

Memorandum 93-08

Subject: Study F-1100.4 -- Family Support (Technical Revisions)

This memorandum deals with issues relating to family support. Attached to the memorandum is a draft of proposed legislation to delete references to "family support" in the statutes on simplified modification of support orders. This restores the Family Code to the scheme used in existing law.

BACKGROUND

"Family support" order is a term used to refer to a form of support order that combines payment of child and spousal support without designating the amount payable for each. See Fam. Code § 92 ("family support" defined). The purpose of this form of order is to obtain more favorable tax treatment for the part of the order that is actually child support. For purposes of federal taxation, an amount paid for spousal support may be deducted from the taxable income of the support obligor and included as the taxable income of the support obligee. By contrast, child support is not deductible by the support obligor or included as income of the support obligee. Cal. Family Law Prac. & Proc. § 27.04 [1]. However, when drafted as a family support order, the entire amount of the order may be taxed as spousal support. In the ordinary situation where the support obligor has a higher taxable income than the support obligee, this arrangement is advantageous for both parties.

Apparently this tax advantage had previously been achieved by drafting a spousal support order, but then providing that the amount of the order would be reduced when specified events relating to the children took place, e.g., the child's death or majority. However, current tax law has substantially restricted this practice by providing that any amount of spousal support that is made contingent on an event relating to a child will be taxed as child support. Cal. Family Law Prac. & Proc. § 27.04[2][a]-[b].

Existing law does not provide a comprehensive set of rules for dealing with family support orders. Civil Code Section 4811(d) provides for the creation of family support orders and states that they may be enforced in the same manner and to the same extent as child support. Beyond this no substantive rules are

provided in existing law. However, some sections do expressly refer to family support. See, e.g., Civ. Code §§ 4383 (enforcement of support order by writ of execution), 4390 (enforcement of support by assignment), 4700.2 (simplified method of discovery before commencement of modification or termination of support); Code Civ. Proc. §§ 674 (contents and amendment of abstract of judgment), 704.160 (exceptions to rule that workers' compensation claim exempt from levy); Rev. & Tax. Code § 19100 (enforcement of support by Franchise Tax Board); Welf. & Inst. Code § 11478.5 (suspension of business or professional license for failure to pay child or family support). Other sections do not contain express references to family support. See, e.g., Civ. Code § 4384.5 (child and spousal judgments exempt from renewal requirement); Code Civ. Proc. § 683.130 (application for renewal of judgment).

TREATMENT IN THE FAMILY CODE

The Family Code has not attempted to provide a comprehensive set of rules relating to family support, but has attempted to clean up some technical problems.

Addition of References to Family Support

Where an existing section referred to family support, the reference is continued in the Family Code. See, e.g. Fam. Code §§ 3660 (purpose of procedure for simplified discovery before modification or termination proceeding), 4506 (abstract of judgment), 5100 (enforcement of support order by writ of execution). Where a section did not refer to family support, but it was clear that it would apply to family support, a reference was added. See Fam. Code §§ 3552 (tax returns of parties), 4500 (support orders enforceable under code), 4502 (support judgments exempt from renewal requirement), 4505 (submission of list of places applied for employment where default in support due to unemployment).

In addition, general definitions were added that include child, family and spousal support. See Sections 150 ("support" defined), 3650 ("support order" defined for purposes of modification or termination of support); Code Civ. Proc. § 680.145 ("child support" defined for purposes of the Enforcement of Judgments Law to include family support). The addition of Section 680.145 to the Enforcement of Judgments Law ensures that sections enacted in the future that fail to make an express reference to family support will nevertheless be treated the same as those that do so.

Clarification of Application of Procedure for Simplified Modification to Family Support Orders

A second technical problem that the Family Code attempts to solve is whether or not the provisions for simplified modification of support orders should be available to modify a family support order. It seems clear that, where a single rule applies to both child and spousal support, it should also be applicable to family support. However, where separate rules are provided for child and spousal support it may not be clear which rule should be applied to family support.

Family Code Section 3660 *et seq.*, providing for discovery before commencement of a proceeding for modification or termination of a support order, continues existing law by applying the child support rule to family support. This is consistent with the approach taken in the rules regarding enforcement. Thus, it might be inferred that family support is to be treated like child support for purposes of modification and termination.

However, in the provisions for simplified modification of a support order, there are two separate and very different standards to be applied in ordering modification. Child support orders may be either increased or decreased, but the amount cannot exceed 10 percent of the current award. Spousal support may only be increased and the amount of the increase must equal the increase in the California all consumer price index. See Fam. Code § 3687 (modification without showing of changed circumstances). The staff felt it was clear that the procedure should be available in cases of family support, and thus the staff added references to family support in Sections 3680 (purpose of article) and 3691 (notice to district attorney). But because the standards provided in Section 3687 are so different, the decision of which standard to apply to family support was deferred with the belief that practitioners would be able to provide feedback on which standard is most appropriate.

At the February 1992 workshop held by the staff to discuss the support provisions of the code, the attending practitioners did not see a clear answer to the question of which standard should be applied to family support. They also expressed some reluctance to be too explicit that family support would be treated like child support since the more emphasis that is placed on this the more likely it may be that the IRS will eliminate the ability to use family support orders in this manner.

The staff also posed the question to the State Bar Family Law Executive Committee in August of 1992. However, despite a number of contacts with the State Bar liaison the staff has yet to receive an opinion from the bar on this matter. (The staff also requested the bar to review generally the issue of family support and a print out of specific sections was provided for their review. The staff has received no response to this request either.)

As a policy matter it is not clear to the staff which rule is most appropriate. If the child support rule is applied, the spousal support portion of the order is compromised in that it is exposed to the potential of being decreased. If the spousal support rule is applied, then the child support portion of the order is compromised in that it is limited to an increase based on the CPI, which might well be less than 10% of the total amount of the award. In addition, the party paying child support is denied the opportunity to get the amount of the order decreased.

STAFF RECOMMENDATION

The 1993 Cleanup bill should revise the simplified modification provisions to eliminate references to family support, thus returning the law to its existing state. See Exhibit 1. This would ensure that when the provisions become operative on January 1, 1994, they will continue existing law, but will leave the question of whether or not the provisions are applicable to family support orders unresolved. If the Commission wishes to resolve this substantive issue, the staff could prepare a memo on these issues. In light of the number of scheduled Commission meetings, however, it would be difficult to include any legislation on the issue in the 1993 bill.

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EXHIBIT 1

Family Support (Technical Revisions)

RECOMMENDED LEGISLATION

Fam. Code § 3650 (technical amendment). "Support order" defined

SEC. ____ . Section 3650 of the Family Code is amended to read:

3650. ~~"Support~~ Unless the provision or context otherwise requires, "support order" as used in this chapter means a child, family, or spousal support order.

Comment. Section 3650 is a new provision designed to facilitate drafting. Throughout this chapter this definition of "support order" applies, in addition to the general definition of this term. See Section 155 ("support order" defined).

Interim Comment. The introductory phrase is added, making this section consistent with other definitions in this code. This is not a substantive change. For provisions dealing with the application of definitions and that contain this phrase, see Sections 50, 900, 2500, 3000, 3500, 3760, 5200, 6900, 8500.

Fam. Code § 3680 (technical amendment). Purpose of article

SEC. ____ . Section 3680 of the Family Code is amended to read:

3680. The purpose of this article is to provide an additional, simplified method for the modification of child, ~~family,~~ and spousal support orders.

Comment. Section 3680 continues former Civil Code Sections 4700.1(a) and 4801.9(a) without substantive change.

Interim Comment. This section is amended to omit the reference to "family" support. This reference was added to the Family Code and removing it is not a substantive change, but conforms the Family Code section to the language of the existing law.

Fam. Code § 3691 (technical amendment). Notice to district attorney

SEC. ____ . Section 3691 of the Family Code is amended to read:

3691. (a) The party filing a notice of motion to modify child ~~or family~~ support with the clerk pursuant to this article shall also mail a duplicate copy of the notice to the district attorney within five working days after filing.

(b) If the district attorney has previously attempted to enforce the spousal support obligation upon which the motion is based, the party filing a notice of motion to modify spousal support with the clerk pursuant to this article shall also mail a duplicate copy of the notice to the district attorney within five working days of filing.

Comment. Subdivision (a) of Section 3691 continues former Civil Code Section 4700.1(g) without substantive change. Subdivision (b) continues former Civil Code Section 4801.9(f)

without substantive change. This section requires that the duplicate copy of the notice be mailed to the district attorney. The former sections required "filing" with the district attorney. This is not intended as a substantive change.

Interim Comment. This section is amended to omit the reference to "family" support. This reference was added to the Family Code and removing it is not a substantive change, but conforms the Family Code section to the language of the existing law.