

RESOLUTION 03-07-2010

DIGEST

Fiduciary Duties: Interest as Penalty for Breach

Amends Family Code section 2102 to clarify how spousal fiduciary duties apply to post-judgment motions to modify child or spousal support.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 2102 to clarify how spousal fiduciary duties apply to post-judgment motions to modify child or spousal support. This resolution should be approved in principle because current law is not clear about the duration of fiduciary duties in the post-judgment period.

Family Code section 2102 provides that spousal fiduciary duties continue “[f]rom the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees . . .” There is dispute about whether this means that the spousal fiduciary duties end when a judgment is entered that provides for the payment of support, or instead when the support obligation ends at some later date. The judgment support is often modified in the interim and parties and counsel are not clear on the applicable fiduciary duties during this time period. This resolution states explicitly that fiduciary duties continue until jurisdiction over support and fees is terminated, but clarifies that the duties are suspended post-judgment until a motion relating to child or spousal support is filed with the court (similar to the application of other discovery-related statutes).

This clarification would help former spouses be more aware of and thus compliant with their fiduciary duties. It is likewise helpful in clarifying that the duties after dissolution will not apply in the absence of a pending motion related to support or fees.

The Resolutions Committee supports the amendment proposed by Flexcom which proposes to add “and served” to the text to clarify that the duties are suspended until a motion involving support or fees is file *and served*.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Association recommends that legislation be sponsored to amend Family Code section 2102 to read as follows:

- 1 § 2102
- 2 (a) From the date of separation to the date of the distribution of the community or
- 3 quasi-community asset or liability in question, each party is subject to the standards

4 provided in Section 721, as to all activities that affect the assets and liabilities of the other
5 party, including, but not limited to, the following activities:

6 (1) The accurate and complete disclosure of all assets and liabilities in which the
7 party has or may have an interest or obligation and all current earnings, accumulations, and
8 expenses, including an immediate, full, and accurate update or augmentation to the extent
9 there have been any material changes.

10 (2) The accurate and complete written disclosure of any investment opportunity,
11 business opportunity, or other income-producing opportunity that presents itself after the
12 date of separation, but that results from any investment, significant business activity
13 outside the ordinary course of business, or other income-producing opportunity of either
14 spouse from the date of marriage to the date of separation, inclusive. The written
15 disclosure shall be made in sufficient time for the other spouse to make an informed
16 decision as to whether he or she desires to participate in the investment opportunity,
17 business, or other potential income-producing opportunity, and for the court to resolve any
18 dispute regarding the right of the other spouse to participate in the opportunity. In the
19 event of nondisclosure of an investment opportunity, the division of any gain resulting
20 from that opportunity is governed by the standard provided in Section 2556.

21 (3) The operation or management of a business or an interest in a business in which
22 the community have an interest.

23 (b) From the date that a valid, enforceable, and binding resolution of the disposition
24 of the asset or liability in question is reached, until the asset or liability has actually been
25 distributed, each party is subject to the standards provided in Section 721 as to all activities
26 that affect the assets or liabilities of the other party. Once a particular asset or liability has
27 been distributed, the duties and standards set forth in Section 721 shall end as to that asset
28 or liability.

29 (c) From the date of separation to the date of a ~~valid, enforceable, and binding~~
30 ~~resolution of all issues relating to child or spousal support and professional fees~~
31 jurisdiction over child or spousal support is terminated, each party is subject to the
32 standards provided in Section 721 as to all issues relating to ~~the support and fees~~, including
33 the immediate, full, and accurate disclosure of all material facts and information regarding
34 the income or expenses of the party. Upon entry of a judgment for child or spousal
35 support, the duties under this subsection shall be suspended until a motion relating to child
36 or spousal support is filed with the court.

37 (d) ~~From the date of separation to the date of a valid, enforceable, and binding~~
38 ~~resolution of all issues relating to professional fees, each party is subject to the standards~~
39 provided in Section 721 as to all issues relating to professional fees, including the
40 immediate, full, and accurate disclosure of all material facts and information regarding the
41 income or expenses of the party.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Family Code section 2102(c) provides that from the date of separation until “the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support...” each party is subject to the standards provided in Family Code section 721 as to all issues relating to support, including the “immediate, full and accurate disclosure of all material facts and information regarding the income or expenses of the party.”

Section 721 creates a fiduciary obligation to affirmatively provide, among other things, the party’s current financial information to the other party.

This Resolution: Amends Family Code section 2102(c) to clarify that the affirmative obligation to provide current financial information to the other party applies to post-judgment motions to modify child and spousal support. It also strikes that portion of Section 2102(c) dealing with professional fees and restates it in a new subsection (d).

The Problem: In the vast majority of cases, the court retains jurisdiction to modify child or spousal support following entry of judgment. This has led to confusion as to whether the fiduciary duties under Family Code section 721 apply to post-judgment motions to modify support since the code states that such duties apply only until the date of a “valid, enforceable, and binding resolution” of all issues regarding support. Some contend a judgment constitutes such a “binding resolution” while others contend that a judgment cannot constitute such a “binding resolution” so long as the court retains jurisdiction to modify support.

This amendment would clarify that the duties under Family Code section 721 apply to post-judgment motions to modify support, but that the duties under that section would be suspended until a motion to modify support was actually filed with the court. This amendment would also be in keeping, and in furtherance of, the stated policy of the State of California to insure total and full disclosure of information in family law matters.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Diane Wasznicky, Bartholomew & Wasznicky, 4740 Folsom Blvd., Sacramento, CA 95816, voice (916) 455.5200, fax (916) 455.6300, email Diane@DivorceWithRespect.com.

RESPONSIBLE FLOOR DELEGATE: Diane Wasznicky

COUNTER ARGUMENTS

FAMILY LAW SECTION

RECOMMENDATION: APPROVE IF AMENDED

The Family Law Section Executive Committee (FLEXCOM) has reviewed proposed Resolution 03-07-2010 and supports this if amended, 15-0-1 as follows: section (c) should be modified so

that the fiduciary duty provisions will only be triggered by the filing “and service” of a post-judgment support or fee motion.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar Board of Governors or overall membership and is not to be construed as representing the position of the State Bar of California.

Membership in the Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.