

#F-670

5/23/84

Memorandum 84-55

Subject: Study F-670 - Attorney's Fees in Family Law Proceedings (Draft of Tentative Recommendation)

Attached to this memorandum is a draft of a tentative recommendation that implements the Commission's decision at the April meeting to recommend the family law court be given full discretion in the matter of attorney's fees. If the draft is satisfactory, we will distribute it to interested persons for comment over the summer.

Respectfully submitted,

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Assistant Executive Secretary

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS

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

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

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

This rule is now obsolete and unduly limits the discretion of the court. It results in cases requiring one party to finance the litigation of the other even though there may be substantial amounts of community assets available to defray the litigation expenses.⁶ The court should be able to review the circumstances of the parties and the litigation, and should be able to award or deny litigation expenses based on such factors as the needs of the parties and their ability to pay, and other relevant considerations. An award should be made out of any appropriate assets--community or separate property, principal or income--and in such amounts as appears reasonable and equitable.

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

An act to amend Section 4370 of the Civil Code, relating to family law proceedings.

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

6. See, e.g., In re Marriage of Folb, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).

Civil Code § 4370 (amended). Costs and attorneys' fees

SECTION 1. Section 4370 of the Civil Code is amended to read:

4370. (a) ~~During the pendency of any proceeding under this party, In a proceeding under this part or a proceeding related thereto, including an appeal or subsequent proceeding,~~ the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees. The court may award costs and attorneys' fees from any source, whether community or separate, principal or income, and in any amount, that appears reasonable and equitable. ~~; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' 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. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded.~~ Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife, of another party to the proceedings to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(b) ~~During the pendency of any proceeding under this party,~~ The court may make an award pursuant to subdivision (a) during the pendency of a proceeding and may from time to time augment or modify an award so made. An application for a temporary order making, augmenting, or modifying an award ~~of attorneys' fees or costs or both~~ shall be made by motion on notice or by an order to show cause, except that it 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, ~~or .~~
- (2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

(c) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

Comment. Section 4370 is amended to add the second sentence to subdivision (a). The other changes in Section 4370 are not substantive and are intended for purposes of reorganization and clarity only.

The second sentence is added to subdivision (a) to broaden the court's discretion in making an award of costs and attorneys' fees in a family law proceeding. The court has discretion to make an award of litigation expenses to the extent the award appears equitable, taking into account all relevant factors. Such factors may include the needs and resources of the parties, the conduct of the litigation, the reasonableness of the fees, the likelihood of collection, and tax considerations. The court is expressly authorized to order payment of litigation expenses from any source that appears proper, including the community and separate estates of the parties. This overrules language in the cases holding, for example, that the court may not require a wife to impair the capital of her separate estate in order to defray her litigation expenses. See, e.g., *In re Marriage of Jafeman*, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972); *Marriage of Hopkins*, 74 Cal. App.3d 591, 141 Cal. Rptr. 597 (1977).