

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1179 (Pacheco)
Version: March 29, 2023
Hearing Date: June 13, 2023
Fiscal: No
Urgency: No
AWM

SUBJECT

Family law: attorney's fees

DIGEST

This bill clarifies that, in a family law case, an award of attorney fees as a sanction may be imposed after a party or the court has provided notice to the party against whom the sanction is proposed and that party is given an opportunity to be heard at a hearing.

EXECUTIVE SUMMARY

The Family Code contains a variety of attorney fee-shifting provisions based on the nature of the matter and the equities involved; for example, in cases for the dissolution of marriage, the court may order one party to pay for both parties' legal representation, if that party is in a significantly better financial situation. Family Code section 271, however, takes a different approach to fee-shifting, by allowing a court to award attorney fees in family law cases as a sanction against a party whose conduct delays or otherwise frustrates state policy promoting cooperation, civility, and settlement in family law matters. This provision is intended to disincentivize obstructionism in family law cases and penalize parties who insist on making family law litigation more difficult than it needs to be.

As currently in statute, section 271 states that the sanction party against whom sanctions are sought must receive notice of the proposed sanction and an opportunity to be heard, but it does not expressly state who may provide that notice, i.e., whether only another party may seek sanctions or whether a court may impose sanctions sua sponte. According to a family law judge who brought this issue to the author's attention, existing family court practice allows both a party and a court to seek sanctions. A recent appellate court interpreting section 271, however, questioned whether the statute provided clear authority to the court to provide notice of possible sanctions.

This bill clarifies what has, apparently, been the existing practice of family law judges since the current statute was added to the law in 1993. Specifically, the bill permits either the party, or the court on its own motion, to provide notice to the party against whom sanctions are proposed that sanctions are being sought or may be imposed. The sanctions then may be imposed only after that party is given an opportunity to be heard at a hearing.

This bill is sponsored by the author. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Family Code, which governs various matters relating to marriage and children. (Fam. Code, §§ 1 et seq.)
- 2) Authorizes a court to order attorney fees and costs to a prevailing party in certain matters arising under the Family Code, provided that the court first determines that the party being ordered to pay fees and costs has the ability to pay. (Fam. Code, § 270; *see id.*, *e.g.*, §§ 2030, 3121, 6344, 6386.)
- 3) Authorizes, as an alternative to 2), a court to base an award of attorney fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys; this award is in the nature of a sanction. (Fam. Code, § 271(a).)
- 4) Provides that a court making an award of attorney fees and costs under 4) shall take into account all evidence concerning the parties' incomes, assets, and liabilities, and may not impose a sanction that imposes an unreasonable financial burden on the party against whom the sanction is imposed; however, the party requesting an award of attorney fees and costs is not required to demonstrate any financial need for the award. (Fam. Code, § 271(a).)
- 5) Provides that an award of attorney fees and costs as a sanction under 3) shall be imposed only after notice to the party against whom the sanction is proposed and an opportunity for that party to be heard. (Fam. Code, § 271(b).)
- 6) Provides that an award of attorney fees and costs as a sanction under 3) is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property. (Fam. Code, § 271(c).)

This bill:

- 1) Clarifies that an award of attorney fees and costs as a sanction may be imposed only after notice has been provided by the party requesting the sanction or the court to the party against whom the sanction is sought, and after the party against whom the sanction is sought has been provided an opportunity to be heard by the court.

COMMENTS

1. Author's comment

According to the author:

Family Law courts often involve difficult cases that can be stalled and rack up fees very quickly. Almost half of these difficult cases do not reach an agreement in a timely fashion. Family [Code] section 271 was added as a tool for a presiding judge to use at their discretion should “the conduct of each party or attorney further[] or frustrate[] the policy of the law” in order to promote settlement and cooperation between litigating parties. This technical change in the section will allow judges to use this tool at their discretion and issue these forms of sanctions should any conduct of each party or attorney further or frustrate the settlement of litigation.

2. This bill clarifies that a court can order attorney fees as a sanction in a family court proceeding on its own motion

The Family Code has a variety of fee-shifting provisions that allow a court to apportion the cost of attorney fees based on factors like each party's ability to pay and a balancing of the equities. Family Code section 271, on the other hand, allows a court to award attorney fees in family law cases as a sanction against a party whose conduct delays or otherwise frustrates the state policy promoting cooperation, civility, and settlement in family law matters.¹ Section 271 “imposes a ‘minimum level of professionalism and cooperation’ to effect the policy favoring settlement of family law litigation – and a reduction of the attendant costs”; “[s]ome courts have said the section authorizes attorney's fees and costs and a penalty for obstreperous conduct.”²

Unfortunately, the procedural portion of section 271 is drafted in the passive voice: it states that the sanction may be awarded “only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.”³ This construction leaves open the question of *who* must provide notice. According to a

¹ Fam. Code, § 271.

² *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1524.

³ Fam. Code, § 271(b).

family law judge who brought this issue to the author's attention, family court practice permits either a party to request sanctions and serve notice on the other party, or the court to, sua sponte, provide notice to a party through a warning that their conduct, if continued, could lead to sanctions. In 2022, however, a Court of Appeal opinion questioned whether section 271 authorizes a family court to impose sanctions on its own motion.⁴

This bill clarifies that a court may impose a section 271 sanction either on the basis of a motion by a party or on the basis of the court's own motion, when the court believes the sanction is warranted under section 271. Where sanctions are sought by a party, the party will be required to bring a noticed motion; when the court seeks the sanction, the "notice" may be a warning from the court that, if the party continues its delaying or frustrating conduct, the court may award the other party attorney fees as a sanction. In both circumstances, the party against whom the sanction is sought must be given an opportunity to be heard at a hearing on the motion.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending legislation: None known.

Prior legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 79, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)

⁴ *Featherstone v. Martinez* (2022) 86 Cal.App.5th 775, 784 & fn. 6.