

RESOLUTION 07-05-06

DIGEST

Support: Defined to Include Attorney Fees and Costs

Amends Family Code section 150 to include attorney’s fees and costs as “support” when the court orders fees or costs paid in the nature of support.

SECTION/COMMITTEE REPORT

FAMILY LAW EXECUTIVE COMMITTEE

APPROVE IN PRINCIPAL

The Family Law Section approves this resolution for the reasons stated by the proponent.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Family Law Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, the Conference of Delegates of the California Bar Associations recommends that Legislation be sponsored to amend Family Code Section 150 to read as follows:

- 1 §150.
- 2 “Support” refers to a support obligation owing on behalf of a child, spouse, or family, or an
- 3 amount owing pursuant to Section 17402. It also includes past due support or arrearage
- 4 when it exists. “Support,” when used with reference to minor child or a child described in
- 5 Section 3901, includes maintenance and education. “Support” also includes an award of
- 6 attorney fees or costs awarded under this code when the court orders such attorney fees or
- 7 costs paid to the party or party’s attorney pursuant to an order for support.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: There is currently no provision in the law allowing the court to order attorney fees in family law cases as additional child/spousal/family support.

This Resolution: Would add a provision to the existing code to provide that the court has authority to award attorney’s fees and costs payable by one party to the other (including orders directly to the other party’s attorney) as support.

The Problem: In some family law cases the court orders one party to pay a portion of other party's attorney fees and costs. In making these orders, a court takes into consideration the need of the party who is to receive the award of fees and costs and the ability of the other party to pay those fees and costs. Because need and ability to pay is the overriding reason for an award of attorney fees and costs in family law cases, it is, in effect, in the nature of support.

Currently, awards of attorney fees and costs from one party to the other, which are not defined as support, may not be protected in bankruptcy or may require expensive bankruptcy litigation to protect. See In re Gionis (9th Cir. BAP, 1994) 170 BR 675. If the party, against whom an award of attorneys fees is made, files for bankruptcy, a substantial hardship and unfairness to the party to whom those fees and costs were awarded can result since that party remains responsible for the fees and costs.

Under the new federal statute 11 USC 101.14A there is a new definition for "Domestic Support Obligations" which make support obligations non-dischargeable. This definition would include a California Support Order made under Family Code Section 150, since the order is based on need, and ability to pay.

The modification proposed by this amendment to Family Code Section 150 would make it clear that fees and costs awarded in the nature of support would be a Domestic Support Obligation and thus non-dischargeable. This would allow the supported spouse/parent to continue to have representation since an award of attorneys fees and costs can be protected from bankruptcy.

IMPACT STATEMENT

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

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