

## Memorandum 93-07

Subject: Study F-1200 - Family Code Technical and Minor Substantive Revisions (Attorney's Fees)

This Memorandum proposes to enact a new general section on ability to pay attorney's fees and to relocate four attorney's fee sections now at the beginning of the Family Code. See Exhibit 1, attached.

Four Sections at Beginning of Code To Be Relocated

There are six sections on attorney's fees in general provisions at the beginning of the Family Code. Fam. Code §§ 270-275. Sections 270-272 apply only during "the pendency of a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties." Under Section 270, the court may modify an award in such a proceeding or in any "proceeding related" thereto. This language was narrowly construed in a case holding that a juvenile court dependency action for a couple's children was not a "proceeding related" to their marriage dissolution. *In re Marriage of Seaman*, 1 Cal. App. 4th 1489, 2 Cal. Rptr. 2d 690 (1991). Thus Sections 270-272 do not apply to the entire code, but only to proceedings under Division 6 (nullity, dissolution, legal separation). When these sections were put in general provisions at the beginning of the code, it was hoped they might be generalized to apply to the whole code. Ultimately they were not generalized. So they should be moved to Division 6 as new Chapter 3.5 (commencing with Section 2027), as set out in Exhibit 1.

Section 273 applies to support proceedings. It permits an award of attorney's fees in an action to enforce a spousal or child support order or a civil penalty for child support delinquency. These proceedings are governed by Division 9 (support). Thus Section 273 should be moved to general provisions in Division 9 as new Section 3557, as set out in Exhibit 1.

The provision in Section 273 for attorney's fees in an action to enforce a civil penalty for child support delinquency was added in 1991 and chaptered out by a later enactment in 1991. We restored this provision in the Family Code, assuming the chaptering out was

inadvertent. Drew Liebert in the office of Senator Hart, author of the earlier enactment, confirmed the chaptering out was inadvertent. Bruce Greenlee of Matthew Bender thinks this provision is superfluous because it is covered by the preceding sentence providing attorney's fees in an action to enforce an "existing order for child support." But "support" may not include penalties. With respect to a child, support means a "support obligation" including maintenance, education, and past due support or arrearage. Fam. Code §§ 4720, 150. An action to enforce a penalty for child support delinquency could be brought solely to enforce the penalty where arrearages have been paid under pressure of litigation but where the penalty itself remains to be litigated. In that case, "support" might not include the penalty, indicating the provision in Section 273 (to be recodified as Section 3557) should be kept. To delete it could have an undesirable substantive effect. To keep it seems harmless at worst.

#### Sections Not To Be Relocated

Attorney's fees and costs as sanction. Section 274 permits an award of attorney's fees and costs as a sanction for obstructive conduct, with no showing of the recipient's need. Section 274 came from former Section 4370.6 of the Civil Code. Section 4370.6 was in the Family Law Act, so it may have been limited to that act. If we keep Section 274 in general provisions, it may apply to proceedings to which it did not apply under the Civil Code, e.g., Domestic Violence Prevention Act, Uniform Parentage Act, emancipation of minors, and adoption. It seems good policy to apply Section 274 to all proceedings under the Family Code. A court should be able to impose sanctions for obstructive conduct regardless of the nature of the proceeding.

Section 274 is also consistent with Section 128.5 of the Code of Civil Procedure, which permits an award of attorney's fees as a sanction and applies to civil litigation generally. Except as provided in the Family Code, general rules of civil procedure apply to Family Code proceedings. Fam. Code § 210. Thus, despite the sanctions provision in the Code of Civil Procedure, Section 274 is needed in the Family Code as an exception to the financial need and ability to pay requirements of Sections 270, 272, and 273. Section 274 should remain

a general provision at the beginning of the code. (The staff would repeal Section 274 and reenact it as Section 271, as set out in Exhibit 1.)

Payment directly to attorney. Under Section 275, when the court orders a party to pay the other party's attorney's fees, the court may order payment directly to the attorney. This came from former Section 4371 of the Civil Code (in the Family Law Act), and before that from former Section 137.5 of the Civil Code. As originally enacted, former Section 137.5 applied only to divorce or separate maintenance. The Legislature broadened Section 137.5 by adding annulment in 1947, support, maintenance, and education of children in 1951, and child custody in 1957, but all these were Family Law Act proceedings.

The staff would apply Section 275 to the whole Family Code. Its purpose is to protect the attorney. Whether to order direct payment is discretionary with the court. It seems hard to justify permitting direct payment in a custody proceeding, but not under the Uniform Parentage Act. The staff would keep Section 275 as a general provision at the beginning of the code. (The staff would repeal Section 275 and reenact it as Section 272, as set out in Exhibit 1.)

Other provisions. Exhibit 2 summarizes the attorney's fee sections in the Family Code. Other than Sections 274 and 275 discussed above, all these have special application, and appear to be needed as discussed below.

Section 2255 applies in a proceeding for nullity of marriage, and qualifies Sections 270-272 by requiring that a person awarded attorney's fees be innocent of fraud or wrongdoing in entering the marriage. Section 2255 is properly located in Part 2 (void or voidable marriage) of Division 6. The staff would not move Section 2255 into the proposed new chapter at the beginning of Division 6 recodifying Sections 270-272.

Section 2334 applies in a proceeding for dissolution of marriage or for legal separation. It permits the court to make an order for attorney's fees during a continuance to allow reconciliation. This is a special provision, and is properly located in Part 3 (dissolution of marriage and legal separation) of Division 6.

Section 3652 permits an order modifying or terminating child

support to award attorney's fees "to the prevailing party." But under Sections 270-272, the general sections discussed above, attorney's fees are not limited to the prevailing party in proceedings for dissolution, nullity, or legal separation; fees may be awarded against a prevailing party. *In re Marriage of Hublou*, 231 Cal. App. 3d 956, 966, 282 Cal. Rptr. 695 (1991); 2 Markey, California Family Law Practice and Procedure § 25.10[1]. Is Section 3652 superfluous?

Section 3652 appears not to be superfluous because Sections 270-272 require the court to consider the "income and needs of the parties" in awarding attorney's fees. Under Section 3652, the court may award attorney's fees to the prevailing party without a showing of need. *In re Marriage of Popenhagen*, 99 Cal. App. 3d 514, 525, 160 Cal. Rptr. 379 (1979); 2 Markey, *supra*, § 25.10[7][b]. The staff would keep Section 3652.

Division 10 (domestic violence) has two attorney fee sections -- Sections 5755 and 5805(b). Section 5755 permits the court to award attorney's fees to the prevailing party after notice and hearing in a domestic violence matter. Section 5805(a) permits the court to appoint counsel for the petitioner in a proceeding to enforce a domestic violence restraining order. Under Section 5805(b), if the court appoints private counsel, the court may order respondent to pay petitioner's reasonable attorney's fees. Superficially it appears that the attorney's fee provisions of Section 5805(b) might be swallowed up by Section 5755, and therefore be unnecessary. But Section 5755 permits the award of attorney's fees to the prevailing party. Section 5805(b) permits the court to order respondent to pay petitioner's attorney fees, whether prevailing or not. Thus Section 5805(b) is not superfluous.

#### Ability to Pay

The attorney's fee provisions now at the front of the Family Code require a determination that the party required to pay has ability to pay. Fam. Code §§ 270, 273. And the court may not order a sanction that puts an "unreasonable financial burden" on the sanctioned party. Fam. Code § 274. Of the special attorney's fee provisions listed in Exhibit 2, only Sections 3028, 3153, 7863, and 8800(f) expressly

require the party ordered to pay to have ability to pay. See also Fam. Code §§ 7895 (appointment of counsel on appeal for party "unable to afford counsel"), 20003 ("extreme hardship"). But an order to pay attorney's fees is not enforceable by contempt if the party ordered to pay lacks ability to pay. See 8 B. Witkin, California Procedure Enforcement of Judgment § 335, at 287, § 344, at 296-97 (3d ed. 1985). See also Fam. Code § 290 (order under Family Code enforceable by execution or contempt) and Comment; Code Civ. Proc. § 1219(a) (imprisonment for omission to perform act "yet in the power of the person to perform").

It appears standard practice for the court to require a showing of ability to pay before ordering a party to pay attorney's fees. See 2 Markey, *supra*, § 25.12[1]. The fact that the party has a cash deficit is not controlling. The party may be ordered to pay attorney's fees if the party has substantial income and other assets, even though the party's expenses exceed income. *Rosenthal v. Rosenthal*, 197 Cal. App. 2d 289, 297-98, 17 Cal. Rptr. 186 (1961).

The staff would codify a general requirement that a party ordered to pay attorney's fees or costs must have present or prospective ability to pay by adding a new section at the beginning of the Family Code:

§ 270 (added). Ability to pay attorney's fees or costs

270. If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine the party has or is reasonably likely to have ability to pay.

The Comment would note that this section generalizes provisions from the Civil Code and is consistent with existing practice. The section and Comment are set out in Exhibit 1. With the addition of this section and the recodification of Sections 274 and 275 as Sections 271 and 272, respectively, there would be three general attorney's fee sections left at the beginning of the Family Code:

§ 270. Ability to pay attorney's fees or costs

§ 271. Attorney's fees and costs as sanction

§ 272. Direct payment to attorney

1992 Enactment on Attorney's Fees

A 1992 family law enactment by Assembly Member Speier added new provisions to the Civil Code on case management plans for allocating

attorney's fees and costs, and on attorney's real property liens. 1992 Cal. Stat. ch. 356. These provisions should be repealed and recodified in Division 6 (nullity, dissolution, and legal separation) of the Family Code as set out in Exhibit 1. To make room for these provisions, the two sections in Article 1 of Chapter 4 of Part 1 of Division 6 (Sections 2030 and 2031) should be repealed and reenacted as Sections 2033 and 2034, respectively, as set out in Exhibit 1.

Respectfully submitted,

Robert J. Murphy  
Staff Counsel

## RECOMMENDED LEGISLATION

Civ. Code § 4370.5 (repealed). Attorney's fees and costs pendente lite  
SEC. \_\_\_\_ . Section 4370.5 of the Civil Code is repealed.

~~4370.5. (a) The court may make an award of attorney's fees and costs under this chapter where the making of the award, and the amount of the award, is just and reasonable under the relative circumstances of the respective parties.~~

~~(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in subdivision (a) of Section 4801. The fact that the party requesting an award of attorney's fees and costs has the resources from which he or she could pay his or her own attorney's fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.~~

~~(c) The court may order payment of an award from any type of property, whether community or separate, principal or income.~~

~~(d) Either party may, at any time prior to the hearing of the cause on the merits, upon noticed motion, request the court to make a finding that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. Upon that finding, the court may in its discretion direct the implementation of a case management plan for the purpose of allocating attorney's fees, court costs, expert fees, and consultant fees equitably between the parties. The case management plan shall focus on specific, designated issues. The plan may provide for the allocation of separate or community assets, security against these assets, and for payments from income or anticipated income of either party for the purpose described in this subdivision and for the benefit of one or both parties. Payments shall be authorized only upon agreement of the~~

~~parties or, in the absence thereof, by court order. The court may order that a referee be appointed pursuant to Section 639 of the Code of Civil Procedure to oversee the case management plan.~~

Comment. Former Section 4370.5 [as amended by 1992 Cal. Stat. ch. 356, § 1] is continued without substantive change in Family Code Section 2029.

Civ. Code § 4372 (repealed), Family law attorney's real property lien

SEC. \_\_\_\_ . Section 4372 of the Civil Code is repealed.

~~4372. (a) Either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties. This encumbrance shall be known as a "family law attorney's real property lien" and shall attach only to the encumbering party's interest in the community real property.~~

~~(b) Notice of a family law attorney's real property lien shall be served either personally or upon the other party's attorney of record at least 15 days before the encumbrance is recorded. This notice shall contain a declaration signed under penalty of perjury containing the following:~~

~~(1) A full description of the real property.~~

~~(2) The party's belief as to the fair market value of the property and documentation supporting that belief.~~

~~(3) Encumbrances on the property as of the date of the declaration.~~

~~(4) A list of community assets and liabilities and their estimated values as of the date of the declaration.~~

~~(5) The amount of the family law attorney's real property lien.~~

~~(c) The nonencumbering party may file an ex parte objection to the family law attorney's real property lien. The objection shall include a request to stay the recordation until further notice of the court and shall contain a copy of the notice received. It shall also include a declaration signed under penalty of perjury as to the following:~~

~~(1) Specific objections to the family law attorney's real property lien and to the specific items in the notice.~~

~~(2) The objector's belief as to the appropriate items or value and any documentation supporting that belief.~~

~~(3) A declaration specifically stating why recordation of the encumbrance at this time would likely result in an unequal division of property or would otherwise be unjust under the circumstances of the case.~~

~~(d) Except as otherwise provided by this section, existing procedural rules regarding ex parte motions shall apply.~~

~~(e) An attorney for whom a family law attorney's real property lien is obtained shall comply with Rule 3-300 of the Rules of Professional Conduct of the State Bar of California.~~

Comment. Former Section 4372 [as added by 1992 Cal. Stat. ch. 356, § 2] is continued in Family Code Section 2030 without substantive change.

Civ. Code § 4373 (repealed). Denial or limitation of family law attorney's real property lien

SEC. \_\_\_\_ . Section 4373 of the Civil Code is repealed.

~~4373. (a) Upon application of either party, the court may deny the family law attorney's real property lien described in Section 4372 based upon a finding that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances of the case. The court may also for good cause limit the amount of the family law attorney's real property lien. A limitation by the court is not to be construed as a determination of reasonable attorney's fees.~~

~~(b) Upon receiving an objection to the establishment of a family law attorney's real property lien, the court may on its own motion determine whether the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. If the court finds that the case involves one or more of these complex or substantial issues, the court may direct the implementation of a case management plan as provided in subdivision (d) of Section 4370.5.~~

~~(c) The court has jurisdiction to resolve any dispute arising from the existence of a family law attorney's real property lien.~~

Comment. Former Section 4373 [as added by 1992 Cal. Stat. ch. 356, § 3] is continued in Family Code Section 2031 without substantive change.

Fam. Code § 231 (technical amendment). Application of part

SEC. \_\_\_\_\_. Section 231 of the Family Code is amended to read:

231. This part applies to a temporary restraining order in a summons issued under any of the following provisions:

(a) Section 2030 ~~2033~~ (proceeding for dissolution, nullity, or legal separation).

(b) Section 7700 (proceeding under Uniform Parentage Act).

Comment. Section 231 is new. This part collects general provisions applicable to any restraining order contained in a summons in the proceedings referred to in this section.

Interim Comment. Section 231 is amended to revise a cross-reference.

Fam. Code §§ 270-275 (repealed). Provisions for attorney's fees and costs

SEC. \_\_\_\_\_. Part 5 (commencing with Section 270) of Division 2 of the Family Code is repealed.

Interim Comment. Former Part 5 (commencing with Section 270) of Division 2 is repealed and continued in substance in the following sections:

<u>Former Section</u>	<u>New Section</u>
§ 270	§ 2027
§ 271	§ 2028
§ 272	§ 2029(a)-(c)
§ 273	§ 3557
§ 274	§ 271
§ 275	§ 272

Fam. Code § 270-272 (added). Provisions for attorney's fees and costs

SEC. \_\_\_\_\_. Part 5 (commencing with Section 270) is added to Division 2 of the Family Code, to read:

PART 5. PROVISIONS FOR ATTORNEY'S FEES AND COSTS

§ 270. Ability to pay attorney's fees and costs

270. If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have ability to pay.

Comment. Section 270 is new and generalizes provisions in former Civil Code Sections 224.10(d), 4370(a), and 4700(b). See also former Civil Code Sections 237.5(c) (party "unable to afford counsel"), 237.7 (appellant "unable to afford counsel"), 4606(g) (party "financially unable to pay"), 4763(a) ("extreme hardship"). Section 270 is

consistent with existing practice. See 2 Markey, California Family Law Practice and Procedure § 25.12[1]. See also Rosenthal v. Rosenthal, 197 Cal. App. 2d 289, 297-98, 17 Cal. Rptr. 186 (1961) (order to pay attorney's fees not precluded even though party's expenses exceed income); Section 271 (sanction may not put "unreasonable financial burden" on sanctioned party).

Interim Comment. Section 270 is new and generalizes provisions in former Family Code Sections 270, 3028, and 8800(f). See also Sections 3153 (party "financially unable to pay"), 7863 (party "unable to afford counsel"), 7895 (appointment of counsel on appeal for party "unable to afford counsel"), 20003 ("extreme hardship").

**§ 271. Award of attorney's fees and costs based on conduct of party or attorney**

271. (a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or 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. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and abilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden upon the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.

(b) An award of fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of fees and costs as a sanction pursuant to this section shall be payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property.

Comment. Section 271 continues former Civil Code Section 4370.6 without substantive change, except that Section 271 is broadened to apply to all proceedings under the Family Code. See also Section 65 ("community property" defined in Section 760 *et seq.*).

Interim Comment. Section 271 continues former Family Code Section 274 without substantive change.

§ 272. Order for direct payment to attorney

272. (a) When the court orders one of the parties to pay costs and attorney's fees for the benefit of the other party, those costs and fees may, in the discretion of the court, be made payable in whole or in part to the attorney entitled thereto.

(b) Subject to subdivision (c), the order providing for payment of the costs and attorney's fees may be enforced directly by the attorney in the attorney's own name or by the party in whose behalf the order was made.

(c) If the attorney has ceased to be the attorney for the party in whose behalf the order was made, the attorney may enforce the order only if it appears of record that the attorney has given to the former client or successor counsel 10 days' written notice of the application for enforcement of the order. During the 10-day period, the client may file in the proceeding a motion directed to the former attorney for partial or total reallocation of fees and costs to cover the services and cost of successor counsel. Upon the filing of the motion, the enforcement of the order by the former attorney shall be stayed until the court has resolved the motion.

Comment. Section 272 restates former Civil Code Section 4371 without substantive change.

Interim Comment. Section 272 continues former Family Code Section 275 without change.

Fam. Code §§ 2027-2031 (added). Attorney's fees and costs

SEC. \_\_\_\_\_. Chapter 3.5 (commencing with Section 2027) is added to Part 1 of Division 6 of the Family Code, to read:

CHAPTER 3.5. ATTORNEY'S FEES AND COSTS

§ 2027. Attorney's fees and costs during pendency of proceeding

2027. (a) During the pendency of a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in

order to ensure that each party has access to legal representation to preserve all of the party's rights, order any party, except a governmental entity, to pay the amount reasonably necessary for the cost of maintaining or defending the proceeding and for attorney's fees. From time to time and before entry of judgment, the court may augment or modify the original award for costs and attorney's fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded.

(b) Attorney's fees and costs within this section may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding.

(c) For services rendered or costs incurred after entry of judgment, the court may award the costs and attorney's fees reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify an award so made, including after an appeal has been concluded.

(d) Any order requiring a party who is not the husband or wife of another party to the proceedings to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

Comment. Section 2027 continues former Civil Code Section 4370(a) without substantive change. The phrase "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" replaces the former reference to "proceeding under this part." The phrase "proceeding under this part" as used in former Civil Code Section 4370(a) referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code).

Section 2029 requires that the award of attorney's fees and costs under Section 2027 be just and reasonable under relevant circumstances of the parties. See *In re Marriage of Hublou*, 231 Cal. App. 3d 956, 282 Cal. Rptr. 695 (1991).

Special provisions may govern attorney's fees and costs in particular circumstances. See, e.g., Sections 916 (attorney's fees in enforcing right to reimbursement after division of community property), 1101(g) (breach of fiduciary duty), 2255 (attorney's fees and costs in proceeding for judgment of nullity of marriage), 2334 (order for attorney's fees during period of continuance for reconciliation), 3027 (attorney's fees in proceeding to recover monetary sanction for false accusation of child abuse or neglect), 3028 (attorney's fees in proceeding to recover compensation for failure to assume caretaker responsibility or for thwarting other parent's visitation or custody rights), 3113, 3150-3153, 3174 (appointment of counsel to represent

child in custody or visitation proceeding), 3407 (attorney's fees where custody or visitation proceeding commenced in clearly inappropriate forum), 3408 (attorney's fees where jurisdiction declined by reason of conduct), 3416 (attorney's fees for enforcement of sister state custody order), 3557 (attorney's fees for enforcing support order or civil penalty), 3652 (attorney's fees in proceeding to modify or terminate child support order), 4002 (attorney's fees for county enforcement of child support), 4303 (attorney's fees for county enforcement of spousal support), 4403 (attorney's fees for county enforcement of parent's right to support), 4803 (limitation on recovery of attorney's fees in proceeding under Uniform Reciprocal Enforcement of Support Act), 5283(d) (earnings assignment order), [6344, 6386] (attorney's fees in proceeding under Domestic Violence Prevention Act), 6602 (contract for attorney's fees for services in litigation for minor), 7640 (counsel fees and costs under Uniform Parentage Act), 7827, 7860-7864, 7895 (appointment of counsel in proceeding to declare child free from parental custody and control), 8800 (independent adoption).

Interim Comment. Section 2027 continues former Section 270 without change. Concerning the meaning of a "proceeding related" to one for dissolution, nullity, or legal separation, see *In re Marriage of Seaman*, 1 Cal. App. 4th 1489, 2 Cal. Rptr. 2d 690 (1991).

Staff Note. In the Comment to Section 2027, the two bracketed sections, 6344 and 6386, would be given those numbers by the Tentative Recommendation, Family Code: Reorganization of Domestic Violence Provisions, and are now Sections 5755 and 5805 of the Family Code.

§ 2028. Notice of application for order

2028. (a) Except as provided in subdivision (b), during the pendency of a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, an application for a temporary order making, augmenting, or modifying an award of attorney's fees or costs or both shall be made by motion on notice or by an order to show cause.

(b) An order described in subdivision (a) may be made without notice by an oral motion in open court at either of the following times:

(1) At the time of the hearing of the cause on the merits.

(2) At any time before entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

Comment. Section 2028 continues former Civil Code Section 4370(b) without substantive change. The phrase "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" replaces the former reference to "proceeding under this part." The phrase "proceeding under this part" as used in former Civil Code Section 4370(b) referred to the former Family Law Act (former Part

5 (commencing with former Section 4000) of Division 4 of the Civil Code).

Interim Comment. Section 2028 continues former Section 271 without change.

§ 2029. Award to be just and reasonable

2029. (a) The court may make an award of attorney's fees and costs under Section 2027 or 2028 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances of the respective parties, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

(c) The court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income.

(d) Either party may, at any time before the hearing of the cause on the merits, on noticed motion, request the court to make a finding that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. Upon that finding, the court may in its discretion direct the implementation of a case management plan for the purpose of allocating attorney's fees, court costs, expert fees, and consultant fees equitably between the parties. The case management plan shall focus on specific, designated issues. The plan may provide for the allocation of separate or community assets, security against these assets, and for payments from

income or anticipated income of either party for the purpose described in this subdivision and for the benefit of one or both parties. Payments may be authorized only on agreement of the parties or, in the absence of an agreement, by court order. The court may appoint a referee pursuant to Section 639 of the Code of Civil Procedure to oversee the case management plan.

Comment. Section 2029 continues former Civil Code Section 4370.5 without substantive change. In subdivision (b), a reference to Section 4320 has been substituted for the broader reference to former Civil Code Section 4801(a). Section 4320 continues the relevant part of former Civil Code Section 4801(a). See also Sections 65 ("community property" defined in Section 760 *et seq.*), 125 ("quasi-community property" defined), 130 ("separate property" defined in Section 760 *et seq.*).

Subdivision (a) of Section 2029 states the general standard for an award of costs and attorney's fees in family law proceedings.

Subdivision (b) lists two important factors the court should consider in making such an award. The factors listed in subdivision (b) 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 (c) expressly authorizes the court to order payment from any source that appears proper, including the community and separate estates of the parties. When enacted in 1985 (as former Civil Code Section 4370.5), this provision overruled language in the cases holding, for example, that the court could 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); *In re Marriage of Hopkins*, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977).

For background on former Civil Code Section 4370.5, see *Recommendation Relating to Litigation Expenses in Family Law Proceedings*, 18 Cal. L. Revision Comm'n Reports 351 (1986).

Interim Comment. Section 2029(a)-(c) continues former Section 272 without substantive change. Subdivision (d) continues subdivision (d) of former Civil Code Section 4370.5 [as amended by 1992 Cal. stat. ch. 356, § 1] without substantive change.

#### § 2030. Family law attorney's real property lien

2030. (a) Either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties. This encumbrance shall be known as a "family law attorney's real property lien" and attaches only to the encumbering party's

interest in the community real property.

(b) Notice of a family law attorney's real property lien shall be personally served on the other party or on the other party's attorney of record at least 15 days before the encumbrance is recorded. The notice shall contain a declaration signed under penalty of perjury containing the following:

(1) A full description of the real property.

(2) The party's belief as to the fair market value of the property and documentation supporting that belief.

(3) Encumbrances on the property as of the date of the declaration.

(4) A list of community assets and liabilities and their estimated values as of the date of the declaration.

(5) The amount of the family law attorney's real property lien.

(c) The nonencumbering party may file an ex parte objection to the family law attorney's real property lien. The objection shall include a request to stay the recordation until further notice of the court and shall contain a copy of the notice received. It shall also include a declaration signed under penalty of perjury containing the following:

(1) Specific objections to the family law attorney's real property lien and to the specific items in the notice.

(2) The objector's belief as to the appropriate items or value and any documentation supporting that belief.

(3) A declaration specifically stating why recordation of the encumbrance at this time would likely result in an unequal division of property or would otherwise be unjust under the circumstances of the case.

(d) Except as otherwise provided by this section, general procedural rules regarding ex parte motions apply.

(e) An attorney for whom a family law attorney's real property lien is obtained shall comply with Rule 3-300 of the Rules of Professional Conduct of the State Bar of California.

Comment. Section 2030 continues former Civil Code Section 4372 without substantive change. In subdivision (a), the reference to a "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" replaces the reference in former Section 4372 to an "action under this part" (Family Law Act).

Interim Comment. Section 2030 continues former Civil Code Section 4372 [as added by 1992 Cal. Stat. ch. 356, § 2].

**§ 2031. Denial or limitation of family law attorney's real property lien**

2031. (a) On application of either party, the court may deny the family law attorney's real property lien described in Section 2030 based on a finding that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances of the case. The court may also for good cause limit the amount of the family law attorney's real property lien. A limitation by the court is not to be construed as a determination of reasonable attorney's fees.

(b) Upon receiving an objection to the establishment of a family law attorney's real property lien, the court may on its own motion determine whether the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. If the court finds that the case involves one or more of these complex or substantial issues, the court may direct the implementation of a case management plan as provided in subdivision (d) of Section 2029.

(c) The court has jurisdiction to resolve any dispute arising from the existence of a family law attorney's real property lien.

**Comment.** Section 2031 continues former Civil Code Section 4373 [as added by 1992 Cal.Stat. ch. 356, § 3] without substantive change.

**Fam. Code §§ 2030-2031 (repealed). Temporary restraining order in summons**

SEC. \_\_\_\_\_. Article 1 (commencing with Section 2030) of Chapter 4 of Part 1 of Division 6 of the Family Code is repealed.

**Interim Comment.** Former Sections 2030 and 2031 are continued in Section 2033 and 2034, respectively, without change.

**Fam. Code §§ 2033-2034 (added). Temporary restraining order in summons**

SEC. \_\_\_\_\_. Article 1 (commencing with Section 2033) is added to Chapter 4 of Part 1 of Division 6 of the Family Code, to read:

Article 1. Orders in Summons

§ 2033. Temporary restraining order in summons

2033. In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order doing all of the following:

(a) Restraining both parties from removing the minor child or children of the parties, if any, from the state without the prior written consent of the other party or an order of the court.

(b) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party. However, nothing in the restraining order precludes the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the proceeding.

(c) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability held for the benefit of the parties and their minor child or children.

Comment. The introductory part of Section 2033 restates the first sentence of former Code of Civil Procedure Section 412.21(a) without substantive change. Subdivisions (a), (b), and (c) continue former Code of Civil Procedure Section 412.21(a)(1)-(3) without change. The former limitation to proceedings commenced on or after July 1, 1990, has been omitted as obsolete. The former language limiting application of the former section to dissolution, nullity, or legal separation proceedings has been omitted as surplus. See Section 2000 (application of part). For general provisions on temporary restraining orders in summons, see Part 3 (commencing with Section 231) of Division 2.

Interim Comment. Section 2033 continues former Section 2030 without substantive change.

§ 2034. Rights, title, and interest of purchaser for value

2034. Nothing in Section 2033 adversely affects the rights, title, and interest of a purchaser for value, encumbrancer for value,

or lessee for value who is without actual knowledge of the restraining order.

Comment. Section 2034 is new.

Interim Comment. Section 2034 continues former Section 2031 without substantive change.

Fam. Code § 2255 (technical amendment). Attorney's fees and costs

SEC. \_\_\_\_\_. Section 2255 of the Family Code is amended to read:

2255. The court may grant attorney's fees and costs in accordance with ~~Part 5 (commencing with Section 270) of Division 2 Chapter 3.5 (commencing with Section 2027)~~ of Part 1 in proceedings to have the marriage adjudged void and in those proceedings based upon voidable marriage in which the party applying for attorney's fees and costs is found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage for which a judgment of nullity is sought.

Comment. Section 2255 continues former Civil Code Section 4456 without substantive change. A reference to Chapter 3.5 (commencing with Section 2027) of Part 1 has been substituted for the narrower reference to former Civil Code Section 4370. This is not intended as a substantive change.

Interim Comment. Section 2255 is amended to revise a cross-reference.

Fam. Code § 3028 (technical amendment). Compensation for failure to assume caretaker responsibility or for thwarting visitation or custody rights

SEC. \_\_\_\_\_. Section 3028 of the Family Code is amended to read:

3028. (a) The court may order financial compensation for periods when a parent fails to assume the caretaker responsibility or when a parent has been thwarted by the other parent when attempting to exercise visitation or custody rights contemplated by a custody or visitation order entered under this code, including, but not limited to, an order for joint physical custody, or by a written or oral agreement between the parents.

(b) The compensation shall be limited to (1) the reasonable expenses incurred for or on behalf of a child, resulting from the other

parent's failure to assume caretaker responsibility or (2) the reasonable expenses incurred by a parent for or on behalf of a child, resulting from the other parent's thwarting of the parent's efforts to exercise visitation or custody rights. The expenses may include the value of caretaker services, but are not limited to the cost of services provided by a third party during the relevant period.

(c) The compensation may be requested by noticed motion or an order to show cause, which shall allege, under penalty of perjury, (1) a minimum of one hundred dollars (\$100) of expenses incurred or (2) at least three occurrences of failure to exercise visitation or custody rights or (3) at least three occurrences of the thwarting of efforts to exercise visitation or custody rights within the six months before filing of the motion or order.

(d) Attorney's fees shall be awarded to the prevailing party upon ~~a showing of the nonprevailing party's ability to pay.~~

Comment. Section 3028 continues former Civil Code Section 4700(b) without substantive change. In subdivision (a), a reference to "order entered under this code" has been substituted for a narrower reference to "order entered pursuant to this part." The former reference to "this part" referred to the former Family Law Act (former Part 5 (commencing with Section 4000) of Division 4 of the Civil Code). This is not intended as a substantive change. The provision in former Civil Code Section 4700(b) requiring "a showing of the nonprevailing party's ability to pay" is continued in Section 270 without substantive change. See also Sections 3003 ("joint legal custody" defined), 3556 (custodial parent's failure to implement noncustodial parent's custody or visitation rights does not affect noncustodial parent's duty of support).

Interim Comment. Section 3028 is amended to delete the requirement in subdivision (d) of "a showing of the nonprevailing party's ability to pay." This requirement is continued in Section 270.

Fam. Code § 3557 (added). Attorney's fees for enforcement of support order or civil penalty for child support delinquency

SEC. \_\_\_\_\_. Section 3557 is added to the Family Code, to read:

3557. Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of the party's rights, shall award reasonable attorney's fees to:

(a) A custodial parent or other person to whom payments should be made in any action to enforce any of the following:

(1) An existing order for child support.

(2) A penalty incurred pursuant to Chapter 5 (commencing with Section 4720) of Part 5 of Division 9.

(b) A supported spouse in an action to enforce an existing order for spousal support.

Comment. Section 3557 continues former Civil Code Section 4370(c)-(d) without substantive change. Subdivision (a)(2) continues language that was added in 1991, but chaptered out by a later-enacted bill. See 1991 Cal. Stat. ch. 110, § 4, chaptered out by 1991 Cal. Stat. ch. 500, § 1. See also Section 3652 (attorney's fees in order modifying or terminating child support order).

Interim Comment. Section 3557 continues former Section 273 without change.

Fam. Code § 8800 (technical amendment), Attorney-client relationship

SEC. \_\_\_\_\_. Section 8800 of the Family Code is amended to read:

8800. (a) The Legislature finds and declares that lawyering may be deficient when conflict of interest deprives the client of undivided loyalty and effort. The Legislature further finds and declares that the relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to the most conscientious fidelity.

(b) The Legislature finds that Rule 2-111(A)(2) of the State Bar Rules of Professional Conduct provides that an attorney shall not withdraw from employment until the attorney has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(c) The Legislature declares that in an independent adoption proceeding, whether or not written consent is obtained, multiple representation by an attorney should be avoided whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise. The Legislature finds and declares that it is the duty of the attorney when a conflict of interest occurs to withdraw promptly from any case, advise the parties to retain independent

counsel, refrain from taking positions in opposition to any of these former clients, and thereafter maintain an impartial, fair, and open attitude toward the new attorneys.

(d) Notwithstanding any other law, it is unethical for an attorney to undertake the representation of both the prospective adoptive parents and the birth parents of a child in any negotiations or proceedings in connection with an adoption unless a written consent is obtained from both parties. The written consent shall include all of the following:

(1) A notice to the birth parents, in the form specified in this section, of their right to have an independent attorney advise and represent them in the adoption proceeding and that the prospective adoptive parents may be required to pay the reasonable attorney's fees up to a maximum of five hundred dollars (\$500) for that representation, unless a higher fee is agreed to by the parties.

(2) A notice to the birth parents that they may waive their right to an independent attorney and may be represented by the attorney representing the prospective adoptive parents.

(3) A waiver by the birth parents of representation by an independent attorney.

(4) An agreement that the attorney representing the prospective adoptive parents shall represent the birth parents.

(e) Upon the petition or motion of any party, or upon motion of the court, the court may appoint an attorney to represent a child's birth parent or parents in negotiations or proceedings in connection with the child's adoption.

(f) The birth parent or parents may have an attorney, other than the attorney representing the interests of the prospective adoptive parents, to advise them fully of the adoption procedures and of their legal rights. The birth parent or parents also may retain an attorney to represent them in negotiations or proceedings in connection with the child's adoption. The court may award attorney's fees and costs for just cause ~~and based upon the ability of the parties to pay those fees and costs.~~

(g) In the initial communication between the attorney retained by or representing the prospective adoptive parents and the birth parents,

or as soon thereafter as reasonable, but before any written consent for dual representation, the attorney shall advise the birth parents of their rights regarding an independent attorney and that it is possible to waive the independent attorney.

(h) Any written consent to dual representation shall be filed with the court before the filing of the birth parent's consent to adoption.

Comment. Section 8800 continues former Civil Code Section 224.10 without substantive change. In subdivisions (f) and (g), references to "attorney" have been substituted for "counsel" for internal consistency. The provision in former Civil Code Section 224.10 that an award of attorney's fees and costs must be based on "the ability of the parties to pay" is continued in Section 270 without substantive change. See also Sections 8512 ("birth parent" defined), 8542 ("prospective adoptive parent" defined).

Interim Comment. Section 8800 is amended to delete the requirement in subdivision (f) that an award of attorney's fees and costs must be based on "the ability of the parties to pay." This requirement is continued in Section 270.

## APPENDIX

### Revised Comments

#### **Code Civ. Proc. § 412.21. Temporary restraining orders in summons**

**Comment.** Former Section 412.21 is continued without substantive change in Part 3 (commencing with Section 231) of Division 2 of the Family Code and Family Code Sections ~~2030~~ 2033 and 7700.

#### **Fam. Code § 754. Limitation on disposition of separate property residence if notice of pendency of proceeding recorded**

**Comment.** Section 754 continues former Civil Code Section 5102(b) without substantive change. See also Section 700 (real property includes leasehold interests in real property).

Section 754 provides a means of restraining transfer or encumbrance of a separate property dwelling for a three-month period during the pendency of separation, annulment, or dissolution proceedings. The restraint applies to voluntary dispositions of the dwelling, as well as involuntary dispositions, such as pursuant to a writ of execution. As to the authority of the court to restrain transfer during pendency of these proceedings, see Section 2035. See also Section ~~2030~~ 2033 (temporary restraining order in summons). A community property dwelling may not be transferred or encumbered without joinder or consent of both spouses. See Sections 1100(c) (disposition or encumbrance of personal property family dwelling), 1102 (lease, transfer, or encumbrance of real property).

For background on former Civil Code Section 5102, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2630 (1980).

#### **Fam. Code § 2035. Ex parte protective orders during pendency of proceeding**

**Comment.** Section 2035 continues the first paragraph of former Civil Code Section 4359(a) without substantive change. Subdivision (c) also continues the third part of former Civil Code Section 5102(a) without substantive change. The third part of former Civil Code Section 5102(a) duplicated, in substance, former Civil Code Section 4359(a)(3), both former sections provided for ex parte orders for temporary exclusion from a dwelling in dissolution, nullity, or legal separation proceedings.

The language in both of the former sections limiting their application to dissolution, nullity, or legal separation proceedings has been omitted as surplus. See Section 2000 (application of part). The reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The reference to Part 4 (commencing with Section 240) of Division 2 has been substituted for the former reference to Code of Civil Procedure Section 527 found in both former sections. This is not a substantive change, since Part 4 (commencing with Section 240) of Division 2 is drawn from and duplicates the applicable parts of Code of Civil Procedure Section 527.

In subdivision (b), the word "telephoning" has been added. This is not a substantive change. See Section 5505 ("protective order" defined); Cal. R. Ct. 1285.05 (mandatory Judicial Council temporary restraining order form).

For general provisions relating to ex parte temporary restraining orders, see Part 4 (commencing with Section 240) of Division 2. See also Sections ~~2030~~ 2033 (temporary restraining order in summons), 2036.5 (exclusion from dwelling following notice and hearing), 3100, 3101 (visitation rights where domestic violence prevention order in effect). For comparable provisions, see Sections 5550, 5650, 5700 (Domestic Violence Prevention Act), 7710 (Uniform Parentage Act).

**Fam. Code § 2255. Attorney's fees and costs**

**Comment.** Section 2255 continues former Civil Code Section 4456 without substantive change. A reference to ~~Part 5 (commencing with Section 270) of Division 2 Chapter 3.5 (commencing with Section 2027) of Part 1~~ has been substituted for the narrower reference to former Civil Code Section 4370. This is not intended as a substantive change.

**Fam. Code § 3585. Support order based on agreement between parents**

**Comment.** Section 3585 continues the first two sentences of former Civil Code Section 4811(a) without substantive change. A reference to "parents" has been substituted for the former reference to "parties." The phrase "based on the agreement" has been added to the second sentence. Neither change is intended to be substantive. The rule in former Civil Code Section 4811(c), limiting application of this section to property settlement agreements entered into on or after January 1, 1970, has been omitted as obsolete. See also Sections ~~273~~ 3557 (attorney's fees for enforcement of support order), 3017 (support order required where parent receiving public assistance), 3651 (modification or termination of support order based on agreement), 4013 (child support obligation discharged in bankruptcy). For a comparable provision relating to spousal support, see Section 3590.

**§ 3587. Court order to effectuate agreement for support for adult child**

**Comment.** Section 3587 continues the first sentence of former Civil Code Section 4700.9 without substantive change. A reference to "parents" has been substituted for the former reference to "parties." This is not intended as a substantive change. The language "and to make a support order to effectuate the agreement" is new, but was implied by the last sentence of former Civil Code Section 4700.9, which is superseded by Family Code Section 4500. See also Sections ~~273~~ 3557 (attorney's fees for enforcement of support order), 3901 (duty to support high school student), 3910 (duty to support incapacitated adult child), 4000 (civil action to enforce parent's duty to support), 4500 (support orders enforceable under this code).

**§ 3590. Support agreement severable and enforceable by court**

**Comment.** Section 3590 continues the first two sentences of former Civil Code Section 4811(b) without substantive change. For a provision limiting applicability of this section, see Section 3593. For a comparable provision relating to child support, see Section 3585.

Absent a written agreement otherwise, spousal support terminates upon death of either party or upon remarriage of the supported party. See Section 4337. See also Sections ~~273~~ 3557 (attorney's fees for enforcement of support order), 3592 (agreement discharged in bankruptcy), 4302 (no support for spouse living separate by agreement unless stipulated), 4323 (agreement concerning effect of cohabitation on spousal support), 4336 (agreement terminating spousal support jurisdiction), 4360(b) (agreement that annuity, life insurance, or trust for spousal support may not be modified or terminated).

**§ 3600. Order for support during pendency of proceeding**

**Comment.** Section 3600 continues the first sentence of former Civil Code Section 4357(a) without substantive change. The language describing the support proceedings to which this section applies is drawn from the first sentence of former Civil Code Section 4700(a)(1), with the addition of language to make clear that this section applies to a child for whom support is authorized under Section 3901. This is not intended as a substantive change. The word "support" has been substituted for "support and maintenance" with reference to support of a husband or wife, since "maintenance" is surplus. The word "support" has been substituted for "support and education" with reference to support of a child. This is not a substantive change. See Section 150 (when used with reference to minor child, "support" includes education). A reference to "child"

has been substituted for "children." This is not a substantive change. See Section 10 (singular includes plural). A reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court).

See also Sections 240-245 (ex parte support orders), ~~273~~ 3557 (attorney's fees for enforcement of support order), 2254 (order for support of putative spouse), 3017 (support order required where parent receiving public assistance).

#### **§ 3652. Attorney's fees and court costs**

**Comment.** Section 3652 continues the seventh sentence of former Civil Code Section 4700(a)(1) without substantive change. A reference to "terminating" has been substituted for "revoking." This is not a substantive change. See also Section ~~273~~ 3557 (attorney's fees for enforcement of support order).

#### **Fam. Code § 3666. Enforcement**

**Comment.** Section 3666 continues without substantive change the third sentence of the last paragraph of former Civil Code Section 4700.2(b) and the third sentence of the last paragraph of former Civil Code Section 4801.1(b). See also Section ~~273~~ 3557 (attorney's fees for enforcement of support order).

#### **Fam. Code § 3768. Liability for failure to comply with assignment**

**Comment.** Section 3768 continues former Civil Code Section 4726.1(g) without substantive change. See also Sections ~~273~~ 3557 (attorney's fees for enforcement of support order), 2050-2053 (notice to insurance carriers in dissolution, nullity, or legal separation proceeding).

#### **Fam. Code § 4000. Civil action to enforce parent's duty to support**

**Comment.** Section 4000 continues former Civil Code Section 4703 without substantive change. The reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The reference to the duty to provide maintenance and education to a child has been omitted as surplus. See Section 150 ("support" includes maintenance and education when used in reference to child).

Section 4000 supersedes the second sentence of former Civil Code Section 196a, the second sentence of the first paragraph of former Civil Code Section 196.5, the first sentence of former Civil Code Section 248, insofar as it gave a child the right to enforce the duty of support, and the second sentence of the first paragraph of former Civil Code Section 4704.5.

For a provision allowing a county to proceed on behalf of the child to enforce the parent's duty of support, see Section 4002. For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relating to enforcement of support orders, see Part 5 (commencing with Section 4500). See also Sections ~~273~~ 3557 (attorney's fees for enforcement of support order), 3017 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or for thwarting other parent's visitation or custody rights), 3556 (effect of failure to implement custody or visitation rights).

#### **Fam. Code § 4001. Order for child support**

**Comment.** Section 4001 continues the first sentence of former Civil Code Section 4700(a)(1) without substantive change. The reference to the duty to provide maintenance and education to a child has been omitted as surplus. See Section 150 ("support" includes maintenance and education when used in reference to child). A reference to Section 3901 has been added to make clear that this section applies to a child for whom support is authorized under that section.

For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relating to enforcement of support orders, see Part 5 (commencing with Section 4500).

See also Sections 273 3557 (attorney's fees for enforcement of support order), 3017 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or thwarting other parent attempting to exercise custody or visitation rights), 3556 (effect of failure to implement custody or visitation rights).

**Fam. Code § 4002. Enforcement by county on behalf of child**

**Comment.** Section 4002 continues former Civil Code Section 248 without substantive change to the extent that the former section related to enforcement of child support by the county.

For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relation to enforcement of support orders, see Part 5 (commencing with Section 4500). See also Sections 273 3557 (attorney's fees for enforcement of support order), 3017 (support order required where parent receiving public assistance), 3556 (effect of failure to implement custody or visitation rights). For comparable provisions, see Section 4303 (county enforcement of duty to provide spousal support), 4403 (county enforcement of duty to support parent).

**Fam. Code § 4005. Factors in determining amount of child support**

**Comment.** Subdivision (a) of Section 4005 continues former Civil Code Section 246 without substantive change to the extent it related to child support. Subdivision (b) generalizes the second sentence of former Civil Code Section 4700(a)(1), which formerly applied to support of a minor child, to apply to all cases of child support, including support of a child described in Section 3910 (adult child who is incapacitated from earning a living and without sufficient means).

See also Sections 273 3557 (attorney's fees for enforcement of support order), 3017 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or thwarting other parent attempting to exercise custody or visitation rights), 3556 (effect of failure to implement custody or visitation rights), 3805 (deferred sale of home order as child support), 4006 (health insurance as factor in child support).

**Fam. Code § 4012. Security for payment**

**Comment.** Section 4012 continues the third sentence of former Civil Code Section 4700(a)(1) without substantive change. The former reference to parents has been omitted as surplus. See Section 10 (singular includes plural). See also Sections 273 3557 (attorney's fees for enforcement of support order), 4550-4573 (deposit of money to secure future child support payments), 4600-4641 (deposit of assets to secure future child support payments). For a provision relating to spousal support, see Section 4339 (security for payment of spousal support).

**Fam. Code § 4320. Circumstances to be considered in ordering spousal support**

**Comment.** Section 4320 continues former Civil Code Section 4801(a)(1)-(10) without substantive change. In the introductory clause, the reference to "under this part" has been added to make clear that the court is only required to consider these factors when making an order for permanent spousal support. For provisions dealing with temporary support orders, see Chapter 4 (commencing with Section 3600) of Part 1. In subdivisions (a)-(c), the references to parties have been substituted for the former references to spouses. This is not a substantive change and conforms the terminology of subdivisions (a)-(c) with that of the remainder of the subdivisions in this section. This section supersedes former Civil Code Section 246 to the extent it related to support of a spouse.

See Section 4360 (in determining supported spouse's needs under Section 4320, court may include amount sufficient for annuity, insurance, or trust to provide support in event of supporting spouse's death). See also Sections 273 3557 (attorney's fees for enforcement of support order), 2641 (reimbursement for community contributions to education or training), 3592 (support order where agreement for support of spouse discharged in bankruptcy).

**Fam. Code § 4330. Order for spousal support in dissolution or legal separation proceeding**

**Comment.** Section 4330 continues the first sentence of former Civil Code Section 4801(a) without substantive change. The reference to Chapter 2 (commencing with Section 4320) has been added. This is not intended as a substantive change. See also Section 273 3557 (attorney's fees for enforcement of support order).

**Fam. Code § 4500. Support orders enforceable under this code**

**Comment.** Section 4500 continues former Civil Code Section 4385 without substantive change. References to "this code" have been substituted for the former references to "this chapter" and "this part," which formerly referred to the provisions for enforcement found in the former Family Law Act. The former references to both "judgment" and "decree" have been omitted as surplus. See Sections 100 ("order" includes decree, as appropriate), 155 ("support order" means judgment or order of support). The reference to "family" support is new and is consistent with Section 4501. See also Sections 273 3557 (attorney's fees and costs for enforcement of support order), 290-291 (enforcement of judgments and orders).

This section supersedes the last sentence of former Civil Code Section 4700.9 (child support orders based on agreement of parties to pay for support of adult child enforceable in same manner as other child support award).

For background on former Civil Code Section 4385, see 16 Cal. L. Revision Comm'n Reports 2143 (1982).

**Fam. Code § 4728. Enforcement of penalties**

**Comment.** Section 4728 continues former Civil Code Section 4700.11(i) without substantive change. See also Section 273 3557 (attorney's fees in action to enforce penalty).

**Fam. Code § 4803. Cumulative remedies; attorney's fees**

**Comment.** Section 4803 continues former Code of Civil Procedure Section 1654 without substantive change. See also Sections 200 (jurisdiction in superior court), 273 3557 (attorney's fees and costs for enforcement of support order).

**Fam. Code § 4804. Obligor in this state bound by duty of support, regardless of residence of obligee**

**Comment.** Section 4804 continues former Code of Civil Procedure Section 1655 without substantive change. See also Sections 273 3557 (attorney's fees and costs for enforcement of support order), 4803 (limitation on recovery of attorney's fees from opposing party for prosecuting or defending action).

**Fam. Code § 4805. Representation by private counsel**

**Comment.** Section 4805 continues former Code of Civil Procedure Section 1655.5 without substantive change. See also Sections 273 3557 (attorney's fees and costs for enforcement of support order), 4803 (limitation on recovery of attorney's fees from opposing party for prosecuting or defending action).

**Fam. Code § 4825. Initiation of proceedings by prosecuting attorney or Attorney General**

**Comment.** Section 4825 continues former Code of Civil Procedure Section 1674 without substantive change. See also Sections 273 3557 (attorney's fees and costs for enforcement of support order), 4803 (limitation on recovery of attorney's fees from opposing party for prosecuting or defending action).

**Fam. Code § 4833. Order for support or reimbursement; enforcement of order**

**Comment.** Section 4833 continues former Code of Civil Procedure Section 1682 without substantive change. See also Sections ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4803 (limitation on recovery of attorney's fees from opposing party for prosecuting or defending action).

**Fam. Code § 4851. Prosecuting attorney or Attorney General represents public interest in enforcing support obligations**

**Comment.** Section 4851 continues former Code of Civil Procedure Section 1698.2 without substantive change. The reference to proceedings under this chapter, meaning proceedings under the Uniform Reciprocal Enforcement of Support Act, has been substituted for the former reference to proceedings under "this part," meaning Part 3 (commencing with Section 1063) of the Code of Civil Procedure (Special Proceedings of a Civil Nature). This is not intended as a substantive change and corrects what appears to have been an error in the former section. See also Sections ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4803 (limitation on recovery of attorney's fees from opposing party for prosecuting or defending action).

**Fam. Code § 5100. Enforcement of child or family support without prior court approval**

**Comment.** Section 5100 continues the first sentence of former Civil Code Section 4383(a) without substantive change. The former references to both "judgment" and "decree" have been omitted as surplus. See Sections 100 ("order" includes decree, as appropriate), 155 ("support order" means judgment or order of support).

This section permits enforcement of a child or family support order without the necessity of obtaining prior court approval under Section 290, so long as the amounts sought to be collected are not overdue by a period greater than that set out in this section. See Sections 290-291 (court approval necessary to enforce amounts overdue for a period greater than that set out in Sections 5100-5104).

See also Sections 150 ("support" includes maintenance and education when used in reference to minor child), ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4011 (priority of child support payments), 4500 (support orders enforceable under this code), 4502 (renewal of support judgment), 5102 (calculating period of enforcement of installment payments); Code Civ. Proc. § 683.130 (application for renewal of judgment). For a similar rule relating to spousal support, see Section 5101 (enforcement of spousal support without prior court approval).

For background on former Civil Code Section 4383, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2616 (1980).

**Fam. Code § 5101. Enforcement of spousal support without prior court approval**

**Comment.** Section 5101 continues the second sentence of former Civil Code Section 4383(a) without substantive change. A reference to Section 290 has been added. This is not a substantive change and conforms with Section 5100. The former references to both "judgment" and "decree" have been omitted as surplus. See Sections 100 ("order" includes decree, as appropriate), 155 ("support order" means judgment or order of support).

This section permits enforcement of a spousal support order without the necessity of obtaining prior court approval under Section 290, so long as the amounts sought to be collected are not overdue by a period greater than that set out in this section. See Sections 290-291 (court approval necessary to enforce amounts overdue for period greater than that set out in Sections 5100-5104).

See also Sections ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4502 (renewal of support judgment), 5102 (calculating period of enforcement of installment payments); Code Civ. Proc. § 683.130 (application for renewal of judgment). For a similar rule relating to child support, see Section 5100 (enforcement of child support without prior court approval).

For background on former Civil Code Section 4383, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2616 (1980).

**Fam. Code § 5103. Enforcement of support against employee pension benefit plan**

**Comment.** Subdivisions (a) and (b) of Section 5103 continue the last two sentences of former Civil Code Section 4383(a) without substantive change. The former references to both "judgment" and "decree" have been omitted as surplus. See Sections 100 ("order" includes decree, as appropriate), 155 ("support order" means judgment or order of support). In subdivision (a), "the proceeding in which the support order was obtained" has been substituted for "a proceeding under this part," meaning the former Family Law Act, former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code. In subdivisions (a) and (b), references to "family" support are new and are consistent with the rule stated in Section 4501. See Section 4501 (family support order enforceable in same manner and to same extent as child support order).

Subdivision (c) continues former Civil Code Section 4383(c) without substantive change. See also Sections 80 ("employee pension benefit plan" defined), ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4011 (priority of child support payments).

For background on former Civil Code Section 4383, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2616 (1980).

**Fam. Code § 5104. Application for writ**

**Comment.** Section 5104 continues subdivision (b) of former Civil Code Section 4383 without substantive change. This section provides technical requirements that must be complied with in addition to the general provisions governing execution. The affidavit provides the court clerk with the information needed to issue the writ and informs the judgment debtor concerning the nature of the debt sought to be collected. If no interest is sought on the amount due and unpaid, the affidavit need state only the total amount. If interest is sought, the affidavit need state only the total amount of interest and also state the amount of each unpaid installment and the date it became due so that the judgment debtor can verify that the interest was accurately computed. See also Sections ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 4502 (renewal of judgment for support); Code Civ. Proc. § 683.130 (application for renewal of judgment).

For background on former Civil Code Section 4383, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2616 (1980).

**Fam. Code § 5241. Penalty for employer failing to comply with order**

**Comment.** Section 5241 continues former Civil Code Section 4390.10(b) without substantive change. See also Sections ~~273~~ 3557 (attorney's fees and costs for enforcement of support order), 5290 (civil penalty for using assignment order as grounds for refusing to hire or for discharging or taking disciplinary action against employee).

**Fam. Code § 5755. Order for payment of attorney's fees and costs**

**Comment.** Section 5755 continues former Code of Civil Procedure Section 547(e) without substantive change. See also Sections ~~270-275~~ 270-272 (general provisions for attorney's fees and costs).

**Fam. Code § 5805. Appointment of counsel to represent petitioner in enforcement proceeding; order that respondent pay petitioner's attorney's fees and costs**

**Comment.** Section 5805 restates former Code of Civil Procedure Section 553 without substantive change. In subdivision (a), the language describing the order has been revised to

conform to subdivision (a) of Section 5804. This is not a substantive change. The words "petitioner" and "respondent" have been substituted for "plaintiff" and "defendant" to conform to revisions made to former law. See 1990 Cal. Stat. ch. 752. See also Sections ~~270-275~~ 270-272 (general provisions for attorney's fees and costs).

**Fam. Code § 7640. Award of attorney's fees and other costs**

**Comment.** Section 7640 continues former Civil Code Section 7011 without change. This section is the same as the first sentence of Section 16 of the Uniform Parentage Act (1973). For general provisions relating to the award of attorney's fees and costs, see Sections ~~270-275~~ 270-272.

SUMMARY OF EXISTING FAMILY CODE PROVISIONS ON  
ATTORNEY'S FEES AND APPOINTMENT OF COUNSEL

DIVISION 2. GENERAL PROVISIONS

§§ 270-272: Court may award attorney's fees in proceeding for dissolution, nullity, or legal separation.

§ 273: Court shall award attorney's fees to a custodial parent in an action to enforce an existing order for child support or to enforce a civil penalty for child support delinquency, or to a supported spouse in an action to enforce an existing order for spousal support.

§ 274: Court may award attorney's fees as a sanction for obstructive conduct.

§ 275: Court may order payment of attorney's fees directly to the attorney, and attorney may enforce the award.

DIVISION 4. RIGHTS AND OBLIGATIONS DURING MARRIAGE

§ 916: If a person is compelled to pay a debt that has been assigned to his or her spouse, the person is entitled to reimbursement, and may recover reasonable attorney's fees incurred in enforcing the right of reimbursement.

§ 1101(g): Allows attorney's fees in connection with spouse's claim for breach of fiduciary duty.

DIVISION 6. NULLITY, DISSOLUTION, AND LEGAL SEPARATION

§ 2010: Court has jurisdiction to award attorney's fees and costs in a proceeding for dissolution, nullity, or legal separation.

§ 2030: A restraining order in a summons shall not preclude use of community property to pay attorney's fees to retain counsel.

§ 2255: Applies to a proceeding for nullity of marriage, but qualifies Section 270 by requiring that the person awarded attorney's fees be innocent of fraud or wrongdoing in entering the marriage.

§ 2330.5: Income and expense declaration not required in default proceeding if there is no demand for money, property, costs, or attorney's fees in the petition.

§ 2334: During a continuance to allow reconciliation, the court may make orders for attorney fees.

DIVISION 8. CUSTODY OF CHILDREN

§ 3027: Court may award attorney's fees for false accusation of child abuse in a child custody proceeding.

§ 3028: Court shall award attorney's fees for thwarting visitation rights.

§ 3113: Authorizes a recommendation to the court for appointment of counsel for the child in a child custody proceeding.

§§ 3150-3153: Court may appoint counsel for a minor child in a custody or visitation proceeding.

§ 3174: Mediator may recommend to court that counsel be appointed for minor child.

§ 3407(g): If court finds that it is clearly an inappropriate forum for child custody determination, court may award attorney's fees. This is in the Uniform Child Custody Jurisdiction Act.

§ 3408(e): If a child has been wrongfully taken from another state, court may award attorney's fees. This is in the Uniform Child Custody Jurisdiction Act.

§ 3416: If a person violates a custody decree of another state, court may award attorney's fees. This is in the Uniform Child Custody Jurisdiction Act.

#### DIVISION 9. SUPPORT

§ 3652: Court may award attorney's fees in an order modifying or terminating child support.

§ 4002: If county enforces child's right of support, county may obtain attorney's fees. Section 270 expressly excludes a governmental entity.

§ 4303: If county enforces right to spousal support, county may obtain attorney's fees. Section 270 expressly excludes a governmental entity.

§ 4403: If county furnishes support to a parent who should have been supported by an adult child, county may obtain attorney's fees from the adult child.

§ 4803: Limits attorney's fees to bad faith cases. This is in Uniform Reciprocal Enforcement of Support Act.

§ 5283(d): Employer who fails to provide information to district attorney may be assessed attorney's fees.

#### DIVISION 10. PREVENTION OF DOMESTIC VIOLENCE

§ 5755: In proceeding regarding domestic violence, court may award attorney's fees.

§ 5805: In proceeding to enforce a restraining order regarding domestic violence where court has appointed counsel, court may award attorney's fees.

## DIVISION 11. MINORS

§ 6602: Court may fix attorney's fees in litigation for a minor.

§ 6752: In approving a minor's contract, court may set aside for the minor one-half of the minor's net earnings, excluding attorney's fees for services in connection with the contract and other business of the minor.

## DIVISION 12. PARENT AND CHILD RELATIONSHIP

§ 7640: In a proceeding under the Uniform Parentage Act, court may award attorney's fees.

§ 7668: Court may continue a proceeding to terminate parental rights to appoint counsel.

§ 7827(e): In action to free child from parental custody and control, court shall appoint counsel for the parent if parent is otherwise unrepresented.

§ 7860-7864: In action to free child from parental custody and control, court may appoint counsel for the child or parent, and private counsel shall be paid by the parties, other than the child.

§ 7895: On appeal in action to free child from parental custody and control, appellate court shall appoint counsel for appellant.

## DIVISION 13. ADOPTION

§ 8800(f): In independent adoption proceeding, court may award attorney's fees.

## DIVISION 20. PILOT PROJECTS

§ 20003: If court finds extreme hardship would result from an order to advance the other party's attorney's fees under Section 20006, the court may order the proceedings to be conducted outside the pilot project and be exempt from the attorney's fee provision.

§ 20006: Unless attorney is a party or is appointed to represent a child, no attorney shall participate in pilot project proceedings. If a party chooses to be represented by an attorney, the party thereby opts out of the pilot project, and court shall require that party to advance the other party's attorney's fees.