

#51

6/24/65

Memorandum 65-35

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

At the last meeting the Commission asked the staff to list various factual situations to point up the problems involved in determining the right to support after an ex parte divorce. We have considered the various variables that might be presented, and we have concluded that a listing of all of the variable factual situations is not feasible.

The variables that we considered were these: the matrimonial domicile, the identity of the divorce plaintiff, the power of the divorce plaintiff to secure personal jurisdiction over the defendant, the domicile of the wife at the time of the divorce, the domicile of the husband at the time of the divorce, the domicile of the wife at the time support is sought, the domicile of the husband at the time support is sought, and the existence of facts giving rise to a right to divorce in the husband, wife, both, or neither. If the possible locations were limited to a state recognizing the survival of the right to support (Calif.) and a state not recognizing the survival of the right to support (Oregon), over 500 combinations would still be involved.

Accordingly, we shall proceed to discuss some of these possible variables in the hope that some may be eliminated from further consideration. In the ensuing discussion, the obligee will be referred to as the wife (or W) and the obligor as the husband (or H); but it should be borne in mind that the wife may at times be an obligor and the husband an obligee.

Matrimonial domicile

We suggest that the matrimonial domicile of the parties be eliminated from consideration as bearing on the right to support after an ex parte divorce.

C

The domicile of the parties at the time of the divorce may be of some relevance if rights are to be fixed as of the time of divorce, and the states where the parties reside at the time support is sought is of some relevance because those states are concerned with the support duties and rights of their domiciliaries. But, unless the matrimonial domicile continues to be the domicile of one of the parties, it appears to be of historical interest only. The parties no longer have any connection with the state that would warrant application of its law.

The divorce plaintiff

C

We suggest, too, that whether the divorce plaintiff was the wife or the husband should have no bearing on the subsequent right to support. If the husband is the divorce plaintiff, the lack of personal jurisdiction over the wife should preclude the divorce decree from destroying her support right. If the wife is the divorce plaintiff, it might be argued that she is voluntarily relinquishing her support right. But such a position would force the wife who needs support to maintain a relationship that is a marriage in name only because of the lack of personal jurisdiction over the husband in the state of her domicile. If the husband has abandoned the wife or committed other marital fault, we do not think the wife should be forced to maintain the marital relationship as the price of continuing to enjoy (?) a right of support.

C

If the husband is free from marital fault, there is stronger reason for arguing that the procurement of a divorce by the wife should terminate any further right to support. In this situation, it may be argued that she is the actor causing the end of the marriage, since the husband has done nothing to warrant its termination. As she is voluntarily giving up the relationship, she should be considered as relinquishing any rights dependent on that relationship.

This view, however, would inhibit wives with meritorious divorce actions

C

from pursuing them for fear that a later court might disagree or for fear that proof might be unavailable at the time support is sought. The wife's inability at the time support is sought to prove marital fault on the part of the husband should not, in and of itself, deprive her of the right to obtain support. Moreover, in some states a divorce may be granted for reasons other than marital fault--such as prolonged noncohabitation or incurable insanity. This view would preclude a wife from ending such a relationship by divorce if she needs continuing support.

Personal jurisdiction over the defendant obtainable

C

Some question was raised at the last meeting whether a right to support should survive an ex parte divorce when the divorce plaintiff could have secured personal jurisdiction over the defendant.

C

No question is involved, of course, if the husband is the divorce plaintiff. When the wife is not personally served, the court should have no right to adjudicate her right to support. But if the wife is the divorce plaintiff, the question is whether she should be barred from asserting the right to support at a later time when she could have obtained personal jurisdiction over the husband and obtained a support order as part of the divorce decree.

C

The way the problem might arise will vary with various state laws. But, in California, the problem can arise as follows: C.C.P. §§ 412 and 413 describe the conditions under which service by publication may be authorized and describe the method for serving by publication. Service by publication is authorized where the person to be served (1) resides out of the state, (2) has departed from the state, (3) cannot after due diligence be found within the state, or (4) conceals himself to avoid the service of summons. Service by publication is made by publishing the summons in a newspaper and, where the defendant's residence is known, by mailing a copy of the summons and complaint to the

defendant. Personal service outside the state may be substituted for publication and mailing. C.C.P. § 417 provides that, if service was made pursuant to Sections 412 and 413, a court has power to render a personal judgment against a person outside the state only if he was personally served with a copy of the summons and complaint and was a resident of the state (1) at the time of the commencement of the action, (2) at the time the cause of action arose, or (3) at the time of service. In Miller v. Superior Court, 195 Cal. App.2d 77, 16 Cal. Rptr. 36 (1961), it was held that personal service is a prerequisite to a personal judgment against a California domiciliary only if the defendant is outside the state. If the defendant is a domiciliary who cannot be located for purposes of personal service, a personal judgment can be given after service by publication and mailing.

Thus, a plaintiff wife whose husband is still a domiciliary of California, but whose whereabouts outside the state are known to the wife, may choose to serve the defendant either by publication and mailing or by personal service outside the state. If she chooses the former course, she cannot secure a personal judgment; but if she follows the latter course, she can.

The question is whether the plaintiff wife should lose the right to support after an ex parte divorce if she fails to proceed by way of personal service outside the state against a domiciliary husband who is out of the state. We suggest she should not.

The normal rule that the courts apply to preclude subsequent litigation of a claim is that the claim could have been asserted in prior litigation where the same parties were personally before the court. This is a question that can usually be determined by looking at the record of the prior action. We know of no case that has applied this rule to a situation where the defendant might have been, but was not, brought personally before the court in the prior litigation. The Restatement of Judgments does not contain a rule to deal with this

C  
situation. To bar the subsequent claim in such a situation would require the court in the later case to probe the mind of the plaintiff to determine whether she knew of the defendant's whereabouts, had reason to suspect that he might move before personal service could be made, could reasonably procure personal service upon him at that place, etc. We think res judicata should be applied to bar a later action for support only were the defendant was personally before the first court.

The domicile of the wife at the time of the divorce--survival of the support right

In Dimon v. Dimon, 40 Cal.2d 516, 526 (1953), Justice Traynor set forth his views on divisible divorce in extenso, and said in regard to the problem here:

C  
For the foregoing reasons, I am of the opinion that a former wife domiciled in California can bring an action for support, either following a divorce decree granted by a California court lacking personal jurisdiction over her former husband, or following an ex parte decree granted her former husband by a foreign court. . . .

A former wife, however, would not be permitted to bring an action in California for support following an ex parte decree, if a similar action would not be entertained by courts of the state where she was domiciled at the time of the decree. If the wife was the plaintiff in the divorce action, and under the law of the state granting the decree the right did not survive divorce, the full faith and credit clause would compel California to give the same effect to the decree and hold that the decree not only dissolved the marriage status but terminated the wife's right to support. On the other hand, if the husband obtains the decree in another state and under the law of the state of the wife's domicile her right to support was lost when the marriage status terminated, she would likewise not be allowed, by migrating to another state, to revive a right that had expired. [40 Cal.2d at 540-541.]

The same view is advocated in Morris, Divisible Divorce, 64 HARV. L. REV. 1287, 1302 (1951):

C  
[The wife] should not be permitted to revive a dead right by migrating after the divorce to a state where she may obtain support, nor should she be permitted to impose on her ex-husband, who may have remarried in reliance on the divorce decree, an obligation of double support which he did not have when the divorce was granted.

The question has not been presented to a California court since the Dimon case, but since the minority view expressed there now appears to be the majority

view, it seems likely that the California Supreme Court would enforce a support right of an ex-wife only if that right survived the divorce under the law of her domicile at the time of the divorce.

If this be the California law, we recommend its retention for the reasons stated in the excerpts quoted above.

The domicile of the wife at the time of the divorce may be relevant on another question--the existence or nonexistence of grounds for divorce or a right to support at that time. But that question will be discussed later.

The domicile of the husband at the time of the divorce--survival of the support right

We do not believe that the domicile of the husband at the time of the divorce should have any bearing on the survivability of the wife's cause of action for support. If the husband is the divorce plaintiff, the wife's absence from the court should preclude the California courts from giving the divorce decree the effect of terminating a right she did have the opportunity to litigate. If the husband is the divorce defendant and under the law of the wife's domicile the right to support survives, she should be able to enforce that right in the California courts because she could not have litigated it in the court granting the divorce.

The relation of the husband's domicile to his duty to support his wife will be discussed later.

The wife's domicile at the time support is sought--survival of the support right

This question was involved in Dimon v. Dimon, for at the time of the action, the wife was a resident of Oregon which does not recognize the survival of a wife's right to support. Rodda v. Rodda, 200 P.2d 616 (Ore. 1948). Justice Traynor's dissent gives no consideration to this fact. The view taken by his opinion is that the law of the wife's domicile at the time of the divorce

controls the survivability of the right. We concur in this view.

In his concurring opinion in Dimon v. Dimon, 40 Cal.2d 516, 545 (1953), Justice Schauer stated:

If there is to be a divorce at all it is the better public policy that the decree of divorce shall settle for all time all the rights and obligations of the parties to the dissolved marriage to the end that litigation arising from such marriage shall end and be known to have ended, and that the parties may have an opportunity to build to a future, free from, and perhaps the better for, the past, rather than to be wrecked by recurring litigation.

The considerations expressed there suggest the fixing of the parties' rights at the time of the divorce (except insofar as later conduct may constitute a forfeiture of such rights) instead of leaving them to modification as the divorced parties migrate from state to state.

The husband's domicile at the time of the support action--survival of the support right

For the reasons expressed above, we think that the husband's domicile when support is sought should have no bearing on the survivability of the wife's right to support.

Law to be applied in determining existence of support right

In his Dimon v. Dimon dissent, Justice Traynor had the following to say concerning possible defenses:

The former husband, however, is not foreclosed from litigating the issue of his guilt in defending an independent action in equity for support by his former wife. The divorce decree obtained by constructive service is, of course, binding upon both parties insofar as marital status is concerned. . . . It does not follow, however, that the decree adjudicated the husband's fault with regard to his duty to support. . . . The full faith and credit clause does not compel such a result . . . ; moreover, such a result would create serious constitutional problems under the due process clause. . . . "It would seem to follow as a corollary of the doctrine herein enunciated that in such an action for alimony on the part of a plaintiff, the defendant would have the right in his defense to contest the merits of the divorce itself, not for the purpose of

setting it aside, but for the purpose of defeating the alimony for which the action was brought. If the plaintiff had the right to bring an independent action for alimony after a divorce has been granted simply because she never had and could not have her day in court in respect to alimony in the divorce proceedings, the defendant for the same reason should be entitled to his day in court respecting the same matter." (Hutton v. Dodge, *supra*, 58 Utah at p. 237.) [40 Cal.2d at 535-536.]

The analysis here seems somewhat inadequate. A showing by the husband that the wife had no cause for divorce, that he was free from marital fault, should not necessarily defeat the wife's support action. Under California law, a court may award a wife support in a divorce action even though it denies her the divorce. CIVIL CODE § 136. A California court is without power, however, to award support to the wife if the husband is granted a divorce because of the marital fault of the wife and the husband is not found guilty of marital fault at the same time. Hager v. Hager, 199 Cal. App.2d 259 (1962). If a divorce is granted to both husband and wife, or if a divorce is granted to the husband and a decree of separate maintenance to the wife, then the court may award support to the wife. De Burgh v. De Burgh, 39 Cal.2d 858 (1952); Salvato v. Salvato, 195 Cal. App.2d 869 (1961).

Thus, the real question seems to be whether the husband could defeat an action for support by the wife, not whether her grounds for divorce were meritorious or not. Under California law, the substantive problem seems to be not only the husband's freedom from marital fault but also the wife's then existing marital fault. And if both are guilty of marital fault, the problem seems to be the equitable one of "clean hands". See De Burgh v. De Burgh, 39 Cal.2d 858 (1952).

Not discussed in the quoted excerpt from the Dimon dissent is the law to be applied. The choice seems to lie among the law of the husband's

domicile at the time of the divorce, the law of the wife's domicile at that time, the law of the husband's domicile at the time of the support action, the law of the wife's domicile at that time, and the law of the forum.

We suggest that the law of the husband's domicile at the time of the divorce should provide the basic governing law. It is important that rights should become fixed at that time, subject to modification only as later conduct on the part of the parties relates to those rights. For reasons previously given, we do not think the parties' rights should be subject to modification and change as the divorced parties migrate from state to state.

We suggest that the law of the husband's domicile be made the applicable law for several reasons. It is the choice now made by the currently recommended Uniform Reciprocal Enforcement of Support Act. The Ohio Supreme Court believes that any other choice deprives an obligor of equal protection of the laws if it deprives him of a defense that any other obligor in the state could assert. Commonwealth ex rel Dept. of Public Assistance v. Mong, 160 Ohio St. 455, 117 N.E.2d 32 (1954). In the absence of a divorce, it seems to be the law now applied by the California courts. Domicile is not a prerequisite to an action for separate maintenance in California; and when such an action is brought by a nondomiciliary, the California courts apply California law, at least when the defendant is a Californian. Hiner v. Hiner, 153 Cal. 254 (1908).

Thus, the husband's duty to support would be that imposed by the law of his domicile at the time of the divorce; and the question for the court in the support action would be whether in an action brought for support at that time the husband could have been compelled to provide support. The following examples will illustrate how this would work:

C

1. W's domicile is in New York. H obtains a divorce in California. In the support action, the California court would determine whether, under California law, H could have been compelled to support W at the time of the divorce. If H had cause for divorce under California law, the court would have to determine whether W also had cause for divorce under California law. See Salvato v. Salvato, 195 Cal. App.2d 869 (1961). If W also had cause for divorce, the court would have discretionary authority to grant W post-divorce support.

C

In this situation, it would be unjust to H to apply New York law. If W had left him, he would be unable to terminate his support duty by a divorce on the ground of desertion as any other California husband would have the right to do; for under New York law adultery is the only recognized ground for divorce. On the other hand, if H's ground for divorce under California law is recognized, it would be unjust to W to limit her right to support because of the limited grounds for divorce in New York. Prior to the divorce, she could assert a California ground for divorce in seeking a California separate maintenance decree. Hiner v. Hiner, 153 Cal. 254 (1908). An ex parte divorce should not alter her right to do so.

C

2. W's domicile is in Nevada, which recognizes three years' noncohabitation as a ground for divorce. H's domicile is in California. Under California law, W's noncohabitation may (and in this example does) constitute desertion. Here again, W should not have the right to compel H to support her, even though the Nevada court would have had power to grant her support if H had been personally before the court. To apply Nevada law deprives H of substantial rights under California law.

C

3. H's domicile is in Nevada. He secures a divorce for three years' noncohabitation. W, a California resident, sues H in California for

post-divorce support. In Nevada, a court may award support to a divorce defendant. Hence, applying Nevada law, the California court can order H to support W even though his Nevada decree was well-grounded. Under Nevada law, a court can consider the equities of the situation at the time of the divorce, just as a California court can do when it grants a divorce to both parties. Hence, in the example, if the California court concluded that W's pre-divorce conduct was such that a Nevada court would not have ordered H to support her, the California court would deny the post-divorce support.

A statute and tentative recommendation reflecting the views expressed above is attached. The format used by the statute is as follows:

The statute appears as a separate title in the Civil Code immediately following the Uniform Civil Liability for Support Act. The terminology (obligor, obligee) follows that used in the Uniform Act.

Section 270 is merely definitional.

Section 271 recognizes the existence of the right to support following ex parte divorce, but it contains none of the standards for determining when the right exists and none of the conditions of its continued existence. All of the limitations on the right to support are contained in the following sections.

Section 272 states the conditions that terminate the right to support as of the time of the ex parte divorce. If any additional conditions on the right are to be added, they should be added here. For example, if it seems desirable to terminate a wife's right to support where she has secured a nonmeritorious divorce, an additional subdivision should be added to Section 272 to so state.

Section 273 states the conditions that terminate a right to support that survived an ex parte divorce. These are defenses based on the post-divorce conduct of the parties.

Section 274 spells out that the post-divorce right to support may be enforced under the Uniform Civil Liability for Support Act and the Uniform Reciprocal Enforcement of Support Act. Apparently, some confusion now exists among the bar as a result of Hudson v. Hudson. Cases can be found where the ex-wife has proceeded by way of a divorce action to enforce the post-divorce support right despite the fact that the marriage was terminated by an ex parte divorce long before she commenced her action. See Weber v. Superior Court, 53 Cal.2d 403 (1960). Grounds for divorce need not be asserted or proved to obtain support under the Uniform Support Acts.

Section 275 provides the obligor with an action to terminate his duty to support.

Section 276 has been added to provide for temporary support and suit money in actions for post-divorce support. Its language is based on Civil Code Section 137.2. Such a section is unnecessary. Hudson v. Hudson held that temporary support could be granted in such an action. Kruly v. Superior Court, 216 Cal. App.2d 589 (1963), held that temporary support could be awarded in an action to obtain support under the Uniform Civil Liability for Support Act (Civil Code Section 243) despite the lack of statutory authorization (the action was by a parent to obtain support from an adult child). Hood v. Hood, 211 Cal. App.2d 332 (1962), also held that temporary support could be awarded in an action to enforce a foreign alimony award despite the lack of statutory authorization. The court based its holding on the general equity power of the court in support actions. Nonetheless, we included the section in order that the right to temporary support might be indisputable.

Section 277 is based on Civil Code Section 206.6. It is designed to warn a county of the possibility of a collusive suit to deprive the county of subrogation rights which would otherwise accrue under Civil Code Section 248.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

#51

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

C 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.

C 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. The currently recommended version of the Uniform Reciprocal Enforcement of Support Act provides that the duty of support that is enforceable under its terms is the duty of support arising under the law of the state where the obligor is present or resident. Applying the law of the obligor's domicile is consistent with the Uniform Act, and fixing the rights and duties of the parties as of the time of the divorce eliminates the uncertainty that would exist if these rights and duties were permitted to change as the parties migrate from state to state.

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.

C

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.

C

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.

C

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:

C

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, recognized in this state as having terminated the marital status of the parties, which was made by a court that did not have personal jurisdiction over the defendant spouse.

C

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 one spouse to support the other 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 one spouse to support the other 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

C 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 one spouse to support the other, 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. Maintenance pendente lite

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 may order the obligor to pay any amount that is necessary for the support and maintenance of the obligee during the pendency of the action, including the costs of suit and attorney's fees necessary for the prosecution or defense of the action. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary. Any such order may be modified or revoked at any time during the pendency of the action except as to any amount that may have accrued prior to the order of modification or revocation.

Comment. A court has inherent power to order the payment of temporary support during the pendency of any action to obtain permanent support. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959); Kruly v. Superior Court, 216 Cal. App.2d 589, 31 Cal. Rptr. 122 (1963); Hood v. Hood, 211 Cal. App.2d 332, 27 Cal. Rptr. 47 (1962). Hence, Section 276 is technically unnecessary. It is included in this title, however, to eliminate any question concerning the power of the court to order such support in actions brought under this title.

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

277. 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 277 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 277 is similar to Civil Code Section 206.6.