

Memorandum 85-42

Subject: Study F-670 - Litigation Expenses in Family Law Proceedings

The Commission decided to submit to the 1985 Legislature its recommendation on awarding litigation expenses in family law proceedings. The purpose of the recommendation is to overrule the case law principle that the wife is not required to invade her separate property assets to pay attorney's fees and to add the conduct of the litigation as one of the factors to be considered in the award of attorney's fees.

We have not had success in finding a legislator willing to be an author for this proposal. The legislators we approached who we have been able to persuade to carry family law legislation for us in the past--Assembly Members McAlister, Isenberg, and Harris--were either not philosophically attuned to the recommendation or not willing to take on more family law legislation.

At this point in the legislative session we can no longer introduce a bill on the subject but can only amend it into another bill. Assemblyman McAlister might be willing to amend it into the family law bill he is carrying for us were we to revise it thus:

SEC. ____ . Section 4370.5 is added to the Civil Code, to read:

4370.5. (a) The court may make an award under this chapter where the making of the award, and the amount of the award, is just and reasonable under the circumstances of the respective parties.

(b) In determining what is just and reasonable under the circumstances, the court shall take into consideration both of the following:

(1) 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.

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

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

The effect of this revision is to add to our original proposal a more concrete standard by which the court determines whether an award of litigation expenses is just and reasonable under the circumstances.

This standard is the standard by which a support determination is made. After all, whether one party should be required to subsidize the attorney's fees of the other should be governed by the same economic considerations as whether one party should be required to support the other generally.

The State Bar Family Law Section, which was strongly supportive of the Commission's original recommendation on this point, has not reviewed the proposed revision. We believe it is essential to have their renewed support if we are to proceed with this recommendation.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary