The background of the page is a collage of US dollar bills. In the foreground, a magnifying glass with a wooden handle is positioned over a portrait of Alexander Hamilton on a one-dollar bill. The text is overlaid on the top half of the image.

Costly Divorces: Third Party Liability for Attorney Fees and Costs

By Diana P. Zitser and
Brandon Johnson



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Recent decisions from the California Court of Appeals have made it easier for a party in a divorce proceeding to seek attorney fees and costs from a third party. Attorneys should take note of these recent developments when reviewing their court strategy to better safeguard their clients' interests.

EVERYONE WHO HAS EVER READ A TABLOID article or watched the evening news is probably familiar with some variation of the phrase “costly divorce.” However, very few people know that the soon-to-be-exes are not the only ones who may bear the legal costs of their divorce.

In most areas of civil litigation, an award of attorney fees and costs is seen as a punishment, and a relatively rare one at that. However, attorney fees and costs are treated very differently in family law proceedings.

In family law proceedings, it is common for the court to award need-based attorney fees and costs. If the court finds both that one party requires an award of attorney fees and costs to maintain or defend the proceeding and that another party has a greater ability to pay, the court will generally order the latter to pay for some or all of the attorney fees and costs of the former.

In a divorce proceeding, third parties who are joined to the case can also be made to pay for another party’s need-based attorney fees and costs. The court can even order third parties to pay for the need-based attorney fees and costs of another party before trial.

Allowing an award of need-based attorney fees and costs from a third party early in the proceedings presents an unusual problem. In theory, an unscrupulous party could use illegitimate claims to join a wealthy third party to the divorce proceeding, and then use the threat of attorney fees and costs to extort money from the third party.

Requiring a party to show that they are reasonably likely to prevail on their claims relating to a third party before awarding need-based attorney fees and costs may be the only sure way to prevent that from happening. However, if parties in a dissolution proceeding were required to prove their case as it relates to a third party before obtaining need-based attorney fees and costs, a wealthy third party would be able to use aggressive litigation to dominate the divorce proceeding and force financially weak litigants to abandon their rights. This dilemma has taken center stage in two important opinions from the California Courts of Appeal, the most recent of which, *In re Marriage of Bendetti*, was decided earlier this year.

Joinder of Third Parties to Divorce Proceedings

Under Rule 5.24 of the California Rules of Court, there are two primary theories by which a person or entity can be joined to a dissolution proceeding.¹ First, a person must be joined to a divorce proceeding if the person claims custody or visitation rights with respect to any minor child of the relationship.²



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Alternatively, a person may be joined to a divorce proceeding if a joinder would be appropriate to determine an issue in the proceeding and the person to be joined is indispensable for either the determination of that issue or enforcement of any judgment.³

The second of the two theories is more general than the first, and it is also more commonly used to join third parties to dissolution proceedings. In particular, the most common reason third parties are joined to divorce proceedings is that they claim or control an interest in property that is subject to the divorce, like the family home, or a business.

A person who has been joined to a dissolution proceeding as a third party is called a claimant.⁴ Claimants are considered a party to the divorce proceeding for all purposes, including discovery and attorney fees and costs under Family Code Section 2030.

Attorney Fees in Divorce Proceedings

There are many differences between the practice of family law and other types of civil litigation, but perhaps the most important difference is the way attorney fees and costs are allocated in family law proceedings.

Under California’s Family Code Section 2030, if there is a disparity between the parties’ ability to pay for attorney fees and costs, upon request, the court is required to order an award for reasonable attorney fees and costs.⁵ A party with a greater ability to pay for attorney fees and costs will be ordered to pay for the attorney fees and costs of a party who is in need of such an award.⁶ Family Code Section 2030 applies specifically to proceedings for divorce or legal separation, but other statutes provide for a similar allocation of attorney fees and costs in other family law proceedings.⁷

Family Code Section 2030 is substantially the same as its predecessor, former Civil Code Section 4370. Civil Code Section 4370 was originally justified as an extension of the duty to support a spouse or child.⁸ Now, Family Code Section 2030’s stated goal is to preserve each party’s rights and ensure that each party has access to legal representation.⁹

Without Section 2030, a financially dominant party would be able to use the costs of the legal process to bury the other parties’ rights. This can be a problem in any kind of litigation, but it may be especially important in divorce proceedings, where the litigation often literally hits home, affecting the parties’ personal livelihoods and the custody of their children.

The practical effect of Family Code Section 2030 is that the party with the strongest financial situation is often required to pay for some or all of the other party’s attorney fees and costs. For the party who is ordered to pay, this can be like adding

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insult to injury, as they are essentially required to pay for their own opposition. While its effects can be frustrating, the courts and legislature have continued to strengthen Section 2030 as a method for preventing a financially dominant party from exercising an unfair advantage in dissolution proceedings.

In 2004, the relevant language of Section 2030 was changed from “the court *may* make findings on whether an award of attorney’s fees and costs under this section is appropriate” to “the court *shall* make findings on whether an award of attorney’s fees and costs under this section is appropriate.”¹⁰

In 2010, Section 2030 was further amended to expressly authorize the courts to award pendente lite attorney fees and costs by adding the language “including access early in the proceedings.”¹¹

Attorney fees and costs awarded under Section 2030 are often described as need-based attorney fees and costs. While attorney fees and costs under Section 2030 are not awarded in every divorce proceeding, they are much more common than an award for attorney fees and costs in other kinds of litigation. When attorney fees and costs are likely to be ordered, they can have a major impact on how the case proceeds. When third parties are joined to a divorce proceeding, they can be required to pay for attorney fees and costs under Section 2030 as well.

Attorney Fees from Third Parties in Divorce Proceedings

Family Code Section 2030’s predecessor, Civil Code Section 4370, originally allowed an award of need-based attorney fees and costs only from a “husband or wife, or father or mother.”¹² However, in 1981, the statute was amended to allow the award from “any party, except a governmental entity.”¹³ This language has continued under Family Code Section 2030.¹⁴ Accordingly, once a person has been joined as a third party to a dissolution proceeding, the person can be required to pay for the attorney fees and costs of the other parties.¹⁵ However, under Section 2030, orders requiring third parties to pay for the attorney fees and costs of another party in a dissolution proceeding must be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.¹⁶

Despite this limitation, depending on how the parties handle the case, a third party joined to a divorce proceeding can still be ordered to pay for a significant amount of another party’s attorney fees and costs. For example, a third party can be ordered to pay even for the attorney fees and costs that another party incurred in joining them to the case.¹⁷

Not long after the legislature changed the statute to allow the court to award need-based attorney fees and costs from third parties, a case came before the Third District Court of Appeal that challenged the statute’s ability to award need-based attorney fees and costs from third parties before trial.

IRMO Siller (1986)

In *In re Marriage of Siller*, the wife alleged that she had a community property interest in 23 parcels of real property which were also claimed by a corporation and a partnership that had been formed by the husband and his brothers during the marriage.¹⁸ After the partnership filed an action seeking imposition of a purchase money resulting trust alleging it had paid the purchase price of those properties solely from its own funds, the wife joined the partnership and the corporation to the dissolution proceeding.¹⁹

Both before and after the third parties were joined to the divorce, the wife made numerous discovery requests that were unsuccessfully opposed by the third parties, including depositions, subpoenas to the third parties’ bank, and demands for the production of documents.²⁰ The third parties also made a motion for a protective order, a motion for judgment on the pleadings, and two prior writ petitions to the Court of Appeal.²¹

The wife prevailed on all of these procedural issues and was awarded attorney fees and costs from the third parties for almost all of her costs under Civil Code Section 4370, the predecessor to Family Code Section 2030.²² The third parties appealed the award of attorney fees and costs, arguing, among other things, that the statute was unconstitutional as applied, and that the statute could only be constitutionally applied when the party seeking fees shows that they are reasonably likely to prevail in their underlying claims against a third party.²³

The Third District Court of Appeal rejected the third parties’ argument and affirmed the award of attorney fees and costs from the third parties, stating that there was no requirement that the party seeking fees against a third party show that they are reasonably likely to prevail in their underlying claims against a third party. However, the Court of Appeal’s decision appeared to be based primarily on the fact that the wife had prevailed on all of the procedural issues for which attorney fees and costs had been awarded.²⁴

Even though the wife had ultimately been unsuccessful in her claims against the third party, the Court of Appeal held that because she had been successful in her procedural actions, those actions were reasonable.²⁵ The Court of Appeal also noted that the facts in the case demonstrated that the wife’s underlying claims were “not specious.”²⁶

Because the Court of Appeal’s decision in *Siller* could have been interpreted to authorize need-based attorney fees and costs from third parties that were incurred to make motions or requests that had prevailed, *Siller* left many questions unanswered. However, because third parties are rarely joined to divorce proceedings, the issue was not revisited by a Court of Appeal until last year.

IRMO Bendetti (2013)

In *In re Marriage of Bendetti*, the divorce settlement between

the husband and his first wife included an agreement that the husband would sell their 50 percent interest in two restaurants and pay the first wife half of the balance of proceeds from the sales.²⁷ The divorce settlement also provided that the husband would pay the first wife spousal support.²⁸ Over the next ten years, the husband gave the first wife neither spousal support nor the wife's share of the proceeds, so the first wife began to take legal action to enforce her interests.²⁹

In the interim, the husband had married a second wife, and the husband and/or the second wife had invested in a steakhouse chain.³⁰ Further, the husband and the second wife were engaged in litigation against the other owner of the steakhouse chain.³¹

As part of the litigation between the husband and the second wife against the other owner, the husband stated in a deposition that while the second wife was nominally the investor in the steakhouse chain, at least some of the money for the investment in the steakhouse chain had come from the proceeds that the husband had been ordered to share with the first wife, and that the husband had been the true investor in the steakhouse chain.³²

The first wife filed a judgment lien in the steakhouse case, but despite that lien and the husband's statements during his deposition, the second wife received a settlement of \$7,250,000 from the steakhouse litigation.³³

After the second wife received this award in the steakhouse litigation, the husband then paid the first wife with funds from the second wife, to settle the first wife's spousal support claim arising from the dissolution proceeding.³⁴ The first wife then requested attorney fees and costs against husband.³⁵

As part of his opposition to this motion, the husband made statements contradicting his earlier statements in the steakhouse case.³⁶ In particular, the husband now stated that the second wife was the true investor in the steakhouses, and that he never expected to receive anything from the steakhouse investment or the steakhouse litigation.³⁷

The second wife brought a declaratory relief action against the first wife in federal court, claiming that all of the proceeds in the steakhouse litigation belonged to her.³⁸ The first wife moved successfully to have the second wife's federal court action dismissed.³⁹

The first wife then joined the second wife to dissolution proceeding, and filed claims for fraud and unjust enrichment against second wife.⁴⁰ The second wife filed a demurer and motion to strike, which caused the first wife to amend the complaint.⁴¹ The first wife also made an omitted asset motion and propounded discovery on the second wife, including an attempt to take the second wife's deposition.⁴²

The first wife then moved for attorney fees and costs from both the husband and the second wife.⁴³ The trial court granted the request, awarding fees from the second wife for the first wife's opposition to the second wife's federal

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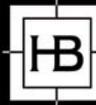
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declaratory relief action, joinder of the second wife, opposing the second wife's demurer and motion to strike, making the omitted asset motion, propounding discovery on the second wife, and attempting to take the second wife's deposition.⁴⁴

The second wife appealed the court's order awarding attorney fees and costs to the first wife, contending that a party seeking attorney fees and costs from a third party must demonstrate a likelihood of success on the merits, and that the first wife had failed to present a prima facie case linking the second wife as a third party to an issue in the proceeding.⁴⁵

Although the Second District Court of Appeal noted that, unlike *Siller*, not all of the attorney fees and costs awarded to the first wife were for motions in which the first wife prevailed, the Court of Appeal nevertheless rejected the second wife's arguments.⁴⁶ The Court of Appeal held that there was no requirement that a party to a divorce proceeding demonstrate a likelihood that he or she will prevail in his or her underlying claims against a third party to be entitled to pendente lite attorney fees and costs from the third party.⁴⁷

The Court of Appeal also held that a party does not have to prevail on the motions and matters for which attorney fees and costs are awarded from the third party, because without such a pendente lite award, parties to divorce proceedings may be unable to pursue their claims.⁴⁸ The Court of Appeal also noted that the facts in the case demonstrated that there were issues in the dissolution proceeding related to the second wife, and that the first wife's claims against the second wife were "not specious" under the facts.⁴⁹

Attorney Fees from Third Parties in Divorce Proceedings after *Bendetti*

The Court of Appeal in *Bendetti* made it clear that in a divorce proceeding, a party seeking attorney fees and costs from a third party for services that have already been performed need not demonstrate a reasonable likelihood that he or she will prevail in his or her underlying claims against the third party, even if the party seeking fees did not prevail on all of the motions and matters for which the attorney fees and costs were incurred. Nevertheless, some important questions remain unanswered.

Although the opinions of the Courts of Appeal in both *Siller* and *Bendetti* noted that the underlying claims against the third parties were "not specious," neither opinion expressly held that such a finding was necessary, so that portion of the opinions may or may not be dicta.⁵⁰

Furthermore, neither *Siller* nor *Bendetti* reached the issue of whether or not the statute could authorize an award of attorney fees and costs from a third party for services to be rendered in the future, because in both cases the trial court only granted attorney fees and costs from the third parties for work that had already been performed.⁵¹

The way attorney fees and costs are treated in family law proceedings is very different from other types of civil litigation. In the courthouses and legislative halls, the wind is blowing more and more strongly towards seeing need-based attorney fees and costs as a way to ensure an equal playing field. When attorney fees and costs may be at issue in a divorce proceeding, the way the facts interact with the policy and intent behind the law has to be understood and carefully evaluated.

After *Bendetti*, an attorney opposing an award of need-based attorney fees and costs will have a more difficult time arguing that the party requesting fees is unlikely to prevail on their underlying claims, but an attorney opposing an award of need-based attorney fees and costs can and should argue that the fees requested are not reasonable or justified. By contrast, an attorney representing a party who is requesting an award of need-based attorney fees and costs, when appropriate, might argue that a fee award is required for an equal playing field, and that their fees are reasonable. 

¹ Cal. Rules of Ct. Rule 5.24(e).

² Cal. Rules of Ct. Rule 5.24(e)(1).

³ Cal. Rules of Ct. Rule 5.24(e)(2).

⁴ Cal. Rules of Ct. Rule 5.24(b).

⁵ Cal. Fam. Code Sec. 2030(a)(2).

⁶ *Id.*

⁷ Cal. Fam. Code Sec. 2030(a)(1), 7605, 7640.

⁸ *IRMO Siller*, 187 Cal.App.3d 36, 45 (1986).

⁹ Cal. Fam. Code Sec. 2030(a)(1).

¹⁰ Cal. Fam. Code Sec. 2030(a)(2) (emphasis added).

¹¹ Cal. Fam. Code Sec. 2030(a)(1).

¹² *Siller*, 187 Cal.App.3d at 46.

¹³ *Id.* at 45.

¹⁴ Cal. Fam. Code Sec. 2030.

¹⁵ *Id.*

¹⁶ Cal. Fam. Code Sec. 2030(d).

¹⁷ *IRMO Bendetti*, 214 Cal.App.4th 863, 867-868 (2013).

¹⁸ *Siller*, 187 Cal.App.3d at 41.

¹⁹ *Id.* at 41-42.

²⁰ *Id.* at 42.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 50.

²⁴ *Id.* at 52-53.

²⁵ *Id.* at 53.

²⁶ *Id.*

²⁷ *Bendetti*, 214 Cal.App.4th at 865.

²⁸ *Id.* at 866.

²⁹ *Id.* at 865-866.

³⁰ *Id.* at 866.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 866-867.

³⁷ *Id.*

³⁸ *Id.* at 867.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 867-868.

⁴³ *Id.* at 867.

⁴⁴ *Id.* at 867-868.

⁴⁵ *Id.* at 868.

⁴⁶ *Id.* at 870-871.

⁴⁷ *Id.* at 871.

⁴⁸ *Id.* at 870-871.

⁴⁹ *Id.* at 871-872.

⁵⁰ *Siller*, 187 Cal.App.3d at 53 and *Bendetti*, 214 Cal.App.4th at 871.

⁵¹ *Siller*, 187 Cal.App.3d at 42, and *Bendetti*, 214 Cal.App.4th at 868.



Test No. 63

MCLE Answer Sheet No. 63

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour in Legal Ethics. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. In family law cases, attorney's fees and costs are usually only awarded as a sanction.
 - True False
2. Need-based attorney's fees and costs are ordered when the court finds that one party requires an award of attorney fees and costs to maintain or defend the proceeding and that another party has a greater ability to pay.
 - True False
3. Third parties who have been joined to a divorce proceeding cannot be ordered to pay for need-based attorney fees and costs.
 - True False
4. A person must be joined to a divorce proceeding if he or she claims custody or visitation rights with respect to any minor child of the relationship.
 - True False
5. A person may be joined to a divorce proceeding if joinder would be appropriate to determine an issue in the proceeding and the person to be joined is indispensable for either the determination of that issue or enforcement of any judgment.
 - True False
6. A person can be joined to a divorce proceeding if they claim or control an interest in property that is subject to the divorce.
 - True False
7. A third party who has been joined to a divorce proceeding is called a claimant.
 - True False
8. Family Code Section 2030 is a continuation of former Civil Code Section 4370.
 - True False
9. The stated goal of Family Code Section 2030 is to preserve each party's rights and ensure that each party has access to legal representation.
 - True False
10. In 2004, the legislature weakened Family Code Section 2030 by changing the relevant language from "the court *shall* make findings on whether an award of attorney's fees and costs under this section is appropriate" to "the court *may* make findings on whether an award of attorney fees and costs under this section is appropriate."
 - True False
11. The practical effect of Family Code Section 2030 is that the party with the weakest financial situation is often required to pay for some or all of the other party's attorney fees and costs.
 - True False
12. Family Code section 2030 does not authorize the courts to award pendente lite attorney fees and costs.
 - True False
13. In a divorce proceeding, when attorney fees and costs are likely to be ordered, they can have a major impact on how the case proceeds.
 - True False
14. Under Family Code Section 2030, orders requiring third parties to pay for the attorney fees and costs of another party in a dissolution proceeding must be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.
 - True False
15. A third party joined to a divorce proceeding cannot be ordered to pay for the attorney fees and costs that another party incurred in joining them to the case.
 - True False
16. Need-based attorney fees and costs can only be awarded from a third party when the party seeking fees shows that they are reasonably likely to prevail in their underlying claims against a third party.
 - True False
17. Need-based attorney fees and costs can only be awarded from a third party for motions or requests in which the party seeking fees has prevailed.
 - True False
18. Need-based attorney fees and costs can only be awarded from a third party for motions or requests that were made by the third party.
 - True False
19. An attorney opposing an award of need-based attorney fees and costs can argue that the fees requested are not reasonable.
 - True False
20. A party seeking need-based attorney fees and costs should not argue that a fee award is required for an equal playing field.
 - True False

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