reasonably necessary for the prosecution or defense of the action or any proceeding relating thereto. In respect to services rendered after the entry of judgment, ~~upon application by an order to show cause or motion,~~ the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter ~~upon application as aforesaid~~ augment or modify any award so made. Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary.

An application for an order making,

AMENDMENT OF COMMISSION'S REVISION PROPOSED BY CAJ

(Cont'd)

to services rendered, ^{ok} or costs incurred, after the entry of judgment, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter augment or modify any award so made, ~~an application for an award for services rendered or costs incurred after judgment may be made,~~ ^{ok} whether or not such relief was requested in the complaint, cross-complaint or answer. Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary.

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augmenting, or modifying an award of attorney's fees or costs or both may be made by ^a motion or by an order to show cause.

No application or notice, other than an oral motion in open court, is necessary when attorney's fees or costs or both are awarded.

(a) At the time of the hearing ^{of the cause} on the merits;

(b) At any time prior to ^{entry of} judgment against a party whose default has been entered pursuant to Section 585 or Section 586 of the Code of Civil Procedure. With respect to divorce actions, judgment as used in this ^{section} subdivision means interlocutory judgment.

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