

First Supplement to Memorandum 80-82

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

Mr. Haskell Titchell has called our office concerning the staff draft attached to Memorandum 80-82 relating to the support of a conservatee spouse when the other spouse has the management and control of the community property. He is concerned that the staff draft lacks necessary details and enforcement provisions.

He made a number of excellent suggestions. Rather than to present the suggestions at the meeting and revise the draft after the meeting, we have prepared a revised staff draft to incorporate his suggestions and some additional provisions. We regret that this is necessary since you have probably already read the initial staff draft. However, it seems the best course of action if we are to approve a recommendation at the October meeting.

The only question the staff has is whether it is desirable to give the court authority to make a temporary support order pending the determination of the petition for a support order in the conservatorship proceeding. We have included a provision for a temporary support order since Mr. Titchell considers such a provision to be very important. It should be noted, however, that a dissolution proceeding involves many issues other than support and a temporary support order may be essential in a marriage dissolution proceeding. There is less need for such a provision where the only issue is support from the community property in a conservatorship proceeding.

The staff suggests that the attached revised staff draft be approved for printing and submission to the 1981 session after any necessary revisions are made.

Respectfully submitted,

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Executive Secretary

REVISEDSTAFF 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.¹ If the competent spouse is unwilling to support the conservatee spouse from the community property,² 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.³

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.

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 community property income or principal or both to the support of the conservatee spouse.⁴ 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.⁵ 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.⁶ Giving broad authority to file such a petition will be useful where the competent spouse is the conservator.

(2) A citation may be issued to the competent spouse requiring that spouse to appear before the court for examination concerning matters relevant to the petition.

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).

(3) The court may order the competent spouse to pay temporary support pending determination of the petition. The competent spouse must serve and file a financial declaration concerning current income and expense and one concerning current property. Ex parte protective orders concerning the property of the competent spouse may be obtained. These provisions are comparable to provisions found in the Family Law Act.

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

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

(6) 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.

(7) If the spouse ordered to provide support refuses to comply with the order, the court may divide the community and quasi-community property equally as in a marriage dissolution and order that the property awarded to the conservatee spouse be transferred to and be included in the conservatorship estate.

(8) The orders of the court may be enforced in the same manner as support orders under the Family Law Act.

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

(10) The Judicial Council is authorized to provide by rule for practice and procedure.

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

(12) 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.⁷ The conservatee spouse has an ownership interest in the community property,⁸ but making community property a part of the conservatorship estate would deprive the competent spouse of the right of equal management and control.⁹ 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.¹⁰ It would go 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.¹¹

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.

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.

11. In enforcing a support obligation, the court must resort first to the community property and then to the quasi-community or other

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, 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

separate property of the spouse required to make the support payment. See Civil Code §§ 4805, 5132.

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 §§ 3080-3092 (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 3080-3092 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 3087.

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).

406/204

§ 3082. Citation to and examination of spouse managing or controlling community property

3082. (a) Upon the filing of a petition under this article, the court may cite the spouse who has the management or control of community property to appear before the court, and the court and the petitioner may examine the spouse under oath concerning the community property and other matters relevant to the petition filed under this article. If the person so cited refuses to appear and submit to an examination, the

court may proceed against the person as provided in Section 614. Upon such examination, the court may make an order requiring the person cited to disclose his or her knowledge of the community property and other matters relevant to the petition filed under this article, and if the order is not complied with the court may proceed against the person as provided in Section 614.

Comment. Section 3082 is drawn from Section 2616 (examination concerning assets of guardianship or conservatorship estate).

08374

§ 3083. Support pendente lite

3083. In any proceeding under this article, the court may, after notice and hearing, order that the spouse who has the management or control of community property to pay from the community property such amount as the court determines is necessary to the support and maintenance of the conservatee spouse pending the determination of the petition under this article. An order made pursuant to this section shall not prejudice the rights of the spouses or other interested parties with respect to any subsequent order which may be made under this article. Any order made under this section may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the petition to modify or revoke the order.

Comment. Section 3083 is the same in substance as Section 4357 of the Civil Code (Family Law Act). The section permits the court to make a temporary order for support if necessary pending the determination of the petition.

406/205

§ 3084. Income and expense declaration and property declaration of competent spouse

3084. When a petition is filed under this article, the spouse having the management or control of community property shall serve and file a current income and expense declaration and a current property declaration in the form prescribed by the Judicial Council.

Comment. Section 3084 requires the filing of financial declarations similar to the requirement of Rule 1243 of the California Rules of Court (Family Law rules). The time for serving and filing the financial declarations may be prescribed by Judicial Council rule. See Section 3091.

406/206

§ 3085. Ex parte protective orders

3085. During the pendency of any proceeding under this article, the court, upon the application of the petitioner, may issue ex parte orders:

(a) Restraining the spouse having the management or control of community property from transferring, encumbering, hypothecating, concealing, or in any way of disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.

(b) Requiring the spouse having the management or control of the community property to notify the petitioner of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures.

Comment. Section 3085 is the same in substance as subdivision (a)(1) of Civil Code Section 4359 (Family Law Act).

405/998

§ 3086. Continuance for preparation for hearing

3086. 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 3086 is the same in substance as Section 2522 (property claimed to belong to ward or conservatee).

406/001

§ 3087. Determination of character of property

3087. 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 3087 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 3087 does not deprive the court of jurisdiction where an objection based on improper venue is raised. Also unlike Section 3023, Section 3087 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).

406/109

§ 3088. Order of court

3088. (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) At the request of any interested person, the court shall make appropriate findings with respect to the circumstances.

(d) 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 give reasonable security therefor.

(e) 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.

(f) The court shall retain jurisdiction to modify or to vacate an order made under this section where justice requires, except as to any amount that may have accrued prior to the date of the filing of the petition to modify or revoke the order. At the request of any interested person, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of the filing of the petition to revoke or modify, or to any date subsequent thereto. 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 3088 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) is the same in substance as the first sentence of the last paragraph of subdivision (a) of Civil Code Section 4801 (Family Law Act).

Subdivision (d) provides for periodic payments, which 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 second sentence of subdivision (d) is drawn from the last paragraph of Civil Code Section 4801.

Subdivision (e) is drawn from Civil Code Section 4701.

The first two sentences of subdivision (f) are drawn from Civil Code Section 247 (Uniform Civil Liability of Support Act) and from the last paragraph of subdivision (a) of Civil Code Section 4801. The remainder of the subdivision provides for notice to the spouse obligated to make the payment and to other interested persons.

406/208

§ 3089. Division of community property; transfer of property to conservator of estate

3089. If the spouse who has the management or control of the community property refuses to comply with any order made under this article or an order made in a separate action to provide support for the conservatee spouse, upon request of the petitioner or other interested person, the court may, in its discretion, divide the community property and the quasi-community property of the spouses equally in the same manner as where a marriage is dissolved. If the community property is so divided, the property awarded to each spouse shall be the separate property of that spouse and the court shall order that the property awarded to the conservatee spouse be transferred or paid over to the conservator of the estate of that spouse to be included in the conservatorship estate and be managed, controlled, and disposed of as a part of the conservatorship estate.

Comment. Section 3089 gives the court in which the conservatorship proceeding is pending authority to make an equal division of the community and quasi-community property as in a marriage dissolution proceeding. The court has discretion whether to make such a division. The spouse having the management or control of community property may consent to all or a part of such property being administered in the conservatorship estate. See Section 3051(c). Such consent may avoid the need for a division under Section 3089.

The authority granted by Section 3089 will be useful, for example, where the property awarded to the conservatee spouse will be sufficient to provide for the support and maintenance of that spouse. The division in such a case will avoid the need for further proceedings to enforce the support obligation from the community property. A division of the community property does not, however, necessarily eliminate the support

obligation of the competent spouse; but, if such a division is made, a separate action will be necessary to obtain future support from the separate property of the competent spouse. See Section 3092 and Comment thereto.

The authority to divide the community property may not be exercised unless the competent spouse refuses to comply with an order made under this article or in a separate action for support of the conservatee spouse.

406/210

§ 3090. Enforcement of orders

3090. Any order of the court made under this article may be enforced by the court by execution, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary.

Comment. Section 3090 is the same in substance as Section 4380 of the Civil Code (Family Law Act). The section adds to the methods of enforcement (such as a wage assignment under Section 3088 or a division of the community property under Section 3089) that are specifically provided for elsewhere in this article.

406/213

§ 3091. Rules for practice and procedure

3091. Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under this article.

Comment. Section 3091 is the same in substance as Civil Code Section 4001 (Family Law Act).

405/931

§ 3092. Use of other procedures for enforcement of support obligation not limited

3092. 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 3092 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 at the time a proceeding is brought under this article, the general rules of civil procedure relating to abatement apply. See the Comment to Section 3087. 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).