

#51

1/10/66

Memorandum 66-1

Subject: Study 51 - Right to Support After Ex Parte Divorce

At the last meeting, the Commission decided to rescind its action requiring the application of California law to determine both the question whether the obligor had a good defense to a support action at the time of the divorce and the question whether the obligee's right to support from the obligor survived the divorce. The Commission then directed the staff to prepare for the Commission's consideration a redraft of Section 272 to require the application of the law of the parties' last matrimonial domicile to determine both questions.

Accompanying this memorandum are two copies of a tentative recommendation containing the redrafted section. Other revisions in the tentative recommendation have also been made in response to suggestions made by Commissioners. The redraft of the tentative recommendation that is designed to apply the law of the matrimonial domicile is on the pink pages. Alternative pages, designed to carry out Commissioner McDonough's recommendation that conflicts problems be left to the courts, are contained on the goldenrod paper. Two copies of the tentative recommendation are provided so that you may mark suggested textual revisions on one copy and return it to the staff at the next meeting.

We have deleted from the tentative recommendation certain paragraphs that appeared in the previous version. We deleted them because they raise problems that we do not deal with specifically in the recommended statute. Our previous policy has been to justify by our recommendations the provisions included in the proposed statute without attempting to discuss reasons for omitting provisions that have been left out of the proposed statute. We

think the same policy should be followed here. The omitted paragraphs are attached to this memorandum as Exhibit I (yellow). We will, of course, include a discussion of this matter in the research study; we believe that this would be the best way to deal with the matter.

It seems to us, after reflection concerning the discussions at the last two meetings, that there has been a misunderstanding concerning what is proposed in this tentative recommendation. Unfortunately, our memoranda gave rise to the misunderstanding and we have attempted to defend it on the merits. Our discussions of the tentative recommendation have assumed that the substance of the support obligation is to be determined for all time by the law of some jurisdiction (obligor's domicile, obligee's domicile, or matrimonial domicile) as of the time of the divorce. But all that the pink recommendation does is preserve those defenses which the obligor had at the time of the divorce under the law of the last matrimonial domicile of the parties. And if the obligor had no defense to a support claim under that law, the pink recommendation directs the court to determine whether the obligee's right to support survived the divorce by reference to the law of the last matrimonial domicile. The only difference between the pink recommendation and the version previously recommended by the staff is that under the staff proposal the obligor's defenses were determined by reference to the law of his domicile at the time of the divorce and the survivability of the obligee's right to support was determined by the law of her domicile at the time of the divorce.

Under neither the pink recommendation nor the previously recommended staff version is the quantity or quality or nature of the obligor's present support obligation or the obligee's present support right to be determined by

reference to the law of some jurisdiction where neither party resides at the time of the support action. Neither proposal purports to fix the extent of the support obligation or the nature of the support right by reference to the time of the divorce. To make this clearer, we have modified the language of Section 271 slightly to provide that the duty of one spouse to support the other "is not affected" by an ex parte divorce decree except as provided in Sections 272 and 273. Sections 272 and 273 deal only with defenses either existing at the time of the divorce or arising subsequent thereto. If a defense under Section 272 or 273 is not applicable, therefore, the marital duty of support is not affected by the ex parte divorce and continues as if the parties were still married.

Hence, whether California would require a former wife now living in Arizona to support her former husband now living in California (assuming she owed him a duty of support at the time of the divorce) would thus be determined in the same way that a court would now determine whether to enforce a right of support on behalf of a California husband against an Arizona wife.

At the moment, the Commission has no approved version of Section 272. The version that is now on pink was approved for drafting purposes so that it could be considered at the next meeting. The questions for the Commission to resolve, then, are:

1. Should Section 272 preserve those defenses to a support claim that he had at the time of the divorce under the law of the parties' last matrimonial domicile? Under the law of the obligor's domicile? Or should the proposed statute merely state that, as a matter of substantive California law, an obligor is entitled to assert defenses he had at the time of the

divorce--thus leaving for the courts to decide when such California substantive law is applicable?

The pink version preserves defenses that the obligor had under the law of the parties' last matrimonial domicile. It must be remembered that if the obligor was living in a different state at the time of the divorce, he may not have been entitled to assert those defenses at that time. But by procuring the divorce ex parte, the obligor can restore his right to assert any defenses he could have asserted at the time the parties last resided together. Of course, he might have been able to restore his right to assert those defenses anyway merely by returning to the state of the matrimonial domicile.

The staff's last recommendation would have preserved for an obligor those defenses he would have had if sued personally for support in the state of his domicile at the time of the divorce. The Commission's criticism of this view has been based on the fact that it permits an obligor to acquire defenses by moving to a particular state where the law is favorable and commencing an ex parte divorce action there.

The alternative version (goldenrod) does not attempt to solve the problems mentioned above, but instead leaves their solution to the courts.

2. Should Section 272 condition recognition of a post-divorce support right upon the recognition of such a right by the law of the parties' last matrimonial domicile? By the law of the obligee's domicile at the time of the divorce? Should the statute provide that California will always recognize survival of the support right after ex parte divorce (providing there was a support right at that time) except in those cases where the full faith and credit clause requires otherwise? Or should the statute merely

provide that support rights survive as a matter of substantive California law, leaving the question of when that law is applicable for the courts to determine?

The pink version conditions survival of the support right upon recognition of such survival by the law of the last matrimonial domicile--even though neither party may have been domiciled there at the time of the divorce. The Commission's choice of law on this point was motivated by a desire to prevent the obligee from forum shopping for a divorce jurisdiction that recognizes survival of the support right.

The staff's previous recommendation was based on the idea that the obligee should continue to have whatever right to support she had immediately after the divorce.

Either version that recognizes that the right to support may be terminated by an ex parte divorce (even though the obligor would have had no defense to a support claim had there been no divorce) involves giving some effect to an ex parte judgment that the other party had no opportunity to contest. Where the obligee was the divorce plaintiff, no unfairness is involved and the full faith and credit clause probably requires recognition of the cessation of the support right. But where the obligee was the divorce defendant, such a rule permits the termination of the support right as a result of a divorce that the obligee may be able to show was improperly granted. It seems somewhat unfair to refuse to permit the obligee to contest the propriety of the divorce for support purposes even though the obligee had no opportunity to contest it at the time it was granted.

Whether such unfairness is unconstitutional cannot be determined. All that the Supreme Court (U.S.) has decided so far is that a state may award

support despite an ex parte divorce obtained by the obligor. It has not been presented the question whether a state may refuse to award support merely because of the termination of the marital status by an ex parte divorce obtained by the obligor.

The foregoing considerations suggest the desirability of a rule that the right of support always survives except when the obligee was the divorce plaintiff and the full faith and credit clause requires recognition of its termination. We recommend that the Commission adopt this rule. The drawback to such a rule, however, is that until it is determined that such a rule is constitutionally required, an obligee can acquire rights she did not have after the divorce simply by migrating to California. She need not establish a residence here, all she needs to do is commence her action here.

The goldenrod version would avoid the above problems by declaring simply as a matter of California substantive law that support rights survive, leaving the above problems for solution by the courts as they determine when California substantive law is applicable and when some other state's substantive law is applicable.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

If inserted in the recommendation this paragraph would appear on page 3, immediately preceding the paragraph now designated "Second":

Second, even if it is assumed that a wife's right of support under California law survives an ex parte divorce obtained by her as a general rule, it is uncertain whether her right to support survives such a divorce in a case where she could have obtained personal jurisdiction over her husband in the divorce action but failed to do so. It is at least arguable that she should be prohibited from "splitting" her cause of action and seeking support in a separate proceeding when all of the issues between the parties might have been settled in the divorce proceeding.

This excerpt would be inserted on page 4 immediately preceding paragraph number 2:

2. Whether the person seeking post-divorce support was a divorce plaintiff who could not secure personal jurisdiction over the other spouse in the divorce action or was the divorce defendant should have no effect on the post-divorce support right. If the husband was the divorce plaintiff, the divorce judgment should not affect the wife's right to support, for the wife was not before the divorce court and had no opportunity to litigate the support question. Neither should the right to support be affected if the wife was the divorce plaintiff and she could not secure personal jurisdiction over the husband. No desirable public policy is served by forcing a wife who needs support to maintain a relationship that is a marriage in name only as the price of retaining her right to support from an absent husband.

3. The right to support should not be affected by an ex parte divorce where the wife was the divorce plaintiff and could have secured personal

jurisdiction over the husband but failed to do so. It would be unjust to bar a claim for support on such a ground if the divorce plaintiff failed to secure personal jurisdiction over the defendant because she did not know of his whereabouts and could not with reasonable diligence have determined that personal jurisdiction over him could be secured. If she knew of the defendant's whereabouts at the time of the divorce action, it would be unjust to bar the later support claim unless she had reason to believe that the defendant would remain there until service could be made, and unless she could reasonably have procured service upon him at that place. Yet, to tie her post-divorce support right to the reasonableness of her decision to proceed with the divorce litigation without securing personal jurisdiction over the husband is not desirable. A divorce plaintiff may choose to proceed without personal jurisdiction over the other spouse because service upon him is difficult or expensive, because it would be inconvenient for the defendant to force him to appear personally in the action, or even because of ignorance of her rights. A wrong guess by the plaintiff as to how reasonable her actions would appear to a later court would cost her her right of support. There is no reason to rest the post-divorce support right on such an uncertain factual basis. Plaintiffs are not permitted to split their causes of action so that a defendant will not be unnecessarily vexed by being forced to defend repetitious litigation. A divorce defendant who was not required to and did not appear in the divorce action is not twice-vexed by support-seeking litigation when a later support action is brought. The second action is the only one where the support issue is presented and is the only one where he is required to appear to defend his economic rights.

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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 Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that a court of one state may validly grant a divorce to a domiciliary of that state despite the lack of personal jurisdiction over the defendant, and the United States Constitution requires other states to give full faith and credit to the divorce judgment insofar as it terminates the marriage. Such a divorce judgment is referred to in this recommendation as an "ex parte divorce."

In Estin v. Estin, 334 U.S. 541 (1948), and Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), the Supreme Court held that an ex parte divorce cannot, of its own force, impair the marital support rights of the defendant spouse. Nevertheless, the California Supreme Court held in Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953), that a former wife whose marriage had been terminated by an ex parte divorce granted by a Connecticut court could not subsequently maintain an action for support against her former husband in California. The court reasoned that, in the absence of a valid alimony award in a divorce action, the right to support under California law 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 authorized to study the ramifications of the Dimon case to determine whether the law stated therein should be revised. The Commission commenced its study; but before completion of the Commission's work, the Supreme Court decided Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959), which overruled the decision in Dimon v. Dimon.

Hudson v. Hudson involved 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 at least some of the problems presented by the Dimon decision. The decision of the United States Supreme Court in the Vanderbilt case has also supplied answers to some of the problems presented by the Dimon decision. These cases seem to have settled the following matters:

1. A divorce judgment granted by a court without personal jurisdiction over the wife cannot of its own force cut off whatever right to support the wife has under the law of her domicile. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

2. Whether the right of a wife to support survives the termination of the marital status by ex parte divorce depends on the law of the wife's domicile at the time of the divorce. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959).

3. Under California law, a wife's right to support survives an ex parte divorce obtained by the husband. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959).

Despite these cases, several problems remain.

First, there is no holding that a wife's right of support under California law survives an ex parte divorce which is obtained by her rather than by her husband. The Dimon case held that a wife relinquishes her right to support by obtaining the ex parte divorce. Because the Dimon case was overruled in the Hudson case, it may be inferred that this holding is no longer the law in California; but neither the Hudson case nor any subsequent appellate case has had occasion to so hold because none has involved a former wife seeking support after an ex parte divorce where she had been the divorce plaintiff.

Second, 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 vehicle for awarding support. One of the matters that seemed to trouble the court in the Dimon case, however, was that no California statute appeared to authorize a suit for support by a person who was not married to the defendant when the suit was filed.

Third, it is uncertain what grounds must be shown as a condition for obtaining post-divorce support. Must grounds for divorce be shown? See, e.g., Weber v. Superior Court, 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960), where the former wife brought a divorce action to obtain support despite the dissolution of the marriage by ex parte divorce nearly three years before.

Fourth, the defenses that may be asserted in an action for support following an ex parte divorce are not clear. The dissenting opinion in the overruled Dimon case suggested that the husband* may contest the merits of the divorce, not for the purpose of setting it aside, but for the purpose of

* For convenience of reference, in this recommendation, "husband" is used to refer to a spouse owing a duty of support and "wife" is used to refer to a spouse to whom a duty of support is owed. It should be remembered, however, that in some cases the wife will have a duty to support her husband. CIVIL CODE § 243.

defeating the claim for support; however, there is no clear authority to that effect. Moreover, the principle seems questionable, for if the husband merely proves that the divorce was improperly granted, all that has been established is that the marriage should still be in existence and, hence, that he should still owe a duty of support as an incident thereof.

Fifth, during a marriage, a husband may bring a divorce action and, if personal jurisdiction is secured over the wife, be freed from any further duty to support the wife. Under existing California law, a court with jurisdiction over both parties may not order a husband to support his wife when the husband is awarded a divorce and no divorce or separate maintenance decree is awarded to the wife at the same time. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Following the termination of a marriage by an ex parte divorce, however, a husband 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 wife can be ended before the witnesses necessary to establish the husband's defense to a support claim have disappeared.

RECOMMENDATION

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

1. The right of a former spouse to support following an ex parte divorce should be made statutory so that the nature and limits of the right can be settled without awaiting the numerous appeals necessary to provide the courts with opportunities to do so.
2. There should be no right to support following an ex parte divorce

if, under the law of the parties' last matrimonial domicile, the support-seeking former spouse had no right of support at the time of the ex parte divorce. And even if the support-seeking spouse had a right to support at the time of the divorce, California should recognize no right to support thereafter if, under the law of the parties' last matrimonial domicile, that right terminated with the end of the parties' marital status.

Requiring the application of the law of the parties' last matrimonial domicile to determine whether there was a right to support at the time of the ex parte divorce and whether that right, if any, survived the ex parte divorce prevents either spouse from altering his support rights or duties to his advantage simply by leaving the jurisdiction where the parties reside and establishing a new residence in a jurisdiction where the law is more favorable.

Under existing California law, a husband can defeat a claim for support made by his wife in a divorce or separate maintenance action by successfully asserting a claim for divorce while defeating his wife's request for a divorce or separate maintenance decree. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Cf. Salvato v. Salvato, 195 Cal. App.2d 869, 16 Cal. Rptr. 263 (1961). And if both spouses are guilty of marital misconduct, a husband can defeat his wife's claim for support if he can persuade the court that, under the doctrine of "clean hands," it would be inequitable to require him to support his wife after the dissolution of the marriage. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952). Cf. Taylor v. Taylor, 197 Cal. App.2d 781, 17 Cal. Rptr. 512 (1961). Other defenses to a claim for support by one spouse against the other are provided in Sections 175 and 176 of the Civil Code. A California husband should not lose the right

to assert these defenses to a claim for support merely because his wife left their California domicile and the marital relationship was then ended by an ex parte divorce. Neither should he be able to relieve himself of the support obligations imposed by California law by leaving the state and obtaining an ex parte divorce in a jurisdiction that does not recognize a post-divorce right to support.

Conversely, California should not encourage spouses to come to California seeking divorce in order to acquire rights that they did not previously have.

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2. There should be no right to support following an ex parte divorce if the former husband could have defeated a claim for support in any action that might have been brought against him at the time of the divorce.

Under existing California law, a husband can defeat a claim for support in a divorce action by successfully asserting a claim for divorce while defeating his wife's request for a divorce or separate maintenance decree. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Cf. Salvato v. Salvato, 195 Cal. App.2d 869, 16 Cal. Rptr. 263 (1961). And if both spouses are guilty of marital misconduct, a husband can defeat a claim for support if he can persuade the court that, under the doctrine of "clean hands," it would be inequitable to require him to continue to support his wife after the dissolution of the marriage. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952); Taylor v. Taylor, 197 Cal. App.2d 781, 17 Cal. Rptr. 512 (1961). Other defenses to a claim for support by one spouse against another are provided in Sections 175 and 176 of the Civil Code. A husband should not lose the right to assert these defenses to a claim for support merely because the marital relationship has been ended by an ex parte divorce.

3. The right to support, even though it survives an ex parte divorce and could not have been defeated had it been asserted at the time of the divorce decree, should be terminated by certain events subsequent to the ex parte divorce. If the wife remarries, there should be no further right to look to the original husband for support thereafter. In addition, since an action for support looks to the equity side of the court for relief, any other conduct on the part of the wife such that it would be inequitable to require the husband to provide further support should be sufficient to terminate the support obligation.

4. It should be made clear 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 (CODE CIV. PROC. §§ 1650-1692). It should not be necessary to proceed under the statutes governing the award of support in divorce or separate maintenance actions.

5. A former husband should be granted the right to bring an action after an ex parte divorce to obtain, in effect, a declaratory judgment that his duty to support his former wife has ended.

6. 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 wife 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 husband'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. Definitions

270. As used in this title:

(a) "Ex parte divorce" means a judgment, recognized in this state as having terminated the marital status of the parties, which was rendered by a court that did not have personal jurisdiction over the defendant spouse.

(b) "Obligor" means a person who owes or is claimed to owe a duty of support to his spouse or former spouse.

(c) "Obligee" means a person to whom a duty of support by his spouse or former spouse is owed or is claimed to be owed.

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. A spouse wishing to obtain support after such a divorce can sue for divorce or separate maintenance inasmuch as the marriage still exists.

The definitions of "obligor" and "obligee" are based on similar definitions that appear in the Uniform Civil Liability for Support Act (see CIVIL CODE § 241) and the Uniform Reciprocal Enforcement of Support Act (see CODE CIV. PROC. § 1653).

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

272. An obligee has no right to support from his former spouse after an ex parte divorce if under the laws of the jurisdiction where they last resided together as husband and wife:

(a) The obligee was not entitled to support from the obligor at the time of the ex parte divorce; or

(b) The ex parte divorce terminated the obligee's right to support from the obligor.

Comment. Section 272 states the conditions under which a spouse's right to support from the other spouse does not continue following an ex parte divorce.

First, subdivision (a) provides that the obligee, i.e., the person claiming support from the former spouse (Section 271), has no right to support from the former spouse following an ex parte divorce if, under the laws of the jurisdiction where they last resided together as husband and wife, the obligee was not entitled to support from the obligor at the time of the ex parte divorce. This language permits the obligor to assert any defense to a post-divorce support claim that he could have asserted at the time of the divorce to a support claim made in a divorce or separate maintenance action under the law of the parties' matrimonial domicile. The law of the matrimonial domicile is applied in order to preclude the obligee from cutting off the obligor's defenses by establishing residence and obtaining a divorce in another state where his defenses could not be asserted and to preclude the obligor from cutting off the obligee's rights by moving to a jurisdiction where he would have defenses that were unavailable under the law of the matrimonial domicile.

Under existing California law, a husband can defeat a claim for support made by his wife by successfully asserting a claim for divorce while defeating his wife's request for divorce or separate maintenance. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Cf. Salvato v. Salvato, 195 Cal. App.2d 869, 16 Cal. Rptr. 263 (1961). And if both spouses are guilty of marital misconduct, a husband can defeat his wife's claim for support by showing that, under the doctrine of "clean hands," it would be inequitable to require him to support his wife after the dissolution of the marriage. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952); Taylor v. Taylor, 197 Cal. App.2d 781, 17 Cal. Rptr. 512 (1961). Other defenses to a claim for support by one spouse against another are provided in Sections 175 and 176 of the Civil Code. Section 272 preserves a California spouse's right to assert these defenses to a post-divorce claim for support even though the other spouse left their California domicile and was living elsewhere when the divorce was procured.

Second, subdivision (b) provides that the obligee has no right to support from the former spouse following an ex parte divorce if, under the law of the parties' last matrimonial domicile, the obligee's right of support was terminated by the ex parte divorce. Although a spouse's right to support from the other spouse survives an ex parte divorce under California law (Section 271; Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959)), a spouse's right to support from the other spouse does not survive an ex parte divorce under the law of some other states (see Annot., 28 A.L.R.2d 1378). Under Section 272(b), the law of the parties' last matrimonial domicile is applied to determine whether the ex parte divorce terminated the marital right to support in order to prevent either spouse from altering his

support rights or duties to his advantage by leaving the matrimonial domicile and establishing a new residence in a jurisdiction where the law is more favorable.

The dissenting opinion in Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953), suggests that the constitutional requirement of full faith and credit forbids this state from recognizing an obligee's right of support after an ex parte divorce if the obligee was the divorce plaintiff and under the law of the state granting the divorce the right of support does not survive divorce. If so, the Constitution provides an additional limitation on the right of post-divorce support in cases where the ex parte divorce is procured by the obligee in a state other than the last matrimonial domicile of the parties.

The dissenting opinion in the Dimon case also asserted that if the obligor obtained the ex parte divorce and under the law of the obligee's domicile the right to support was lost when the marriage status terminated, the obligee could not, by migrating to another state, revive the right that had expired. 40 Cal.2d at 540-541. Inasmuch as the Dimon decision was overruled in an opinion written by the author of the Dimon dissent (Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959)), this assertion may now represent the law in California. If so, Section 272 modifies the law by requiring the courts to look to the law of the parties' last matrimonial domicile to determine whether the obligee's right to support survived the ex parte divorce rather than to the law of the obligee's domicile at the time of the divorce.

It should be noted that Section 272 merely specifies the circumstances under which the marital right to support will not survive an ex parte

divorce. It does not fix the nature of the support right as of the time of the divorce. Unless the post-divorce conduct of the parties should give rise to a defense under Section 273, if the obligee had a right of support that survived the divorce, the nature and extent of the support right that will be enforced under this title must be determined under the law applicable at the time of the support action just as if the parties were still married.

ALTERNATIVE

§ 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 at the time of the divorce the obligee would not have been entitled to obtain support from the obligor in a divorce, or separate maintenance, or any other action that could be brought under the laws of this state to obtain such support.

Comment. Under existing law, there are several defenses to a claim for support made by one spouse against the other. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him. CIVIL CODE § 175. Similarly, a wife is not required to support her husband, even though he is in need of support, if he has deserted her. CIVIL CODE § 176. A husband is not liable for his wife's support when they are living separately pursuant to an agreement that does not provide for her support. CIVIL CODE § 175. An obligor spouse may not be required to support the other if the obligor is granted a divorce on the ground of the obligee's marital misconduct and the obligee fails to show that the obligor is also guilty of marital misconduct. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962). Cf., Salvato v. Salvato, 195 Cal. App.2d 869, 16 Cal. Rptr. 263 (1961). And if both spouses are guilty of marital misconduct, a California court considers the equitable doctrine of "clean hands" in determining whether a claim for support may be enforced. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952); Taylor v. Taylor, 197 Cal. App.2d 781, 17 Cal. Rptr. 512 (1961).

Under Section 272, if at the time of the ex parte divorce the obligor spouse could have successfully resisted a claim for support on any of the above grounds or upon any other ground, the ex parte divorce terminates any further duty of support. If the obligor spouse had no defense to a claim for

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support at the time of the ex parte divorce, the duty of support continues under Section 271 and may be enforced in an appropriate action thereafter. But see Section 273 and the Comment thereto.

Section 272 deals only with the question when a right of support is ended by an ex parte divorce as a matter of substantive California law. In some cases, California law will be inapplicable. For example, it may be inappropriate to apply California law if both parties are nonresidents of California. It may also be inappropriate to apply California law if there is no right or duty of support under the law of another state where one of the parties resides. The dissenting opinion in Dimon v. Dimon, 40 Cal.2d 516, 526, 254 P.2d 528 (1953), suggests that the constitutional requirement of full faith and credit requires this state to apply the law of the state where the divorce was granted and recognize the termination of the right of support if the obligee was the divorce plaintiff and under the law of the divorcing state the right of support did not survive the divorce decree. The dissenting opinion in the Dimon case also suggests that if the obligor obtained the ex parte divorce and under the law of the obligee's domicile the right to support was lost when the marriage status terminated, the California courts will apply that law so that the obligee may not, by migrating from state to state, revive the right that had expired. 40 Cal.2d 540-541.

Because of the varied factors that must be considered in each case to determine what is the applicable law, Section 272 declares only the California substantive law and leaves the determination of the question when that law should be applied for the courts to determine.

§ 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 as of such time as:

- (a) The obligee remarries; or
- (b) Circumstances occur which would make it inequitable to require the obligor to continue to support the obligee.

Comment. Section 272 prescribes conditions under which the right of a spouse to support terminates 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.

Subdivision (a) is self-explanatory. Subdivision (b) is included in recognition that the duty to support is enforced by the equity side of the court. Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609 (1896); Galland v. Galland, 38 C 1. 265 (1869). Cf. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952). See also Radich v. Kruly, 226 Cal. App.2d 683, 38 Cal. Rptr. 340 (1964). 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.

Illustrative of the defenses that are available under subdivision (b) is the equitable defense of laches. Although no statute of limitations runs on the duty of support (the duty is a continuing one), a court might deem it inequitable to enforce such a duty after a long period has elapsed without any assertion of a claim for support. Similarly, a court might deem it inequitable to uphold a claim for support by a former wife who lives with a man without marrying him in order to avoid the defense provided in subdivision (a).

§ 274. Action to enforce duty to support

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

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. During a marriage, an obligor spouse may, by obtaining a divorce in an action where the obligee is personally served, obtain a judgment determining that his duty to support the obligee spouse has ended. 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, a former spouse who is potentially liable for support may initiate the action to determine whether there is any further obligation to support. He need not wait until he is sued for support 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 may be 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

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.

Ex Parte Divorce

SUGGESTED ALTERNATIVE TO SECTION 272 OF TENTATIVE RECOMMENDATION

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

272. (a) An obligee has no right to support from his former spouse after an ex parte divorce if, under the laws of the jurisdiction where they last resided together as husband and wife, the obligee was not entitled to support from the obligor at the time of the ex parte divorce.

(b) An obligee has no right to support from his former spouse after an ex parte divorce if the obligee was the divorce plaintiff and the full faith and credit clause of the United States Constitution requires recognition of the ex parte divorce as terminating the right to support.

February 18, 1966

Memorandum to Law Revision Commission

From: John R. McDonough

Subject: Memorandum 66-1 (Right to Support after
Ex Parte Divorce)

Gentlemen:

I take it that no one will be surprised to learn that I favor that version of the latest Tentative Recommendation which substitutes the goldenrod pages for their pink counterparts. That is, I continue to favor our trying to develop a sound body of California substantive law on support-after-ex-parte-divorce ^{leaving} ~~and to leave~~ choice of law in this complicated area to the courts.

It should be noted, to begin with, that if the Commission accepts the Staff's view of what the Tentative Recommendation (in either form) means, the differences which I have heretofore had with some in our discussions on this subject will be largely dissipated. This is because, as I understand Memorandum 66-1, it says that most questions relating to the quantity, quality and nature of the support rights involved are to be determined by reference to the law applicable to the parties as of the time of the support action, presumably as chosen or selected by the courts. If my understanding is correct and if the Commission were to adopt this view, then my view as to how the matter should be ~~handled~~ ^{be handled} will have prevailed, subject only to proposed Sections 272 and 273. Accordingly, I confine my remarks in this memorandum to my disagreement with Sections 272 and 273.

(As I understand, at least one member of the Commission disagrees with the Staff, holding that the law of the last matrimonial domicile should govern not only "defenses" but also the quantity, quality and nature of the support right. I, of course, disagree with him to the extent that he disagrees with the Staff; my ensuing remarks on proposed Sections 272 and 273 state, in part, the basis of that broader disagreement.)

Section 272. One major concern which prompts this section and, a fortiori, the views of those who would apply the law of the last matrimonial domicile (hereinafter LMD) to all issues, appears to be that we must take steps to ward off "forum (domicile) shopping" by spouses bent on gaining support rights or avoiding support obligations. I believe that this is a largely imaginary evil. I would guess that a change of domicile by one spouse or both is a not infrequent concomitant of the disintegration of a marriage. Spouses doubtless leave the LMD for many reasons -- to go home to mother, to get away from the scene of a personal disaster, to find another spouse, etc. But I know of no evidence to suggest that substantial numbers of people leave their LMDs to seek a preferred climate insofar as support rights or obligations are concerned. This concern is, I suspect, a spectre created by our imaginations rather than a fact of life among refugees from broken marriages. In any event, if it existed in a particular case, I believe that a court would take it into account in determining which law to apply.

Another and related concern that has been expressed in our discussions is that an ex-spouse ought to be able to determine with certainty, at any given time, exactly

what his support obligations are and will be -- that he should not have to live in uncertainty or subject to the risk that his support obligations to his ex-spouse will suddenly be escalated by the latter's change of domicile. There is, of course, merit in this quest for certainty but I suspect that we would be chasing a will-o'-the-wisp in trying to legislate assurance to the spouses we seek to protect. Nothing short of a judgment (declaratory or other) can provide any real assurance on this score. Certainly the Staff proposal does not meet this problem leaving, as it does, the quantity, quality and nature of support rights at large in a substantial number of cases (I would guess a large majority, believing that proposed Section 272 will not decide many cases). But even if the law of the LMD were made applicable to all issues, as some may advocate, the obligor spouse would be left to guess, at his peril, how a particular court would apply that law to the facts of his particular case -- or, more precisely, the record he could develop in a particular lawsuit. Proposed Section 272 would enable few lawyers to give few clients firm assurance as to what their support obligations to ex-spouses were, in my opinion.

Of course, even if proposed Section 272 were aimed at imaginary evils or unattainable certainty, or both, this would not, standing alone, condemn it. What does condemn it, in my view, is that we ought not to shackle the courts with inflexible choice of law rules -- as distinguished from leaving them free to deal in a differentiated way with the virtually infinite variety of distinctive fact situations they will encounter -- because the evils we hope to eradicate do not

really exist and/or the benefits we hope to gain are both unattainable and insubstantial. I do not believe that the case for proposed Section 272 is made, whether it be given the relatively narrow scope suggested by the Staff or the much wider scope advocated by some.

Section 273. If this section remains in the Tentative Recommendation, I would recast it to read as follows:

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

273. When a marriage has been terminated by an ex parte divorce, no action may be maintained in this state by one spouse against the other for support for any period after:

(a) The obligee remarries; or

(b) Circumstances occur which would make it inequitable to require the obligor to continue to support the obligee.


The purpose of this revision would be to enable California courts to decline to award support in some cases without necessarily precluding a subsequent award of support by another state taking a different view of the significance of remarriage or the circumstances which make a support award inequitable. As it now appears in the Tentative Recommendation, proposed Section 273 could be read as requiring California law to be applied and a judgment on the merits rendered in every case, particularly if Section 272 is read in the context of the pink rather than the goldenrod pages. But suppose a New York wife were suing an Illinois husband for support in California. I think that our courts should be free to dismiss the action without

prejudice pursuant to the principles stated in proposed Section 273 but I see no reason why we should foreclose a different decision in a later action by a New York, Illinois or Texas court.

Here, again, if we were to leave these cases to the courts as choice of law cases, no statute would be necessary. Where a case is governed by California law, the principles expressed in proposed Section 273 would automatically be applied since they are a part of our law. Cases decided, pursuant to regular choice of law principles, under non-California law would be handled by the well developed conflict of laws doctrine that a cause of action governed by the law of another state which is offensive to the public policy of the forum will be dismissed without prejudice.

In all that is said above, the overall point is simple: Choice of law problems are complex. Over the years a considerable variety of techniques and doctrines have been developed by the courts to deal with them. Together, they constitute a reasonably satisfactory array of judicial weapons to deal with choice of law matters. The problem of support after ex parte divorce should be left to the courts to handle with the techniques and experience which they have accumulated. To be sure, the present rules and techniques do not provide certainty and are otherwise subject to criticism. Indeed, the field of choice of law is in ferment if not, indeed, turmoil simply because of the very subtlety and complexity of the problems involved. At this juncture impatience with judicial groping and the desire for simplicity and certainty should not lead us to suppose

that we can formulate a few a priori pronouncements which will provide acceptable solutions to problems which are not only complex in and of themselves but which constitute only a small segment of a larger body of problems in this area. Let us concentrate on formulating a body of sound substantive principles and leave choice of law to the courts, with our blessing and our commiserations.


J.R.M.

JRM:mh