

RESOLUTION 5-03-2002

DIGEST

Assignment Orders: Including Attorney's Fees and Setting Priority

Amends Family Code section 5238 to include attorney's fees in orders requiring an employer to withhold payments from an obligor's wages, and setting priority for such payments.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends Family Code section 5238 to include attorney's fees in orders requiring an employer to withhold payments from an obligor's wages, and setting priority for such payments. This resolution should be disapproved because it is inappropriate and impractical.

This resolution proposes that when a court issues a wage assignment order directing a payor spouse's employer to withhold support payments from the paycheck, it must also include any attorney's fees the court has ordered the payor spouse to pay. This resolution is inappropriate because it conflicts with Family Code sections 5208 and 17200, et seq. Family Code section 5208 was amended, effective January 1, 2000, to require that when a court orders child or family support, any earnings assignment order for support must be issued on an "order/notice to withhold income for child support" form as required in 42 U.S.C. section 666. This was part of an effort to standardize support orders to assist in nationwide enforcement. As a consequence there is now a federally mandated wage assignment form for child and support. There is also a different California Judicial Council form for wage assignment for spousal support. Neither form includes attorneys' fees.

This resolution is also impractical, because it cannot be enforced. As a continuation of the standardization effort, Family Code sections 17200, et seq., effective January 1, 2000, transferred the collection and enforcement of child and spousal support to the newly created Department of Child Support Services ("DCSS") under the California Health and Human Services Agency. DCSS is empowered, pursuant to section 17202, to collect only child and spousal support payments. It has no authority to collect attorneys' fees. Thus, in order to enact this resolution, these two statutes and possibly others would have to be amended.

While having fees included on a wage assignment order would gain an attorney priority over general creditors, this priority is not enforceable and would come at the price of frustrating efforts to create nationwide support order enforcement. It should be disapproved.

SECTION/COMMITTEE REPORT

FAMILY LAW SECTION EXECUTIVE COMMITTEE

Recommendation: Approve in Principle

Reasons: The Family Law Executive Committee supports this resolution because it is recognized that having parties or litigants be able to afford representation is of significant benefit to the Courts. That being so it can only facilitate representation to insure a party's ability to get the funds ordered for fees in the least expensive way possible.

We do note, however, that the question of whether this change in the law would be applicable in governmental support cases is not addressed here and should be, as well as the applicability to the federal wage assignment forms.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Family Code section 5238 to read as follows:

- 1 §5238
- 2 (a) Where an assignment order or assignment orders include ~~both~~ current support, ~~and~~
- 3 payments towards the liquidation of arrearages, and attorney's fees, priority shall be given first to
- 4 the current child support obligation, then the current spousal support obligation, and thereafter to
- 5 the liquidation of child and then spousal support arrearages, followed by the attorney's fees.
- 6 Payments towards attorney's fees shall only be made if all the other payments total less than 50%
- 7 of the obligor's net disposable income.
- 8 (b) Where there are multiple assignment orders for the same employee, the employer shall
- 9 prorate the withheld payments as follows:
- 10 (1) If the obligor has more than one assignment for support, the employer shall add
- 11 together the amount of support due for each assignment.
- 12 (2) If 50 percent of the obligor's net disposable earnings will not pay in full all of the
- 13 assignments for support, the employer shall prorate it first among all of the current support
- 14 assignments in the same proration that each assignment bears to the total current support owed.
- 15 (3) The employer shall apply any remainder to the assignments for arrearage support in the
- 16 same proportion that each assignment bears to the total arrearage owed.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Does not provide for the inclusion of attorney's fees in a Wage and Earnings Assignment Order.

This Resolution: Would modify the Family Code providing for the inclusion of an order of attorney's fees in a Wage and Earnings Assignment Order.

The Problem: Under current law, there is no provision for the inclusion of an attorney's fee order in the Wage and Earnings Assignment Order. Therefore, if the obligor does not voluntarily pay, the attorney and/or the client must go back into court to enforce the order, incurring more time and expense.

IMPACT STATEMENT

This proposed resolution affects Section 5230, and 5253 of the Family Code, which are companion resolutions to this one, so that attorney's fees may be included in a Wage and Earnings Assignment Order.

AUTHOR AND/OR PERMANENT CONTACT: Barry I. Besser, Esq., 2230 W. Chapman Ave., Ste. 200, Orange, CA 92868, 714/978-1788.

RESPONSIBLE FLOOR DELEGATE: Barry I. Besser, Esq.

COUNTERARGUMENT

BEVERLY HILLS BAR ASSOCIATION

To provide the Judge discretion to include the payment of attorneys' fees and cost in an earnings assignment order, as set forth in Resolution 5-01-2002, is agreed; however, there is no basis to severely limit the Judge's discretion in making such order when based on the facts and evidence presented as set forth in Resolutions 5-02-2002 and 5-03-2002. Further, the limitations set forth in these resolutions are in direct conflict with Family Law Section 5206, which defines the sources of income subject to an earnings assignment order. Family Law Section 5206 provides the Judge with wide discretion to order support from any and all sources of income the obligor may have or from which the obligor may receive income at any time in the future, whether in the form of direct cash, or some other form, such as bonuses, benefits, payments and credits due or to become due at some time in the future, dividends, rents, residuals, patent rights, and mineral or other natural resources; and to order any and all of these sources of income subject to an earnings assignment order when applicable.