

#L-701

9/10/80

Memorandum 80-82

Subject: Study L-701 - Guardianship-Conservatorship (Support of  
Conservatee Spouse From Community Property)

Haskell Titchell, a San Francisco attorney, has written the Commission to suggest the need for a revision of the guardianship-conservatorship law. His letter is attached as Exhibit 1.

Under existing law, the competent spouse has the exclusive right to control and manage the community property when a conservator is appointed for the other spouse. Mr. Titchell suggests that a summary procedure in the conservatorship proceeding should be provided to compel the competent spouse to apply the community property to the support of the conservatee spouse. It appears that this is not permitted under existing law and that a separate action must be instituted to compel support from the community property.

The staff believes that this is a good suggestion. We have drafted the attached recommendation to carry out the suggestion. See the attached draft for a description of the problem and the proposed legislation.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

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August 27, 1980

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

RE: Guardianship-Conservatorship Law  
Division 4 - Probate Code

Dear Mr. DeMouilly:

I am moderator of one of the CEB panels which will be presenting the new guardianship-conservatorship law to lawyers in San Rafael, Sacramento and San Francisco. In connection with our preparation for these sessions, we have obviously reviewed the law in substantial depth. The purpose of this letter is to advise you that we have discovered what we believe to be a substantial and serious omission in the statutory scheme.

Under Section 3051, a spouse with legal capacity has exclusive management and control over community property where the other spouse has a conservator. Section 3057 provides a means of protection to assure "good faith in the management and control of the community property." Neither this section nor any other section of the code or the general law apply to the extremely serious problem of how and in what manner the

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competent spouse can be required to contribute community income or community principal if necessary to the support of the conservatee spouse. Since the conservatee spouse may no longer have any estate at all if the property is community property, it is essential that the conservator if not the spouse, or an interested party if the spouse is the conservator have the right to resort to a summary proceeding to enforce support contribution for the benefit of the conservatee.

In the light of this omission, I urgently recommend that a new section 3058 be added for protection of right of spouse who lacks legal capacity to appropriate support. This section should then permit the following:

1. A citation to be served upon the competent spouse to appear before the court and to show cause why an order should not be entered requiring the spouse to provide appropriate support for the conservatee.

2. In the course of the proceeding the court should have the right to determine:

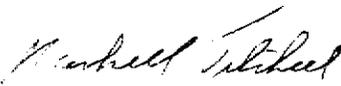
- (a) The extent and nature of the community property.
- (b) The amount of the annual community property income.
- (c) The amount necessary to support the conservatee in the standard to which the conservatee has been accustomed.

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(d) The court to order the competent spouse to make the determined payment on a monthly basis to the conservator of the person of the conservatee and reserve jurisdiction in its order to thereafter modify the support payment upon motion which may be served by mail upon the competent spouse.

Basically, this is the outline of my suggestion. It should be thought about in more detail but it seems quite apparent that a provision of this type is essential and that it would be desirable that once having obtained jurisdiction over the competent spouse that jurisdiction continue to attach so that adjustment in support might be made by motion rather than citation.

Very truly yours,

  
Haskell Titchell

HT:pd  
cc: Mr. David Lee  
Hon. Omer L. Rains  
Hon. Allister McAllister

STAFF DRAFT

## RECOMMENDATION

relating to

## ENFORCEMENT OF SUPPORT OF CONSERVATEE FROM COMMUNITY PROPERTY

Section 3051 of the Probate Code gives the spouse with legal capacity the exclusive management and control over community property where the other spouse has a conservator of the estate.<sup>1</sup> If the competent spouse is unwilling to support the conservatee spouse from the community property,<sup>2</sup> it appears that the conservator or other interested person can enforce the support obligation only by instituting a separate action. There is no provision for a summary procedure in the conservatorship proceeding to enforce the support obligation from the community property.<sup>3</sup>

The Commission recommends the enactment of legislation to provide a summary procedure that will permit the conservator or other interested person to obtain an order requiring the competent spouse to apply the

1. The right given to the competent spouse to manage and control the community property where a conservatorship is established does not otherwise alter the rights of the spouses in the community property or in the income or proceeds of such property. Prob. Code § 3020. The competent spouse can consent to the inclusion of some or all of the community property in the conservatorship estate. See Prob. Code § 3051(c). Even if the competent spouse consents to the inclusion of community property in the conservatorship estate, the court has authority to exclude the property from the conservatorship estate if the court determines that its inclusion would not be in the best interest of the spouses or their estates. See Prob. Code § 3054.
2. Both spouses owe to each other mutual duties of support. Civil Code §§ 242, 5100, 5132. See also In re Marriage of Epstein, 24 Cal.3d 76, 85, 592 P.2d 1165, \_\_\_, 154 Cal. Rptr. 413, \_\_\_ (1979). The establishment of a conservatorship for one spouse does not relieve the other spouse of the duty of support. See Guardianship of Thrasher, 105 Cal. App.2d 768, 234 P.2d 230 (1951).
3. The statute does not specify what procedure may be used to require the competent spouse to support the conservatee spouse from the community property. As to the possible availability under existing law of a summary procedure in the conservatorship proceeding to enforce such support, see the discussion in note 5, infra.

community property income or principal or both to the support of the conservatee spouse.<sup>4</sup> There already is precedent for such a summary procedure in a conservatorship proceeding where the conservatee has a claim to real or personal property, title to or possession of which is held by another.<sup>5</sup> The requirement that a separate action be instituted to enforce the support obligation merely results in unnecessary expense and delay.

The legislation recommended by the Commission contains the following significant provisions:

(1) A proceeding to enforce the obligation for support from the community property may be initiated by the filing of a petition in the court in which the conservatorship proceeding is pending. The petition may be filed by the conservator or conservatee, a relative or friend of the conservatee, or any interested person.<sup>6</sup> Giving broad authority to file such a petition will be useful where the competent spouse is the conservator.

(2) The court may grant a continuance for a reasonable time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing.

(3) The court may hear and determine whether property is community or separate property when the issue is raised in the proceeding.

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4. The new provisions should be made a part of the statute governing the management and control of community property where a conservator has been appointed for one of the spouses (Prob. Code §§ 3000-3074).
  5. Prob. Code §§ 2520-2528. Whether the summary procedure under Sections 2520-2528 would be available to enforce support is unclear and, even if available, the procedure under those sections is inadequate to enforce the support obligation since, for example, there is no provision for periodic payments or for an assignment order. In addition, the proceeding may be halted by an objection on the ground that venue would be improper if the matter were determined in a separate civil action. See Section 2524.
  6. See Prob. Code § 1424 (defining "interested person" to include a public officer or employee or a public entity).

(4) In determining the amount for support, the court shall consider the same factors that would be considered in a separate action for support.

(5) The court may order the community property income or principal or both to be applied to the support of the conservatee as ordered by the court. The court may order a specified monthly or other periodic payment to the conservator of the person or other person designated in the order. The court may order a wage assignment for the amount of the periodic payment and the employer must comply with the order. The wage assignment provisions are drawn from those applicable to wage assignments for support under Civil Code Section 4701.

(6) The court retains jurisdiction to modify or vacate the order for support where justice requires.

(7) The new summary procedure is permissive and in addition to any other procedure otherwise available to enforce the support obligation.

(8) Use of the summary procedure is not permitted if support is sought from the separate property of the spouse managing or controlling the community property or from some other person. Ordinarily all property of the conservatee becomes property of the conservatorship estate and is available for the support of the conservatee.<sup>7</sup> The conservatee spouse has an ownership interest in the community property,<sup>8</sup> but making community property a part of the conservatorship estate would deprive the competent spouse of the right of equal management and control.<sup>9</sup> For this reason, the existing statute gives the competent spouse the right of exclusive management and control of community property if a conservator of the estate is appointed for the other spouse.<sup>10</sup> It would go

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7. See Prob. Code § 2401 (duty to manage and control conservatee's estate). See also the Comment to Prob. Code § 2401 ("The duty of management and control . . . requires that the conservator act diligently in marshaling, taking possession of, and making an inventory of the conservatee's assets"). See Prob. Code §§ 2420 and 2422 (use of income of estate or proceeds of sale of estate assets for support of conservatee).

8. Civil Code § 5105.

9. Civil Code § 5125 (spouses have equal right of management and control of community property).

10. See note 1, supra.

too far, however, to extend the right of exclusive management and control to deprive the court in which the conservatorship proceeding is pending of the authority to make an appropriate order requiring that community property be applied to the support of the conservatee spouse. On the other hand, the enforcement of a support obligation against other property--property that is not property of the conservatee--is best left to determination in an independent action as would be the case if there were no conservatorship.<sup>11</sup>

The recommended legislation also makes clear that appeals may be taken from orders or judgments under Probate Code Sections 3000-3154 (management or disposition of community or homestead property where spouse lacks legal capacity) as in a civil action.

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

An act to amend Section 1461 of, to add Section 3024 to, and to add Article 3 (commencing with Section 3080) to Chapter 2 of Part 6 of Division 4 of, the Probate Code, relating to conservatorships.

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

Probate Code § 1461 (amended)

SECTION 1. Section 1461 of the Probate Code is amended to read:

1461. (a) As used in this section, "director" means:

(1) The Director of Mental Health when the state hospital referred to in subdivision (b) is under the jurisdiction of the State Department of Mental Health.

(2) The Director of Developmental Services when the state hospital referred to in subdivision (b) is under the jurisdiction of the State Department of Developmental Services.

(b) Except where the petition, report, or account is filed by the director, notice of the time and place of hearing on the petition,

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11. In enforcing a support obligation, the court must resort first to the community property and then to the quasi-community or other separate property of the spouse required to make the support payment. See Civil Code §§ 4805, 5132.

report, or account, and a copy of the petition, report, or account, shall be mailed to the director at the director's office in Sacramento at least 15 days before the hearing if both of the following conditions exist:

(1) The ward or conservatee is or has been during the guardianship or conservatorship proceeding a patient in or on leave from a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services.

(2) The petition, report, or account is filed under any one or more of the following provisions: Section 1510, 1820, 1861, 2212, 2403, 2421, 2422, or 2423; Article 7 (commencing with Section 2540) of Chapter 6 of Part 4; Section 2580, 2592, 2620, or 3080; Chapter 3 (commencing with Section 3100) of Part 6.

(c) If the ward or conservatee has been discharged from the state hospital, the director, upon ascertaining the facts, may file with the court a certificate stating that the ward or conservatee is not indebted to the state and waive the giving of further notices under this section. Upon the filing of the certificate of the director, compliance with this section thereafter is not required unless the certificate is revoked by the director and notice of the revocation is filed with the court.

(d) The statute of limitations does not run against any claim of the State Department of Mental Health or the State Department of Developmental Services against the estate of the ward or conservatee for board, care, maintenance, or transportation with respect to an account that is settled without giving the notice required by this section.

Comment. Section 1461 is amended to add a reference to Section 3080 so that the department will receive notice of petitions filed under that section where the department may have an interest in the petition.

405/873

Probate Code § 3024 (added). Appeals

SEC. 2. Section 3024 is added to the Probate Code, to read:

3024. Appeals may be taken from orders and judgments under this part as in a civil action.

Comment. Section 3024 makes clear that rules governing appeals in a civil action govern appeals from orders and judgments under this part.

405/955

Probate Code §§ 3080-3085 (added).

SEC. 3. Article 3 (commencing with Section 3080) is added to Chapter 2 of Part 6 of Division 4 of the Probate Code, to read:

Article 3. Enforcement of Support of  
Spouse Who Has Conservator

§ 3080. Petition for order

3080. If one spouse has a conservator and the other spouse has the management or control of community property, the conservator or conservatee, a relative or friend of the conservatee, or any interested person may file a petition under this article in the court in which the conservatorship proceeding is pending for an order requiring the spouse who has the management or control of community property to apply the income or principal, or both, of the community property to the support and maintenance of the conservatee as ordered by the court.

Comment. Sections 3080-3085 provide a new procedure for obtaining an order requiring a spouse managing and controlling community property to apply such property to the support of the spouse having a conservator. A public officer or employee or a public entity may file a petition under this article. See Section 1424 (defining "interested person").

Where an issue is raised in a proceeding under this article whether property is community property or the separate property of either spouse, the court may hear and determine the issue in the proceeding. See Section 3083.

405/958

§ 3081. Notice of hearing

3081. (a) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(b) If the spouse who has the management or control of community property is not the conservator, the petitioner shall also cause notice

of the hearing and a copy of the petition to be served on that spouse in accordance with Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Comment. Section 3081 is adapted from Section 2521 (property claimed to belong to ward or conservatee).

405/998

§ 3082. Continuance for preparation for hearing

3082. Any person interested in the proceeding under this article may request time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing, and the court shall grant a continuance for a reasonable time for any of such purposes.

Comment. Section 3082 is the same in substance as Section 2522 (property claimed to belong to ward or conservatee).

406/001

§ 3083. Determination of character of property

3083. In a proceeding under this article, the court may hear and determine whether property is community property or the separate property of either spouse if that issue is raised in the proceeding.

Comment. Section 3083 makes clear that the court has jurisdiction to determine whether property is community or separate in a proceeding under this article. The section is consistent with Section 3023 which applies generally to proceedings under this division; but, unlike Section 3023, Section 3083 does not deprive the court of jurisdiction where an objection based on improper venue is raised. Also unlike Section 3023, Section 3083 does not contain an express provision requiring the court to abate a proceeding under this article when another action is pending. However, the general rules of civil procedure with respect to abatement when another action is pending apply to proceedings under this article. See Section 1233. See generally 3 B. Witkin, California Procedure Pleading §§ 961-972, at 2537-47 (2d ed. 1971).

§ 3084. Order of court

3084. (a) The court may order the spouse who has the management or control of community property to apply the income or principal, or both, of the community property to the support and maintenance of the conservatee (including care, treatment, and support of a conservatee who is a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services) as ordered by the court.

(b) In determining the amount ordered for support and maintenance, the court shall consider the following circumstances of the spouses:

- (1) The earning capacity and needs of each spouse.
- (2) The obligations and assets, including the separate property, of each spouse.
- (3) The duration of the marriage.
- (4) The age and health of the spouses.
- (5) The standard of living of the spouses.
- (6) Any other relevant factors which it considers just and equitable.

(c) The court may order the spouse who has the management or control of community property to make a specified monthly or other periodic payment to the conservator of the person of the conservatee or to such other person as is designated in the order. The court may order the spouse required to make the periodic payments to assign, to the person designated in the order to receive the payments, that portion of the earnings of the spouse due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support and maintenance of the conservatee. Such order shall operate as an assignment and shall be binding upon any existing or future employer upon whom a copy of the order is served. The Judicial Council shall prescribe the form for such assignment orders. The employer may deduct the sum of one dollar (\$1) for each payment made pursuant to the order. Any such assignment made pursuant to court order shall have priority as against any execution or other assignment unless otherwise ordered by the court or unless the other assignment is made pursuant to Section 4701 of the Civil Code.

(d) The court shall retain jurisdiction to modify or to vacate an order made under this section where justice requires. At least 15 days before the hearing on the petition to modify or vacate the order, the petitioner shall mail a notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, to the spouse who has the management or control of the community property. Notice shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 to any other persons entitled to notice of the hearing under that chapter.

Comment. Subdivision (a) of Section 3084 is drawn in part from subdivision (a) of Section 2420. Subdivision (b) is drawn from Civil Code Section 246 (Uniform Civil Liability for Support Act).

Subdivision (c), which provides for periodic payments, is drawn in part from Civil Code Section 4701. Periodic payments are to be made to the conservator of the person or other person designated in the order (such as the State Department of Mental Health or the State Department of Developmental Services).

The first sentence of subdivision (d) is drawn from Civil Code Section 247 (Uniform Civil Liability of Support Act). The remainder of the subdivision provides for notice to the spouse obligated to make the payment and to other interested persons.

405/931

§ 3085. Use of other procedures for enforcement of support obligation not limited

3085. Nothing in this article affects or limits the right of the conservator or any interested person to institute an action against any person to enforce the duty otherwise imposed by law to support the spouse having a conservator. This article is permissive and in addition to any other procedure otherwise available to enforce the obligation of support.

Comment. Section 3085 makes clear that this article may be used as an alternative to other procedures for enforcement of a support obligation and does not preclude the enforcement of a support obligation by a separate action for support against the spouse managing or controlling the community property. If a separate action is pending, the general rules of civil procedure relating to abatement apply. See the Comment to Section 3083. The procedure provided in this article cannot be used and a separate action is necessary if support is sought from the separate property of the spouse managing and controlling the community property or from some other person. As to enforcement of support generally, see Civil Code §§ 241-254 (Uniform Civil Liability for Support Act). See also Code Civ. Proc. §§ 1650-1699 (Revised Uniform Reciprocal Enforcement of Support Act of 1968).