#F-670 02/22/84

Memorandum 84-37

Subject: Study F-670 - Award of Attorney's Fees at Dissolution (Folb case)

Background

Although the Commission has determined to give top priority to the probate study during 1984, the Commission has also requested the staff to work into the agenda selected aspects of family law, including the remainder of Reppy's "Dirty Dozen" of bad family law decisions.

The only item on Professor Reppy's list the Commission has not yet taken up is the line of cases that treat the wife's attorney's fees at dissolution of marriage as the husband's separate debt. This line is illustrated by the case of In re Marriage of Folb, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975). Folb involved a marriage in which the husband had substantial separate assets (well over $2 million) and in which the community also had substantial value ($2,044,445.88). After dividing the community property equally and awarding the husband and wife each $1,022,222.94 of community assets, the trial court then directed that $60,000 of community property be paid to the wife's attorneys before division. The husband, understandably, complained that this was an unequal division, since he had to bear the total cost of his own attorneys out of his separate property or his share of the community, while at the same time paying half of his wife's attorney fees from his share of the community. The Court of Appeal was unsympathetic, following other cases to the effect that the equal division mandate of the Family Law Act does not apply to attorney's fees, and it is proper for the trial court to direct that payment of the wife's attorney fees be made from the husband's share of the community. "In view of the decisional law, we find no inequality in the trial court's division of the community in the instant case." 53 Cal. App.3d at 875.

Professor Reppy observes that it has been repeatedly held that the court at dissolution can in effect achieve an unequal division by ordering the husband to pay the wife's attorney's fees with funds that are his after dividing community assets and other debts. "Folb relied on Civ. Code § 4370, which authorizes an award of attorney's fees, but that hardly means the obligation is H's separate debt. What reason would the legislature have for leaving open this strategem whereby the divorce court can 'punish' H for his 'fault' that led to the divorce? Or is

there some other reason why H's attorney's fees at divorce are treated differently from W's? (Keep in mind that an alimony award will be given W if she is unable to earn sufficient funds after divorce for her support.)" W. Reppy, Community Property in California 238 (1980).

Law of Attorney's Fees

The law on awarding attorney's fees in dissolution proceedings is that the court has discretion to order a party "to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees." Civil Code § 4370. The purpose of this provision is to enable a party to have sufficient resources to adequately present the party's case. See, e.g., Bernheimer v. Bernheimer, 103 Cal. App.2d 643, 230 P.2d 17 (1951); Avnet v. Bank of America, 232 Cal. App.2d 244, 42 Cal. Rptr. 616 (1965). In order to be entitled to an award the party must demostrate that his or her resources are not sufficient to meet the expenses of litigation. See, e.g., Martins v. Superior Court, 12 Cal. App.3d 870, 90 Cal. Rptr. 898 (1970).

Nonetheless, the courts have consistently held that a wife is not required to impair the capital of her separate estate in order to defray her litigation costs. See, e.g., Marriage of Stachon, 77 Cal. App.3d 506, 143 Cal. Rptr. 599 (1977); Marriage of Hopkins, 74 Cal. App.3d 591, 141 Cal. Rptr. 597 (1977). There appears to be a distinction between separate assets and separate income of the wife: a party may have sufficient separate income to obviate need, but where the separate estate is not income-producing, it shouldn't be impaired. Spiegel, Awards of Attorney Fees and Costs, 2 California Marital Dissolution Practice § 21.5 at 826-27 (Cal. Cont. Ed. Bar (1983).

Although the wife is not required to finance the litigation out of her own separate estate (or her share of the community property), the husband may be required to finance the litigation of both parties out of his. This rule dates from the era before no-fault dissolution of marriage and equal division of assets. In Weinberg v. Weinberg, 26 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967), for example, the husband had a substantial separate estate (in excess of $2 million) and there was $338,164.93 of community property to be divided equally. Although the husband was ordered to pay substantial spousal and child support, he was also ordered to pay the wife's $20,000 legal fees out of his separate property. The husband appealed, on the basis that the wife's attorney

fees should have been charged against the community before distribution, the theory behind the award being to compensate the wife for the husband's use of the community estate to pay his own attorney. The Supreme Court simply pointed out that the statute gives the court discretion to award attorney's fees without regard to available resources. "Even when the wife has separate property in addition to community property, the trial court need not require her to resort to her own capital for payment of her counsel before ordering her husband to pay attorney's fees. [Citations.] Here plaintiff had no separate property. No abuse of discretion appears." 67 Cal.2d at 571.

The staff can perceive no basis for this result other than a gut reaction that although the wife has plenty, the husband has more than plenty and can better afford to pay the fees. The result cannot really be explained on the basis that this predated equal division and no-fault divorce, since in the Weinberg case a divorce was awarded to each party and equal division of assets was mandated in such a case. In fact, when the policy of his area of the law was reexamined after enactment of the Family Law Act, the Court of Appeal came to the same result.

The case of In re Marriage of Jafeman, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972), came under the Family Law Act. In this case the husband's separate estate was minimal, the community estate was fairly substantial, there were no children and both spouses worked, and the wife had some separate property. Nonetheless, the trial court ordered the husband to pay the wife's counsel fees. The husband objected that this would not be an equal division of the community property, since he would have to pay them out of his share of the community. The Court of Appeal noted that under prior law, the award of attorney's fees was considered to be a separate matter from division of the property. "The clear import of Weinberg is that even when the court is required to divide the community property equally, an award of attorney's fees may be made without regard to the character of the funds from which the payment may ultimately be made. This suggests that the award of attorney's fees is an independent matter and is not to be interjected into the consideration of division of the community property when an equal division is required." 29 Cal. App.3d at 264. The Court of Appeal went on to examine the Family Law Act for legislative intent to change prior law,

but was unable to find such an intent and therefore concluded that the trial court could properly award the wife attorney's fees and that the award was not in derogation of the husband's right to an equal share of the community property.

The Jafeman holding has been followed in later cases such as Folb and In re Marriage of Barnert, 85 Cal. App.3d 413, 149 Cal. Rptr. 616 (1978). It should be noted, however, that this treatment of attorney's fees is within the discretion of the court, and the court may also treat attorney's fees as a community obligation and order payment from the community. In re Marriage of Berlin, 54 Cal. App.3d 547, 126 Cal. Rptr. 746 (1976); Wong v. Superior Court, 246 Cal. App.2d 541, 54 Cal. Rptr. 783 (1966); Gilb v. Gilb, 170 Cal. App.2d 379, 329 P.2d 176 (1959). Jafeman specifically refers to this court discretion, although there is some question whether attorney's fees may be treated as a community debt if opposed by either party. See discussion in Spiegel, Awards of Attorney Fees and Costs, 2 California Marital Dissolution Practice § 21.24 at P. 838 (Cal. Cont. Ed. Bar 1983).

Policy Decisions

The basic policy decision confronting the Commission is whether to overrule Folb and similar cases that establish the principle that the husband can be required to pay the wife's attorney's fees out of the husband's separate property (or his share of the community property). The Commission's consultant, Professor Reppy, has labeled this line of cases a "two-star horrible" in that it is inimical to the fundamental scheme of equal division of the community property.

The question arises, of course, what is to be done where the wife has inadequate assets to pay the attorney's fees? This situation is much more troublesome than the situation where there is a substantial amount of community property being divided. Professor Reppy points out that where the wife has few assets and is incapable of self-support, spousal support is the proper remedy. And of course, if there is little community property with which the wife can pay her attorney's fees, there is also little community property with which the husband can pay her fees, let alone his own. In such a case, if the husband has substantial separate assets, it may be proper to make the husband bear part of the expense. This, in essence, is a form of support. However, the staff agrees with Professor Reppy that this should be done as a support order

(for which there are statutory standards) rather than as a separate order for payment of attorney's fees (for which there appear to be no standards).

Assuming the Commission wishes to abrogate the Folb line of cases, the next question is whether the attorney's fees of the parties should be treated as community debts or as the separate debt of each party. To the staff there is a theoretical appeal to treating the attorney's fees of both parties as community debts. The expenses incurred in dividing the community seem properly to be a community obligation, just as attorney's fees involved in a civil action for partition of property are a common expense to be apportioned among the owners of the property.

On the other hand, treating attorney's fees as a community expense requires a court finding and determination of reasonableness. The laissez-faire approach would be to have each party bear his or her own attorney's fees, which could be as reasonable or unreasonable as the party desires. The fees would be paid out of the party's separate property or share of the community property, without the necessity of court involvement. In a case where there is unsufficient community property to pay the attorney's fees of a party, and the party doesn't have the capacity to earn money to pay them, a support award would be in order. Also, although the tax considerations here are not clear, it appears there may be some tax advantage to treating the attorney's fees of each spouse as the separate obligation of the spouse rather than as a community obligation. See discussion in Angela & Chomsky, Income Tax Treatment of Legal and Accounting Fees, in Tax Aspects of Marital Dissolutions: A Basic Guide for General Practitioners §§ 6.8-6.9 at pp. 142-144 (Cal. Cont. Ed. Bar 1979).

After the Commission has determined the best approach, the staff will prepare a tentative recommendation to distribute to persons on our family law mailing list for comment.

Respectfully submitted,

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