

Memorandum to the Law Revision Commission

Subject: Award of Attorney's Fees and Costs
Pursuant to Civil Code Section 137.3

I. An inquiry to the State Bar for information as to any prior State Bar history on this subject turned up the following items:

1. Excerpt from Report of Committee on Administration of Justice, 26 State Bar Journal 187 at 193 (1951):

Resolution No. 10 proposed the amendment of section 137 of the Civil Code, to add provisions authorizing the court to make an award for legal services rendered or costs incurred, prior as well as subsequent to the order of court therefor. In support, it was argued that the present rule may leave certain services uncompensated and that the value of the services can best be determined after their rendition. Thus, there is now the common practice of stipulating that the court may determine the balance of the fees at the time of trial. The presence or absence of a stipulation, it was contended, should not affect the merits and, if the suggested change were made, many preliminary proceedings would be avoided.

The Committee, in considering this proposal through its Sections, felt that objections could be raised both as to the precise form of the proposal and the necessity for a change in present statutes. For example, it was doubted whether a general provision abrogating the rule against allowances for past services was sufficient. Thus, a party for the first time could make claim for such allowance at the trial or possibly even after trial and appeal.

Subsequently, the subject received further consideration, in connection with the suggestion of the 1950 Conference that Resolution No. 45 be amended to preserve the rule that an allowance for attorney's fees ordered paid to one of the parties is enforceable by contempt. This latter suggestion was approved by the Committee. For the purpose of giving effect to it and to provide a procedure to permit allowances to be made for past services, the following revised text of proposed section 137.5 of the Civil Code was prepared and thereafter approved at the general meeting in May.

Sec. 137.5. During the pendency of any action for annulment, divorce or for separate maintenance, or for the

support, maintenance or education of children, upon an order to show cause or motion the Court may order the husband or wife or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees. Upon application, the court may in its discretion at any time thereafter increase the original award, if any, for costs and attorney's fees in such amount as may be necessary and reasonable for the prosecution or defense of the action, as the case may be, and in determining the amount of such increased costs and attorney's fees, the Court may consider costs theretofore expended and legal services theretofore performed, provided that no order shall be made for costs expended or legal services performed prior to the filing of the first such order to show cause or motion. If costs and attorney's fees are made payable to one of the parties, such order may be enforced by the Court by such order or orders as in its discretion the Court may, from time to time, deem necessary; provided, however, that the Court may, in its discretion, make such costs and attorney's fees payable, in whole or in part to the attorney entitled thereto, in which case judgment may be entered and execution levied accordingly. (Text of present section omitted; the last sentence does not reflect any change that may be made by A. B. 955, as amended.)

The Committee favors a change in the rule relating to allowance for past services substantially for the reasons summarized above.

2. Excerpt from Report of Committee on Administration of Justice,

28 State Bar Journal 256 at 269 (1953):

(B) Attorney's Fees and Costs in Domestic Relations Cases-C. C. 137.3

At the request of the Board, the Committee prepared the final text of a bill on past services in domestic relations matters. (For earlier history, see 1950 Res. 10; 1951 Report, 26 Jnl. 192.)

Amendments recommended to Civil Code 137.3 expressly authorize the court, in actions for divorce, separate maintenance, child support or annulment (subject to C. C. 87), to make an award for past services and costs, including services rendered and costs incurred prior to the filing of the complaint.

In general, the amendments also provide (1) that the court may augment or modify an award; (2) relief, i.e., for allowance for attorney's fees and costs, must be requested in the complaint, cross-complaint or answer; (3) application by order to show cause or motion, in addition to requested relief in the pleading, is required. While the amended section does now permit allowance for past services, nevertheless it is intended to require that allowances for costs and services prior to judgment be made and determined by that time. Thus, an application for such services could not be made for the first time after entry of judgment. Allowances for services and costs subsequent to the entry of judgment (for example, in connection with

an appeal, or in later enforcement proceedings) would be made on application for an order to show cause of motion. In this situation, it is believed, the application assumes more importance, as the pleadings so to speak have been merged in the judgment. Likewise, in this situation, the award could be augmented or modified.

No change is made in the wording prescribing the basis for allowances, namely, amounts "reasonably necessary" to maintain or defend the action or proceeding.

By caveat, it should be pointed out: (1) the amendments do not compel allowances for past services, but merely empower the court to act; and (2) the amended section places emphasis upon the prayer for relief in the "complaint, cross-complaint or answer." (A.B. 2438; 1953 Stats., ch. 620.)

3. Excerpt from Supplement to Second Progress Report of Senate Interim
Judiciary Committee, 1953 Regular Session:

CIVIL CODE 137.3
(Bill No. A.B. 2438)

(27) Procedure for Allowing Attorneys' Fees and Costs in
Domestic Relations Matters

The purpose of Assembly Bill 2438, amending Civil Code 137.3, is to provide in more detail for the procedure when applications are made for allowance for attorneys' fees and costs in domestic relations matters and, specifically, to empower the court to make appropriate orders without being restricted to a fixed rule as to the time when the application must be made. Under the present rule declared by case law the court may not make an allowance for past services when application is not made until they have fully performed. See Warner v. Warner, 105 C. A. 2d 763 (1951). The rule has also been broadly stated in general terms as prohibiting an allowance for past services. See Warner v. Warner, 34 C. 2d 838 (1950). As a result, unless a stipulation is entered into or there is some other special order the court is compelled to speculate in advance in making the allowance. See Warner v. Warner, 34 C. 2d 838 (1950).

The amendments proposed authorize the court to make allowance for past services and costs theretofore incurred and permit the court to augment or modify the original award. Compare on orders for additional allowance, Rose v. Rose, 109 C. 544 (1895); DeVall v. DeVall, 102 C. A. 2d 53 (1951); and on stipulation for award to be determined by, or at the time of the judgment, Farrer v. Farrer, 41 C.A. 452 (1919); Brockmiller v. Brockmiller, 57 C. A. 2d 623 (1943). It is to be noted that the word "modify" is included. See Warner v. Warner, 34 C. 2d 838, 841.

It would be necessary for the pleading to request the relief, i.e., pray for an allowance for attorney's fees and costs; application by order to show cause or motion would also be required, although as indicated such motion or order to show cause would not be required to precede the services or incurring of costs. It is to be noted also that the section distinguishes between applications for allowances before entry of judgment in the trial court and after such time. Separate treatment is given in order that the matter of services and costs prior to entry of judgment may be determined by the judgment itself (or prior thereto), and will not be continued, or be raised for the first time, thereafter.

In respect to services rendered after the entry of judgment by order to show cause or motion the court may make an allowance and thereafter upon application augment or modify any award so made. In context, the requirement for relief in the pleading does not appear to apply with equal force to applications sub-

sequent to judgment (particularly as to later enforcement proceedings).

Assembly Bill 2438 does not change the basis for allowances, namely, amounts "reasonably necessary" to maintain or defend the action or proceeding.

The amendments will eliminate the necessity for speculation in advance, or the necessity of following the present practice of stipulating that the amounts be fixed at the time of trial. Sometimes necessary steps are not taken or are overlooked and the court must then deny awards on what amount to purely technical grounds. It is believed that the new procedure will tend to decrease the volume of orders to show cause which is now substantial and which require considerable time of the courts, parties and counsel.

The bill makes the same procedure applicable to situations in annulment cases where allowances are now authorized by Section 87 of the same code.

4. The State Bar also sent a copy of the current (mimeographed) Report of the Committee on Administration of Justice to the Board of Governors. It contains the following item relevant to Section 137.3:

(7) Domestic relations-custody actions-attorney's fee.

In the 1955 annual report (30 St. Bar Jnl. 289) reference is made to the decision in Hendrix v. Hendrix, 130 C. A. 2d. 379, holding that the provisions of Section 137.3 and 137.5 of the Civil Code were not broad enough to authorize an allowance for attorney's fees where independent action is brought for the custody of minor children of the parties.

The principle of corrective legislation was approved last year.

In response to a direction for a specific text, it is recommended that the word "custody" be added to first sentence of Sections 137.3 and 137.5, e.g., "(During the pendency of) any action for . . . divorce or separate maintenance, or for the custody, support, maintenance and education of children"

As drawn, the amendment is not intended to cover guardianship proceedings, where different considerations may apply.

II. The Chairman has called my attention to the fact that the report of the Assembly Interim Committee on Judiciary, (Volume 20 No. 2, Assembly Interim Committee Reports 1953-55) contains at page 34, in the report of the Subcommittee on Domestic Relations, the following item:

B. ATTORNEYS' FEES IN DIVORCE AND ANNULMENT ACTIONS

Section 137.3 of the Civil Code provides for awarding attorneys' fees and costs in divorce and annulment actions. It

provides expressly that such an award shall be made only after an order to show cause or notice of motion has been served on the defendant when the award is made either prior to or after judgment. While Section 137.3 does not expressly provide that an order to show cause or notice of motion is necessary when an award of attorneys' fees and costs is requested in connection with a decree of annulment or an interlocutory or final decree of divorce, the courts in some counties have held that such an award is improper in the absence of an order to show cause or a notice of motion.

In the opinion of the committee this interpretation results in an unnecessary burden on the courts and litigants.

Further, there is no provision in the law at present by which a party to a divorce or annulment action can be ordered to pay attorneys' fees for services rendered to effect a reconciliation. As it is the policy of the State to preserve marriages, it seems at least as desirable to make provision for compelling payment for such services as for services rendered in bringing about a dissolution of marriage.

Recommendation

The committee recommends that Section 137.3 of the Civil Code be amended to allow the trial judge presiding at a divorce action be allowed to order payment of reasonable attorney's fees during pendency divorce actions. It also recommends that the court should be given authority to order the payment of attorney fees for services rendered in effecting reconciliations.

(You may be interested in comparing the first paragraph of this item with the first paragraph of Topic No. 15, page 31, 1955 Report of the Law Revision Commission to the Legislature.)

The Chairman states in his communication that he believes that consideration should be given by the commission to the Interim Committee's suggestion that the Section 137.3 be extended to include an order to pay attorney's fees for services rendered to effect a reconciliation. He says:

On this latter point, it may be that the matter is not within the scope of our topic but I think we should consider what, if any, recommendation we should give to the suggestion made in the recommendation of the Interim Committee.

I do not believe that any of the items referred to herein bear directly upon our study of attorney's fees and costs but am sending them to you so that you can determine this question for yourselves.

John R. McDonough, Jr.
Executive Secretary