

First Supplement to Memorandum 83-49

Subject: Study F-661 - Support After Death of Support Obligor

Attached as Exhibit 1 is a draft of the preliminary portion of a recommendation to accompany the draft statute attached to Memorandum 83-49.

The following is a draft of a Comment to amended Section 4801 of the Civil Code (as amended in the draft statute attached to Memorandum 83-49):

Comment. Subdivision (a) of Section 4801 is amended to give the court express authority to make an order requiring the maintenance of insurance to provide for support after the death of the support obligor. Such an order would be appropriate only where just and reasonable in view of the circumstances of the parties required to be considered under this subdivision and only if the order is necessary so that the supported spouse will not be left without means for support if the support obligor dies. This authority is consistent with the practice of parties in a marital termination settlement. See, e.g., S. Waltzer, California Marital Termination Settlements § 5.56, at 195 (Cal. Cont. Ed. Bar 1971).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Exhibit 1

RECOMMENDATION

relating to

INSURANCE FOR THE BENEFIT OF SUPPORTED SPOUSE

Where a 25-year old marriage is dissolved, the wife may be unable to work and lack the resources necessary to support herself. In such a case, the court is likely to order the husband to provide support for the wife for the rest of her life.¹ But if the husband dies before the wife, the wife may be left without any means of support. This is because the obligation under a court order for spousal support does not survive the death of the support obligor unless the parties otherwise agree in writing.²

A marital termination settlement may include provisions that 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.³ But, where the parties are unable to reach an agreement and the court must determine the support obligation, the court does not have clear statutory authority to make provision for the case where the supported spouse will be left without means for support if the other spouse dies.

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1. For a list of factors that determine the support order, see Civil Code Section 4801(a). The factors include the earning capacity, needs, and obligations and assets (including separate property) of each spouse, the duration of the marriage, the ability of the supported spouse to work, the age, health, and standard of living of the spouses, and any other factors the court deems just and equitable.
 2. Civil Code § 4801(b). The parties in a marital termination settlement may agree that support continues to be an obligation of the estate of the support obligor. See, e.g., *Steele v. Langmuir*, 65 Cal. App.3d 459, 135 Cal. Rptr. 426 (1976). In such case, a spousal support order based on the agreement may survive death. See, e.g., *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1 (1957).
 3. See, e.g., S. Waltzer, *California Marital Termination Settlements* § 5.56, at 195 (Cal. Cont. Ed. Bar 1971).

The Commission does not recommend a change in the existing rule terminating a spousal support order when the support obligor dies.⁴ Instead, the Commission recommends that the court be given authority to require the maintenance of insurance to protect against the loss of support payments upon the death of the support obligor. This is a reasonable and practical alternative to continuation of support after the support obligor's death. In determining the needs of the supported spouse, the court should have authority to include in the amount ordered for support an amount to cover the cost of insurance for the supported spouse on the life of the support obligor. The order should be limited to cases where it is just and reasonable in view of the circumstances of the respective parties⁵ and necessary so that the supported spouse will not be left without means for support if the support obligor dies.

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4. Among the criticisms directed at the California spousal support scheme is that the support award terminates upon the death of the support obligor. See, e.g., Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 816 (1982). A child support award does not terminate on death of the parent. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4646-47 (8th ed. 1974). However, making a spousal support award an obligation of the deceased support obligor's estate would delay and greatly complicate the probate of the estate. The death of the support obligor ordinarily would be a change in circumstances requiring a redetermination of the amount of support obligation. A not insignificant problem would be the method to be used to finance the continuation of support payments for the duration of the life of the supported spouse and what effect the method selected would have on the other persons entitled to the estate of the decedent. The former spouse might be greatly favored over the children and surviving spouse of the decedent.
5. See note 1 supra.