

RESOLUTION 8-06-2003

DIGEST

Cohabitation: Definition and Circumstances for Abatement of Spousal Support

Amends California Family Code section 4323 to include cohabitation by parties of the same sex as grounds for reduction of spousal support.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends California Family Code section 4323 to include cohabitation by parties of the same sex as grounds for reduction of spousal support. This resolution should be disapproved because it imposes a lengthy waiting period and because it removes discretion from the court.

Section 4323 currently sets forth a rebuttable presumption of a decreased need for spousal support if the supported party is cohabiting with a person of the "opposite sex." This section should be amended to include cohabitation by parties of the same sex. However, this resolution creates more problems than it solves. Under the proposed amendment, the ex-spouse will be required to wait a year before there could be a modification proceeding. There is no such limitation now, and a mandatory waiting period would be unfair in that the payor spouse would have to continue to pay support for an unreasonable period of time.

Presently, there is only a rebuttable presumption that the cohabiting party has a reduced need for support. Under this resolution, support would be reduced to zero in all circumstances if cohabitation was found to exist. The court needs the discretion to review all facts and evidence to come to a determination of whether spousal support is to be eliminated, reduced or remain unchanged in order to promote fairness.

Additionally, this resolution borrows language from the domestic partner statutes to help define what constitutes cohabitation. While it is true that once there is cohabitation, whether by parties of the same sex or by parties of the opposite sex, then the ex-spouse should be able to seek modification, references to the domestic partnership statutes are unnecessary. If one ex-spouse is cohabiting with a new person, whether of the opposite or same sex, the other ex-spouse should have the ability to seek redress. Requiring the ex-spouse to prove that the cohabiting parties meet the requirements of the domestic partner statutes is an unreasonable burden.

SECTION/COMMITTEE REPORT

FAMILY LAW SECTION

Recommendation: **APPROVE IN PRINCIPLE IF AMENDED**

Reasons:

The committee would support the resolution if the provisions of section 4323 (a) were amend to make the section "gender neutral," and delete the remainder of the provisions of the resolution. Section 4323 would read:

“(1) Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the

supported party is cohabiting with a ~~person of the opposite sex~~ *another person*. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support as provided for in Chapter 6 (commencing with Section 3650) of Part 1.”

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 4323 to read as follows:

1 §4323
2 (a) ~~(1)~~ Except as otherwise agreed to by the parties in writing, ~~there is a rebuttable~~
3 ~~presumption, affecting the burden of proof, of decreased need for spousal support if the supported~~
4 ~~party is cohabiting with a person of the opposite sex. Upon a determination that circumstances have~~
5 ~~changed, the court may modify or terminate the spousal support on a showing that a supported~~
6 ~~spouse has cohabited with the same partner, regardless of gender, for one year or more, the court~~
7 ~~shall not order or continue spousal support paid to the supported spouse. The court shall retain~~
8 ~~jurisdiction to order spousal support, as provided for in Chapter 6 (commencing with Section 3650)~~
9 ~~of Part 1, or to terminate spousal support on proof of change of circumstances; change of~~
10 ~~circumstances can include the continued cohabitation thereafter.~~
11 (b) Cohabitation is defined as two adults who have chosen to share one another’s lives in an
12 intimate and committed relationship of mutual caring. Cohabitation shall be established when all of
13 the following requirements are met:
14 (1) Both persons have a common residence as defined in Family Code section 297(c). (2)
15 The two persons are not related by blood in a way that would prevent them from being married to
16 each other in this state.
17 (3) Both persons are at least 18 years of age.~~(2)~~ (4) Holding oneself out to be the
18 husband or wife of the person with whom one is cohabiting is not necessary to constitute
19 cohabitation as the term is used in this subdivision.
20 (5) ~~The person with whom one is cohabiting need not be of the opposite sex.~~
21 ~~(b)~~ (c) The income of a supporting spouse's subsequent spouse or nonmarital partner shall
22 not be considered when determining or modifying spousal support.
23 (e) ~~(d)~~ Nothing in this section ~~precludes later modification or termination of spousal support~~
24 ~~on proof of change of circumstances. Prohibits either party from bringing a motion to modify or~~
25 ~~terminate spousal support under any other grounds allowed under the law.~~

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

PROPOSER: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Spousal support terminates on remarriage of the supported party. Existing law creates a rebuttable presumption of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex. The proposed legislation would modify the statute to eliminate outdated opposite-sex language and expand the language consistent with legislation relating to domestic partnerships.

This Resolution: Defines cohabitation consistent with the domestic partnership statutes and provides for abatement of support in cases of prolonged cohabitation.

The Problem: Current legislation is not sensitive to, nor does it recognize same-sex relationships. The language of the statute only allows for a reduction in spousal support on cohabitation with a member of the opposite sex, and therefore does not even address the issue of same-sex relationships. When a supported spouse cohabitates with a person of the same sex, they are able to avoid the application of the presumption because this statute's language has not been brought into the 20th, let alone the 21st, century and made gender neutral.

The proposed resolution defines cohabitation consistent with the definitions used in the Domestic Partnership legislation which are already the law. Lack of a definition of what really constitutes "cohabitation" has impeded effective use of statute since its inception.

The proposed resolution abates support during periods of prolonged cohabitation and thereby eliminates the requirement to show the extent of decreased need in order to obtain a reduction in support paid to a spouse who is cohabiting with a partner. Under current law, there is a rebuttable presumption of decreased need for spousal support if the supported spouse is cohabiting with a person of the opposite sex. This standard requires extensive discovery and costly litigation to document the supported party's previous need, current needs, and the extent of the new partner's financial contributions to the relationship. These hearings generally require the testimony of accounting experts and require significant and intrusive discovery of the income and expenses of the supported party and the new partner.

Proof of decreased need is arbitrary and ambiguous. The standard therefore is subject to wide disparity in treatment from jurisdiction to jurisdiction. In some jurisdictions spousal support is frequently dropped to zero upon cohabitation. In other jurisdictions the cohabitation has little or no effect on the existing court order.

The purpose of spousal support is to ensure a party's support until a party is self-sufficient. Spousal support terminates on remarriage. There is an ever-increasing problem in high support cases where supporting parties have a financial disincentive to remarry. People cohabit in committed relationships which amount to defacto marriages, but do not remarry in order to continue to collect spousal support; thereby undermining the purpose and premise of spousal support. The payment of support to a spouse who has been cohabiting with another partner for years is perceived as being so patently unfair that it results in extensive and continued litigation.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Diane Wasznicky

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The problem with this law is it leads to harsh results, i.e. cutting off support on the basis of cohabitation without consideration of other factors. Further, there is a concern that the resolution, as drafted, will lead to additional litigation regarding circumstances of cohabitation. It is proposed that the resolution should be amended as follows:

Section 4323 (a) "Except as otherwise agreed to by the parties in writing, on a showing that a supported spouse has cohabitated with the same partner, regardless of gender, for one year or more, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support. Upon a determination that circumstances have changed, the court may modify or terminate spousal support. The court shall retain jurisdiction to order spousal support, as provided for in Chapter 6 (commencing with Section 3650) of part 1, or to terminate spousal support on proof of change of circumstances; change of circumstances can include the continued cohabitation thereafter."

The rest of the proposal (sub-sections b, c and d) was fine.