

Memorandum 89-62

Subject: Study L-400 - Notice in Community Property Proceeding Where
Spouse Lacks Legal Capacity

If a married person lacks legal capacity, the competent spouse may petition for court authorization of a proposed community property transaction where ordinarily consent or joinder of both spouses would be required. Prob. Code §§ 3100-3154. Notice of the time and place of hearing and a copy of the petition must be sent to adult relatives within the second degree of the spouse who lacks legal capacity. *Id.* §§ 3121, 3131. The petition must contain a description and estimated value of the community property that is the subject of the proposed transaction. *Id.* § 3121.

Exhibit 1 is a letter from attorney Catherine Hughes for the Legal Center for the Elderly and Disabled in Sacramento. She says that in her practice she finds that the competent spouse who is petitioning often objects to revealing details of family finances (i.e., the description and value of community property) to his or her in-laws. She thinks it should be sufficient merely to send the notice of the time and place of hearing, without sending a copy of the petition. This would put family members of the incompetent spouse on notice of the proceeding without revealing financial details. On the other hand, the right of the competent spouse to privacy in managing community property must be balanced against the possibility of abuse if the competent spouse is allowed to proceed without scrutiny by relatives of the incompetent spouse.

In an analogous situation, before 1983 when notice was given of a spousal set-aside under former Sections 650-657, a copy of the petition had to be sent along with the notice of hearing. Section 653 was amended in 1983 so the notice could be sent without the petition if the surviving spouse received all the decedent's property under the will and all contingencies in the will were satisfied. This 1983 amendment was supported by the State Bar and by the Beverly Hills Bar Association. Under the Commission's 1986 revisions, Section 13655(b) now requires that notice of hearing be given, but that the petition

need not be sent in any case.

Ms. Hughes' suggestion could be accomplished by amending Section 3131 as follows:

Probate Code § 3131 (amended). Notice

3131. (a) At least 15 days before the hearing on the petition, the petitioner shall cause a notice of the time and place of the hearing and a copy of the petition to be served upon any nonpetitioning spouse not alleged to lack legal capacity for the proposed transaction.

(b) Service under subdivision (a) shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure.

(c) At least 15 days before the hearing on the petition, 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 adult relatives named in the petition at the addresses set forth in the petition.

Comment. Subdivision (c) of Section 3131 is amended to delete the requirement that a copy of the petition be mailed with the notice of the time and place of the hearing to relatives of the spouse alleged to lack legal capacity. This is to afford greater privacy to the other spouse.

This proposal does not delete from subdivision (a) the requirement that a copy of the petition be served on the competent spouse, since that spouse is entitled to know the details of the proposed transaction.

Does the Commission want to amend Section 3131 as indicated?

Respectfully submitted,

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Staff Counsel

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CA LAW REV. COMMISSION

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February 1, 1989

John DeMouilly
California Law Revision Commission
400 Middlefield Road Suite 2
Palo Alto CA 94303-4739

Dear Mr. DeMouilly:

In my practice I frequently counsel clients concerning eligibility for Medi-Cal when one spouse may have to enter a skilled nursing facility. If the ill spouse is no longer competent, it may be necessary to file a petition under Probate Code §3100 to enable the well spouse to engage in certain transactions involving the community property. Many times the petition will request court approval of an agreement to transmute the community property into two equal shares of separate property. Several of my clients have been very displeased that a copy of the petition containing the details of their finances and property had to be sent to their in-laws.

The objection seems legitimate especially since there is a competent spouse to handle the community property. When a conservator is appointed for an incompetent spouse, the community property is not included within the conservatorship estate as long as there is a competent spouse to handle the property. Sending the notice without the petition should be sufficient to put the family members on notice without disclosing every financial detail. In many cases a copy of the petition is the same as sending a copy of an inventory and appraisal to all the relatives.

I'm not certain if there is a solution, but thank you for the opportunity to raise the issue.

Sincerely,



CATHERINE L. HUGHES
Attorney at Law

CLH:ab