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Family

Chapter 718: Financial Protection for Victims of Sexually Violent Felonies by a Spouse

Kailey Hackbarth

Code Sections Affected

Family Code § 4324.5 (new), § 4320 (amended).
AB 1522 (Atkins); 2012 STAT. Ch. 718.

I. INTRODUCTION

A San Diego jury found Shawn Harris guilty of forcible oral copulation against his wife, Crystal Harris, and the trial judge sentenced him to six years in prison.¹ Despite this verdict, the judge for their divorce proceedings awarded Mr. Harris \$1,000 per month in spousal support² and approved a settlement awarding him an additional \$47,000 in legal fees.³ Although the court stayed his spousal support during his incarceration, Mr. Harris may bring suit to reinstate the payments upon his release.⁴

The California State Legislature responded to this situation by enacting Chapter 718, which limits judicial discretion in cases where a spouse convicted of a violent sexual felony against the other spouse would otherwise receive spousal support.⁵

1. See *People v. Harris*, No. D059126, 2012 WL 1651015, at *2 (Cal. Ct. App. May 11, 2012) (affirming the judgment against Shawn Harris).

2. AB 1522—PROHIBITING SPOUSAL SUPPORT FOR PERPETRATORS OF DOMESTIC VIOLENCE (Apr. 10, 2012) [hereinafter AB 1522 FACT SHEET] (on file with the *McGeorge Law Review*); see also Juju Chang & Alyssa Litoff, *Sexual Assault Victim Ordered to Pay Alimony to Attacker Fights to Change California Law*, ABC NEWS (Apr. 5, 2012), <http://abcnews.go.com/US/sexual-assault-victim-ordered-pay-alimony-attacker-fights/story?id=16075409#.T9Pp92LGYyg.link> (on file with the *McGeorge Law Review*) (explaining that Shawn Harris would have received \$3,000 per month based on other factors, but the judge reduced the spousal support by two-thirds because of his conviction, in what Crystal Harris called “the rape discount”).

3. AB 1522 FACT SHEET, *supra* note 2; Chang & Litoff, *supra* note 2.

4. Chang & Litoff, *supra* note 2.

5. AB 1522 FACT SHEET, *supra* note 2.

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II. LEGAL BACKGROUND

A. *No-Fault Dissolution of Marriage*

Before 1969, in order to terminate a marriage, the law required a spouse to prove the existence of certain socially reprehensible grounds for divorce.⁶ In 1969, the Family Law Act (Act)⁷ modified the grounds for divorce under California law, as well as the subsequent division of community property.⁸ The Act created no-fault divorce in the State of California, allowing a petitioning spouse to demonstrate only irreconcilable differences⁹ or incurable insanity.¹⁰ The Act mandates equal division of community property without regard to either spouse's contribution to the breakdown of the relationship.¹¹ Before Chapter 718, the state's no-fault approach generally prohibited the admission of "evidence of specific acts of misconduct" in any dissolution proceeding.¹²

B. *Existing Exceptions to the No-Fault Rule*

Under existing law, courts determine spousal support by considering several factors.¹³ Those factors include the conviction of an abusive spouse¹⁴ and "any

6. See 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband & Wife* § 59 (10th ed. 2005).

The plaintiff or cross-complainant was required to submit evidence to establish that at least one of a number of grounds for divorce existed. The grounds were adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance and conviction of a felony. Incurable insanity was later added. . . . Allegations of extreme mental or physical cruelty became commonplace, and questionable methods of gathering effective but lurid and ludicrous evidence were occasionally employed.

Id.

7. 1969 Cal. Stat. ch. 1608 (enacting CAL. CIV. CODE §§ 4000–5317, which are currently codified in scattered sections of the California Family Code).

8. 11 WITKIN, *supra* note 6, § 1.

9. See generally CAL. FAM. CODE § 2311 (West 2004) (defining irreconcilable differences as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved"); *In re Marriage of Walton*, 28 Cal. App. 3d 108, 116, 104 Cal. Rptr. 472, 479 (4th Dist. 1972) (defining irreconcilable differences as "marital problems which have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and as to which there is no reasonable possibility of elimination, correction or resolution").

10. FAM. § 2310. See generally *id.* § 2312 (requiring proof of incurable insanity for dissolution on those grounds).

11. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 350, 109 Cal. Rptr. 862, 865 (1st Dist. 1973) (dictum), *overruled by* *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106 (1976). Although *Marvin* overruled *Cary*'s application of the Act to unmarried couples, it did not reject *Cary*'s interpretation of the Act itself or its underlying policies. *Id.*; 11 WITKIN, *supra* note 6, § 59.

12. FAM. § 2335.

13. *Id.* § 4320; see also *In re Marriage of Ackerman*, 146 Cal. App. 4th 191, 207, 52 Cal. Rptr. 3d 744, 756 (4th Dist. 2006) ("The trial court has broad discretion in balancing the applicable statutory factors and determining the appropriate weight to accord to each, but it may not be arbitrary and must both recognize and apply each applicable factor.").

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other factors the court determines are just and equitable.”¹⁵ Additionally, a spouse’s conviction for domestic violence against the other spouse creates a rebuttable presumption against spousal support to the abusive spouse.¹⁶ However, the court’s discretion ultimately determines the effectiveness of these protective measures.¹⁷ Prior to Chapter 718, only a spouse’s conviction for attempting or soliciting the murder of the other spouse guaranteed the injured spouse any protection against community property division and awards of spousal support or other payments from the injured spouse to the convicted spouse.¹⁸

III. CHAPTER 718

When a person is convicted of a violent sexual felony against his or her spouse, Chapter 718 requires that a judge consider that criminal conviction in reducing or eliminating a spousal support award.¹⁹ Where either spouse files a petition for dissolution within five years after the conviction and any time served,²⁰ Chapter 718 additionally prevents an award of spousal support to the convicted spouse,²¹ protects the injured spouse’s²² separate property from any requirement to pay for the convicted spouse’s attorney’s fees,²³ allows the injured spouse to request that the court consider the date of legal separation to be the date of the conduct leading to the conviction,²⁴ and shields the injured spouse’s retirement and pension benefits from community property division.²⁵ Chapter 718, by including a cross-reference to Section 667.5 of the Penal Code,²⁶ enumerates violent sexual felonies to include rape,²⁷ sodomy,²⁸ oral copulation,²⁹ sexual penetration,³⁰ and rape, spousal rape, or sexual penetration, in concert.³¹

14. FAM. § 4320(m).

15. *Id.* § 4320(n).

16. *Id.* § 4325. *See generally id.* § 6211(a) (classifying spousal abuse as inherently domestic violence).

17. *Dean v. Dean*, 59 Cal. 2d 655, 657, 381 P.2d 944, 946 (1963) (holding that trial courts have the discretion to determine spousal support).

18. *See* FAM. § 782.5 (West 2012) (entitling the injured spouse to one-hundred percent of the community property interest in the injured spouse’s retirement and pension benefits); *id.* § 4324 (West 2004 & Supp. 2012) (prohibiting awards of spousal support or insurance benefits or payments from the injured spouse to the convicted spouse).

19. *Id.* § 4320(m) (amended by Chapter 718).

20. Time served includes time spent in custody, on probation, or on parole. *Id.* § 4324.5(a) (enacted by Chapter 718).

21. *Id.* § 4324.5(a)(1) (enacted by Chapter 718).

22. *See id.* § 4324.5(c) (enacted by Chapter 718) (defining “injured spouse” as “the spouse who has been the subject of the violent sexual felony for which the other spouse was convicted”).

23. *Id.* § 4324.5(a)(2) (enacted by Chapter 718).

24. *Id.* § 4324.5(a)(3) (enacted by Chapter 718).

25. *Id.* § 4324.5(a)(4) (enacted by Chapter 718).

26. *Id.* § 4324.5(b) (enacted by Chapter 718); *id.* § 667.5(c) (West 2012).

27. *See generally* CAL. PENAL CODE § 261(a)(2), (a)(6) (West 2008) (defining rape); *id.* § 262(a)(1), (a)(4) (defining spousal rape).

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IV. ANALYSIS

A. *Why Is Chapter 718 Necessary?*

Prior to Chapter 718, family court judges retained broad discretion to award spousal support as they saw fit, based on certain factors.³² Even the statutory presumption against awarding spousal support to a spouse convicted of domestic violence³³ was not sufficient to effectively shield Ms. Harris from having to pay spousal support and attorney's fees to her convicted ex-husband.³⁴ The categorical exception to this judicial discretion created by Chapter 718³⁵ is an effort by its authors and supporters to prevent the revictimization of injured spouses who would otherwise be required to provide financially for their abusers.³⁶

B. *The Importance of Judicial Discretion*

State judges have long held considerable discretion to allocate community property and award spousal support³⁷ and attorney's fees upon the dissolution of a marriage.³⁸ The Association of Certified Family Law Specialists (ACFLS) contends that removing this discretion from the courts creates an undesirable inflexibility to adjust a ruling in light of mitigating circumstances.³⁹

While Chapter 718 establishes certain prohibitions regarding spousal support and attorney's fees within the statutory five-year limit,⁴⁰ judges retain significant

28. See generally *id.* § 286(c)–(d) (West Supp. 2012) (defining sodomy).

29. See generally *id.* § 288a(c), (d) (defining oral copulation).

30. See generally *id.* § 289(a), (l) (defining forcible acts of sexual penetration).

31. See generally *id.* § 264.1 (defining rape, spousal rape, or forcible sexual penetration, in concert).

32. See *supra* Part II.B (discussing the determination of spousal support).

33. CAL. FAM. CODE § 4325 (West 2004).

34. See Chang & Litoff, *supra* note 2 (quoting Judge Gregory Pollack's in-court statements to explain his award of spousal support and attorney's fees to Mr. Harris: "It's a long-term marriage. He's a stay-at-home dad . . . how can you say there should be no support without being sexist?").

35. FAM. § 4324.5(a)(1)–(2) (enacted by Chapter 718).

36. AB 1522 FACT SHEET, *supra* note 2; see also Press Release, Jesus Rodriguez, Assistant Dist. Attorney, Off. of the San Diego Cnty. Dist. Attorney, DA-Sponsored Bill Denying Spousal Support to Violent Felons Goes Forward (Mar. 19, 2012), <http://www.sdca.org/files/Spousal%20Support%20Bill%20to%20Committee%203-19-12.pdf> (on file with the *McGeorge Law Review*) (noting that requiring injured spouses to pay their abusers spousal support is inconsistent with the policy of fairness underlying the Family Code).

37. 11 WITKIN, *supra* note 6, § 227.

38. *Id.* § 193.

39. Letter from Diane Wasznicky, President, Ass'n of Certified Family Law Specialists, to Mike Feuer, Assembly Member, Cal. State Assembly (Mar. 12, 2012) [hereinafter Wasznicky Letter] (on file with the *McGeorge Law Review*). The ACFLS warns of unintended consequences of this inflexibility, such as where a spouse may plead guilty to a listed crime to save the marriage, only to subsequently be excluded from his or her share of community property earned after the conviction. *Id.*

40. FAM. § 4324.5(a)(1)–(2) (enacted by Chapter 718).

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discretion to allocate most community property⁴¹ and have full discretion to award spousal support five years after the conviction and time served,⁴² although certain factors may now carry more weight.⁴³

C. Deprivation of a Spouse's Community Property Interest

A state cannot constitutionally deprive a person of any vested property interest without due process.⁴⁴ Accordingly, legislation depriving a spouse of any community property interest⁴⁵ is not retroactive, unlike most amendments to the Family Code.⁴⁶ Chapter 718 deprives the convicted spouse of a vested community property interest in a portion of the injured spouse's retirement and pension benefits corresponding to the fraction of the benefits earned during marriage.⁴⁷ Although the prerequisite of a conviction built into Section 4324.5 of the Family Code provides spouses whose property interests may be adversely affected by Chapter 718 the necessary notice and opportunity to present their objections in a criminal trial,⁴⁸ due process may prevent the retroactive application of this part of Chapter 718 unless the court provides adequate notice to the defendant at trial that a conviction of a violent sexual felony against one's spouse may result in the deprivation of certain community property interests.⁴⁹

The ACFLS argues that the expanded scope of this pension provision to include violent sexual felonies⁵⁰ is problematic because "[t]here is no nexus

41. Chapter 718 only rescinds discretion over the community property interest in the injured spouse's retirement and pension benefits. *Id.* § 4324.5(a)(4) (enacted by Chapter 718).

42. *Id.* § 4324.5(a) (enacted by Chapter 718) (limiting the application of this subsection to petitions for dissolution filed within five years of the conviction and time served).

43. *Id.* § 4320(m) (amended by Chapter 718) (requiring that a judge consider the criminal conviction of an abusive spouse in making a statutory reduction or elimination of a spousal support award).

44. U.S. CONST. amend. XIV, § 1; *see also* CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law . . .").

45. FAM. § 751 (West 2004) ("The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.").

46. *Id.* § 4(h); *see also In re Marriage of Fellows*, 39 Cal. 4th 179, 189, 138 P.3d 200, 205 (2006) ("Even in the face of specific legislative intent, retrospective application is impermissible if it 'impairs a vested . . . right without due process of law.'") (quoting *In re Marriage of Fabian*, 41 Cal. 3d 440, 447, 715 P.2d 253, 257 (1986)).

47. FAM. § 4324.5(a)(4) (enacted by Chapter 718). These are benefits derived from employment during marriage and before separation. *In re Marriage of Lehman*, 18 Cal. 4th 169, 177, 955 P.2d 451, 454 (1998).

48. *See generally* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

49. FAM. § 4324.5 (enacted by Chapter 718); *see supra* text accompanying note 47 (discussing the convicted spouse's lost interest in the victim spouse's retirement and pension benefits).

50. FAM. § 4324.5(a)(4) (enacted by Chapter 718). Existing law provided this remedy only where a spouse's conviction was for attempting to murder the other spouse or for soliciting the murder of the other spouse. *Id.* § 782.5 (West 2012).

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between the behavior and remedy.”⁵¹ Despite Chapter 718’s narrow application, the ACFLS predicts a likelihood of unjust outcomes and unintended consequences, as well as further expansions to the list of applicable convictions.⁵² While there is a seemingly low volume of cases to which Chapter 718 will apply,⁵³ even a limited application may demonstrate that “hard cases make bad law.”⁵⁴

V. CONCLUSION

California law prior to Chapter 718 allowed broad judicial discretion in allocating spousal support and legal fees regardless of a person’s conviction for a violent sexual felony against a spouse,⁵⁵ with the sole exception of a spouse’s conviction for attempting or soliciting his or her spouse’s murder.⁵⁶ The law also required equal division of community property except under that same limited circumstance.⁵⁷ Chapter 718 protects injured spouses by extending these narrow exceptions to encompass convictions for sexually violent felonies against the perpetrator’s spouse.⁵⁸ Proponents hope that Chapter 718 will prevent further trauma to injured spouses by prohibiting court-mandated financial support to their convicted abusers;⁵⁹ time will tell if this “hard case[] ma[d]e bad law.”

51. Wasznicky Letter, *supra* note 39. “If a person is convicted for the attempted murder of a spouse, the penalty of denying that person interest in the property which he or she may have gained if successful makes some sense. . . . The Family Law courts are not criminal courts and the legislature should not be creating that prospect.” *Id.*

52. *Id.*

53. *See, e.g.*, ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1522, at 2 (Aug. 23, 2012) (suggesting that the California State Legislature was aware of only one such case).

54. *Green v. Georgia*, 442 U.S. 95, 98 (1979) (Rehnquist, J., dissenting).

55. *See supra* Part IV.B (discussing the role of judicial discretion).

56. CAL. FAM. CODE § 4324 (West 2004 & Supp. 2012).

57. 11 WITKIN, *supra* note 6, § 59.

58. FAM. §§ 4320 (amended by Chapter 718), 4324.5 (enacted by Chapter 718).

59. AB 1522 FACT SHEET, *supra* note 2.