

## Memorandum 84-62

Subject: Study F-670 - Attorney's Fees in Family Law Proceedings  
(Revised Draft)

The Commission at the June meeting reviewed the staff draft of a recommendation to overturn the case law rule that a wife (as opposed to husband) is not required to impair the capital (as opposed to income) of her separate estate in order to defray litigation expenses in family law proceedings. The Commission also had before it at that time a critique of the staff draft, prepared by the Executive Committee of the State Bar Family Law Section. In response to the offer of assistance made in the critique, the Commission requested the Executive Committee to submit its own version of an appropriate draft.

The draft submitted by the Executive Committee is attached as Exhibit 1. The draft would amend Civil Code Section 4370 as follows:

4370. (a) The Legislature finds and declares that it is the policy of this State to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and their counsel. In making an order under this section, the court shall consider together with the factors enumerated in decisional and statute law the extent to which the conduct of each party and their counsel has furthered or frustrated this policy. It shall be a further purpose of this section to substantially equalize the bargaining power of the parties.

~~(a)~~ (b) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife of another party to the proceedings to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(c) The court may award fees and costs from any source, whether community or separate property, principal or income and in an amount which is just under the circumstances, taking into consideration all of the factors enumerated in existing law which are consistent with this section.

~~(b)~~ (d) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court:

(1) At the time of the hearing of the cause on the merits; or

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

~~(e)~~ (e) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

The staff has several problems with this draft. Technically, we do not like to see lengthy, complex sections built into the codes. One of the virtues of Commission-recommended legislation is short, simple, clear statutes. We can understand the Executive Committee's concern that the present statute be tampered with as little as possible, but we do not believe the Commission should put its imprimatur on it. The revised staff draft (attached to this memorandum) seeks to incorporate the Executive Committee suggestions without endorsing a lengthy and complex section.

Substantively, the staff is unhappy with the references to "factors enumerated" in decisional and statute law and consistent with the section. We understand the purpose of the language to make clear that case law is not overruled except to the extent the new language is inconsistent. However, we think these references create ambiguity and imply more than is intended. We handle this problem in our revised draft by noting in the Comment that existing law is generally preserved.

The Executive Committee draft also refers specifically to the following factors the court must consider in arriving at an award of costs and attorney's fees:

(1) The extent to which the parties furthered or frustrated the state policy of promoting cooperation and settlement of litigation.

(2) The objective of substantially equalizing the bargaining power of the parties.

Although the staff has preserved these factors in the draft, we question listing them alone in the statute. That appears to give them undue emphasis, especially the "conduct of litigation" factor. The staff also questions the objective "to substantially equalize the bargaining power of the parties." It appears doubtful to us that the bargaining power of the parties can ever be substantially equal, except in an unusual case. Shouldn't we simply be saying, at most, that our objective is to enable a party to have sufficient resources to adequately present his or her case? This is what the cases say, and to the staff it appears that this is also what we should say.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1  
WALZER AND GABRIELSON

STUART B. WALZER\*  
JAN C. GABRIELSON\*  
LINDA L. PAAVOLA  
KATHI CUFFARO

\*CERTIFIED SPECIALIST\* FAMILY LAW  
CALIFORNIA BOARD OF LEGAL SPECIALIZATION  
\*DIPLOMATE NATIONAL BOARD  
OF TRIAL ADVOCATES

A LAW CORPORATION  
1888 CENTURY PARK EAST, SUITE 1107  
LOS ANGELES, CALIFORNIA 90067

TELEPHONES 12131  
879-0320 • 557-0915

September 6, 1984

EXPRESS MAIL

Nathaniel Sterling  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Revisions to Civil Code 4370,  
Attorneys' Fees and Costs in  
Family Law Proceeding

Dear Nat:

You have asked me to draft proposed revisions to Civil Code §4370 to take care of the problems put forth by the Commission and the Executive Committee of the State Bar Family Law Section. I have drafted the following which I believe effectively solves the problems of existing law.

Add a new paragraph before (a):

"The Legislature finds and declares that it is the policy of this State to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and their counsel. In making an order under this section, the court shall consider together with the factors enumerated in decisional and statute law the extent to which the conduct of each party and their counsel has furthered or frustrated this policy. It shall be a further purpose of this section to substantially equalize the bargaining power of the parties."

Add a new paragraph after (a):

"The court may award fees and costs from any source, whether community or separate property, principal or income and in an amount which is just

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under the circumstances, taking into consideration  
all of the factors enumerated in existing law which  
are consistent with this section."

The Executive Committee suggested that the desired changes  
be made by tampering with the present statute as little as  
possible to minimize conflicts with existing case law.

I hope this is helpful.

Best regards. -

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan C. Gabrielson", written in dark ink.

JAN C. GABRIELSON

JCG:jd

STAFF DRAFT

## TENTATIVE RECOMMENDATION

relating to

## LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS

The court in a dissolution proceeding 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."<sup>1</sup> The purpose of an award of attorneys' fees is to enable a party to have sufficient resources to adequately present the party's case.<sup>2</sup> In order to be entitled to an award the party must demonstrate that his or her resources are not sufficient to meet the expenses of litigation.<sup>3</sup>

Although the court has discretion to award litigation expenses, the discretion is limited by the principle that a wife may not be required to impair the capital (as opposed to income) of her separate estate in order to defray litigation expenses.<sup>4</sup> This rule appears to be a relic of the era before equal management and control: because the husband had management and control of the community property and could pay his own attorney's fees out of the community, the wife was not required to bear her own attorney's fees but could require payment out of the community or out of the husband's separate property.<sup>5</sup>

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1. Civil Code § 4370.
  2. 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).
  3. See, e.g., *Martins v. Superior Court*, 12 Cal. App.3d 870, 90 Cal. Rptr. 898 (1970).
  4. 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); *In re Marriage of Jafeman*, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972).
  5. Cf. discussion in *Weinberg v. Weinberg*, 26 Cal.2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

This rule is now obsolete and unduly limits the discretion of the court. It results in cases requiring one party to finance the litigation of the other even though there may be substantial amounts of community assets available to defray the litigation expenses.<sup>6</sup> The court should be able to review the circumstances of the parties and the litigation, and should be able to award or deny litigation expenses based on such factors as the needs of the parties and their ability to pay, the conduct of the litigation, and other relevant considerations. An award should be made out of any appropriate assets--community or separate property, principal or income--and in such amounts as appears just.

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

An act to add Section 4370.5 to the Civil Code, relating to family law proceedings.

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

969/013

Civil Code § 4370.5 (added). Standard for award of costs and attorney's fees

SECTION 1. Section 4370.5 is added to the Civil Code, to read:

4370.5. In making an award under this chapter:

(a) The court shall take into consideration, in addition to such other factors as are proper, the following:

(1) The need for such an award to substantially equalize the bargaining power of the parties.

(2) The extent to which the conduct of each party and attorney furthers or frustrates the policy of the law to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.

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6. See, e.g., *In re Marriage of Folb*, 53 Cal. App.3d 862, 126 Cal. Rptr. 306 (1975).

(b) The court may order payment from any source, whether community property or separate property, principal or income, and in an amount that is just under the circumstances.

Comment. Subdivision (a) of Section 4370.5 lists two important factors the court should consider in making an award of costs and attorney's fees in family law proceedings. The factors listed in subdivision (a) are not exclusive, and the court may consider any other proper factors, including the likelihood of collection, tax considerations, and other factors announced in the cases. See, e.g., *In re Marriage of Lopez*, 38 Cal. App.3d 93, 113 Cal. Rptr. 58 (1974).

Subdivision (b) broadens the court's ability to make an appropriate award of costs and attorney's fees by expressly authorizing the court to order payment from any source that appears proper, including the community and separate estates of the parties. This overrules language in the cases holding, for example, that the court may not require a wife to impair the capital of her separate estate in order to defray her litigation expenses. See, e.g., *In re Marriage of Jafeman*, 29 Cal. App.3d 244, 105 Cal. Rptr. 483 (1972); *Marriage of Hopkins*, 74 Cal. App.3d 591, 141 Cal. Rptr. 597 (1977).