

Memorandum 85-24

Subject: Study F-661 - Provision for Support if Support Obligor Dies

The Commission approved its Recommendation Relating to Provision for Support if Support Obligor Dies for printing and submission to the 1985 legislative session. A copy of the recommendation is attached. Assembly Member McAlister introduced Assembly Bill 150 to effectuate this recommendation. The recommendation contains the proposed legislation that was introduced as Assembly Bill 150.

Under existing law, where it is just and reasonable to do so in light of the particular circumstances of the parties, the court is authorized to require insurance on behalf of a supported spouse to provide for the needs of the supported spouse after the death of the support obligor. The recommendation would give the court more flexibility in devising an appropriate solution. It authorizes the court to require the purchase of an annuity or the establishment of a trust to provide for the needs of the supported spouse if the other spouse dies first.

The recommendation was sent to approximately 300 persons and organizations. Three comments were received. One supported the recommended legislation. The other two objected to it. Exhibit 1 (Justice Robert Kingsley) would prefer to give the court authority to include "a provision in the divorce decree compelling the husband to make, and keep in force, a Will such as the Court finds he would have made absent the matters that led to the dissolution." We do not believe that it would be possible for a court to make such a determination and we do not believe that it would be possible to obtain legislative approval of such a proposal. The proposal goes far beyond the limited authority the court would be given under the Commission's recommended legislation.

The other letter (Exhibit 2 - Judge Harlan K. Veal) objects to the 1984 legislation giving the court authority to require insurance and to the new Recommendation which would give the court authority to require purchase of an annuity or establishment of a trust. The writer of this letter believes that the 1984 legislation and the new Recommendation are unconstitutional and "constitutes 'Big Brother' personified." The letter takes the view that the 1984 legislation and the new Recommenda-

tion give the former spouse more protection than is given to a spouse married when the other spouse dies. However, it should be noted that a spouse married when the other spouse dies has considerable protection under existing law. One major protection is the family allowance, which can continue until the final settlement of the estate if the estate is solvent. And Section 1026 of the Probate Code provides that continuation of administration is permitted if the family allowance is needed to pay for necessities of life and the needs of the recipient for continued family allowance outweigh the needs of the decedent's heirs or beneficiaries under the decedent's will whose interest would be adversely affected by continuation of the administration of the estate for this purpose. An equally important protection for a surviving spouse is the power of the court to select and set apart a probate homestead for the lifetime of the supported spouse. In exercising the power to set aside a probate homestead the court must consider among other factors the needs of the surviving spouse, the claims of creditors, and the needs of the heirs or devisees of the decedent. The court also has the power to set apart to the surviving spouse all or any part of the property of the decedent exempt from enforcement of a money judgment (other than the family dwelling which can only be set aside as a probate homestead). Finally, in the case the decedent's estate (over and above all encumbrances) does not exceed \$20,000, the court can set aside the entire estate to the surviving spouse. All of the above provisions for the protection of the surviving spouse take property that otherwise would be governed by the decedent's will and go to someone else. Accordingly, the staff is not persuaded that the recommended legislation gives the former spouse more protection than existing law gives a surviving spouse.

Assembly Member McAlister is enthusiastic about this recommendation and will work hard to obtain its enactment. The staff recommends no change in the recommended legislation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

November 27, 1984

ROBERT KINGSLEY
ASSOCIATE JUSTICE

California Law Revision Commission,
4000 Middlefield Road, Suite D-2,
Palo Alto, California 94303

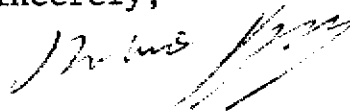
Gentlemen:

I have received, and read, the Tentative Recommendations on: (1) Provision for Support if Support Obligor Dies; (2) Effect of Adoption or Out of Wedlock Birth on Rights at Death; (3) Distribution Under a Will or Trust; (4) Protection of Mediation Communications; (5) Recording Severance of Joint Tenancy; (6) Abandoned Easement; and (7) Durable Powers of Attorney. I find no comments necessary as to five of the Recommendations, but do have comments as to two:

(1) Support After Death: The present law reflects the realities of life. Had there been no divorce, support of a wife necessarily ends with death of the husband. Absent divorce, the husband usually has (but need not) make provision by Will. Divorce or otherwise, the wife gets her share of community property but no more except by Will. All that I can see is needed is a provision in the divorce decree compelling the husband to make, and keep in force, a Will such as the Court finds he would have made absent the matters that led to the dissolution.

(2) Durable Powers: I think it would be desirable, in the case the witness(es) rely on "convincing evidence" to have the witness(es) indicate (probably by check off) which of the six forms of proffered he (she) relied on.

Sincerely,





Harlan K. Veal

Judge

In Chambers
Hall of Justice
Redwood City, California 94063

December 5, 1985

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303Re: Recommendations for Proposed Legislation:
(1) Relating to Abandoned Easements;
(2) Relating to Support if Support Obligor Dies

Gentlemen:

Regarding your above recommendations, I would suggest that you might want to consider the following:

2. I believe there is a possibility that C.C. Section 4801.4 as enacted in 1984 is unconstitutional and with your proposed amendment would become even more so. I fail to see how the court can order a spouse to do something more to guarantee support of another spouse than the supporting spouse would be otherwise obligated to do if the spouses were still happily married. Thus, if a couple are married and one spouse dies without having made any voluntary provision for life insurance, annuity, trust fund, etc., and if the deceased spouse left no meaningful estate, there is nothing which the widow or widower can thereafter do about forcing support. The 1984 amendment to C.C. 4801.4, together with your proposed new amendment imply that society has the right to require of happily married spouses, (together with the right to intervene in that marriage to see that such is accomplished) that there be an estate out of which the surviving spouse can be supported or that security for such be created immediately upon a marriage occurring. As much as I appreciate the concern of supported former spouses to see to it that the support will survive the death of the supporting spouse, I believe both the 1984 amendment and your proposed new amendment constitute "Big Brother" personified. The purported discretion given the trial court, I suggest is unrealistic; it is hard to conceive of a situation wherein the supported spouse could not make a very able "just and reasonable" argument.

Yours very truly,

Harlan K. Veal

HENRY ANGERBAUER, CPA
2401 WILLOW GLEN CT.
CONCORD, CA 94520

11/24/84

Law Revision Commission:

~~please~~
I agree with your recommendation that the court be given greater latitude to provide for the supported spouse in marital dissolution proceedings. In the event of the death of the support obligor the supported spouse should be provided for whenever possible. The limitations imposed upon the court under existing laws are too restrictive. Your recommendation is appropriate in order.

Sincerely



APPENDIX XVI
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Provision for Support
if Support Obligor Dies

September 1984

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303
(415) 494-1305

DAVID ROSENBERG
Chairperson
JAMES H. DAVIS
Vice Chairperson
SENATOR BARRY KEENE
ASSEMBLYMAN ALISTER McAUSTER
ROGER ARNEBERGH
JOHN B. EMERSON
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ARTHUR K. MARSHALL
EDWIN K. MARZEC
ANN E. STODDEN

September 30, 1984

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Unless the parties otherwise agree in writing, a spousal support order terminates when the support obligor dies. The Commission recommends that the court be given more flexibility in selecting an appropriate method to deal with the support needs after death terminates the order. Existing law gives the court authority to require insurance for the benefit of the supported spouse. This authority should be expanded to allow the court to order the purchase of an annuity for the supported spouse or to order that the support obligor establish a trust to provide for the support of the supported spouse.

This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (family law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

PROVISION FOR SUPPORT IF SUPPORT OBLIGOR DIES

A spousal support order does not survive the death of the support obligor.¹ This rule applies both to a contested court order and to an order made pursuant to a marital termination settlement. However, the parties to a marital termination settlement may agree that support continues to be an obligation of the estate of the support obligor,² and a spousal support order based on such an agreement may survive death.³ Absent an agreement, the support order is terminated by the obligor's death, even though continued support may be a necessity for the former spouse.

When the parties are negotiating a marital termination settlement, they may take into consideration the eventuality of the death of the support obligor and plan for it through life insurance, a trust fund, or other devices.⁴ Where the parties are unable to reach an agreement, the court in a contested case has very limited authority to provide for the possibility that the support obligor's death will terminate the support obligation. Civil Code Section 4801.4, enacted in 1984,⁵ authorizes the court in an appropriate case to take into account the cost of insurance in setting the amount of support.⁶ If insurance is already in

¹ *Parker v. Parker*, 193 Cal. 478, 225 P. 447 (1924); *Roberts v. Higgins*, 122 Cal. App. 170, 9 P.2d 517 (1932); *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868 (1937); former Civil Code § 139, as amended by 1951 Cal. Stats. ch. 1700, § 7, at 3912, now recodified as Civil Code § 4801(b).

² See, e.g., *Steele v. Langmuir*, 65 Cal. App.3d 459, 135 Cal. Rptr. 426 (1976).

³ See, e.g., *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1 (1957).

⁴ See, e.g., S. Walzer, *California Marital Termination Settlements* § 5.24, at 170-72, § 5.56, at 195 (Cal. Cont. Ed. Bar 1971) and Supp. 1984 § 5.44, at 76.

⁵ 1984 Cal. Stats. ch. 1573.

⁶ The only effect of the new section is to authorize the court in an appropriate case to take into account the cost of insurance in setting the amount of support. This cost is only one of many factors that are taken into account in setting the amount of support. See Civil Code § 4801(a). The new section does not extend the time a support order remains in effect. The existing law is continued that the support order

force on the life of the support obligor, this section authorizes the court to order that the support obligor maintain some or all of the insurance in force and name the supported spouse as the beneficiary of the insurance. Or, if the support obligor is insurable, the section authorizes the court to order that the support obligor obtain and maintain insurance and name the supported spouse as beneficiary. The support obligor can change the beneficiary on the insurance if the supported spouse dies before the support obligor.

The court's authority to require insurance is subject to important limitations: The authority may be exercised only "where it is just and reasonable in view of the circumstances of the respective parties" and only where the insurance is needed "so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support."⁷

The Commission has received letters from several women whose long-term marriages were ended by a marriage dissolution.⁸ These women live in constant fear that their support payments will be terminated by the death of their former husbands, leaving them without any means for support. The 1984 statute is of no assistance to them. Their former husbands either are no longer insurable or insurance can be obtained only at a prohibitive cost. Yet the former husbands have the financial means to make some other provision for continued support if the husband dies.

The Commission recommends that the 1984 statute be expanded to give the court authority to order the purchase of an annuity for the supported spouse or to order the spouse required to make the payment of support to establish a trust to provide for the support of the supported

terminates when the support obligor dies unless the parties have otherwise agreed in writing. But the insurance proceeds upon the death of the support obligor will provide funds to the supported spouse for support after the death of the support obligor. See Senate Journal, Feb. 9, 1984, at 7784-85.

⁷ Civil Code § 4801.4, enacted by 1984 Cal. Stats. ch. 1573.

⁸ Letter from Janice Solotoy to Senator Rosenthal (Oct. 18, 1984); letter from Marilyn Silver to Assembly Member McAlister (July 16, 1984) (copies on file in office of Law Revision Commission). One writer was 75 years old and had been married for 25 years; the other was 60 years old and had been married for 32 years.

spouse.⁹ Like the authority to require insurance, the expanded authority could be exercised only where just and reasonable in view of the circumstances of the respective parties and only so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support. This expansion would give the court more flexibility in selecting the appropriate method of protecting the supported spouse where it is just and reasonable to do so in view of the circumstances of the particular case. For example, if a trust is used, the trust could provide for the support of the supported spouse during that spouse's life and then the income or assets of the trust, or both, could be paid to the person designated by the support obligor who established the trust.

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

An act to amend Section 4801.4 of the Civil Code, relating to family law.

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

Civil Code § 4801.4 (amended)

SECTION 1. Section 4801.4 of the Civil Code is amended to read:

4801.4. For the purposes of Section 4801, where it is just and reasonable in view of the circumstances of the respective parties, the court, in determining the needs of a supported spouse, may include an amount sufficient to *purchase an annuity for the supported spouse or to maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support, or may require the spouse required to make the*

⁹ This recommendation would give the court a somewhat more limited authority than was previously recommended by the Commission. See *Recommendation Relating to Effect of Death of Support Obligor*, 17 Cal. L. Revision Comm'n Reports 897 (1984).

payment of support to establish a trust to provide for the support of the supported spouse, so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support.

Comment. Section 4801.4 is amended to give the court more flexibility in selecting an appropriate method to provide funds to the supported spouse for continued support after a support order is terminated by the death of the support obligor. The section is expanded to give the court authority to order the purchase of an annuity for the supported spouse or to order that the support obligor establish a trust to provide for the support of the supported spouse. This expansion is in recognition that in some circumstances the amount of insurance in force, if any, on the life of the support obligor may be insufficient and the support obligor may no longer be insurable or insurance can be obtained only at a prohibitive cost.

If insurance is already in force on the life of the support obligor, this section authorizes the court to order that the support obligor maintain some or all of the insurance in force and name the supported spouse as the beneficiary of the insurance. And, if the support obligor is insurable, the section authorizes the court to order that the support obligor obtain and maintain insurance and name the supported spouse as beneficiary. The support obligor can change the beneficiary on the insurance if the supported spouse dies before the support obligor. Instead of ordering the support obligor to maintain insurance and name the supported spouse as beneficiary, the court may order the support obligor to purchase an annuity for the supported spouse to provide support in the event that the support obligor dies before the supported spouse. In some cases, this may be less expensive than insurance. In other cases, the establishment of a trust to provide for the support of the supported spouse during that spouse's lifetime may be the best solution. If a trust is used, after the death of the supported spouse, the income or assets of the trust, or both, could be paid to the person designated by the support obligor.

Section 4801.5 does not change the rule that the support order terminates when the support obligor dies. Civil Code § 4801(b). The section permits the court *where it is just and reasonable to do so in view of the circumstances of the particular case* to order (as a part of the support) insurance, an annuity, or establishment of a trust, *where necessary so that the supported spouse will not be left without means for support if the support obligor dies.* This

section supplements the provisions of Civil Code Section 4801 which requires the court to consider a number of factors in determining the amount and duration of support.

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

PROVISION FOR SUPPORT IF SUPPORT OBLIGOR DIES

September 1984

Important note. The Law Revision Commission plans to submit this recommendation to the 1985 session of the Legislature. Nevertheless, the Commission seeks the comments of interested persons and organizations. Changes in the recommended legislation can be made before it is enacted. It is just as important to advise the Commission that you approve of the recommendation as it is to advise the Commission that you believe that it needs to be revised.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

September 30, 1984

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

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When the parties are negotiating a marital termination settlement, they may take into consideration the eventuality of the death of the support obligor and plan for it through life insurance, a trust fund, or other devices.⁴ Where the parties are unable to reach an agreement, the court in a contested case has very limited authority to provide for the possibility that the support obligor's death will terminate the support obligation. Civil Code Section 4801.4, enacted in 1984,⁵ authorizes the court in an appropriate case to take into account the cost of insurance in setting the amount of support.⁶ If insurance is already in force on

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5. 1984 Cal. Stats. ch. 1573.
6. The only effect of the new section is to authorize the court in an appropriate case to take into account the cost of insurance in setting the amount of support. This cost is only one of many

the life of the support obligor, this section authorizes the court to order that the support obligor maintain some or all of the insurance in force and name the supported spouse as the beneficiary of the insurance. Or, if the support obligor is insurable, the section authorizes the court to order that the support obligor obtain and maintain insurance and name the supported spouse as beneficiary. The support obligor can change the beneficiary on the insurance if the supported spouse dies before the support obligor.

The court's authority to require insurance is subject to important limitations: The authority may be exercised only "where it is just and reasonable in view of the circumstances of the respective parties" and only where the insurance is needed "so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support."⁷

The Commission has received letters from several women whose long-term marriages were ended by a marriage dissolution.⁸ These women live in constant fear that their support payments will be terminated by the death of their former husbands, leaving them without any means for support. The 1984 statute is of no assistance to them. Their former husbands either are no longer insurable or insurance can be obtained only at a prohibitive cost. Yet the former husbands have the financial means to make some other provision for continued support if the husband dies.

factors that are taken into account in setting the amount of support. See Civil Code § 4801(a). The new section does not extend the time a support order remains in effect. The existing law is continued that the support order terminates when the support obligor dies unless the parties have otherwise agreed in writing. But the insurance proceeds upon the death of the support obligor will provide funds to the supported spouse for support after the death of the support obligor. See Senate Journal, Feb. 9, 1984, at 7784-85.

7. Civil Code § 4801.4, enacted by 1984 Cal. Stats. ch. 1573.

8. Letter from Janice Solotoy to Senator Rosenthal (Oct. 18, 1984); letter from Marilyn Silver to Assembly Member McAlister (July 16, 1984) (copies on file in office of Law Revision Commission). One writer was 75 years old and had been married for 25 years; the other was 60 years old and had been married for 32 years.

The Commission recommends that the 1984 statute be expanded to give the court authority to order the purchase of an annuity for the supported spouse or to order the spouse required to make the payment of support to establish a trust to provide for the support of the supported spouse.⁹ Like the authority to require insurance, the expanded authority could be exercised only where just and reasonable in view of the circumstances of the respective parties and only so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support. This expansion would give the court more flexibility in selecting the appropriate method of protecting the supported spouse where it is just and reasonable to do so in view of the circumstances of the particular case. For example, if a trust is used, the trust could provide for the support of the supported spouse during that spouse's life and then the income or assets of the trust, or both, could be paid to the person designated by the support obligor who established the trust.

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

An act to amend Section 4801.4 of the Civil Code, relating to family law.

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

9. This recommendation would give the court a somewhat more limited authority than was previously recommended by the Commission. See Recommendation Relating to Effect of Death of Support Obligor, 17 Cal. L. Revision Comm'n Reports 897 (1984).

Civil Code § 4801.4 (amended)

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Comment. Section 4801.4 is amended to give the court more flexibility in selecting an appropriate method to provide funds to the supported spouse for continued support after a support order is terminated by the death of the support obligor. The section is expanded to give the court authority to order the purchase of an annuity for the supported spouse or to order that the support obligor establish a trust to provide for the support of the supported spouse. This expansion is in recognition that in some circumstances the amount of insurance in force, if any, on the life of the support obligor may be insufficient and the support obligor may no longer be insurable or insurance can be obtained only at a prohibitive cost.

If insurance is already in force on the life of the support obligor, this section authorizes the court to order that the support obligor maintain some or all of the insurance in force and name the supported spouse as the beneficiary of the insurance. And, if the support obligor is insurable, the section authorizes the court to order that the support obligor obtain and maintain insurance and name the supported spouse as beneficiary. The support obligor can change the beneficiary on the insurance if the supported spouse dies before the support obligor. Instead of ordering the support obligor to maintain insurance and name the supported spouse as beneficiary, the court may order the support obligor to purchase an annuity for the supported spouse to provide support in the event that the support obligor dies before the supported spouse. In some cases, this may be less expensive than insurance. In other cases, the establishment of a trust to provide for the support of the supported spouse during that spouse's lifetime may be the best solution. If a trust is used, after the death of the supported spouse, the income or assets of the trust, or both, could be paid to the person designated by the support obligor.

Section 4801.5 does not change the rule that the support order terminates when the support obligor dies. Civil Code § 4801(b). The section permits the court where it is just and reasonable do do so in view of the circumstances of the particular case to order (as a part of

the support) insurance, an annuity, or establishment of a trust, where necessary so that the supported spouse will not be left without means for support if the support obligor dies. This section supplements the provisions of Civil Code Section 4801 which requires the court to consider a number of factors in determining the amount and duration of support.