

## RESOLUTION 07-04-2013

### DIGEST

#### Family Law: Requirement for Bond or Personal Undertaking to Stay Enforcement of Award of Costs or Attorneys Fees

Amends Code of Civil Procedure section 917.1 to require a bond or personal undertaking to stay enforcement of an award of costs and/or attorney fees on appeal in certain family law cases.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 917.1 to require a bond or personal undertaking to stay enforcement of an award of costs and/or attorney fees on appeal in certain family law cases. This resolution should be approved in principle because it clarifies any existing ambiguity that no stay is placed on the payment of attorney's fees in family cases, while giving the trial court discretion to authorize a stay upon the posting of a bond.

Code of Civil Procedure section 917.1 provides that a judgment or order requiring "money or the payment of money" is only stayed upon posting of a bond, but that an order or judgment solely awarding "costs" is exempt such that enforcement is automatically stayed under Code of Civil Procedure section 916. With limited exceptions, awards of attorney's fees fall within the meaning of "costs" for purposes of stays. (See, e.g., *Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1542-1544.)

There currently exists some uncertainty as to whether an order solely awarding attorney's fees in a family law action is automatically stayed. (See, e.g., *In re Glatzhofer v. Tao* (Aug. 6, 2002) 2002 Cal. App. Unpub. LEXIS 7393, \*6 [concluding fees awarded under Family Code sections 2030 and 2032 are not costs subject automatic stay].) This resolution would clarify that an order solely awarding attorney's fees in a family law case is not automatically stayed upon the perfecting of an appeal. It would further authorize the trial court to exercise discretion to allow a stay upon the posting of a bond.

The general reasoning for automatically staying cost and attorney's fee awards in civil cases should not apply in family law cases. Costs and fees are more significant in family law cases because they not only impact the divorcing spouses, but often impact children, e.g. continuing therapy for the children or professional assistance to deal with highly charged emotional issues related to custody. The denial of an ability to collect fees and costs during an appeal may well result in the prevailing divorcee having funds available to defend the appeal with the assistance of counsel.

## TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Code of Civil Procedure section 917.1 to read as follows:

1 § 917.1  
2 [Subdivisions (a) through (d) remain unchanged.]  
3 (e) The perfecting of an appeal shall not stay proceedings as to a judgment or order that  
4 solely awards attorney fees, costs or both pursuant to Family Code sections 2030, 3121, 6344,  
5 7605 or 7640. The trial court may in its discretion stay execution of any such judgment or order  
6 pending review on appeal or for any other period or periods but only upon condition that an  
7 undertaking shall be given in accordance with section 917.1.

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

**PROPONENT:** Sacramento County Bar Association

## STATEMENT OF REASONS

The Problem: Under Code of Civil Procedure § 916, an appeal generally stays proceedings on the judgment or order appealed from. Code of Civil Procedure § 917.1, however, requires an insurer's bond or undertaking by personal sureties to stay a judgment or order for money or directing the payment of money. A judgment or order that awards only costs and/or attorney fees, however, is not subject to § 917.1. It is automatically stayed on appeal without a bond or undertaking. *Nielsen v Stumbos* (1990) 226 Cal.App.3d 301; *Chapala Mgmt. Corp. v. Stanton* (2010) 186 Cal.App.4th 1532; *but see In re Marriage of Falcone & Fyke* (2012) 203 Cal. App. 4th 964 (fees awarded as sanctions; bond required); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400 (fees under anti-SLAPP statute; bond required). No provision in the Family Code governs stays on appeal. It's possible cost and fee awards in family law proceedings are stayed on appeal without bond or undertaking.

This Solution: This resolution would provide that an appeal from a judgment or order under the Family Code awarding costs, attorney fees or both based on a party's need is not stayed pending appeal unless the trial court in its discretion grants a stay and requires an undertaking pursuant to Code of Civil Procedure § 917.1. Several sections of the Family Code provide for awards of costs, fees or both based on the need of one party and the ability of the other to pay. See, Fam. Code §§ 2030 (dissolution of marriage, legal separation or nullity); 3121 (actions for exclusive custody); 6344(b) (domestic violence); 7605 and 7640 (action to establish parentage, custody and visitation). The intent is to level the playing field by equalizing the parties' ability to obtain legal representation and pay expenses of litigation. That purpose would be defeated if these need-based cost and attorney fee awards were automatically stayed by appeal. The party ordered to pay costs and fees could stay the award by simply filing a notice of appeal and impede, if not cripple, the needy party's ability to obtain legal representation and pay litigation expenses. In non-family law cases, although cost and fee awards are automatically stayed on appeal, the court has discretion to require a bond or undertaking. Code Civ. Proc. § 917.9(a)(3). This resolution

would reverse the rule for need-based fee awards in family law cases. An appeal would not stay enforcement of the award, but the court would have discretion to grant a stay but only on condition of giving a bond or undertaking pursuant to § 917.1.

#### **LEGISLATIVE HISTORY**

Not known

#### **IMPACT STATEMENT**

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

**AUTHOR AND/OR PERMANENT CONTACT:** Jay-Allen Eisen, 2431 Capitol Avenue, Sacramento, CA 95816; (916) 4415810; ae@eisenlegal.com.

**RESPONSIBLE FLOOR DELEGATE:** Jay-Allen Eisen

---

### **COUNTER-ARGUMENT(S) TO RESOLUTION 07-04-2013**

#### **FAMILY LAW SECTION OF THE STATE BAR OF CALIFORNIA**

Rationale: This resolution seeks to amend Code of Civil Procedure section 917.1, which addresses the actions that are stayed upon the filing of an appeal. The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) believes that an order for *pendente lite* need-based fees is not stayed pending appeal absent posting a bond. But there is, at a minimum, a split of authority on whether post-judgment fees and costs or sanctions based fees and costs (or a “mixed” order, or one that is not defined as either need based or conduct based) are stayed upon the filing of an appeal. The amendment proposed by this resolution could potentially create more problems than it resolves through unintended consequences.

#### **Disclaimer:**

**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 Trustees 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.**