RESOLUTION 07-01-2018

DIGEST
Sanctions: Expand Court's Authority to Grant
Amends Family Code section 271 to expand the court's authority to grant sanctions beyond attorney fees and costs.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 271 to expand the court's authority to grant sanctions beyond attorney fees and costs. This resolution should be disapproved because the proposed language is ripe for abuse by litigants and will result in unintended consequences.

The purpose of Family Code section 271 is to encourage settlement and cooperation between the parties by allowing the court to order sanctions against a bad actor. Under Family Code section 271, a party need not actually suffer harm to seek and be awarded sanctions under this section. Expanding the potential sanctions to include "any other sanction the court deems appropriate" would only serve to increase litigation. Under the proposed language, a party could seek monetary sanctions as well as a change in the custody order or force the sale of a property to penalize the bad actor. The means of penalizing a party, and the request by an irate opponent to the court, could become elaborate and vindictive. The use of attorney's fees and costs allows the court to base sanctions on fees that the court can identify and readily ascertain, instead of providing the court a carte blanche approach to resolving the bad acts of a party that no other court is allowed.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 271 to read as follows:

§271

(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees ~~and~~ costs, and any other sanction the court deems appropriate, on the extent to which the conduct of each party or 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. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to

demonstrate any financial need for the award.

(b) An award ~~of attorney's fees and costs~~ as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award ~~of attorney's fees and costs~~ as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: Family Code section 271 is meant to deter conduct in family law litigation that obstructs settlement and cooperation between the parties. It is used to deter behavior and conduct of parties and attorneys that increase the cost of litigation in family law matters. However, it limits the court's authority to only order sanctions in the amount of the attorney's fees and costs expended by the wronged party. This is often times insufficient to deter the conduct.

The Solution: This resolution would amend Family Code section 271 to expand the court's authority to award sanctions it deems appropriate in conjunction with the conduct – beyond just attorney fees and costs, thereby expanding the court's authority to deter obstructive conduct.

IMPACT STATEMENT
The resolution does not affect laws, statute, or rules other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: B. J. Fadem

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE AS AMENDED

FLEXCOM supports the goal of this Resolution in amending Family Code section 271 to

correctly reflect the intent and goal of this important remedy where it is warranted. However, FLEXCOM agrees with the Sacramento County Bar Association (SCBA) Counterargument that the Resolution as written is not clear enough in trying to achieve this goal. FLEXCOM Approves as Amended Resolution 07-1-18 with the amendments proposed by SCBA and reflected in the Counterargument.

SACRAMENTO COUNTY BAR ASSOCIATION

SCBA supports the general goal of this Resolution. However, we feel it is too vague to accomplish the goal effectively. We propose the following revisions to 07-01-18:

1). Line 3- add a comma after word fees;
2). Line 6-10: Add a comma after word fees, delete word "and", add a comma after word "costs" and add phrase "and any other sanction the court deems appropriate." Line 6-7 delete words "of attorney's fees, costs or other award." Delete two sentences starting with "In making an award" from lines 7-10.
3). Line 11: Delete word "an" and replace with word "the". Add a comma after 'fees'; delete word 'and'; add a comma after 'costs' and add phrase 'or other award' after 'costs'.
4). Line 13: Delete phrase "of attorney's fees and costs".
5). Lines 15-16: Add sentence Such an award for monetary sanctions is intended to serve as a deterrent to similar future conduct on the part of the party being sanctioned.
6). Add subsection (d) An award under this section is not limited to the amount of attorney's fees and costs incurred by the injured party. To the extent that *Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142 or *Webb v. Webb* (2017) 12 Cal. App. 5th 876 hold otherwise, they are hereby abrogated.

The statement of reasons submitted with 07-01 erred in identifying the problem. Family Code §271 has always been interpreted and applied to address the overall expense the non-cooperative conduct causes the other party to incur as well as the need to deter such future conduct. The two cases mentioned in the added subsection (d) limited application of §271 to attorney fees and legal costs. This limited interpretation is what needs to be specifically addressed, since the injured party can suffer lost time, multiple pleadings, lost time from employment, delayed relief, loss of opportunities/assets due to delays, etc.

Since the statute already provides that the requesting party is not required to show need to receive such an award, it is unfair to have the court consider the ability of the sanctioned party to pay. The reality is that a party with a minimal assets/income has no disincentive to cooperate with the law and process because the current language ties the hands of the court in this regard. To be a true deterrent there needs to be an expectation that the court will award a sanction if the conduct rises to the level sufficient for such an award.

RESOLUTION 07-02-2018

DIGEST
Child Support: Repeal Suspension of Driver's License for Non-Payment
Deletes Family Code section 17520 to remove the suspension of a driver's, professional or recreational license for non-payment of child support.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution deletes Family Code section 17520 to remove the suspension of a driver's or professional or recreational license for non-payment of child support. This resolution should be disapproved because the repeal of this code section in its entirety would eliminate effective means of ensuring compliance with orders to pay child support.

The proponent is correct that "Examining Child Support Arrears in California: The Collectability Study" (March 2003) did establish that most support arrears were owed by individuals with low incomes, however, that report did not examine the impact or effectiveness of any other enforcement tool other than wage withholding, where the individual's employer pays the support obligation directly to the Department of Child Support Services ("DCSS"), prior to issuing a paycheck to the obligor. It is therefore unclear from this study if license suspensions, which under the code section includes driver's, professional and recreational licenses, impact collection efforts.

The resolution is similar to Assembly Bill 103 which was signed into law in 2017 which amended Penal Code section 1463.007 to limit the suspension or hold on a driver's license to driving-related offenses or for a failure to appear in court. The amendment only modified section 1463.007 of the Penal Code, however, so it is unclear whether this modification will also be made applicable to the DCSS, which is the state entity authorized to collect past due child support (and spousal support amounts if the department is also collecting child support from the obligor). The resolution is also similar to Resolutions 10-05-2017 (suspension of driver's license for habitual truancy), 10-06-2017 (suspension of driver's license for conviction of prostitution related offense), and 10-07-2017 (suspension for conviction of vandalism), all of which were approved in principle. While the resolution appears to be in line with the current legislative trend to limit the suspension of driver's licenses or other professional licenses to offenses related to those licenses or for a failure to appear in court, the elimination of the ability to suspend a license is an effective tool that is not wielded without due process or an opportunity to stay the suspension, and may in fact be a better option than others currently available to DCSS.

There are few good options for ensuring the collection of past due debt, but a license suspension tends to be a good "shot across the bow" to gain the obligor's attention and cooperation, prior to levying bank accounts or retirement accounts, or placing a lien against a property – arguably

more extreme measures which DCSS is also authorized to take. Family Code section 17520 currently requires notice to be sent to the child support obligor, allows for the issuance of a temporary 150-day license to allow for a payment plan to be worked out between the obligor and DCSS, does not suspend commercial driver's licenses, and allows the obligor to request the court to stay the suspension entirely should the obligor show that such a suspension would interfere with employment or child care. Eliminating this code section entirely would eliminate an effective enforcement and collection tool and likely increase the outstanding debt rather than decrease it, as it would effectively remove any incentive to timely repayment while interest (at 10% per annum) continued to accrue.

This resolution is related to Resolution 07-03-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to delete Family Code section 17520 to read as follows:

~~§ 17520.~~

~~(a) As used in this section:~~

~~(1) "Applicant" means a person applying for issuance or renewal of a license.~~

~~(2) "Board" means an entity specified in Section 101 of the Business and Professions Code, the entities referred to in Sections 1000 and 3600 of the Business and Professions Code, the State Bar, the Bureau of Real Estate, the Department of Motor Vehicles, the Secretary of State, the Department of Fish and Wildlife, and any other state commission, department, committee, examiner, or agency that issues a license, certificate, credential, permit, registration, or any other authorization to engage in a business, occupation, or profession, or to the extent required by federal law or regulations, for recreational purposes. This term includes all boards, commissions, departments, committees, examiners, entities, and agencies that issue a license, certificate, credential, permit, registration, or any other authorization to engage in a business, occupation, or profession. The failure to specifically name a particular board, commission, department, committee, examiner, entity, or agency that issues a license, certificate, credential, permit, registration, or any other authorization to engage in a business, occupation, or profession does not exclude that board, commission, department, committee, examiner, entity, or agency from this term.~~

~~(3) "Certified list" means a list provided by the local child support agency to the Department of Child Support Services in which the local child support agency verifies, under penalty of perjury, that the names contained therein are support obligors found to be out of compliance with a judgment or order for support in a case being enforced under Title IV-D of the federal Social Security Act.~~

~~(4) "Compliance with a judgment or order for support" means that, as set forth in a judgment or order for child or family support, the obligor is no more than 30 calendar days in arrears in making payments in full for current support, in making periodic payments in full, whether court ordered or by agreement with the local child support agency, on a support arrearage, or in making periodic payments in full, whether court ordered or by agreement with the local child support agency, on a judgment for reimbursement for public assistance, or has obtained a judicial finding that equitable estoppel as provided in statute or case law precludes~~

enforcement of the order. The local child support agency is authorized to use this section to enforce orders for spousal support only when the local child support agency is also enforcing a related child support obligation owed to the obligee parent by the same obligor, pursuant to Sections 17400 and 17604.

(5) "License" includes membership in the State Bar, and a certificate, credential, permit, registration, or any other authorization issued by a board that allows a person to engage in a business, occupation, or profession, or to operate a commercial motor vehicle, including appointment and commission by the Secretary of State as a notary public. "License" also includes any driver's license issued by the Department of Motor Vehicles, any commercial fishing license issued by the Department of Fish and Wildlife, and to the extent required by federal law or regulations, any license used for recreational purposes. This term includes all licenses, certificates, credentials, permits, registrations, or any other authorization issued by a board that allows a person to engage in a business, occupation, or profession. The failure to specifically name a particular type of license, certificate, credential, permit, registration, or other authorization issued by a board that allows a person to engage in a business, occupation, or profession, does not exclude that license, certificate, credential, permit, registration, or Home Bill Information California Law Publications Other Resources My Subscriptions My Favorites other authorization from this term.

(6) "Licensee" means a person holding a license, certificate, credential, permit, registration, or other authorization issued by a board, to engage in a business, occupation, or profession, or a commercial driver's license as defined in Section 15210 of the Vehicle Code, including an appointment and commission by the Secretary of State as a notary public. "Licensee" also means a person holding a driver's license issued by the Department of Motor Vehicles, a person holding a commercial fishing license issued by the Department of Fish and Game, and to the extent required by federal law or regulations, a person holding a license used for recreational purposes. This term includes all persons holding a license, certificate, credential, permit, registration, or any other authorization to engage in a business, occupation, or profession, and the failure to specifically name a particular type of license, certificate, credential, permit, registration, or other authorization issued by a board does not exclude that person from this term. For licenses issued to an entity that is not an individual person, "licensee" includes an individual who is either listed on the license or who qualifies for the license.

(b) The local child support agency shall maintain a list of those persons included in a case being enforced under Title IV-D of the federal Social Security Act against whom a support order or judgment has been rendered by, or registered in, a court of this state, and who are not in compliance with that order or judgment. The local child support agency shall submit a certified list with the names, social security numbers, and last known addresses of these persons and the name, address, and telephone number of the local child support agency who certified the list to the department. The local child support agency shall verify, under penalty of perjury, that the persons listed are subject to an order or judgment for the payment of support and that these persons are not in compliance with the order or judgment. The local child support agency shall submit to the department an updated certified list on a monthly basis.

(c) The department shall consolidate the certified lists received from the local child support agencies and, within 30 calendar days of receipt, shall provide a copy of the consolidated list to each board that is responsible for the regulation of licenses, as specified in this section.

(d) On or before November 1, 1992, or as soon thereafter as economically feasible, as determined by the department, all boards subject to this section shall implement procedures to

~~accept and process the list provided by the department, in accordance with this section. Notwithstanding any other law, all boards shall collect social security numbers or individual taxpayer identification numbers from all applicants for the purposes of matching the names of the certified list provided by the department to applicants and licensees and of responding to requests for this information made by child support agencies.~~

~~(e) (1) Promptly after receiving the certified consolidated list from the department, and prior to the issuance or renewal of a license, each board shall determine whether the applicant is on the most recent certified consolidated list provided by the department. The board shall have the authority to withhold issuance or renewal of the license of an applicant on the list.~~

~~(2) If an applicant is on the list, the board shall immediately serve notice as specified in subdivision (f) on the applicant of the board's intent to withhold issuance or renewal of the license. The notice shall be made personally or by mail to the applicant's last known mailing address on file with the board. Service by mail shall be complete in accordance with Section 1013 of the Code of Civil Procedure.~~

~~(A) The board shall issue a temporary license valid for a period of 150 days to any applicant whose name is on the certified list if the applicant is otherwise eligible for a license.~~

~~(B) Except as provided in subparagraph (D), the 150-day time period for a temporary license shall not be extended. Except as provided in subparagraph (D), only one temporary license shall be issued during a regular license term and it shall coincide with the first 150 days of that license term. As this paragraph applies to commercial driver's licenses, "license term" shall be deemed to be 12 months from the date the application fee is received by the Department of Motor Vehicles. A license for the full or remainder of the license term shall be issued or renewed only upon compliance with this section.~~

~~(C) In the event that a license or application for a license or the renewal of a license is denied pursuant to this section, any funds paid by the applicant or licensee shall not be refunded by the board.~~

~~(D) This paragraph shall apply only in the case of a driver's license, other than a commercial driver's license. Upon the request of the local child support agency or by order of the court upon a showing of good cause, the board shall extend a 150-day temporary license for a period not to exceed 150 extra days.~~

~~(3) (A) The department may, when it is economically feasible for the department and the boards to do so as determined by the department, in cases where the department is aware that certain child support obligors listed on the certified lists have been out of compliance with a judgment or order for support for more than four months, provide a supplemental list of these obligors to each board with which the department has an interagency agreement to implement this paragraph. Upon request by the department, the licenses of these obligors shall be subject to suspension, provided that the licenses would not otherwise be eligible for renewal within six months from the date of the request by the department. The board shall have the authority to suspend the license of any licensee on this supplemental list.~~

~~(B) If a licensee is on a supplemental list, the board shall immediately serve notice as specified in subdivision (f) on the licensee that his or her license will be automatically suspended 150 days after notice is served, unless compliance with this section is achieved. The notice shall be made personally or by mail to the licensee's last known mailing address on file with the board. Service by mail shall be complete in accordance with Section 1013 of the Code of Civil Procedure.~~

~~(C) The 150-day notice period shall not be extended.~~

~~(D) In the event that any license is suspended pursuant to this section, any funds paid by the licensee shall not be refunded by the board.~~

~~(E) This paragraph shall not apply to licenses subject to annual renewal or annual fee.~~

~~(f) Notices shall be developed by each board in accordance with guidelines provided by the department and subject to approval by the department. The notice shall include the address and telephone number of the local child support agency that submitted the name on the certified list, and shall emphasize the necessity of obtaining a release from that local child support agency as a condition for the issuance, renewal, or continued valid status of a license or licenses.~~

~~(1) In the case of applicants not subject to paragraph (3) of subdivision (e), the notice shall inform the applicant that the board shall issue a temporary license, as provided in subparagraph (A) of paragraph (2) of subdivision (e), for 150 calendar days if the applicant is otherwise eligible and that upon expiration of that time period the license will be denied unless the board has received a release from the local child support agency that submitted the name on the certified list.~~

~~(2) In the case of licensees named on a supplemental list, the notice shall inform the licensee that his or her license will continue in its existing status for no more than 150 calendar days from the date of mailing or service of the notice and thereafter will be suspended indefinitely unless, during the 150-day notice period, the board has received a release from the local child support agency that submitted the name on the certified list. Additionally, the notice shall inform the licensee that any license suspended under this section will remain so until the expiration of the remaining license term, unless the board receives a release along with applications and fees, if applicable, to reinstate the license during the license term.~~

~~(3) The notice shall also inform the applicant or licensee that if an application is denied or a license is suspended pursuant to this section, any funds paid by the applicant or licensee shall not be refunded by the board. The Department of Child Support Services shall also develop a form that the applicant shall use to request a review by the local child support agency. A copy of this form shall be included with every notice sent pursuant to this subdivision.~~

~~(g) (1) Each local child support agency shall maintain review procedures consistent with this section to allow an applicant to have the underlying arrearage and any relevant defenses investigated, to provide an applicant information on the process of obtaining a modification of a support order, or to provide an applicant assistance in the establishment of a payment schedule on arrearages if the circumstances so warrant.~~

~~(2) It is the intent of the Legislature that a court or local child support agency, when determining an appropriate payment schedule for arrearages, base its decision on the facts of the particular case and the priority of payment of child support over other debts. The payment schedule shall also recognize that certain expenses may be essential to enable an obligor to be employed. Therefore, in reaching its decision, the court or the local child support agency shall consider both of these goals in setting a payment schedule for arrearages.~~

~~(h) If the applicant wishes to challenge the submission of his or her name on the certified list, the applicant shall make a timely written request for review to the local child support agency who certified the applicant's name. A request for review pursuant to this section shall be resolved in the same manner and timeframe provided for resolution of a complaint pursuant to Section 17800. The local child support agency shall immediately send a release to the appropriate board and the applicant, if any of the following conditions are met:~~

~~(1) The applicant is found to be in compliance or negotiates an agreement with the local child support agency for a payment schedule on arrearages or reimbursement.~~

~~(2) The applicant has submitted a request for review, but the local child support agency will be unable to complete the review and send notice of its findings to the applicant within the time specified in Section 17800.~~

~~(3) The applicant has filed and served a request for judicial review pursuant to this section, but a resolution of that review will not be made within 150 days of the date of service of notice pursuant to subdivision (f). This paragraph applies only if the delay in completing the judicial review process is not the result of the applicant's failure to act in a reasonable, timely, and diligent manner upon receiving the local child support agency's notice of findings.~~

~~(4) The applicant has obtained a judicial finding of compliance as defined in this section.~~

~~(i) An applicant is required to act with diligence in responding to notices from the board and the local child support agency with the recognition that the temporary license will lapse or the license suspension will go into effect after 150 days and that the local child support agency and, where appropriate, the court must have time to act within that period. An applicant's delay in acting, without good cause, which directly results in the inability of the local child support agency to complete a review of the applicant's request or the court to hear the request for judicial review within the 150-day period shall not constitute the diligence required under this section which would justify the issuance of a release.~~

~~(j) Except as otherwise provided in this section, the local child support agency shall not issue a release if the applicant is not in compliance with the judgment or order for support. The local child support agency shall notify the applicant in writing that the applicant may, by filing an order to show cause or notice of motion, request any or all of the following:~~

~~(1) Judicial review of the local child support agency's decision not to issue a release.~~

~~(2) A judicial determination of compliance.~~

~~(3) A modification of the support judgment or order.~~

~~The notice shall also contain the name and address of the court in which the applicant shall file the order to show cause or notice of motion and inform the applicant that his or her name shall remain on the certified list if the applicant does not timely request judicial review. The applicant shall comply with all statutes and rules of court regarding orders to show cause and notices of motion. This section shall not be deemed to limit an applicant from filing an order to show cause or notice of motion to modify a support judgment or order or to fix a payment schedule on arrearages accruing under a support judgment or order or to obtain a court finding of compliance with a judgment or order for support.~~

~~(k) The request for judicial review of the local child support agency's decision shall state the grounds for which review is requested and judicial review shall be limited to those stated grounds. The court shall hold an evidentiary hearing within 20 calendar days of the filing of the request for review. Judicial review of the local child support agency's decision shall be limited to a determination of each of the following issues:~~

~~(1) Whether there is a support judgment, order, or payment schedule on arrearages or reimbursement.~~

~~(2) Whether the petitioner is the obligor covered by the support judgment or order.~~

~~(3) Whether the support obligor is or is not in compliance with the judgment or order of support.~~

~~(4) (A) The extent to which the needs of the obligor, taking into account the obligor's payment history and the current circumstances of both the obligor and the obligee, warrant a conditional release as described in this subdivision.~~

~~(B) The request for judicial review shall be served by the applicant upon the local child~~

~~support agency that submitted the applicant's name on the certified list within seven calendar days of the filing of the petition. The court has the authority to uphold the action, unconditionally release the license, or conditionally release the license.~~

~~(C) If the judicial review results in a finding by the court that the obligor is in compliance with the judgment or order for support, the local child support agency shall immediately send a release in accordance with subdivision~~

~~(l) to the appropriate board and the applicant. If the judicial review results in a finding by the court that the needs of the obligor warrant a conditional release, the court shall make findings of fact stating the basis for the release and the payment necessary to satisfy the unrestricted issuance or renewal of the license without prejudice to a later judicial determination of the amount of support arrearages, including interest, and shall specify payment terms, compliance with which are necessary to allow the release to remain in effect.~~

~~(l) The department shall prescribe release forms for use by local child support agencies. When the obligor is in compliance, the local child support agency shall mail to the applicant and the appropriate board a release stating that the applicant is in compliance. The receipt of a release shall serve to notify the applicant and the board that, for the purposes of this section, the applicant is in compliance with the judgment or order for support. Any board that has received a release from the local child support agency pursuant to this subdivision shall process the release within five business days of its receipt. If the local child support agency determines subsequent to the issuance of a release that the applicant is once again not in compliance with a judgment or order for support, or with the terms of repayment as described in this subdivision, the local child support agency may notify the board, the obligor, and the department in a format prescribed by the department that the obligor is not in compliance. The department may, when it is economically feasible for the department and the boards to develop an automated process for complying with this subdivision, notify the boards in a manner prescribed by the department, that the obligor is once again not in compliance. Upon receipt of this notice, the board shall immediately notify the obligor on a form prescribed by the department that the obligor's license will be suspended on a specific date, and this date shall be no longer than 30 days from the date the form is mailed. The obligor shall be further notified that the license will remain suspended until a new release is issued in accordance with subdivision (h). Nothing in this section shall be deemed to limit the obligor from seeking judicial review of suspension pursuant to the procedures described in subdivision (k).~~

~~(m) The department may enter into interagency agreements with the state agencies that have responsibility for the administration of boards necessary to implement this section, to the extent that it is cost effective to implement this section. These agreements shall provide for the receipt by the other state agencies and boards of federal funds to cover that portion of costs allowable in federal law and regulation and incurred by the state agencies and boards in implementing this section. Notwithstanding any other provision of law, revenue generated by a board or state agency shall be used to fund the nonfederal share of costs incurred pursuant to this section.~~

~~These agreements shall provide that boards shall reimburse the department for the nonfederal share of costs incurred by the department in implementing this section. The boards shall reimburse the department for the nonfederal share of costs incurred pursuant to this section from moneys collected from applicants and licensees.~~

~~(n) Notwithstanding any other law, in order for the boards subject to this section to be reimbursed for the costs incurred in administering its provisions, the boards may, with the~~

approval of the appropriate department director, levy on all licensees and applicants a surcharge on any fee or fees collected pursuant to law, or, alternatively, with the approval of the appropriate department director, levy on the applicants or licensees named on a certified list or supplemental list, a special fee.

(o) The process described in subdivision (h) shall constitute the sole administrative remedy for contesting the issuance of a temporary license or the denial or suspension of a license under this section. The procedures specified in the administrative adjudication provisions of the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) shall not apply to the denial, suspension, or failure to issue or renew a license or the issuance of a temporary license pursuant to this section.

(p) In furtherance of the public policy of increasing child support enforcement and collections, on or before November 1, 1995, the State Department of Social Services shall make a report to the Legislature and the Governor based on data collected by the boards and the district attorneys in a format prescribed by the State Department of Social Services. The report shall contain all of the following:

(1) The number of delinquent obligors certified by district attorneys under this section.

(2) The number of support obligors who also were applicants or licensees subject to this section.

(3) The number of new licenses and renewals that were delayed, temporary licenses issued, and licenses suspended subject to this section and the number of new licenses and renewals granted and licenses reinstated following board receipt of releases as provided by subdivision (h) by May 1, 1995.

(4) The costs incurred in the implementation and enforcement of this section.

(q) Any board receiving an inquiry as to the licensed status of an applicant or licensee who has had a license denied or suspended under this section or has been granted a temporary license under this section shall respond only that the license was denied or suspended or the temporary license was issued pursuant to this section. Information collected pursuant to this section by any state agency, board, or department shall be subject to the Information Practices Act of 1977 (Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 of the Civil Code).

(r) Any rules and regulations issued pursuant to this section by any state agency, board, or department may be adopted as emergency regulations in accordance with the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). The adoption of these regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, and safety, or general welfare. The regulations shall become effective immediately upon filing with the Secretary of State.

(s) The department and boards, as appropriate, shall adopt regulations necessary to implement this section.

(t) The Judicial Council shall develop the forms necessary to implement this section, except as provided in subdivisions (f) and (l).

(u) The release or other use of information received by a board pursuant to this section, except as authorized by this section, is punishable as a misdemeanor.

(v) The State Board of Equalization shall enter into interagency agreements with the department and the Franchise Tax Board that will require the department and the Franchise Tax

~~Board to maximize the use of information collected by the State Board of Equalization, for child support enforcement purposes, to the extent it is cost effective and permitted by the Revenue and Taxation Code.~~

~~(w) (1) The suspension or revocation of any driver's license, including a commercial driver's license, under this section shall not subject the licensee to vehicle impoundment pursuant to Section 14602.6 of the Vehicle Code.~~

~~(2) Notwithstanding any other law, the suspension or revocation of any driver's license, including a commercial driver's license, under this section shall not subject the licensee to increased costs for vehicle liability insurance.~~

~~(x) If any provision of this section or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.~~

~~(y) All rights to administrative and judicial review afforded by this section to an applicant shall also be afforded to a licensee.~~

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: In order to be able to pay child support, a parent who is obligated to pay support needs to have a valid driver's license so that he or she can travel to and from work. In many instances he or she actually drives a motor vehicle in connection with his or her work, such as a bus driver, service technician and many other occupations. Moreover, if the obligor parent has a business, occupational or professional license such license must be valid in order for such parent to work. Under the current statutory scheme, all such licenses are subject to suspension for non-payment of child support.

Family Code section 17520's approach to the collection of support arrearages is not really effective. For example, according to "Examining Child Support Arrears in California: The Collectibility Study" (March 2003), only $3.8 billion, or 26% of the $14.4 billion owed, would be collected over 10 years. The report concluded that most arrears were owed by individuals who owed more than $20,000, and who had relatively low incomes. Suspending the obligor parent's driver's license and business, occupation and professional license actually exacerbates the problem because such parent can no longer work.

The Solution: This resolution would repeal Family Code section 17520, to allow suspensions of a driver's licenses, professional licenses, and recreational licenses, for failure to pay child support. Family Code section 17520 is harmful because in order to be able to pay child support, non-custodial parents must be able to travel to and from work, and they must also be able to practice their business, occupation or profession.

Further, Family Code section 17520 license suspensions are not necessary because there are several other mechanisms available to collect and enforce child support payments. For example,

a parent's wages can be garnished (Family Code section 17500) and the government can levy financial assets or personal property (Family Code section 17522). *See also* Family Code sections 17500 – 17561, with numerous methods for "Collections and Enforcement." Family Code section 17520, to suspend driver's licenses, professional licenses, and recreational licenses, should be repealed because it hinders collection of child support payments.

IMPACT STATEMENT
42 U.S.C section 666(a)(16), which might affect the state's ability to receive certain federal grant funding. In addition, it would affect Business & Professions Code section 490.5, that provides for the suspension of business, occupational and professional licenses for failure to pay child support.

CURRENT OR PRIOR RELATED LEGISLATION
Family Code section 17520, added by Stats 1999 c. 478 (AB 196); amended by SB 1159 (Lara, 2014), section 10.
42 U.S.C section 666(a)(16) added by Public Law No. 104-193 section 369 110 Stat. 2251 (Aug. 22, 1996) (amended 42 U.S.C. section 666(a) by adding subdivision (16)).

Vehicle Code sections 22651(h), 22651(p). [Towing of vehicle for suspended license.]

Vehicle Code section 14602.6(a)(1). [Impoundment of vehicle for suspended license.]

See National Federation of Independent Business v. Sebelius (132 S.Ct. 2566 (2011)), which held that the Patient Protection and Affordable Care Act (commonly referred to as the ACA or Obamacare) improperly coerced the States to expand Medicaid. The ACA's language was classified as "coercive" because it effectively forced States to join the federal program by conditioning the continued provision of Medicaid funds on States agreeing to materially alter Medicaid eligibility to include all individuals who fell below 133% of the poverty line.

See CCBA Resolution 10-05-2017 (adopted), to not suspend driver's licenses for habitual truancy

See CCBA Resolution 10-06-2017 (adopted), to not suspend driver's licenses for prostitution

See CCBA Resolution 10-07-2017 (adopted), to not suspend driver's licenses for graffiti / vandalism

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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION - DISAPPROVE

This Resolution seeks to delete Family Code section 17520, which is an enforcement tool used by DCSS in collecting support. FLEXCOM notes that there is an existing process to work out arrangements with DCSS to avoid the suspension of the license. There is also an average of 3-5 months' notice provided before such action is taken, to work with DCSS to avoid this action. In addition, the impact of the loss of federal funding for the child support program and collection efforts would be significant to California. This is a consequence FLEXCOM does not support.

RESOLUTION 07-03-2018

DIGEST
Child Support: Repeal Suspension of Professional License for Non-Payment
Deletes Business and Professions Code section 490.5 to no longer allow the suspension of a professional license due to non-payment of child support.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution deletes Business and Professions Code section 490.5 to no longer allow the suspension of a professional license due to non-payment of child support. This resolution should be disapproved because the repeal of this code section in its entirety would eliminate an effective means of ensuring compliance with orders to pay child support.

Under Business and Professions Code section 494, prior to suspending an obligor's license, the obligor must be provided at least 15 days' notice of the hearing on the petition for an interim order and an opportunity to respond prior to an order for suspension being issued. While the proponent correctly points out that there are other effective ways to enforce the collection of child support, it is uncertain whether levying an obligor's bank or retirement accounts without notice (for which the obligor must then pay taxes and early withdrawal penalties), filing a lien accruing 10% interest per year against the obligor's real property without notice, or intercepting tax returns without notice are better, less invasive alternatives than threatening an obligor with the loss of a professional license. Further, the suspension of a professional license is permissive, not mandatory, and often is not triggered until substantial arrears have accumulated and when wage garnishment is not a viable option. Eliminating this code section entirely would eliminate this effective incentive.

This resolution is related to Resolution 07-02-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to delete Business and Professions Code section 490.5 to read as follows:

~~§ 490.5~~
~~A board may suspend a license pursuant to Section 17520 of the Family Code if a licensee is not in compliance with a child support order or judgment.~~

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Since 1994 Family Code section 17520 and Business & Professions Code section 490.5 requires the suspension of a business, occupational or professional license of a parent who is required to pay child support if the obligor parent falls in arrears in his or her support obligation.

When the business, occupational or professional license of a child support obligor parent is suspended for accruing a support arrearage it is much more difficult for that parent to earn the very income he or she was deriving from his or her business, occupational or professional license – which would enable that parent to pay his or her child support obligation. This is a classic catch-22 situation wherein the leverage of enforcement by suspending a license is counterproductive and causes further harm to the children by causing the obligor parent to fall deeper and deeper in arrears.

The Solution: This resolution would repeal Business & Professions Code section 490.5, which allows the suspension of business, occupational or professional licenses for failure to pay child support. Section 490.5 should be repealed because in order to be able to pay child support, the obligor parent with a business, occupational or professional license must be able to engage in his or her business, occupation or profession. In addition, this type of enforcement is not necessary because there are several other mechanisms to enforce the collection of child support. For example, a parent's wages can be garnished (Family Code section 17500) and financial assets or personal property can be levied upon and seized. (Family Code section 17522; s*ee also*, Family Code sections 17500 – 17561, with numerous programs for Collections and Enforcement.) Thus, Business & Professions Code section 490.5 should be repealed in its entirety.

IMPACT STATEMENT
42 U.S.C. section 666(a)(16)

If implemented, this resolution might affect California's federal grant funding from the "Child Support Enforcement Program."

CURRENT OR PRIOR RELATED LEGISLATION
Added by Stats. 1994, c. 906. (AB 923), section 1; Amended by Stats. 2018. C. 328 SB 1330, section 3.

Family Code section 17520, added by Stats 1999 c. 478 (AB 196).

42 U.S.C. section 666(a)(16) added by Public Law No. 104-193 section 369 110 Stat. 2251 (Aug. 22, 1996) (amended 42 U.S.C. section 666(a) by adding subdivision (16)).

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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION - DISAPPROVE

This Resolution seeks to delete a very effective collection tool used by DCSS. In addition to the general concerns expressed with regard to Resolution 07-02-18, we are also concerned that the statistics used to support the proponent's argument are 15 years old and totally out of date. We believe the existing statute provides an effective tool, with notice and opportunity to resolve, in collecting support, especially with self-employed licensed parents. FLEXCOM disapproves the Resolution.

RESOLUTION 07-04-2018

DIGEST
Marriage: Delete Provisions Allowing Minors to Marry
Deletes Family Code sections 302, 303 and 304 to prohibit individuals under the age of 18 from marrying.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution deletes Family Code sections 302, 303 and 304 to prohibit individuals under the age of 18 from marrying. This resolution should be disapproved because California already has judicial protections for minors, and allowing persons under the age of 18 to marry can aid in financial and social stability for young families.

Family Code sections 302, 303, and 304 currently permit minors to marry, provided that they have the consent of the court, a parent or a legal guardian. By definition, minors lack the legal capacity to make most significant legal decisions for themselves. (See e.g. Fam. Code, § 6701, subd. (b) (providing that a minor does not have the capacity to enter into a contract relating to real property).) Therefore, these statutes require a court order before a minor can marry, which is a safeguard against abuse.

Allowing minors to marry with a court order can be beneficial and help provide social, emotional, and financial support for minors. For example, when minors unexpectedly have children, allowing them to marry provides a simple, legally binding family relationship which makes healthcare, housing, and financial support easier to access, enforce, and navigate.

During the last legislative session, Sen. Bill 273 (Hill) was introduced and would have required child protective services to review proposed marriages of minors. The bill is currently inactive.

This resolution is related to Resolution 07-05-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to delete Family Code sections 302, 303, and 304 to read as follows:

~~§ 302~~

~~(a) An unmarried person under 18 years of age is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry.~~

~~(b) The court order and written consent of at least one of the parents or the guardian of~~

~~each underage person shall be filed with the clerk of the court, and a certified copy of the order shall be presented to the county clerk at the time the marriage license is issued.~~

~~§ 303~~

~~If it appears to the satisfaction of the court by application of a minor that the minor requires a written consent to marry and that the minor has no parent or has no parent capable of consenting, the court may make an order consenting to the issuance of a marriage license and granting permission to the minor to marry. The order shall be filed with the clerk of the court and a certified copy of the order shall be presented to the county clerk at the time the marriage license is issued.~~

~~§ 304~~

~~As part of the court order granting permission to marry under Section 302 or 303, the court shall, if it considers it necessary, require the parties to the prospective marriage of a minor to participate in premarital counseling concerning social, economic, and personal responsibilities incident to marriage. The parties shall not be required, without their consent, to confer with counselors provided by religious organizations of any denomination. In determining whether to order the parties to participate in the premarital counseling, the court shall consider, among other factors, the ability of the parties to pay for the counseling. The court may impose a reasonable fee to cover the cost of any premarital counseling provided by the county or the court. The fees shall be used exclusively to cover the cost of the counseling services authorized by this section.~~

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: California law currently allows a minor to be married in the state of California upon obtaining a court order and with written consent of at least one parent. However, these sections endanger minors, who are still subject to their parents' authority, and may not be marrying out of their free will. By comparison, once an individual turns 18, she or he has the legal power to withhold consent to marriage without suffering consequences from someone who holds legal authority over them. Specifically, studies have shown that many of the minors who marry are female and are compelled by a parent to enter into the marriage. The minor has not truly consented to the marriage.

The Solution: This resolution would solve the problem by deleting the provisions allowing for marriage of minors. This would help guarantee that minors are not forced into arranged marriages not of their own true volition.

IMPACT STATEMENT
This would likely result in a cost savings to the courts who must currently process and grant petitions for the marriage of a minor.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Karen Frostrom

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM shares the concerns expressed in the Statement of Reasons by the proponent. We agree that this is an effective and reasonable remedy for a growing problem.

RESOLUTION 07-05-2018

DIGEST
Marriage: Restrict Age Range of Persons Allowed to Marry Minors
Amends Family Code section 302 to place a restriction on the exception allowing individuals under the age of 18 to marry.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 302 to place a restriction on the exception allowing individuals under the age of 18 to marry. This resolution should be disapproved because California already has judicial protections for minors and allowing persons under the age of 18 to marry can aid in financial and social stability for young families.

Family Code sections 302, 303, and 304 currently permit minors to marry, provided that they have the consent of the court, and a parent/legal guardian. By definition, minors lack the legal capacity to make most significant legal decisions for themselves. (See e.g. Fam. Code, § 6701, subd. (b) (providing that a minor does not have the capacity to enter into a contract relating to real property).) However, these statutes require a court order before a minor can marry and there is no indication that they do not provide adequate protections against the risk of forced marriages in California.

Further, allowing minors to marry with a court order can help provide social, emotional, and financial support to minors, particularly where teenagers unexpectedly have children. Marriage establishes a legally binding family relationship which makes healthcare, housing, and financial support easier to access, enforce, and navigate. While paternity proceedings already provide a mechanism to provide care for a child, they do not provide for total familial care and benefits.

The modern trend appears to be heading towards restricting or abolishing laws authorizing minors to marry (see e.g. Del. House Bill 337 [2018], raising the minimum age of marriage to 18 years old without exception; Va. Code, § 20-48, raising the minimum age to 16 with the consent of a court, parent or guardian, or 18 years old without that consent). While this resolution follows the legislative trend in other states, California has existing protections for minors.

During the last legislative session, Sen. Bill 273 (Hill) was introduced and would have required child protective services to review proposed marriages of minors. The bill is currently inactive.

This resolution is related to Resolution 07-04-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 302 to read as follows:

§ 302

(a) An unmarried person under 18 years of age is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry, except that under no circumstances may a minor under the age of 16 be granted consent to marry an adult over the age of 20.

(b) The court order and written consent of at least one of the parents or the guardian of each underage person shall be filed with the clerk of the court, and a certified copy of the order shall be presented to the county clerk at the time the marriage license is issued.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: California law currently allows a minor to be married in the state of California upon obtaining a court order and with written consent of at least one parent. However, these sections endanger minors, who are still subject to their parents' authority, and may not be marrying out of their free will. This amendment is intended to prevent the most dangerous marriages of a very young girl to a much older man. Specifically, studies have shown that many of the minors who marry are female and are compelled by a parent to enter into the marriage. The minor has not truly consented to the marriage.

The Solution: This resolution would solve the problem by modifying the provisions allowing for marriage of minors to prevent forced marriages between teenagers and much older adults. This would help guarantee that minors are not forced into arranged marrages not of their own true volition with much older adults.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Karen Frostrom

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – DISAPPROVE

FLEXCOM does support the concerns expressed but does not agree that 07-05-18 is an effective remedy. In fact, we feel that this proposed remedy could be too easily abused, providing misleading reliance and diminished oversight where needed. We therefore disapprove.

RESOLUTION 07-06-2018

DIGEST
Welfare & Institutions: Correction of Reference to Outdated Code Section
Amends Family Code section 6323 to update the citation to a code section that was repealed and replaced.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 6323 to update the citation to a code section that was repealed and replaced. This resolution should be approved in principle because it removes reference to a repealed statute that allowed the court to rely on a determination of paternity through a district attorney proceeding.

Since Welfare and Institutions Code section 11350.1, referenced in Family Code section 6323, has been repealed and replaced, the reference to that statute should be removed.

Family Code section 6323 provides a mechanism for the court to establish temporary custody and visitation of a minor child based on who has established a parent-child relationship. The statute provides the court with several factors to determine the parent-child relationship, including a determination of paternity. Before it was repealed, Welfare and Institutions Code section 11350.01 allowed a court to rely on a determination of paternity by a district attorney in a court proceeding. Since the Legislature has instead given authority to the local Department of Child Support Services to determine or establish paternity through Family Code section 17400, the family court can now rely on a finding by the Department of Child Support Services to determine or establish paternity, which the proposed resolution provides.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 6323 to read as follows:

§ 6323

(a) Subject to Section 3064:

(1) The court may issue an ex parte order determining the temporary custody and visitation of a minor child on the conditions the court determines to a party who has established a parent and child relationship pursuant to paragraph (2). The parties shall inform the court if any custody or visitation orders have already been issued in any other proceeding.

(2) (A) In making a determination of the best interests of the child and in order to limit the child's exposure to potential domestic violence and to ensure the safety of all family members, if the party who has obtained the restraining order has established a parent and child

relationship and the other party has not established that relationship, the court may award temporary sole legal and physical custody to the party to whom the restraining order was issued and may make an order of no visitation to the other party pending the establishment of a parent and child relationship between the child and the other party.

(B) A party may establish a parent and child relationship for purposes of subparagraph (A) only by offering proof of any of the following:

(i) The party gave birth to the child.

(ii) The child is conclusively presumed to be a child of the marriage between the parties, pursuant to Section 7540, or the party has been determined by a court to be a parent of the child, pursuant to Section 7541.

(iii) Legal adoption or pending legal adoption of the child by the party.

(iv) The party has signed a valid voluntary declaration of paternity, which has been in effect more than 60 days prior to the issuance of the restraining order, and that declaration has not been rescinded or set aside.

(v) A determination made by the juvenile court that there is a parent and child relationship between the party offering the proof and the child.

(vi) A determination of paternity made in a proceeding to determine custody or visitation in a case brought by the Department of Child Support Services ~~district attorney~~ pursuant to Family Code section 17400 et seq. ~~Section 11350.1 of the Welfare and Institutions Code.~~

(vii) The party has been determined to be the parent of the child through a proceeding under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

(viii) Both parties stipulate, in writing or on the record, for purposes of this proceeding, that they are the parents of the child.

(b) (1) Except as provided in paragraph (2), the court shall not make a finding of paternity in this proceeding, and any order issued pursuant to this section shall be without prejudice in any other action brought to establish a parent and child relationship.

(2) The court may accept a stipulation of paternity by the parties and, if paternity is uncontested, enter a judgment establishing paternity, subject to the set-aside provisions in Section 7646.

(c) When making any order for custody or visitation pursuant to this section, the court's order shall specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members. Where the court finds a party is staying in a place designated as a shelter for victims of domestic violence or other confidential location, the court's order for time, day, place, and manner of transfer of the child for custody or visitation shall be designed to prevent disclosure of the location of the shelter or other confidential location.

(d) When making an order for custody or visitation pursuant to this section, the court shall consider whether the best interest of the child, based upon the circumstances of the case, requires that any visitation or custody arrangement shall be limited to situations in which a third person, specified by the court, is present, or whether visitation or custody shall be suspended or denied.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Section 6323 of the Family Code presently cites to a section of the Welfare and Institutions Code that has been repealed, and references the district attorney when the task of child support collection is now assigned to the Department of Child Support Services

The Solution: Legislation to amend Section 6323 to update the citations.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Michelene Insalaco

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves the proposed amendments to correct references to citations and agencies, reflecting current practice.

RESOLUTION 07-07-2018

DIGEST
Domestic Violence: Attorney's Fees for Restraining Orders
Amends Family Code section 6344 to allow a party to recover attorney's fees for domestic violence orders without a financial showing.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 6344 to allow a party to recover attorney's fees for domestic violence orders without a financial showing. This resolution should be disapproved because it dispenses with the requirement to consider the incomes, assets and liabilities of the parties.

A domestic violence restraining order requires some relationship between the parties. Often, this relationship is marital, co-habitual, or familial, which often means that the finances of the two parties are intertwined. Currently, the court is required to consider the incomes, assets and liabilities of the parties prior to making any order for attorney's fees. This information allows the court to issue an order that has some relation to the ability of a party to pay the fees ordered without invading the community assets or creating a destructive financial situation.

The amendment, as written, essentially turns the payment of attorney's fees to the prevailing party into a type of sanction, but this approach overlooks two significant issues: sometimes the "prevailing party" is not the victim of physical and/or emotional abuse, and this resolution could have the unintended consequence of chilling a party's willingness to seek a restraining order. Without considering the incomes of the parties and their respective ability to pay attorney's fees, the court may be ordering excessive fees which may necessarily be drawn from the community property assets of the parties if the losing party has no income or separate assets, which would place the payor into financial peril.

The sanctions section of the Family Code (Fam. Code, § 271), requires the court to consider the parties' incomes, assets, and liabilities, so as not to order sanctions in an amount that creates an unreasonable financial burden on the party against whom the sanction is imposed. While the requirement for financial disclosures may slow the process of obtaining orders for attorney's fees, it is consistent with the requirement for obtaining child support or spousal support when such requests are made along with the request for a restraining order. The amendment dispenses with this protection and forces the court to make this decision blind, and as such, may create more problems than it is trying to solve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommend that legislation be sponsored to amend Family Code section 6344 to read as follows:

§ 6344

(a) After notice and a hearing, the court may issue an order for the payment of attorney's fees and costs of the prevailing party.

(b) In any action in which the petitioner is the prevailing party and cannot afford to pay for the attorney's fees and costs, the court shall, if appropriate based on the parties' respective abilities to pay, order that the respondent pay petitioner's attorney's fees and costs for commencing and maintaining the proceeding. Whether the respondent shall be ordered to pay attorney's fees and costs for the prevailing petitioner, and what amount shall be paid, shall be determined based upon (1) the respective incomes and needs of the parties, and (2) any factors affecting the parties' respective abilities to pay.

(c) Notwithstanding subsection (b), attorney fees and costs to the prevailing party may be ordered without the showing of need, ability to pay, or the respective incomes of the parties, where the relief sought is solely a domestic violence protective order and the Court only ruled on that requested relief.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Domestic violence (DV) victims need attorney representation at DV court proceedings, but courts require an evaluation of the respondent's ability to pay and the parties' respective incomes when a DV petitioner requests attorney's fees. This is not required of an elder abuse or civil harassment petitioner. When requesting reimbursement of attorney fees on a DV restraining order (form DV-100, item 20), the petitioner must submit a four-page FL-150 form, which details the victim's income and expenses. This requires the victim to reveal to their abuser the details of their income and expenses. The submission of that form also causes a delay, if the court will not accept the restraining order request until the FL-150 is submitted. Then at the DV hearing, the court evaluates (1) the respective incomes and needs of the parties, and (2) any factors affecting the parties' respective abilities to pay, as per Family Code (FC) §6344.

The Solution: To remove the requirement to base a request for attorney fees on the parties' respective abilities to pay. FC § 6344 (a) allows the court to issue an order for the payment of attorney's fees and costs of the prevailing party. If the ability to pay is not a factor in determining reimbursement for attorney fees in elder abuse (WIC §15657.03(t) or civil harassment restraining orders (CCP §527.6(s)), then it shouldn't be a factor in domestic violence restraining order requests. This proposed change will provide access to justice for victims of domestic violence by charging the respondent for the victim's attorney fees. This proposed change will also lessen the burden placed on courts because of the requirement of the FL-150 form that must accompany the domestic violence restraining order request. This proposed resolution provides for consistent

guidelines in determining attorney fees in domestic violence, elder abuse, and civil harassment restraining order cases.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Maria Palazzolo

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves the amendment of Family Code section 6344 and the effort to make this code section consistent with statutes for Elder Abuse and Civil Harassment cases in the award of attorney's fees to prevailing parties without a showing of need/ability to pay.

RESOLUTION 07-08-2018

DIGEST
Domestic Violence Pleadings: Allegations Deemed a Privileged Publication
Amends Civil Code section 47 to clarify that pleadings filed under a domestic violence case in a marital dissolution proceeding are protected as a privileged publication.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 47 to clarify that pleadings filed under a domestic violence case in a marital dissolution proceeding are protected as a privileged publication. This resolution should be disapproved because it would impose more restrictive standards to actions filed under the Domestic Violence Prevention Action than what is currently applied.

Currently, statements made in any judicial proceeding, with few exceptions, are privileged communications. Civil Code section 47 clarifies that in an action for a marital dissolution, a more restrictive standard is applied. Under section 47, a statement made in a marital dissolution action against a person who is not a party to the action is only privileged if the statement is made in a verified pleading, is made without malice, and the accuser has reasonable or probable cause to believe the truth of the allegation.

The resolution attempts to avoid applying these restrictions to actions brought under the Domestic Violence Prevention Action ("DVPA"), which include restraining orders but can also include child custody, property, and support actions, even if the DVPA action is filed separately from the marital dissolution action. It is unclear whether this amendment is necessary and how a DVPA action's privileges would be maintained if the DVPA action was to be consolidated with the dissolution action, especially considering the overlap of issues in both actions.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 47 to read as follows:

§ 47

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for

marital dissolution or legal separation, but not including in an action brought under the Domestic Violence Prevention Act ("DVPA") even if the DVPA matter is brought within a marital dissolution action, made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

(d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Civil Code section 47 creates a privilege for communications in the course of a judicial proceeding. This privilege is important and designed to avoid any chilling effect on a party's constitutional right of free speech, and ability to pursue meritorious legal claims. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056; *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 426-427.) In 1927, in connection with the "fault" divorce laws, the "divorce proviso" was added to section 47. This provides that statements about third parties in divorce filings are not privileged unless they meet certain conditions (stated under oath; without malice; on reasonable grounds).

A victim of domestic violence who is not married to the abuser seeks a restraining order by filing an application under the Domestic Violence Prevention Act ("DVPA"). There is no question that the divorce proviso does not apply to such cases. However, a married victim often files a DVPA application within a pending marital dissolution case. At least one trial court has held that the divorce proviso applies in such actions, because the pleadings are in fact filed in a marital action. This places the victim at risk of a retaliatory defamation suit. This distinction is clearly inequitable. If there is any arena where a chilling effect should be avoided, it is in the area of domestic violence. And it arguably violates notions of equal protection to treat domestic violence victims differently on the basis of their marital status. (In fact the entire divorce proviso is arguably outdated and unnecessary, but this may be addressed in a subsequent resolution.)

The Solution: Legislation to amended Section 47 to specify that the divorce proviso does not apply to any DVPA matter, whether brought within a marital case or not, will remedy this problem.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves the Resolution to amend Civil Code section 47 based on the concerns expressed by the proponent in the Statement of Reasons.

RESOLUTION 07-09-2018

DIGEST
Visitation: Rights for Great-Grandparents Following Death of a Parent
Amends Family Code section 3102 to expand visitation rights to great-grandparents of a child following the death of a parent.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 3102 to provide great-grandparents with rights to visit their great-grandchildren that equal grandparents' visitation rights. This resolution should be disapproved because great-grandparents already have visitation rights with their great-grandchildren.

Section 3102 subdivision (a) provides that grandparents of the deceased parent may be granted reasonable visitation with the child of the deceased parent. The relationship between grandparents of the deceased parent and the child of the deceased parent is that of great-grandparent and great-grandchild. Therefore, great-grandparents already have the right to be granted reasonable visitation with their great-grandchild. If great-grandparents were added to section 3102 subdivision (a), this would actually include great-great-grandparents of the child, which seems to go too far.

This resolution is related to Resolution 07-10-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3102 to read as follows:

§ 3102

(a) If either parent of an unemancipated minor child is deceased, the children, siblings, parents, grandparents and great-grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority upon a finding that the visitation would be in the best interest of the minor child.

(b) In granting visitation pursuant to this section to a person other than a grandparent or great-grandparent of the child, the court shall consider the amount of personal contact between the person and the child before the application for the visitation order.

(c) This section does not apply if the child has been adopted by a person other than a stepparent grandparent or great-grandparent of the child. Any visitation rights granted pursuant to this section before the adoption of the child automatically terminate if the child is adopted by a person other than a stepparent grandparent or great-grandparent of the child.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Existing law provides that when the parent of an unemancipated minor dies, the minor's children, siblings, parents, and grandparents can be awarded reasonable visitation. The code as drafted eliminates the ability for great-grandparents to seek the same visitation.

Under current law, great-grandparents do not have grounds in the Family Code to seek visitation with their great-grandbabies should one of the parents die. The family structures and dynamics are ever changing, and it is not uncommon for grandparents, and even great-grandparents to raise their grandchildren and great-grandchildren.

In fact, in 2014 in the case of *Finberg v. Manset*, the judge found for the parents, saying that the law unfairly discriminates between natural parents and adoptive parents. On appeal, however, the court found that the law is constitutional, noting that children who have been through family upheavals may need the stability of continuing relationships with grandparents. This same logic can easily apply to great-grandparents as well.

The Solution: This resolution would add great-grandparents to the code, and allow great-grandparents to seek visitation with their great-grandchildren should a parent die.

IMPACT STATEMENT
This resolution is related to Family Code Section 3103.

CURRENT OR PRIOR RELATED LEGISLATION
None know.

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RESPONSIBLE FLOOR DELEGATE: Lisa J. Mendes

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves this Resolution and agrees with the proponents that such an amendment to Family Code section 3102 is logical and timely.

RESOLUTION 07-10-2018

DIGEST
Visitation: Rights for Great-Grandparents in Actions Involving Divorce and Child Custody
Amends Family Code section 3103 to give great-grandparents the same visitation rights as grandparents in actions involving marital dissolution, annulment, separation, and child custody.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 3103 to give great-grandparents the same visitation rights as grandparents in actions involving marital dissolution, annulment, separation, and child custody. This resolution should be disapproved because it would allow great-grandparents to assert visitation rights over the objections of both parents and when child custody is not disputed.

Under section 3103, grandparents are permitted to obtain court-ordered visitation with a minor child whose parents are involved in proceedings for dissolution of marriage, physical and/or legal custody, or protective orders for domestic violence over the objection of either one or both parents. In order for the court to grant visitation under section 3103, the court must determine that there was a preexisting relationship between the grandparent and the minor child and the visits are in the best interests of the minor child.

Unlike a parent, a grandparent who is neither parent nor guardian bears no legal responsibility for a child's well-being and may influence the child in a way that is contrary to both parents' wishes. There is no justification to give standing to an even more distant relation, and absent a finding of parental neglect, abuse, or abandonment in a case where child custody is disputed, courts should not be in the business of allowing great-grandparents to assert visitation rights against parents who are seeking to divorce, but are otherwise in agreement. Whatever benefits may be achieved by court-ordered great-grandparent visitation for the minor child, it is counterbalanced by the toxic effect that litigation can have on the relationship between the great-grandparent and the parents, the parents and the child, and the great-grandparent and the child.

Furthermore, the resolution would extend standing to potentially eight additional persons to sue for visitation in a marital dissolution action that does not involve them.

This resolution is related to Resolution 07-10-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Association recommends that legislation be sponsored to amend Family Code section 3103 to read as follows:

§ 3103

(a) Notwithstanding any other provision of law, in a proceeding described in Section 3021, the court may grant reasonable visitation to a grandparent or great-grandparent of a minor child of a party to the proceeding if the court determines that visitation by the grandparent or great-grandparent is in the best interest of the child.

(b) If a protective order as defined in Section 6218 has been directed to the grandparent or great-grandparent during the pendency of the proceeding, the court shall consider whether the best interest of the child requires that visitation by the grandparent or great-grandparent be denied.

(c) The petitioner shall give notice of the petition to each of the parents of the child, any stepparent, and any person who has physical custody of the child, by certified mail, return receipt requested, postage prepaid, to the person's last known address, or to the attorneys of record of the parties to the proceeding.

(d) There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent or great-grandparent is not in the best interest of a minor child if the child's parents agree that the grandparent or great-grandparent should not be granted visitation rights.

(e) Visitation rights may not be ordered under this section if that would conflict with a right of custody or visitation of a birth parent who is not a party to the proceeding.

(f) Visitation ordered pursuant to this section shall not create a basis for or against a change of residence of the child but shall be one of the factors for the court to consider in ordering a change of residence.

(g) When a court orders grandparental or great-grandparental visitation pursuant to this section, the court in its discretion may, based upon the relevant circumstances of the case:

(1) Allocate the percentage of grandparental or great-grandparental visitation between the parents for purposes of the calculation of child support pursuant to the statewide uniform guideline (Article 2 (commencing with Section 4050) of Chapter 2 of Part 2 of Division 9).

(2) Notwithstanding Sections 3930 and 3951, order a parent or grandparent or great-grandparent to pay to the other, an amount for the support of the child or grandchild or great-grandchild. For purposes of this paragraph, “support” means costs related to visitation such as any of the following:

(A) Transportation.

(B) Provision of basic expenses for the child, or grandchild or great-grandchild, such as medical expenses, day care costs, and other necessities.

(h) As used in this section, “birth parent” means “birth parent” as defined in Section 8512.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Existing law provides that the Court may only grant reasonable visitation to grandparents failing to consider the potential need for great-grandparents to be afforded the same right. The code as drafted eliminates the ability for great-grandparents to seek the same visitation.

Under current law, great-grandparents do not have grounds in the Family Code to seek visitation with their great-grandchildren. The family structures and dynamics are ever changing, and it is not uncommon for grandparents, and even great-grandparents to raise their grandchildren and great-grandchildren.

In fact, in 2014 in the case of *Finberg v. Manset*, the judge found for the parents, saying that the law unfairly discriminates between natural parents and adoptive parents. On appeal, however, the court found that the law is constitutional, noting that children who have been through family upheavals may need the stability of continuing relationships with grandparents. This same logic can easily apply to great-grandparents as well.

The Solution: This resolution would add great-grandparents to the code, and allow great-grandparents to seek visitation with their great-grandchildren.

IMPACT STATEMENT
This resolution is related to Family Code Section 3102.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves this Resolution to amend Family Code section 3103 for the reasons noted in Resolution 07-09-18 and the proponent's Statement of Reasons.

RESOLUTION 07-11-2018

DIGEST
Family Support: Gender-Neutral Calculation Software
Amends Family Code section 3830 to require that any software used in determining child or spousal support obligations must be formatted to avoid gender-specific pronouns.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 3830 to require that any software used in determining child or spousal support obligations must be formatted to avoid gender-specific pronouns. This resolution should be disapproved because currently the most commonly used software programs in family court already allow for gender-neutral references.

Without question, there is a large and still growing population of same-sex couples who rear children, as well as parents, who do not adhere to a gender binary. While it is true that DissoMaster—the *de rigueur* software program commonly used in family law court to determine the appropriate amount of child and spousal support obligations—has a default binary gendered vernacular (female-male, mother-father, wife-husband), the existing program can easily be customized to identify the parties with a name or description that clearly and appropriately conforms with their identity. The program is very capable of being set-up by gender-neutral designations (e.g., Parent 1, Parent 2) to accommodate clear and unambiguous references for genderqueer, non-binary gender, and same-sex couples and parents, or even "traditional" parental assignments, without gender-specific pronouns which may create confusion or be inaccurate. Consequently, the courts and attorneys already have the flexibility to ensure that the parties are accurately identified when determining the appropriate amount of child or spousal support.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3830 to read as follows**:**

§ 3830

(a) On and after January 1, 1994, no court shall use any computer software to assist in determining the appropriate amount of child support or spousal support obligations, unless the software conforms to rules of court adopted by the Judicial Council prescribing standards for the software, which shall ensure that it performs in a manner consistent with the applicable statutes and rules of court for determination of child support or spousal support, and is formatted to avoid gender-specific pronouns**.**

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: While the Department of Child Support Services (DCSS) child support calculator uses gender-neutral pronouns ("Parent 1" and "Parent 2"), the widely used computer software program called DissoMaster Program uses gendered pronouns ("Father" and "Mother"). This is problematic because many family law litigants do not adhere to a gender binary, or are same-sex families without a mother-father binary.

Many family law practitioners have to explain to same-sex parents how/why their support obligation/right is categorizing them by gender delineations that are not only inaccurate, but also irrelevant to statutory support duties. Many litigants take offense to being labeled "father" when there are two mothers involved, or vice versa. Many litigants take offense to being labeled "Wife" when they are in fact a male receiving spousal support in a same-sex matter.

This is further problematic when it concerns families who have had to combat abuse based on gender expression and identity. The Dissomaster Program is perceived as an extension of the court/law. It is the program used by judges and is available on court computers in family courts throughout California. For many litigants, this mislabeling is a perpetuation of discrimination and abuse.

This problem is not isolated to a small minority. According to a 2008 report by the Williamson Institute (UCLA School of Law), there are 109,000 same-sex couples living in California; nearly 25% of these couples are raising more than 52,000 children. At various times, same-sex marriage has been legal in California since 2008. Many of these people are likely to confront the legal issues of child and/or spousal support. The current Dissomaster Program fails their needs by using gendered pronouns.

While the Dissomaster Program allows attorneys (or those using the program) to re-name "Mother" and "Father" by actual names or other titles (such as "Parent 1" or "Parent 2," the parties' actual names are typically not used in support orders (Findings and Order After Hearing, or Judgments); instead orders commonly use "Petitioner" or "Respondent." Additionally, support orders often require the parties attach Dissomaster Calculation Reports. As such, the Dissomaster identity label should correctly correspond. In running Dissomaster calculations, the program opens up with "Mother"/"Father" defaults which still need to be manually altered, often times in the presence of clients who witness the systematic gendered mislabeling.

Litigants should not have to manually un-gender the default. The default should be inclusive of gender non-binary parties, and same-sex litigants.

The proposed amended would also be in line with 2017's Senate Bill 179, which allows Californians the option of gender non-binary identification on state identification documents. The current support calculation software defaults to gender binaries.

The Solution: This resolution simply amends California's Family Code Section 3830(a) so as to make it a non-discriminatory and inclusive, allowing greater applicability to same-sex and gender non-conforming litigants resolving the issues of child and/or spousal support. For clarity, this resolution does not call for any algorithmic changes, or any re-evaluation of how/when support is ordered.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT AND PRIOR LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION - DISAPPROVE

FLEXCOM understands the general concerns and respects the desire for gender neutral language. However, we do not believe an amendment to Family Code section 3830 is necessary. The DCSS calculator, as noted, is already gender neutral. The Disso Master program targeted here can also be made gender neutral very easily by anyone who uses the program. The gender aspect of the program is too easily adjusted in our opinion to warrant such a legislative remedy. We therefore disapprove.

RESOLUTION 07-12-2018

DIGEST
Premarital Agreements: Commencement of Seven-Day Waiting Period
Amends Family Code section 1615 to clarify that when a party is not represented by counsel the required seven-day waiting period runs from the date the final draft is provided.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 1615 to clarify that when a party is not represented by counsel the required seven-day waiting period runs from the date the final draft is provided. This resolution should be approved in principle with recommended amendments because it clarifies the application of the seven-day waiting period.

Family Code section 1615 establishes numerous requirements for a valid premarital agreement. One of these requirements is a seven-day waiting period between the time a party against whom enforcement is sought is "first presented with the agreement and advised to seek legal counsel and the time that the agreement is signed." A recent case, *In re Marriage of Clarke and Akel* (2018) 19 Cal.App.5th 914, held that even if an unrepresented party drafted the first draft of the premarital agreement at issue, the seven day waiting period still applied between the date of receipt of the final draft of the premarital agreement and the date the agreement was signed. The resolution attempts to clarify the code section to reflect this holding that the waiting period applies to the final draft of the agreement rather than any earlier draft, and as written this amendment appears to effect this change.

However, the resolution also appears to change the application of the waiting period only to unrepresented parties against whom enforcement is sought, which is a fundamental change to the current application of this code section. This fundamental change could be avoided by moving the suggested language of "if unrepresented by legal counsel" to modify who is advised to seek legal counsel rather than to modify the party against whom enforcement is sought, such that the resolution would read as follows, "[t]he party against whom enforcement is sought, had not less than seven calendar days between the time that the party was first presented with the final draft of the agreement and advised to seek legal counsel, if unrepresented by legal counsel, and the time that the agreement was signed."

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 1615 to read as follows:

§ 1615

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought, <u>if unrepresented by legal counsel,</u> had not less than seven calendar days between the time that party was first presented with the <u>final draft of the</u> agreement and advised to seek independent legal counsel and the time that the agreement was signed.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

<u>The Problem</u>: Section 1615 provides that a premarital agreement is not enforceable if the party against whom enforcement is sought was not represented by counsel and received the agreement less than seven days before it was signed. Family law attorneys are not presently clear if the

seven days runs from the presentation of the first draft of the agreement, or revised drafts. Further, this section is ambiguous as to whether the seven day period applies to parties who have attorneys (case law has determined that it does not).

The Solution: Legislation to amended Section 1615 to clarify its application.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves the clarification proposed here for Family Code section 1615 with regard to the pre-signing time period. This clarification will provide clear guidance that is needed.

TRUSTS AND ESTATES SECTION

TEXCOM is supportive of the concept of clarifying changes to the law that will ensure that unrepresented parties have adequate time to consider the contents of premarital agreements. However, TEXCOM has questions about this resolution as drafted.

First, TEXCOM believes the proposed reference to a "final draft" is potentially ambiguous. If a party is "first presented" with a "final draft" of an agreement to review, makes no changes after reviewing, and is then "presented" with a "final agreement" to execute several days later, does the "final draft" or the "final agreement" trigger the seven days? Consistent with the goals of this resolution, it might be clearer if the statute referred to the "final agreement" instead of the "final draft." But even with that change, TEXCOM has questions regarding the document that should be used to trigger the seven-day waiting period, as a matter of policy. Under existing Family Code section 1615(c), it is deemed that a premarital agreement was not executed voluntarily unless the court finds certain specific facts, including that:

> (1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

> (2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

If an unrepresented party is "first presented" with an initial draft of an agreement, advised to seek independent legal counsel, and expressly waives, in a separate writing, representation by independent legal counsel, does the presentation of subsequent drafts trigger (1) a new obligation to advise the unrepresented party to seek independent counsel; (2) a new requirement that representation by independent legal counsel be expressly waived in a separate writing; and (3) a new seven-day waiting period? Under the resolution, a minor and non-material change could render the agreement unenforceable or initiate a new seven-day waiting period, even where the unrepresented party has already expressly waived his or her right to seek independent legal counsel (at least with respect to a prior draft of the agreement) and continues to discuss subsequent drafts. Moreover, section 1615(c)(3) provides additional protections for the unrepresented party, prior to signing the agreement, by also requiring the court to find that:

> (3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.