

#51

6/3/65

Memorandum 65-29

Subject: Study No. 51 - Right to Support After Ex Parte Divorce

Attached to this memorandum you will find a tentative recommendation and a statute designed to carry out the policy decisions made by the Commission at the May meeting. The tentative recommendation and the Comments to the sections sufficiently explains the statute. Your attention is particularly invited to the following matters: Note the defenses provided under Sections 272 and 273. The Commission's action at the May meeting was quite general insofar as defenses are concerned. Note particularly subdivisions (b) and (c) of Section 273.

Section 276 is patterned after Civil Code Section 206.6. Is the problem pointed out in the Comment of sufficient magnitude to warrant the inclusion of such a section?

Respectfully submitted,

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Assistant Executive Secretary

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

THE RIGHT OF A FORMER SPOUSE TO MAINTAIN AN ACTION FOR SUPPORT

AFTER AN EX PARTE DIVORCE

BACKGROUND

In 1953, the California Supreme Court held in Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953), that a wife who obtained a divorce from a Connecticut court that did not have personal jurisdiction over her husband could not subsequently maintain an action for support against her husband in California. The court reasoned that, in the absence of a valid alimony award in a divorce action, the right to support is dependent upon the existence of a marriage. Hence, the divorce judgment that terminated the marriage also terminated the wife's right to support that was dependent thereon.

The California Law Revision Commission was then directed to study the ramifications of the Dimon case to determine whether the law stated therein should be revised. The Commission retained a consultant, Professor Harold W. Horowitz of the University of Southern California Law School; but, immediately after he submitted his study to the Commission, the Supreme Court decided Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959), which overrules the decision in Dimon v. Dimon.

In Hudson v. Hudson, the Supreme Court was dealing with a wife who had commenced a divorce action against her husband in California. While the action was pending, the husband obtained a decree of divorce from an Idaho court that did not have personal jurisdiction over the wife. The Supreme

Court held that notwithstanding the Idaho decree the wife could maintain her California action as an action merely for support instead of as an action for divorce and support.

The Hudson decision has remedied the substantive problems created by the Dimon decision. It is clear now that there is a continuing right to support following a divorce by a court without jurisdiction over both parties to the marriage. Several problems of detail remain, however.

First, it is not clear from the Hudson decision what form of action should be brought to enforce the continuing duty of support. The problem was not present in the Hudson case, for there a divorce action had already been commenced and provided the means for awarding support. But it is uncertain whether grounds for divorce must be shown as a condition for obtaining such relief.

Second, the grounds upon which the obligor spouse may contest an action for support following a divorce are not clear. The dissenting opinion in the overruled Dimon case suggests that the obligor spouse may contest the merits of the divorce; but there is no clear authority to that effect, and the law to be applied in determining whether the obligor has a defense is uncertain.

Third, during a marriage, an obligor spouse may obtain a judgment of divorce that terminates his duty of support. In fact, if the obligor is granted a divorce and no divorce is granted to the obligee at the same time, a California court is without jurisdiction to order the obligor to continue to support the obligee. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Following a divorce decreed by a court without jurisdiction over both parties, an obligor spouse no longer has an action for divorce available to terminate the duty of support. Hence, some other form of action is needed so that the possibility of being required to support the

obligee can be ended before the witnesses necessary to establish the obligor's defense to such an action have disappeared.

RECOMMENDATION

To resolve these problems, the Law Revision Commission recommends the enactment of legislation embodying the following principles:

1. The right of an obligee spouse to support following a divorce decreed by a court without jurisdiction over both spouses (referred to hereinafter as "ex parte divorce") should be made statutory. If the right is statutory, the nature of the right--when it arises and when it terminates--can be settled without awaiting the prosecution of numerous appeals to provide the courts with an opportunity to define the nature of the right.

2. There should be no right to support following an ex parte divorce if the obligor had a good defense to a claim for support in any divorce action, support action, or separate maintenance action that might have been brought against him at the time of the divorce. The law to be utilized in determining whether he had such a good defense should be the law of his domicile at the time of the divorce. An obligee should not have the power to go to a state with easy divorce laws and short residence requirements and thus cut off the good defenses the obligor might have been able to assert if sued personally at his domicile.

3. There should be no right to support following an ex parte divorce if, under the law of the obligee's domicile at the time of the divorce, the obligee's right to support, if any, did not survive the divorce. This recommendation is suggested in the dissenting opinion in the Dimon case and the majority opinion in the Hudson case. California does not have a greater interest in the right of a divorced spouse to support following an ex parte divorce than does the state of the obligee's own domicile. If that state has terminated her right of support, there is no reason for California to resurrect her right.

4. There should be no right to support following an ex parte divorce if the obligee spouse unjustifiably abandoned the obligor and made no effort to return prior to the divorce. Under Civil Code Sections 175 and 176, a California spouse is under no duty to support a spouse who has unjustifiably abandoned the obligor. Where such a state of abandonment exists at the time of the ex parte divorce, the divorce should end any possibility of the re-creation of the right to support thereafter.

5. There should be no right to support following an ex parte divorce if the spouses are living separately at the time of divorce pursuant to an agreement not providing for support. Under Civil Code Section 175, a husband is not liable for the support of his wife if they are living separately pursuant to such an agreement. If during such time the marriage is terminated by an ex parte divorce, the divorce should end any possibility of the re-creation of the right to support thereafter.

6. The right to support, when not terminated by an ex parte divorce, should be terminated thereafter under some circumstances. If the obligee remarries, there should be no further right to look to the original spouse for support thereafter. Since an action for support looks to the equity side of the court for relief, any other conduct on the part of the obligee such that it would be inequitable to require the obligor to provide further support should be sufficient to terminate the support obligation. For example, a divorced wife might prefer to live with a man without marrying him in order to avoid termination of her right to support from her former husband. A court under such circumstances might deem it to be inequitable to require the former husband to provide her support under such circumstances. The right to support, too, should end if a long period of time elapses without

any assertion of the right by the obligee spouse. The Commission believes that support rights arising out of a former marriage should cease if the obligor is not served with process in an action to enforce such rights within 10 years after the judgment of divorce becomes final.

7. The statutes should indicate that an action to enforce support rights that continue after an ex parte divorce may be brought under either the Uniform Civil Liability for Support Act (CIVIL CODE §§ 241-254) or the Uniform Reciprocal Enforcement of Support Act (CCIE CIV. PROC. §§ 1650-1692). This will make it clear that the obligee need only show a right to support in order to obtain necessary relief and that it is unnecessary to proceed under the statutes governing the award of support in divorce actions.

8. The obligor should be granted the right to bring an action after an ex parte divorce in order to obtain an adjudication that the obligee's right to support has ended.

9. In any action in which the court might adjudge that the right to support after ex parte divorce has been terminated, service on the civil legal officer of the county where the obligee resides should be required before the court has jurisdiction to render a judgment. This will preclude the granting of a judgment terminating the duty to support in a friendly suit designed primarily to shift the obligor's support burden to the local tax rolls.

PROPOSED LEGISLATION

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

An act to add Title 4 (commencing with Section 270) to Part 3 of Division 1 of the Civil Code, relating to liability and rights to support.

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

SECTION 1. Title 4 (commencing with Section 270) is added to Part 3 of Division 1 of the Civil Code, to read:

TITLE 4. SUPPORT FOLLOWING EX PARTE DIVORCE

§ 270. "Ex parte divorce"

270. As used in this title, "ex parte divorce" means a judgment, terminating a marriage, which was made by a court that did not have personal jurisdiction over both the husband and wife.

Comment. "Ex parte divorce" is defined here to permit convenient reference in the remainder of the title. The definition requires that the divorce be effective to terminate the marriage. Hence, a divorce judgment made by a court without jurisdiction to terminate the marriage is not an "ex parte divorce" within the meaning of this title.

§ 271. Right to support following ex parte divorce

271. The duty of a husband to support his wife, and the duty of a wife to support her husband when in need, is not terminated by or after an ex parte divorce except as provided in Sections 272 and 273.

Comment. Section 271 states the existing law that the right of a spouse to support from the other spouse is not terminated by an ex parte divorce. See Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959). Limitations on the right to support following ex parte divorce are stated in Sections 272 and 273.

§ 272. When right to support terminated by ex parte divorce

272. The duty of a husband to support his wife, and the duty of a wife to support her husband when in need, is terminated by an ex parte divorce if:

(a) Under the law of the obligor's domicile at the time of the divorce, the obligor could not be ordered to provide for either the present or future support of the obligee in a divorce action, separate maintenance action, or any other action to obtain such support;

(b) Under the law of the obligee's domicile at the time of the divorce, the obligee's right to support, if any, is terminated by the ex parte divorce;

(c) The obligee unjustifiably abandoned the obligor and has not offered to return prior to the divorce; or

(d) The obligee is living separate from the obligor pursuant to an agreement that does not provide for support to the obligee.

Comment. Section 272 states the conditions under which a spouse's right to support is terminated by an ex parte divorce.

Subdivision (a) provides that there is no right to support following such a divorce if the obligor spouse could not have been held liable under the law of his domicile for the obligee's support if sued personally at the time of the divorce. The law of the obligor's domicile is applied in order to preclude the obligee from cutting off the obligor's defenses by establishing residence and obtaining the divorce in another state where his defenses could not be asserted. At least one court has held, when dealing with the duty of a child to support a parent, that it would be unconstitutional to preclude an obligor from presenting defenses that are available under the law of his

domicile to a claim for support by an obligee. Commonwealth ex rel. Dept. of Public Assistance v. Mong, 160 Ohio St. 455, 117 N.E.2d 32 (1954). See Annot., 42 A.L.R.2d 768, 779-780 (1955).

Subdivision (b) apparently states the existing law as indicated in Hudson v. Hudson, 52 Cal.2d 735, 740, 344 P.2d 295 (1959).

Subdivisions (c) and (d) make certain defenses that would be applicable under California law to an action for support during marriage applicable to an action for support following an ex parte divorce. See CIVIL CODE §§ 175, 176.

§ 273. When right to support terminated following ex parte divorce

273. The duty of a husband to support his wife, and the duty of a wife to support her husband when in need, when not terminated by an ex parte divorce is terminated thereafter if:

- (a) The obligee remarries;
- (b) The obligee so conducts himself that it would be inequitable to the obligor to require him to furnish support to the obligee; or
- (c) Within 10 years from the date the judgment terminating the marriage became final, the obligor is not served with process sufficient to secure personal jurisdiction over him in an action to enforce such duty.

Comment. Section 272 prescribes conditions under which the right of a spouse to support is terminated at the time of an ex parte divorce. Section 273 prescribes the conditions under which the right of a spouse to support is terminated at a later time.

Subdivisions (a) and (c) are self-explanatory. Subdivision (b) is included in recognition that the duty to support is enforced by the equity side of the court. Hence, the duty should not be enforced when it would be inequitable to do so. The circumstances under which it might be inequitable to enforce the duty to support will vary from case to case, and the statute would unduly confine the courts if it attempted to state in detail what inequity is contemplated.

§ 274. Action to enforce duty to support following ex parte divorce

274. The duty of support following an ex parte divorce may be enforced in an action brought under the provisions of Title 3 (commencing with Section 241) of this part or Title 10a (commencing with Section 1650) of Part 3 of the Code of Civil Procedure.

Comment. Section 274 clarifies the nature of the action to be used to enforce the duty to support following an ex parte divorce. It provides that an action for such support may be maintained under either the Uniform Civil Liability for Support Act (CIVIL CODE §§ 241-254) or the Uniform Reciprocal Enforcement of Support Act (CODE CIV. PROC. §§ 1650-1692). Hence, it is unnecessary to proceed under the laws relating to actions for divorce and separate maintenance to enforce the post-divorce duty to support.

§ 275. Action to terminate duty to support following ex parte divorce

275. Any person whose marriage has been terminated by an ex parte divorce may bring an action against his former spouse to obtain a determination that his duty to support such spouse was terminated by or after the ex parte divorce.

Comment. The defenses to an action for support after an ex parte divorce that are stated in Sections 272 and 273 may prove illusory if the obligor is unable to obtain an adjudication of his duty to support when the witnesses necessary to establish those defenses are still available. During a marriage, an obligor spouse may, by obtaining a divorce, cut off any further duty to support the obligee spouse. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Section 275 provides the obligor with a comparable right after the marriage has been terminated by an ex parte divorce. Under Section 275, the obligor may initiate the action to determine whether there is any further obligation to support, he need not wait until he is sued and attempt to establish his defenses at that time.

§ 276. Service on county civil legal officer in actions relating to support following ex parte divorce

276. In any action brought to enforce a duty of support after an ex parte divorce, and in any action brought to obtain a determination that a duty of support was terminated by or after an ex parte divorce, the court shall not have jurisdiction to render a judgment until 30 days after the county counsel, or the district attorney in any county not having a county counsel, of the county in which the obligee resides, if he is a resident of this state, has been served with notice of the pendency of the action.

Comment. Section 276 is included in this title in order that the county in which an obligee resides may be aware when the obligee's right to support is about to be terminated. Sometimes the county will have subrogation rights that may be affected, and sometimes a friendly action to terminate a duty to support may be instituted in order to preclude subrogation rights from arising in the immediate future. See CIVIL CODE § 248. Notice to the county is required, therefore, to provide it with an opportunity to protect its rights. Section 248 is similar to Civil Code Section 206.6.