

1st Supp - 65-72

November 11, 1965

Memorandum to Law Revision Commission

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

Gentlemen:

Joe Harvey recently sent me over a draft of a memorandum (Memo 65-55) on this topic, together with his current draft of the Commission's Tentative Recommendations thereon, as revised in light of action taken at the July meeting, which I missed. On behalf of the Commission, he invited my comments. I have given the matter some thought and have reached the conclusion, at least tentatively, that we should leave this problem to the courts.

The reason for this view is my growing awareness of how large the problem is, in terms of the truly amazing number and variety of potential fact situations that are logically involved (see demonstration below). To do a decent job, it seems to me, we would not only have, at the analytical stage, to address ourselves to an enormous number of hypothetical situations but would also have, at the legislating stage, to draft an exceedingly detailed and complex statute. I doubt that we have either the patience or the wisdom to analyze and solve so many problems, particularly in light of our very substantial workload. I suggest, therefore, that we leave the matter to the courts to deal with on a case by case basis, at least until they call -- or demonstrate their need -- for legislative help.

The demonstration that the problem is an enormous one can be made, I think, by calling attention to a number of factors, the presence or absence of which is or may be significant to the proper determination of particular cases. Here are some (I doubt all) of the factors that may vary in particular cases and whose existence or nonexistence may be relevant to their just solution:

1. Is the husband or wife suing for support?
2. Where is the support action plaintiff domiciled when the action is filed?
3. Where is the support action defendant domiciled when the action is filed?
4. What is the law or policy of the support action plaintiff's domicile and what consideration should it be given?

5. What is the law or policy of the support action defendant's domicile and what consideration should it be given?
6. Should California entertain a support action or an action to terminate the right to support following an exparte divorce unless
 - (a) Plaintiff is domiciled here; or
 - (b) Defendant is domiciled here; or
 - (c) Both are domiciled here?
7. Was the divorce action brought in:
 - (a) California?
 - (b) A sister state?
 - (c) A foreign country?
8. Did the divorcing court have personal jurisdiction over both parties?
9. Could personal jurisdiction over both parties have been obtained?
10. Did the divorce decree award support to the support action plaintiff?
11. Did the divorce decree specifically deny support to the divorce action plaintiff?
12. Was the divorce decree silent as to support?
13. Does the divorce decree purport to settle the issue of support conclusively
 - a) under its own law?
 - b) under all law?
14. Is the divorce decree modifiable under the divorcing jurisdiction's law
 - a) without limitation?
 - b) within limits -- e.g., upon a showing of changed circumstances only?

15. Is California bound to give full faith and credit to
 - a) the divorce decree?
 - b) the law of the divorcing state?
 - c) the law of any other state -- e.g., the domicile(s) of one (or both) of the parties?
16. Should California give greater effect to the divorce decree than it may be required to give
 - for example, should California, as a matter of public policy, give any other jurisdiction's divorce decree at least as much res judicata effect as it would give a similar decree of its own?
17. Should some support cases be decided by declining, on grounds of public policy, to hear the case or to apply particular sister-state or foreign laws?

These are, I am sure, not all of the factors that make for variety in this general situation. But even the number of combinations (e.g., of hypothetical cases) that emerge if one begins to manipulate these factors is staggering -- as I found when I tried to set up some diagrams or charts to get the general picture before me graphically.

The difficulty we face is, I think, that unless we do diagram or chart all of the possible combinations, and then think carefully about each of them, we are apt to draft some rather inadequate and possibly quite harmful legislation. I doubt that the large number and variety of potential problems involved can be satisfactorily solved by a series of very broad general propositions in statute form. Specifically, I seriously question that as broad and general a proposition as a legislative choice of law rule that all rights of all parties to support action shall be governed by California law is a sound approach to a problem so complex in size and, in all probability, in the subtlety and difficulty of the policy problems presented. Indeed, it seems to me that this would be a bull-in-the-china-shop legislative approach that would border on the irresponsible.

So, I suggest that we leave this matter to Traynor and company, unembarrassed by legislation on the subject. Their mistakes, if any, will affect only particular cases, at least initially. And a case-by-case approach by them is likely, it seems to me, to produce sounder results than the pronouncement of general propositions, a priori, at this time.

J. R. M.

JRM:mh