#F-662 8/1/83

Memorandum 83-70

Subject: Study F-662 - Special Appearance in Family Law Proceedings (Draft of Tentative Recommendation)

Attached to this memorandum as Exhibit 1 is a letter from Judge (now Justice) Donald King pointing out a problem in family law procedure. The Commission reviewed this letter a year ago and decided to request to the Legislature to expand the Commission's authority from community property to family law generally in order to be able to study this and other problems that come to the Commission's attention. The Legislature has expanded the Commission's authority to study family law generally in 1983 Cal. Stats. res. ch. 40.

The problem pointed out by Justice King is that in a family law proceeding, the respondent may make a special appearance to contest the in personam jurisdiction of the court by way of a motion to quash service of summons under Code of Civil Procedure Section 418.10. However, while the motion to quash is pending, the petitioner may seek pendente lite orders for temporary child and spousal support, temporary custody, restriction of visitation rights, determining the use of property, etc. If the respondent contests any of these pendente lite orders the respondent is deemed to have made a general appearance, thereby waiving the challenge to the court's jurisdiction.

Justice King gives the example of several recent cases where orders to show cause for temporary support of the wife were unopposed because of the husband's pending motion to quash service for lack of jurisdiction. "I have felt very uncomfortable making such orders when there have been references in the motion to quash about poor economic circumstances on the part of the husband." Justice King believes that in an equitable proceeding, especially one to terminate a marriage, it is inappropriate to preclude a person from participating in an order to show cause hearing to set temporary support and making other financial orders because to do so will result in the person's motion to quash being denied.

Justice King believes this problem is peculiar to family law because the court may have subject matter jurisdiction of many aspects of the marriage without having personal jurisdiction over one of the parties. The staff agrees that this is a problem that should be addressed, although we do not believe the problem is unique to family law. Any time a civil

proceeding involves a contest of personal jurisdiction and a temporary restraining order or other pendente lite relief is sought, the problem arises. Perhaps it is more of a problem in family law than in other cases because of the wide variety of statutorily authorized pendente lite orders and because these orders are regularly used.

There are a number of possible approaches to resolving this problem. One approach is a general revision of the rules of civil procedure to provide that a person who makes a special appearance for the purpose of contesting in personam jurisdiction may, during the pendency of the contest, participate in other proceedings without waiving the jurisdictional point. This has been advocated for California, and would be consistent with the Federal Rules of Civil Procedure. See, e.g., Gorfinkle, Special Appearance in California--The Need for Reform, 5 U.S.F.L. Rev. 25 (1970). This would be a substantial project--we would want to examine the policy of the existing California rule that is hostile to special appearances, and we would need to review the various types of litigation where this could be important to see what sort of practical impact it would have.

The staff prefers to deal with the more narrow and more manageable issues involving family law, although it would be possible to do both a narrow project on a short-term basis and a broader project on a long-term basis, if the Commission is interested in this.

Of the possible approaches to the narrow family law procedural problem, two appear promising to the staff. One possibility is to provide that if a pendente lite order is made during the time a challenge to the jurisdiction of the court is pending, upon resolution of the challenge the respondent may apply to have the order modified or terminated retroactively. The staff does not believe this solution is wholly satisfactory for a number of reasons. First, it reverses the express policy of existing Civil Code Section 4357, which provides that a temporary support order "may be modified or revoked at any time except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke." Presumably, this policy is to protect the spouse and minor children who may have spent the support money in good faith reliance on an apparently valid court order. Next, in a case involving few assets, the ability of the defendant to go back and reverse an order may be meaningless because the assets may have been exhausted, particularly if the jurisdictional issue

has been pending for any length of time because of an appeal. As Justice King says, "The whole case may be over by then." Finally, the ability to go back and reverse an order is not much consolation for the respondent if the order gave temporary custody of a child to the petitioner or if the order denied the respondent visitation rights. Moreover, the ability of the respondent to obtain custody in the future may be irreversibly harmed by the fact of the petitioner's temporary custody during the jurisdictional litigation, regardless of the later reversal.

For these reasons, the staff prefers a different solution--to permit the respondent to contest a pendente lite order during jurisdictional litigation without thereby waiving the jurisdictional issue. During this time an appearance by the respondent would be a special appearance and not a general appearance. We have prepared a tentative recommendation to this effect and attached it to this memorandum. We believe this is a narrowly-drawn proposal that will cure the family law problem with a minimum of disruption.

One issue we confronted in preparing the tentative recommendation is the degree to which the respondent could litigate a pendente lite order and still be deemed to be making only a special appearance. We took the approach that so long as the respondent appears only <u>in opposition</u> to an order, there is no general appearance. The respondent loses this protection if the respondent affirmatively seeks relief, thereby indicating to some extent acquiescence to the court's authority.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Superior Court of California

San Francisco

DONALD B. KING, JUDGE

February 23, 1982

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

I am writing to you to suggest an area to which the Law Revision Commission should extend its consideration. It is a subject peculiar to family law because of the fact that the court in a family law action can have jurisdiction as to one or more matters, i.e., marital status, child custody, etc., and not have jurisdiction as to other matters such as the ability to enter a money judgment against the respondent.

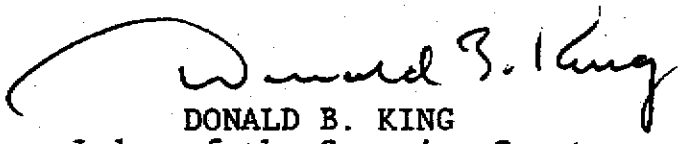
The problem arises on a motion to quash for lack of personal jurisdiction when there is also pending an order to show cause for temporary support and other matters. If the motion to quash is denied, the respondent has no ability to participate in the order to show cause hearing at which temporary support and other matters may be fixed, because by doing so a general appearance is made. In family law, it seems to me that this is inappropriate. I believe there should be a procedure where the respondent in a family law action can use the special appearance to also participate in the hearing on orders to show cause as long as there is an appeal pending at the time of the order to show cause or undertaken within the appropriate time. Otherwise, the orders made under the order to show cause become due and, pursuant to the Civil Code, cannot be modified retroactively any further back than the filing of a motion for modification once an appeal has been completed. The whole case may be over by then.

I have had several Iranian cases lately and the allegations of the wives at the time of the order to show cause (which is unopposed because the husband's motion to quash it had been denied and is being appealed) were presented with evidence of significant income based upon the income and expense declaration of the wives, which under our Uniform Bay Area rules are considered as received in evidence. I have felt very uncomfortable making such orders when there have been references in the motion to quash about poor economic circumstances on the part of the husband.

It seems to me in an equitable proceeding, especially one to terminate a marriage, that it is inappropriate to preclude someone from participating in an order to show cause hearing to set temporary support and making other financial orders because their motion to quash was denied. They cannot participate, pending the outcome of their appeal, without having made a general appearance. It does seem to me that the Law Revision Commission might take a look at this problem as it exists in family law cases.

Best wishes.

Very truly yours,



DONALD B. KING
Judge of the Superior Court

DBK:rjm

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

SPECIAL APPEARANCE IN FAMILY LAW PROCEEDINGS

The respondent in a family law proceeding may make a special appearance to challenge the personal jurisdiction of the court.[1] During the pendency of the respondent's challenge the petitioner often seeks pendente lite relief in the form of an order for temporary spousal or child support,[2] restraint of personal misconduct by a party or disposition of property,[3] attorney fees and costs pendente lite,[4] or custody and visitation.[5] The respondent in this situation cannot oppose the pendente lite order because opposition amounts to a general appearance in the family law proceeding, thus prejudicing the respondent's challenge to the personal jurisdiction of the court.[6]

As a result, a pendente lite order may go unopposed even though the respondent has good ground for opposition.[7] This is inequitable, particularly if the respondent's challenge to the personal jurisdiction of the court is legitimate.

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1. Cal. Rules of Court 1234; Code Civ. Proc. § 418.10.

2. Civil Code § 4357.

3. Civil Code § 4359; Code Civ. Proc. § 527.

4. Civil Code § 4370.

5. Civil Code § 4600.1.

6. See discussion in Brayton, Jurisdiction, Venue, and Service of Process, in 1 California Marital Dissolution Practice § 11.32 (Cal. Cont. Ed. Bar 1981).

7. For example, the petitioner may seek temporary spousal support and the order is unopposed even though the respondent's means are inadequate. Judge King gives the instance of several recent cases in which the wife seeks such an unopposed order--"I have felt very uncomfortable making such orders when there have been references in the motion to quash about poor economic circumstances on the part of husband." Letter from Judge Donald B. King, San Francisco Superior Court, to John H. DeMoully, Executive Secretary, California Law Revision Commission (February 23, 1982).

The law should not preclude a person from participating in a pendente lite family law proceeding for fear that to do so will result in waiver of the person's challenge to the jurisdiction of the court. The Law Revision Commission recommends that the law be revised to enable the respondent in a family law proceeding to oppose a pendente lite order during the pendency of a challenge to the personal jurisdiction of the court without making a general appearance.[8] This will enable fair litigation of the issues on the merits without prejudicing the rights of either party.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 4356 to the Civil Code, relating to family law.

The people of the State of California do enact as follows:

28291

Civil Code § 4356 (added)

SECTION 1. Section 4356 is added to the Civil Code, to read:

4356. (a) During the time a motion pursuant to Section 418.10 of the Code of Civil Procedure is pending, the respondent may appear in opposition to an order made during the pendency of proceedings under this part and the appearance shall not be deemed a general appearance by the respondent.

(b) As used in this section, a motion pursuant to Section 418.10 of the Code of Civil Procedure is pending from the time notice of motion is served and filed until the time within which to petition for a writ of mandate has expired or, if a petition is made, until the time final judgment in the mandate proceeding is entered.

Comment. Section 4356 is added to enable the respondent to contest pendente lite orders in family law proceedings without prejudicing the respondent's right to litigate the in personam jurisdiction of the court by special appearance pursuant to Code of Civil Procedure Section 418.10.

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8. This is consistent with the suggestions for reform made in Gorfinkle, Special Appearance in California--The Need for Reform, 5 U.S.F.L. Rev. 25 (1970). The Commission's present recommendation applies only to family law proceedings and not to civil procedure generally. Family law proceedings involve this situation with some frequency because the family law court may have subject matter jurisdiction without personal jurisdiction and because during the initial stages of dissolution of the family unit the parties often require early access to the court. See Samuels, Orders to Show Cause and Pendente Lite Relief, in 2 California Marital Dissolution Practice § 15.1 (Cal. Cont. Ed. Bar 1983).