

Memorandum 85-4

Subject: Study F-670 - Attorneys' Fees in Family Law Proceedings
(Comments on Tentative Recommendation)

Attached to this memorandum is a copy of the tentative recommendation the Commission distributed for comment concerning litigation expenses in family law proceedings. The major purpose of the tentative recommendation is to reverse the rule that the husband must pay the wife's attorney's fees if it would impair the wife's separate estate to pay them herself. (Existing law contains no similar prohibition against impairment of the husband's separate estate.) The tentative recommendation would give the court discretion whether, and out of what assets, to award attorneys' fees, and would make clear that the conduct of litigation by the parties is one of the factors to consider in making an award.

This proposal met with mixed reaction. The proposal was approved without further comment by Henry Angerbauer (Exhibit 4), and by the family law judges of the San Mateo County Superior Court (see letter from Judge Thomas M. Jenkins, attached to Memorandum 85-15 (division of pensions)).

Justice Robert Kingsley (Exhibit 3), on the other hand, believes existing law is correct and should not be changed. Where the wife's current income is insufficient to pay her attorney's fees, she is by definition in difficult financial circumstances. "In such a case, the wife should not be required to invade an already insufficient capital to pay litigation expenses. The present case law arrives at a fair result; I would not like to see it changed."

The main problem the staff has with this line of reasoning is that it assumes the husband has greater earning capacity and greater assets than the wife, which may not necessarily be true. Why should the husband be required to invade his meager assets to pay the wife's attorney, whereas the wife need not? We think Justice Kingsley is viewing the award of attorney's fees as a disguised form of support, where the husband is in better financial condition than the wife.

This is precisely the problem Professor Reppy (Exhibit 1) has with the recommendation--it gives too much discretion to the court. He

believes that attorneys' fees should be satisfied first out of community assets. Only then, if the community assets are exhausted, should either party be required to invade their separate estate for the benefit of the other. This is also the position of Demetrios Dimitriou (Exhibit 2), who would add the further limitation that if all community and separate assets are exhausted, a party should not be assigned the debt to pay the attorney of the other party.

Professor Reppy explicates his basic position with this question: How can there ever be a situation where it is "just" to order one spouse to use her or his separate property to pay attorney fees of the other if there is community property on hand? If this leaves the wife without community property, an alimony award is then the appropriate remedy. In other words, Professor Reppy would not use the award of attorney's fees as a disguised form of support, but would require the fees to be paid directly and then make an undisguised support award if necessary.

The Los Angeles County Bar Family Law Section Executive Committee (Exhibit 5) sees other problems with the tentative recommendation. They are concerned about the failure of the draft to distinguish pre- and post-litigation expenses. They also feel the draft would create uncertainty as to whether or not the court may order one of the parties to pay his or her own attorney's fees in a fixed amount. Apart from these drafting issues, they are disturbed by the policy of the proposal which tends to make the parties bear their own expenses. They believe this will inhibit lawyers from taking clients whose assets may not be substantial and preclude such persons from effective representation.

Justice Zelling, Chairman of the Law Reform Committee of South Australia, has written (Exhibit 6) to advise us of a completely different approach used with some success in Australia. For the past 10 years parties have been required to bear their own litigation costs. If either party (usually the wife) has not sufficient means to finance the litigation, the party may receive legal assistance from the Legal Aid Commission. Under the old system of requiring the husband to finance litigation, proceedings were often taken and prolonged litigation ensued promoted by lawyers for the wife, knowing the husband would have to pay in any event. "The new sections have been very successful in practice in eliminating wasted proceedings and wasted Court time."

It is clear that there is no consensus among interested persons that the Commission's tentative recommendation is necessarily the best solution to the litigation expense problem. The staff is persuaded by Professor Reppy's reasoning that the approach he offers is sound. However, to implement the Reppy approach we would need to do some re-drafting and to circulate for comment the revised tentative recommendation. Given the Commission's priority objective of completing a new Probate Code for introduction in 1986, the staff believes this matter should be deferred until time permits to make progress on this matter on a low priority basis.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Duke University
DURHAM
NORTH CAROLINA

September 24, 1984

SCHOOL OF LAW

POSTAL CODE 27706

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Memorandum 84-62 --
Attorneys' Fees at Dissolution

Dear Nat:

Your most recent suggestion concerning treatment of a debt for attorneys' fees associated with divorce in my view achieves very little to improve the current, unsatisfactory state of the law. The comment to proposed section 4370.5 indicating disapproval of cases stating a wife (as opposed to a husband) need not dip into capital to pay attorneys' fees is useful, but the existing law is probably unconstitutional for sex discrimination anyway.

I feel the costs of winding up a 50-50 partnership should be borne equally by the partners. What we need is a statute flatly declaring all such attorneys' fees at divorce to be community debts. If this leaves the wife without community property, an alimony award is then the appropriate remedy.

Can you possibly explain to me how there can ever be a situation where it is "just" to order one spouse to use her or his separate property to pay attorney fees of the other if there is community property on hand?

At the very least there should be a pecking order as in Civil Code section 5122 concerning tortious obligations: each spouse's separate property cannot be touched until community funds are exhausted.

Sincerely,



William A. Reppy, Jr.
Professor of Law

WAR:jma

EXHIBIT 2

LAW OFFICES OF
MAIER DIMITRIOU & ROSS
500 WASHINGTON STREET
SUITE 510
SAN FRANCISCO, CALIFORNIA 94111
TELEPHONE (415) 434-1000

October 12, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Tentative Recommendations F-663 and F-670

Gentlemen:

With respect to F-663 (Employee Pension Benefit Plans), I would like to add my voice in support of your tentative recommendation.

With respect to F-670 (Litigation Expenses), I would recommend that additions be made to your proposed Civil Code Section 4370.5(2)(b) so that it would make clear that the court is limited to assets belonging to the parties and that the fees and costs should be charged against community assets prior to separate assets.

I continue to appreciate receiving copies of your proposed recommendations.

Yours very truly,



Demetrios Dimitriou

DD/kg

EXHIBIT 3
STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

October 12, 1984

California Law Revision Commission,
4000 Middlefield Road,
Palo Alto, California 94303

Gentlemen:

I am in receipt of copies of your Tentative Recommendations on (1) Litigation Expense in Family Law Proceedings; and (2) Division of Employee Pension Benefit Plans.

As to the latter recommendation, I thoroughly concur. It makes possible an intelligent solution of problems which cannot always properly be dealt with under the present case law.

I must express my disapproval of the other recommendation. We are dealing with a case in which, by definition, the wife has no income (over and above living costs) from either her separate or her share (or prospective share) of the community. In such a case, the wife should not be required to invade an already insufficient capital to pay litigation expenses. The present case law arrives at a fair result; I would not like to see it changed.

Sincerely,

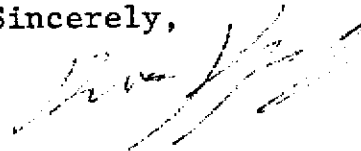


EXHIBIT 4

HENRY ANGERBAUER, CPA
1401 WILLOW GLEN CT.
CONCORD, CA 94521

10/14/84

Law Revision Commission:

I have read your tentative recommendation
relating to Litigation Expenses in Family
Law Proceedings and I agree with your
conclusions and suggest that your
conclusions be implemented into law.

Best Regards

Sincerely



EXHIBIT 5

EDWARD M. RASKIN*
GERALD E. LICHTIG*
JOHN A. ELLIS*
*A PROFESSIONAL LAW CORPORATION

RASKIN, LICHTIG & ELLIS
ATTORNEYS AT LAW
1880 CENTURY PARK EAST, SUITE 714
LOS ANGELES, CALIFORNIA 90067

TELEPHONE
553-6171

December 21, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendation Relating to
Litigation Expenses in Family Law Proceedings

Ladies and Gentlemen:

I am writing this letter on behalf of the Los Angeles County Bar Family Law Section Executive Committee. The Committee has studied and discussed the tentative recommendations referred to above.

One of the Committee's concerns is that the proposed legislation makes no distinction between awards of litigation expenses pending litigation, and at the time of trial, or thereafter. This is a matter of concern since, although equal management and control exists, in theory, usually it does not exist in actuality.

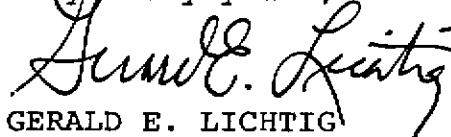
The Committee is further concerned that the legislation and the comment concerning the legislation are so drawn as to create uncertainties as to whether or not a court could now order one of the parties to pay his or her own attorneys' fees in a fixed amount notwithstanding the prior decision in Wong v. Superior Court (1966) 246 C.A. 2d 541, 54 Cal. Rptr. 782.

The Committee is further concerned that the legislation, as drafted, will encourage orders that "each party bear his/her own attorney fees and litigation expenses". Such a rule, overruling the decision in Marriage of Hopkins (1977) 74 C.A. 3d 591, 141 Cal. Rptr. 597, and the lines of cases indicated in the tentative recommendation, would have serious adverse effects upon clients as well as upon the Family Law Bar. Frequently, attorneys accept representation of clients in family law matters upon the expectation that a fee award will be made upon the conclusion of

the case. Thus, counsel is often willing to wait a year or more for payment of fees over and above either an initial retainer or a pendente lite award. If the court were encouraged to require each client to pay his or her attorney's fees, the attorney undertaking representation of that client would then be left with no court award and a potential dispute with his or her client necessitating either arbitration of the fee dispute or litigation. Such dispute would further delay the attorney recovering the fee, and in many instances, would trigger the "knee-jerk" reaction of a cross-complaint for malpractice. The delay in receipt of ultimate payment, the likelihood of diminution in the amount thereof, and the potential for the cross-complaint for malpractice all would tend to discourage attorneys from undertaking representation of clients who are now able to obtain representation on a "fee to be awarded by the court" basis. As a result of such likely consequences, a segment of the public now able to obtain effective representation, would be less likely to be able to do so in the future if the proposed legislation were enacted without affording further protection to the public and to the Family Law Bar.

The Committee urges further study of this matter by the Law Revision Commission and substantial modification of the tentative recommendation in order to avoid the adverse consequences which we foresee in the event that the tentative recommendation is proposed in the form of actual legislation. We stand ready and willing to participate in any discussions concerning this matter which would be helpful to the Commission.

Very truly yours,



GERALD E. LICHTIG
Co-Chair, Subcommittee
re California Law Revision
Commission

mlb

cc: Sorrell Trope
Dennis Wasser



LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

MEMBERS—

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C.B.E. (Chairman)

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(Deputy Chairman)

THE HON. MR JUSTICE LEGOE
(Deputy Chairman)

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ALICE HIGERTWOOD M.J. Detmold

G. F. HISKEY S.M.

SECRETARY—

MISS J. E. HILL

EXHIBIT 6

FROM THE CHAMBERS OF THE CHAIRMAN:

THE HON. MR JUSTICE ZELLING, C.B.E.

JUDGES' CHAMBERS

SUPREME COURT

ADELAIDE S.A. 5000

PHONE: 217 0451 EXT. 724

15th October 1984

The Secretary,
Californian Law Revision Commission,
4000 Middlefield Road, Suite D-2
Palo Alto,
CA 94303

Dear Sir,

I have just received your tentative recommendation relating to Litigation Expenses in Family Law Proceedings.

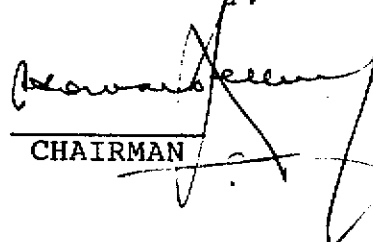
In Australia for nearly a decade now costs are not ordinarily ordered in Family Law proceedings at all. The relative sections of the Family Law Act are 117 and 118, a copy of which is enclosed herewith.

In practise this works very well. If either party, usually the wife, has not sufficient means to finance the litigation she receives legal assistance from the Legal Aid Commission.

Under the old system under which the wife could pledge her husband's credit for costs, proceedings were often taken and prolonged litigation ensued ^{permitted} by lawyers on behalf of the wife who knew the husband had to pay in any event.

The new sections have been very successful in practise in eliminating wasted proceedings and wasted Court time.

Yours sincerely,


CHAIRMAN

(7) Where a member of the staff of the Institute was, immediately before his appointment, an officer of the Australian Public Service or a person to whom the *Officers' Rights Declaration Act 1928-1975* applied—

- (a) he retains his existing and accruing rights;
- (b) for the purpose of determining those rights, his service as a member of the staff of the Institute shall be taken into account as if it were service in the Australian Public Service; and
- (c) the *Officers' Rights Declaration Act 1928-1975* applies as if this Act and this section had been specified in the Schedule to that Act.

(8) This section has effect notwithstanding the *Public Service Act 1922-1975* but subject to any other Act relating to persons employed by Australia.

Costs.

117. (1) Subject to sub-section (2) and section 118, each party to proceedings under this Act shall bear his own costs.

(2) If the court is of opinion in a particular case that there are circumstances that justify it in doing so, the court may, subject to the regulations, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court thinks just.

(3) A person who has instituted a matrimonial cause or a person who is entitled to participate in proceedings either as a respondent or intervener may apply to the Australian Legal Aid Office for legal assistance under this section in respect of the proceedings.

(4) Where an application is made by a person under sub-section (3), the Attorney-General, the Director of the Australian Legal Aid Office or a person employed in the Australian Legal Aid Office authorized by the Director in writing in that behalf may (in the case of a person employed in the Australian Legal Aid Office, subject to any restriction in that authority in writing) authorize legal assistance to the applicant in accordance with the means and needs test of the Australian Legal Aid Office for the giving of legal assistance.

Frivolous or vexatious proceedings.

118. The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious, dismiss the proceedings and make such orders as to costs as it thinks just.

Married persons may sue each other.

119. Either party to a marriage may bring proceedings in contract or in tort against the other party.

Criminal conversation, adultery and enticement.

120. After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage.

Restriction on publication of evidence.

121. (1) A person shall not print or publish—

- (a) any statement or report that proceedings have been instituted in the Family Court or in another court exercising jurisdiction under this Act; or

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS

September 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 30, 1984.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

TENTATIVE RECOMMENDATION

relating to

LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS

The court in a dissolution proceeding has discretion to order a party "to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees."¹ The purpose of an award of attorneys' fees is to enable a party to have sufficient resources to adequately present the party's case.² In order to be entitled to an award the party must demonstrate that his or her resources are not sufficient to meet the expenses of litigation.³

Although the court has discretion to award litigation expenses, the discretion is limited by the principle that a wife may not be required to impair the capital (as opposed to income) of her separate estate in order to defray litigation expenses.⁴ This rule appears to be a relic of the era before equal management and control: because the husband had management and control of the community property and could pay his own attorney's fees out of the community, the wife was not required to bear her own attorney's fees but could require payment out of the community or out of the husband's separate property.⁵

This rule is now obsolete and unduly limits the discretion of the court. It results in cases requiring one party to finance the litigation of the other even though there may be substantial amounts of community assets available to defray the litigation expenses.⁶ The court

1. Civil Code § 4370.
2. See, e.g., *Bernheimer v. Bernheimer*, 103 Cal. App.2d 643, 230 P.2d 17 (1951); *Avnet v. Bank of America*, 232 Cal. App.2d 244, 42 Cal. Rptr. 616 (1965).
3. See, e.g., *Martins v. Superior Court*, 12 Cal. App.3d 870, 90 Cal. Rptr. 898 (1970).
4. See, e.g., *Marriage of Stachon*, 77 Cal. App.3d 506, 143 Cal. Rptr. 599 (1977); *Marriage of Hopkins*, 74 Cal. App.3d 591, 141 Cal. Rptr. 597 (1977); *In re Marriage of Jafeman*, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972).
5. Cf. discussion in *Weinberg v. Weinberg*, 26 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).
6. See, e.g., *In re Marriage of Folb*, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).

should be able to review the circumstances of the parties and the litigation, and should be able to award or deny litigation expenses based on such factors as the needs of the parties and their ability to pay, the conduct of the litigation, and other relevant considerations. An award should be made out of any appropriate assets--community or separate property, principal or income--and in such amounts as appears just.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 4370.5 to the Civil Code, relating to family law proceedings.

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

969/013

Civil Code § 4370.5 (added). Standard for award of costs and attorney's fees

SECTION 1. Section 4370.5 is added to the Civil Code, to read:

4370.5. In making an award under this chapter:

(a) The court shall take into consideration, in addition to such other factors as are proper, the following:

(1) The need for such an award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case.

(2) The extent to which the conduct of each party and attorney furthers or frustrates the policy of the law to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.

(b) The court may order payment from any source, whether community property or separate property, principal or income, and in an amount that is just under the circumstances.

Comment. Subdivision (a) of Section 4370.5 lists two important factors the court should consider in making an award of costs and attorney's fees in family law proceedings. The factors listed in subdivision (a) are not exclusive, and the court may consider any other proper factors, including the likelihood of collection, tax considerations, and other factors announced in the cases. See, e.g., In re Marriage of Lopez, 38 Cal. App.3d 93, 113 Cal. Rptr. 58 (1974).

Subdivision (b) broadens the court's ability to make an appropriate award of costs and attorney's fees by expressly authorizing the court to order payment from any source that appears proper, including the community and separate estates of the parties. This overrules language in the cases holding, for example, that the court may not require a wife to impair the capital of her separate estate in order to defray her litigation expenses. See, e.g., In re Marriage of Jafeman, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972); Marriage of Hopkins, 74 Cal. App.3d 591, 141 Cal. Rptr. 597 (1977).