

## Memorandum 83-12

Subject: Study F-661 - Continuation of Support Obligation After Death  
of Support Obligor (Staff Draft of Tentative Recommendation)

In the course of the Commission's work on wills and intestate succession, the Commission considered family maintenance legislation and other proposals to assist persons whom the decedent was legally obligated to support. One problem the Commission found was that a spousal support obligation (unlike a child support obligation) terminates upon the death of the support obligor, leaving the supported spouse no remedy.

The reasons for this rule are obscure, and the rule seems to conflict with common sense. If the decedent was legally obligated to support a person, that person should have a claim against the decedent's estate. The estate should not be distributed as a windfall to other persons who had no direct connection with the decedent, at the expense of a person to whom the decedent had an obligation.

The staff has prepared the attached draft of a tentative recommendation to reverse existing California law on this matter. If the Commission approves the recommendation we will distribute it to interested persons on both our probate and family law mailing lists for comment.

Respectfully submitted,

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STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

CONTINUATION OF SUPPORT OBLIGATION AFTER  
DEATH OF SUPPORT OBLIGOR

A spousal support order does not survive the death of the support obligor.<sup>1</sup> This rule applies both to a contested court order and an order made pursuant to a marital termination settlement. However, a marital termination settlement may provide that the support continues to be an obligation of the estate of the support obligor.<sup>2</sup>

Even though support may be a necessity for the former spouse,<sup>3</sup> and even though the former spouse is a preferred creditor during the obligor's lifetime,<sup>4</sup> the support order is terminated by the obligor's death. The obligor's estate must satisfy other general creditors and must distribute the obligor's property to heirs and devisees instead of to the person to whom the obligor owed a duty of support.

The rule that a spousal support order terminates upon the death of the support obligor is based on the concept that the obligation grows out of the marital relationship. Absent dissolution of marriage, the marital relationship, along with the corresponding support obligation, would be terminated by the death of the spouse. A spousal support order based on a marital termination settlement may survive death, however, because it is based on a contract between the parties rather than on the marital relationship.<sup>5</sup>

California law arrived at the position that a spousal support order is terminated by the death of the support obligor without careful consideration of the public policies involved. The rule was first suggested

1. Civil Code § 4801(b).
2. See, e.g., *Steele v. Langmuir*, 65 Cal. App.3d 459, 135 Cal. Rptr. 426 (1976).
3. For a listing of factors that determine the support order, see Civil Code Section 4801(a).
4. See, e.g., Civil Code §§ 4801.6 (wage assignment for support), 4812 (support after discharge in bankruptcy); Code Civ. Proc. §§ 697.320 (judgment lien), 703.070 (exemptions), 706.030 (withholding order for support), 1218 (contempt).
5. See, e.g., *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1 (1957).

by the Supreme Court in dictum in 1924. The Court stated that, "[P]rovisions for the support of the wife contained in divorce decrees have been construed by courts of other states as ceasing and determining upon the death of either spouse. If the decree here under consideration were merely the ordinary provision for the payment of permanent alimony, then we might be constrained to follow those decisions, because provisions for the payment of alimony not made upon the consent of the parties, but usually against the opposition of one of the spouses, are founded upon the legal obligation which the law imposes upon the husband to support the wife, and that obligation comes to an end upon the death of either spouse. So, regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse."<sup>6</sup>

Despite the circularity of this reasoning and the question-begging nature of the conclusion, subsequent cases followed the Supreme Court's dictum and simply accepted as established California law that a support order does not survive the death of the support obligor.<sup>7</sup> The cases were codified in 1951.<sup>8</sup>

Other jurisdictions are in conflict whether a support order survives the death of the support obligor. In the states that hold a support order terminates with the death of the support obligor, the rationale of the holding is not clearly articulated. The reasoning appears to be jurisdictional--when the support obligor dies the family law court loses jurisdiction over the person and the support order therefore terminates.<sup>9</sup>

The reasons in favor of the existing California rule are technical and unconvincing compared with the policy of providing adequate support for a person dependent on, and entitled to, support.<sup>10</sup> A spousal support

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6. Parker v. Parker, 193 Cal. 478, 480-481, 225 P. 447 (1924).

7. See, e.g., 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).

8. Former Civil Code § 139, as amended by 1951 Cal. Stats., ch. 1700, p. 3912, § 7; now recodified as Civil Code § 4801(b).

9. See, e.g., 24 Am. Jur.2d, Divorce and Separation §§ 642-643 (1966); Annot., 39 A.L.R.2d 1406 (1955).

10. Among the criticisms directed at the California spousal support scheme is precisely that the support award terminates upon the

order is often inadequate for the needs of the former spouse,<sup>11</sup> needs that do not necessarily terminate upon the death of the support obligor. The death of the obligor is not an event that should cause general creditors and heirs of the decedent to be preferred, to the exclusion of the former spouse. The support obligation arose out of the marital relation; the death of the obligor does not affect the reality that the marital relation existed and generated the need for support that may continue beyond the obligor's death.

By comparison, a child support order does not terminate on death of the parent, even though the parent-child relationship is terminated by death. A child support order survives the death of the support obligor.<sup>12</sup>

The Law Revision Commission recommends that existing law governing the termination by death of a spousal support order be reversed. A spousal support order should survive the death of the support obligor. However, the spouses should be able to provide by written agreement that support terminates upon the death of the support obligor.<sup>13</sup>

This recommendation would not hinder a Probate Court from closing the estate of the support obligor. There is adequate authority in the law for a court order that the obligor's personal representative pay into court or to a trustee a lump sum sufficient to pay future installments as they become due.<sup>14</sup> This is done under existing law in the case of a child support obligation, which survives the death of the support

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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).

11. See, e.g., Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181 (1981).
12. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4646-47 (8th ed. 1974).
13. See Civil Code §§ 4802, 4801(b) (right of husband and wife to alter support rules by agreement). This would restore California law governing marital termination settlements to its position prior to the 1951 amendment to former Civil Code Section 139. See 6 B. Witkin, Summary of California Law Husband and Wife § 204, pp. 5074-75 (8th ed. 1974).
14. Prob. Code §§ 953 (payment into court to cover contingent claims or claims not yet due); 953.1 (payment to trustee).

obligor, as well as in the case of a spousal support obligation that survives death by agreement of the parties.<sup>15</sup> Nor would the recommendation preclude modification of the support order after the death of the obligor in an appropriate case.<sup>16</sup>

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

An act to amend Section 4801 of the Civil Code, relating to spousal support.

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

SECTION 1. Section 4801 of the Civil Code is amended to read:

4801. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties.

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

(4) The duration of the marriage.

(5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.

(6) The time required for the supported spouse to acquire appropriate education, training, and employment.

(7) The age and health of the parties.

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15. See, e.g., *Newman v. Burwell*, 216 Cal. 608, 615, 15 P.2d 511 (1932); *Newhall v. Newhall*, 227 Cal. App.2d 800, 810 n.7, 39 Cal. Rptr. 144 (1964).

16. Civil Code § 4801(a).

(8) The standard of living of the parties.

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make the payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

(b) Except as otherwise agreed by the parties in writing, the obligation of ~~any~~ a party under ~~any~~ an order ~~or judgment~~ for the support ~~and maintenance~~ of the other party ~~shall terminate~~:

(1) Terminates upon the death ~~of either party~~ or the remarriage of the other party.

(2) Does not terminate upon the death of the party. This paragraph applies to an order made or modified on or after January 1, 1985. An order made before January 1, 1985, and not modified on or after January 1, 1985, is governed by the applicable law prior to the enactment of this paragraph.

(c) When a court orders a person to make specified payments for support of the other party for a contingent period of time, the liability of the person terminates upon the happening of the contingency. If the party to whom payments are to be made fails to notify the person ordered to make the payments, or the attorney of record of the person so ordered, of the happening of the contingency and continues to accept support payments, the supported party shall refund any and all moneys received which accrued after the happening of the contingency, except that the overpayments shall first be applied to any and all support payments which are then in default. The court may, in the original order for support, order the party to whom payments are to be made to notify the person ordered to make such payments, or his or her attorney of record, of the happening of the contingency.

(d) An order for payment of an allowance for the support of one of the parties shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction.

(e) In any proceeding under this section the court may order a party to submit to an examination by a vocational training consultant. The order may be made only on motion, for good cause shown, and upon notice to the party to be examined and to all parties, and shall specify the time, place, manner, conditions, scope of the examination and the person or persons by whom it is to be made. The party refusing to comply with such an order shall be subject to the same consequences provided for failure to comply with an examination ordered pursuant to Section 2032 of the Code of Civil Procedure.

(f) For the purposes of this section, "vocational training consultant" means an individual with sufficient knowledge, skill, experience, training, or education relating to interviewing, the testing and analysis of work skills, the planning of courses of training and study, the formulation of career goals, and the work market to qualify as an expert in vocational training under Section 720 of the Evidence Code.

Comment. Subdivision (b) of Section 4801 is amended to reverse the rule formerly stated in the subdivision that a support obligation terminates on the death of the support obligor. Under subdivision (b) as amended, court-ordered support is an obligation of the estate of the obligor. This overrules cases such as Parker v. Parker, 193 Cal. 478, 225 P. 447 (1924) (dictum) (support decree ceases to be effective upon the death of either spouse). Likewise under subdivision (b) as amended, court-ordered support pursuant to a marital termination settlement is an obligation of the estate of the obligor, unless the settlement includes a written agreement otherwise. This overrules cases such as Hilton v. McNitt, 49 Cal.2d 79, 315.2d 1 (1957) (support agreement terminates on death of obligor absent contrary agreement in writing). The other changes in subdivision (b) are technical.