

First Supplement to Memorandum 83-67

Subject: Study F-650 - Liability of Stepparent for Child Support (Comments on Tentative Recommendation)

In connection with its work on the liability of marital property for debts, the Commission has made the policy decision that if a parent having a child support obligation remarries, the community property of the second marriage is liable for the child support obligation except for the earnings of the new spouse. This is consistent with the treatment given premarital debts generally.

Assemblyman McAlister, author of AB 1460--the Commission's bill on liability of marital property for debts--agrees with this policy but does not want this provision included in the bill for political reasons. The district attorneys child support enforcement organization is opposed to this provision. We will be seeking to have a separate bill introduced to effectuate the Commission's recommendation on this point, and we have distributed for comment the draft of a recommendation to do so.

Policy of Recommendation

We have received one letter supporting the policy of this recommendation. See Henry Angerbauer, CPA (Exhibit 1). We also know from discussions with other interested people that there is widespread support for the proposal. The staff has met with a subcommittee of the Family Law Section of the State Bar, which also supports the policy of the recommendation.

Justice Robert Kingsley (Exhibit 4) is opposed to the recommendation. He posits a situation where a custodial wife is working to support her children and then remarries. Her new husband does not want her to work since his income is adequate, but refuses to support the children. In this case, the husband's earnings should be liable. The staff does not believe this is a realistic hypothetical; in this situation either the wife will continue to work or the husband will assume the responsibility of supporting the stepchildren. It is not a practical problem.

The Commission's proposal is aimed more at the situation where the noncustodial spouse having a child support obligation remarries. In this situation the children are not living with the new stepparent and there is no reason to expect the new stepparent to support the children.

There is a related troublesome question, however, that we have not yet grappled with. Suppose the parent with the child support obligation stops working upon remarriage, to be supported by the new spouse. This cuts off the income flow available for the child--the typical "marital bankruptcy" situation. True, all the community assets of the second marriage will be liable for the support obligation, but if the step-parent's earnings are totally consumed and all property of the marriage is exempt (e.g., car, house, household furnishings), there will be nothing out of which the child support obligation can be satisfied.

A similar situation can arise where the parent and new spouse enter into a marital property agreement, for example to create a separate property marriage. This would have the effect of eliminating community property in the second marriage and possibly restricting the amount available to a prenuptial creditor such as a child to whom support is owed. Whether such a marital property agreement can affect the child support obligation is not clear. The staff draft of a statute governing such agreements (attached to Memorandum 83-71) would not allow an agreement to affect the child support obligation.

One way to deal with these situations is to attack them head-on. The court has authority to hold a person in contempt who fails to satisfy a child support obligation. Code Civ. Proc. § 1209.5. It may be advantageous to make clear in a Comment that a decision of the obligor spouse voluntarily to stop working or to recharacterize property with the result that the spouse no longer is able to satisfy the support obligation may be punishable by contempt.

Effect of Stepparent Earnings on Support Obligation

Even though the earnings of the stepparent are not liable for child support under the Commission's recommendation, the earnings may substantially raise the support obligor's standard of living so that the support obligor is able to afford a higher level of child support. For this reason the recommendation provides that a court may take into account the earnings of the stepparent in determining a modification of the support order.

Kenneth D. Robin (Exhibit 3) points out that the court should consider not only the earnings of the new spouse of the support obligor in modifying a support obligation, but also the earnings of the new spouse (if any) of the custodial parent. "As now written in your present

proposal, in situations where both parents have remarried, it would appear that a Court could consider the earnings of the new spouse of the non-custodial supporting parent and ignore the earnings of the new spouse of the custodial parent." Although not necessary, the staff agrees it would be useful to add the following language to Section 5120.150(c):

(c) Nothing in this section limits the matters a court may take into consideration in determining or modifying the amount of a support order including, but not limited to, the earnings of the spouse of the person obligated for child or spousal support and the earnings of the spouse of the custodial parent.

Reimbursement of Community

Although the earnings of the stepparent would not be liable for a child support obligation under the Commission's recommendation, other community property of the second marriage would be liable. Suppose other community property is used to satisfy the child support obligation even though the support obligor has substantial amounts of separate property that could have been used. Existing law is that in such a situation the community is entitled to reimbursement to the extent the community property is used disproportionately to satisfy the support obligation. *Weinberg v. Weinberg*, 67 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

The Commission's recommendation codifies the reimbursement right but not the "disproportionate" standard. In that sense, the Comment to Section 5120.150(b) is misleading in stating that Weinberg is codified, as Professor Reppy points out (Exhibit 2). We will revise the comment to more precisely state the effect of the recommendation on existing law.

Professor Reppy also questions the Commission's standard for reimbursement of the community--one-half the community property used to satisfy the support obligation. He suggests it would make sense to reimburse the community for all community property used when there was separate income available and not used. While Professor Reppy's point makes some sense, we must remember that the amount of the support obligation may be based in part on the availability of community property as well as separate property of the obligor spouse, so that it may be proper for the community to bear a share of the child support obligation. The Commission's proposal to reimburse the community for one-half the commu-

nity property applied to the child support obligation is, we believe, an effort to apportion the child support obligation between separate and community property in a simple, though rough, manner that avoids litigation. However, the apportionment is already accomplished, in a fashion, by requiring reimbursement of the community only if separate income, as opposed to separate property, is available but not used. If there is separate income, there will ordinarily be substantial amounts of separate property to produce the income. For this reason, the staff ultimately agrees with Professor Reppy's suggestion, and recommends that Section 5120.150(b) be revised to provide reimbursement to the community for amounts applied to a child support obligation, not exceeding the amount of available separate income that was not used.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

8/27/83

California Law Revision Commission:

Re: Liability of Step Parent - for child support

I agree with your recommendations and conclusions set forth in the tentative Recommendation of the above mentioned issue.

Thank you for permitting me to make my views known in connection with your tentative recommendations and conclusions on these subjects.

Best Regards,

H

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

POSTAL CODE 27706

August 9, 1983

Mr. Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Nat:

You are wrong to opine on the attached proposal that subdivision (b) codifies Weinberg. Even assuming, which is unclear, that Weinberg looked only to nonexempt separate property in determining what reimbursement was appropriate, a 50% reimbursement would be ordered under Weinberg only if precisely the same amount of separate and community property existed at the time payment was made, and such fractions also existed at the time the obligation was fixed.

Thus, consider this fact situation: when the husband used community funds to pay a child support claim (and at the time the claim was fixed) he had \$400,000 in separate property on hand and there was \$100,000 of community funds subject to his management. He took \$5000 of community funds to pay the child support. Under Weinberg, the reimbursement right is \$4000, because 80% of the obligation is viewed as created by the existence of the separate property.

But your proposal limits reimbursement to \$2500. I cannot understand why, but I did want you to realize it is not a codification of Weinberg but puts the community in a worse position than Weinberg.

Is it possible that you erred in using the word "community" on line three of the attached (circled in red by me) and that you really meant instead "the nonbligor spouse"? If so, then the 50% limit on reimbursement makes sense.

Sincerely,



William A. Reppy, Jr.
Professor of Law

enc:
WAR/sa

KENNETH D. ROBIN

ATTORNEY AT LAW

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August 10, 1983

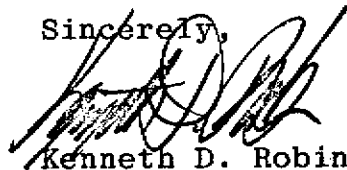
California Law Revision
Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Re: Tentative Recommendations Relating To
Liability of Stepparent For Child Support

Dear Sir:

Although I believe the same effect would be mandated by Civil Code Section 5127.6, I would think that for the sake of clarity your proposed Civil Code Section 5120.150(c) should make it clear that a Court, in determining or modifying the amount of child support, may consider not only the earnings of the non-custodial supporting spouse and (usually) his new spouse, but also consider the earnings of the custodial/recipient spouse and (usually) her new spouse. As now written in your present proposal, in situations where both parents have remarried, it would appear that a Court could consider the earnings of the new spouse of the non-custodial supporting parent and ignore the earnings of the new spouse of the custodial parent.

Sincerely,



Kenneth D. Robin

KDR:nb

COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

August 22, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Recommendation on Liability of Steparents

Gentlemen:

I regard the entire philosophy of your recommendation as bad policy. The recommendation does make some sense if we envisage a second marriage where the husband has dependent children and the wife works. But it is bad policy in the usual situation which, in my experience, is this:

(remember the section involved applies only where the natural father is either dead or for some reason not obligated to support):

The wife has children by her former husband; she has supported them by her own earnings or out of her separate income, or out of both; the new husband does not want her to continue working; the new husband has an income adequate to support the wife and her children.

In that situation, I think the new husband has assumed the obligation of supporting her new wife and her children. If that is not his expectation, he should not have married. If your recommendation is adopted, unless the wife has a substantial separate income, she must either have a disagreement with her husband and continue her pre-marriage job, or her children will starve!

Sincerely,


ROBERT KINGSLEY
Associate Justice

RK:gaw