

## Memorandum 83-21

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

The Commission has distributed for comment its tentative recommendation for continuation of a support obligation after the death of the support obligor. A copy of the tentative recommendation is attached. Under this proposal, a spousal support obligation survives the death of the support obligor and is enforceable as a claim against the decedent's estate in probate. The support order is not subject to modification except to reflect testamentary dispositions to the supported person and to prevent manifest injustice to other persons dependent on the decedent for support. The support obligation could be satisfied by the estate by creation of a trust fund or purchase of an annuity.

The comments received on the tentative recommendation are attached as Exhibits 1-12. Four of the comments support the recommendation. See Exhibits 2 (American Association of Retired Persons), 5 (Sacramento County Sheriff's Department), 11 (Henry Angerbauer, C.P.A.), and 12 (Sacramento County District Attorney's Office). The commentators who favor the tentative recommendation give no supporting arguments in its favor; presumably they agree with the Commission's reasoning. One commentator is neutral, seeing the advantages of the tentative recommendation, but also concerned that it would put the divorced spouse in a better position than he or she would be in if still married to the decedent at the time of the decedent's death. See Exhibit 6 (Professor Paul J. Goda, S.J.). The remaining seven comments oppose the tentative recommendation. The bases of the opposition are analyzed below.

The main concern that persons opposed to the recommendation express is that there may not be sufficient assets in the decedent's estate both to pay the support obligation of the decedent and to take care of the needs of the decedent's surviving spouse by a subsequent marriage. They point out that the death of the support obligor cuts off the income flow with which the support obligation is ordinarily paid, that a decedent's estate commonly is not large, and that requiring satisfaction of the support obligation in effect prefers the former spouse over the surviving spouse. These observations are common to all those who oppose

the recommendation. See Exhibits 1 (T.K. Boynton), 3 (Peter L. Muhs), 4 (Professor William A. Reppy, Jr.), 7 (Executive Committee of the Family Law Section of the Los Angeles County Bar Association), 8 (Kenneth D. Robin), 9 (Susan E. Howie), and 10 (Jack E. Cooper).

The tentative recommendation does recognize that there may be insufficient assets, and permits the court to modify or revoke the support order "in extraordinary circumstances to mitigate manifest injustice to other persons dependent on the party for support." Two of the commentators acknowledge the existence of this provision, but feel that it would cause procedural problems and generate unpalatable litigation among the former spouses and families of the decedent. See Exhibits 9 (Susan E. Howie) and 10 (Jack E. Cooper).

In addition to this major concern, two other concerns of the commentators are significant. Several feel that permitting the support obligation to be enforced after death could hamper the closing of probate estates. See Exhibits 1 (T.K. Boynton) and 9 (Susan E. Howie). These commentators, along with several others, also feel that the support order should be subject to later modification or termination for changed circumstances--if the financial condition of the supported spouse improves for one reason or another. See also Exhibits 7 (Los Angeles County Bar Association) and 8 (Kenneth D. Robin).

The staff believes these objections to the tentative recommendation are well taken and express real concerns. One way to accommodate these concerns is to make survival of the support obligation discretionary with the court and to revise the standard for modification of the support award to make it more responsive to the needs of both the supported spouse and the surviving spouse and family of the decedent. This is the suggestion of the Los Angeles County Bar Association (Exhibit 7). See also Exhibit 10 (Jack E. Cooper) ("Why not provide for the probate court determining what amount of support and family allowance should be paid, based upon the facts that exist at the time, rather than requiring support obligations of the prior marriage be given priority?"). While this approach would meet the objections that have been expressed somewhat, it is litigation intensive.

An alternative approach that would satisfy some of the objectives of the Commission without creating the possibility that the former spouse would be preferred over the surviving spouse is to give the

former spouse the same right to a family allowance as the surviving spouse. This is suggested by both Peter L. Muhs (Exhibit 3) and Professor Reppy (Exhibit 4). This proposal has the advantage, as well, of working with concepts familiar to practitioners. As Mr. Muhs points out, "While the mechanics and question of priority may be difficult, the result would be more consistent with our present structure of probate and property law." One shortcoming of this approach is that the family allowance is limited in duration; our wills and intestate succession recommendation would permit holding the estate open for continuation of the family allowance.

Along these same lines, Mr. Muhs also suggests that the former spouse might, in appropriate circumstances, be permitted to receive a probate homestead. This is an attractive possibility in cases where the former spouse is residing in the former family home at the time of the decedent's death. The probate homestead is now, under the Commission's revisions, a support concept involving temporary occupancy; extension to a supported spouse appears appropriate.

A final possibility is that, rather than any of the foregoing approaches, the court at dissolution requires the support obligor to maintain insurance to provide a substitute in the event of death. See Exhibit 10 (Jack E. Cooper). The Commission discussed this possibility before, but concluded that legislation is unnecessary since this can be done (and often is done) at present. But as Mr. Cooper suggests, "why not require it so that any future spouse and children will not suffer unnecessarily."

The staff believes that of these possible approaches, the concept of giving the former spouse to whom a support obligation is owed the same family protections as the surviving spouse (family allowance, probate homestead) is the most sound. It is consistent with basic support concepts, can be accommodated under existing probate procedures, and gives assurance that the former spouse is not preferred over the surviving spouse. If the Commission agrees with this approach, we will revise the recommendation accordingly.

One house-keeping matter remains to be considered. The Commission had its tentative recommendation introduced in bill form, to be held without being set for hearing until the Commission received and reviewed comments on the tentative recommendation. If the Commission adopts the

family allowance-probate homestead approach recommended by the staff, this will amount to a fundamental change in the tentative recommendation. Does the Commission wish to redistribute a revised recommendation, or shall we amend the bill and set it for hearing? The staff believes we should proceed with the bill; if there are problems, they can be corrected in connection with our general probate law and procedure study.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

## Exhibit 1

LAW OFFICES OF

## NAKASHIMA &amp; BOYNTON

S. STEPHEN NAKASHIMA  
THEODORE K. BOYNTON  
JANN M. NAKASHIMA

440 SOUTH WINCHESTER BOULEVARD  
SAN JOSE, CALIFORNIA 95128

AREA CODE 408  
TELEPHONE 246-0246

February 7, 1983

California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, California 94306

Gentlemen:

I just read this morning that the Commission is proposing, among other things, to amend the law governing spousal support to provide that it shall continue after the death of the obligor spouse.

I am quite opposed to this proposal. If enacted, it would give to a former spouse greater rights than a continuing spouse would have. If one married spouse passes away, the only thing which the surviving spouse is entitled to receive is the one-half share of the community property and any other property which might be left under the terms of the Will of the deceased spouse. Since the income stream of a deceased spouse (if any) necessarily terminates with his or her death, the surviving spouse no longer will receive an income flow. Under the Commission's proposal, a former spouse would continue to have an income flow even though income production of the obligor spouse has terminated with his or her death. It should be remembered that property accumulated by the parties whose marriage has been dissolved has already been divided in the dissolution proceeding comparable to the division or other disposition which would take place in a probate proceeding upon death.

I am also concerned that the Commission's proposal would interfere with the orderly closing of probate estates. How would the continuing spouse's obligation be funded? Would an actuarially determined fund be carved out of the probate estate and utilized to make future payments, would the estate have to purchase a commercial annuity or how would the matter be handled? If a commercial annuity were purchased and delivered to the surviving spouse, how would the estate recover the overpayment which could result if the former spouse were to remarry, receive an inheritance or enjoy a substantial increase in his or her income which would constitute a change of circumstances justifying the reduction or termination of the spouse's obligation?

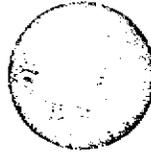
I hope that the Commission will reconsider its tentative proposal and abandon what I believe to be an ill conceived change which could result in many gross inequities.

Very truly yours,

*T. K. Boynton*

T. K. Boynton

TKB:md



AMERICAN  
ASSOCIATION  
OF RETIRED  
PERSONS

**AARP STATE LEGISLATIVE COMMITTEE**

February 11, 1983

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road Suite D-2  
Palo Alto, Ca. 94306

Gentlemen:

Thanks for sending a copy of your #F-661 TENTATIVE RECOMMENDATION relating to CONTINUATION OF SUPPORT OBLIGATION AFTER DEATH OF SUPPORT OBLIGAR.

I have examined the draft copy which you sent, and I find that it seems to be OK. I have no suggestions for revising it.

Sincerely,

A handwritten signature in cursive script that reads "Frank Freeland".

Frank Freeland, Member AARP SLC  
429 Dunster #2  
Campbell, Ca. 95008

## Exhibit 3

LAW OFFICES

## COOPER, WHITE &amp; COOPER

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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JAMES B. FRANKEL  
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\* PROFESSIONAL CORPORATION

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ALAN C. FREELAND \*  
DAVID W. TUCKER  
JOHN D. MAHONEY  
E. GARTH BLACK  
PETER L. MUHS \*  
MARGARET HART EDWARDS  
BEVERLY BREWSTER  
CAREY F. CORSALEY  
JAMES W. POINDEXTER  
LAWRENCE J. SISKIND  
JOYCE S. JABER  
JAMES M. WAGSTAFFE  
THOMAS J. STIKKER  
BARRY J. KRAMERROBERT M. RAYMER \*  
CHARLES W. KENADY \*  
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W. RONALD INGRAM \*  
PETER E. TAUSSIG  
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MARK L. TUFT  
NEIL L. SHAPIRO  
JAMES S. GREENAN \*  
JOHN M. ROSS  
JEFFREY F. CLARK  
CHRISTOPHER J. LAMMERS  
DAVID W. BARRON  
DOUGLAS MO  
JOHN P. MAKIN  
ANDREW H. TROTT  
JED E. SOLOMON  
JAY G. CHAFETZ  
MARIA L. JOSEPH  
KENNETH J. COHEN

February 11, 1983

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94306Re: Tenative Recommendation Relating to  
Continuation of Support Obligation  
After Death of Support Obligor

Gentlemen:

I am disturbed by your above referenced tentative recommendation dated January 22, 1983 and am opposed to it for the reasons stated in this letter.

As a lawyer who practices primarily in the tax, estate planning and probate areas, it appears to me that the proposed change in the law would put a divorced spouse in a position of preferential treatment to a non-divorced spouse.

Under our "no-fault" divorce law, the community property is divided equally and certain support obligations to minor children and to one of the spouses can be ordered if no marital settlement agreement is reached.

Under the provisions of the Probate Code, a married decedent may provide for his property to go in any manner, subject to provisions to create a temporary family allowance or to create a homestead limited in duration to the life of the surviving spouse or the minority of the affected children. Except for these two provisions, there is no requirement that a decedent provide for a spouse out of the decedent's portion of any community property or out of the decedent's separate property.

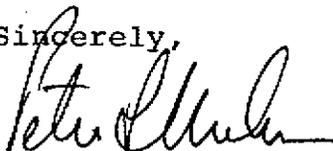
Under the tentative recommendation, allowing the support obligation to a spouse to continue beyond the lifetime of the paying spouse puts the alimony recipient at a distinct advantage to another surviving spouse, similarly dependent upon this or a similar decedent, but who was not provided for by the decedent's Will.

It seems to me that if a change is to be made in what has been a long established rule in this state, a new law might enlarge the group of persons who can claim a family allowance to include a former spouse already receiving alimony, in order to cushion the termination of regular periodic payments of alimony, and, in appropriate circumstances, to provide that such a former spouse may also receive a probate homestead. While the mechanics and question of priority may be difficult, the result would be more consistent with our present structure of probate and property law.

The other alternative would be to increase the forced share of a surviving spouse (i.e. non-divorced) in the decedent's estate, perhaps by extending the family allowance for life. This seems to me to be a radical change in our community property system, akin to the common law dower and curtesy system never adopted in this state.

Thank you for your opportunity to present my views on this tentative recommendation and for your consideration of them.

Sincerely,



Peter L. Muhs

PLM:ccc

Exhibit 4

**Duke University**DURHAM  
NORTH CAROLINA  
27706

SCHOOL OF LAW

TELEPHONE (919) 684-2834

February 14, 1983

Mr. Nat Sterling  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

Re: Proposed Amendment to Civil Code § 4801

Dear Nat:

I am disturbed by the proposal for making the ex-wife's alimony claim a creditor's claim that survives the death of the ex-husband. Consider this scenario. Wealthy H married W-1 and they cohabit for 10 years (she not working) whereupon H divorces her to marry young W-2. The divorce court awards substantial alimony to W-1 because of the length of the marriage, her foregoing employment, H's wealth, etc.

Five years after marrying W-2, H dies. His will leaves all to his mother.

The proposal for amendment of § 4801 means W-2 casts unfair favor on W-1. There is no community property, because the couple lived off dividends and interest from H's inheritance. W-2 has no nonbarrable share under California law in the separate property. The sale protection she has is the family allowance. W-1 is only 34 years old and is expected to live 45 more years. The cost of an annuity for her to pay her the alimony for 45 more years will eat up all the separate property. W-1 is now rich; W-2 has very little under the family allowance law. Your escape clause in the proposed amendment reducing the alimony "to mitigate manifest injustice to other persons dependent on the [decedent] for support" assures only enough money for W-2's family allowance. Further reduction redounds to Mother's benefit.

To me, death is one of the risks of marriage. When W-1 married H she knew that at his death he could cut her off with nothing because they were living off his separate property. Why should the fact of the divorce eliminate her having taken that risk?

Suppose H was sickly when W-1 married him? Are you going to fix the amount of lump sum alimony she gets at his death based on his actual life expectancy or on mortality tables? Or would you fix the annuity for W-1 based solely on HER life expectancy even though she knew when she married H he was much older and would become unproductive (from a labor standpoint) while she was still young?

Mr. Nat Sterling  
Page Two  
February 14, 1983

I would recommend that W-1 get no more than the same family allowance the law assures W-2 when there is no community property. I am appalled at the preference to be given W-1 over W-2.

Sincerely,



William A. Reppy, Jr.  
Professor of Law

WAR/sa

SACRAMENTO COUNTY



SHERIFF'S DEPARTMENT

**Robbie Waters**  
Sheriff

February 15, 1983

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94306

RE: California Law Revision Commission  
Tentative Recommendations

Dear Madam/Sir:

The tentative recommendations related to Continuation of Support Obligation after Death of Support Obligor and Awarding Family Home to Spouse Having Custody of Children, do not appear to affect the duties and responsibilities of a sheriff's department.

These recommendations appear to be both justified and reasonable changes.

Thank you for providing us with the opportunity for comment.

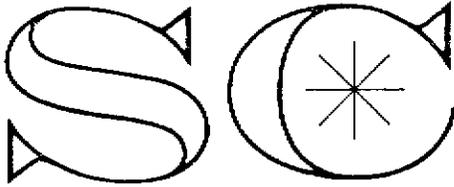
Very truly yours

ROBBIE WATERS, SHERIFF

  
Lt. Paul T. DeRouen  
Executive Officer, Civil Division

PTD:bgm

Exhibit 6



THE UNIVERSITY OF SANTA CLARA • CALIFORNIA • 95053

SCHOOL OF LAW

984-4286 or  
4443

February 16, 1983

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94306  
Attn: Mr. Nat Sterling

Dear Nat:

I have just received three of your Tentative Recommendations:

- #F-660 Awarding Family Home to Spouse Having Custody of Children
- #F-661 Continuation of Support Obligation After Death of Support Obligor
- #H-510 Joint Tenancy and Community Property

I heartily subscribe to the last one on Joint Tenancy and Community Property and I think you have done a very good job on it.

I agree with the first on awarding the family home to the spouse having custody of the children, although I suppose I am affected by the problem of filling up the statute books.

I will take a firm straddle with regard to #F-661, Continuation of Support Obligation After Death of Support Obligor. On the one hand, I can see the logic of the position you have taken, that if child support continues, why should not spousal support? And such a position might even have an indirect effect on the notion that economic considerations may have a tendency to continue families in existence rather than too easily seek a divorce. On the other hand, the continuation of such a support obligation gives something that is seemingly a gratuity to which that spouse would not necessarily be entitled if the spouse were alive.

As I say, I say nothing.

Best wishes.....

Sincerely,

Paul J. Goda, S.J.

PJG:jw

<b>Family Law Section of the Los Angeles County Bar Association</b>	617 SOUTH OLIVE STREET LOS ANGELES, CALIFORNIA 90014 (213) 627-2727
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February 18, 1983

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, California 94306

Re: Recommendation Relating To Division of Joint Tenancy And Tenancy In Common Property At Dissolution Of Marriage; Tentative Recommendations Relating To (1) Joint Tenancy And Community Property, (2) Continuation Of Support Obligation After Death of Support Obligor, and (3) Awarding Family Home To Spouse Having Custody Of Children

Dear Members:

The Executive Committee of the Family Law Section of the Los Angeles County Bar Association, which represents approximately 1,300 family law lawyers, has considered the above-referenced Recommendations promulgated by the Law Revision Commission. At a meeting held on February 15, 1983, the committee unanimously voted to voice its opposition to each of the recommendations.

3. Tentative Recommendation Relating To Continuation Of Support Obligation After Death Of Support Obligor.

An order for spousal support is predicated predominantly upon the ability of the support obligor to make payments (Civ. Code §4801(a) (1)), if the support obligee is in need thereof. Such ability to pay is materially lessened, if not destroyed, by the death of the support obligor. The automatic continuation of support obligations upon the death of the support obligor appears, therefore, to be erroneous.

After the death of the support obligor, the income previously used to pay spousal support, in most instances, ends. Except in unusual circumstances, where the support obligor has amassed a substantial estate, or has left his heirs with extensive life insurance proceeds, continuation of the support obligation seems unjustifiable.

**Officers**

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Martin C. Pachter, 1st Vice-Chair  
Dennis M. Wasser, 2nd Vice-Chair  
Joseph Taback, Secretary

**Advisory Council**

William Heyler  
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Reginald D. Armstrong  
Mary Ellen Berke  
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Thomas Brayton  
Irwin Butler  
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Gary Cooperman

Bobette Fleishman  
Robert Friedman  
Max Goodman  
Paul Gutman  
Suzanne Harris  
Hon. William P. Hogoboom  
Stephen S. King  
Stephen A. Kolodny

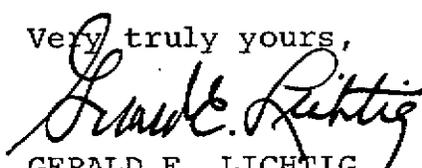
Gerald E. Lichtig  
Gloria Lopez-Hicks  
Hon. Billy G. Mills  
Connolly Oyler  
Commr. Norman Pittluck  
Edward Poll  
Michael A. Pontrelli  
Jill S. Robbins

S. David Rosenson  
Saul Ross  
Commr. John Sandoz  
Commr. Darlene Schempp  
Judith Shapiro  
Martin E. Shucart

The Recommendation prohibiting modification after the death of the support obligor is unjust. Not only is the support obligor's income stream ended upon death, but other factors may subsequently arise which might justify modification or termination. For example, the supported spouse might become employed, inherit a substantial estate, or commence living with a person of the opposite sex so as to come within the provisions of Civil Code §4801.5.

Perhaps an alternative would be to permit the trial court to continue the support obligation after the death of the support obligor, in its discretion, but only if such support obligation were modifiable or terminable after the death of the support obligor.

Our committee stands ready to provide any additional input which you may desire concerning these or other proposals affecting the practice of family law.

Very truly yours,  
  
GERALD E. LICHTIG

GEL:dsd  
cc: Sybil Anne Davis, Chair  
Martin E. Shucart, Legislative  
Committee Chair

## Exhibit 8

**KENNETH D. ROBIN**

ATTORNEY AT LAW

2204 UNION STREET

SAN FRANCISCO, CALIFORNIA 94123

(415) 563-2400

February 22, 1983

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94306

Re: Tentative Recommendation Relating to  
Continuation of Support Obligation After  
Death of Support Obligor

Dear Sir:

I must say that I am rather surprised to read the tentative recommendation of the Commission on this subject. I feel that the proposal is inappropriate and that its reasoning is inconsistent:

(1) In making comparisons with the child support situation, and in particular in its over-emphasis of the origin of the support (i.e., that both "arise" from the marriage relationship), the Recommendation altogether omits any reference to the most obvious fact that distinguishes child support from spousal support. Child support recognizes that the child is unable to support himself and, in lieu of making him a burden upon society, makes his support the equal responsibility of both of the parents. There is certainly nothing inconsistent in saying that this kind of obligation survives the death of either of those parents since the need for support obviously continues and that continued responsibility is better laid at the feet of the decedent's estate than with the tax-paying public. However, notwithstanding what might sometimes be thought of as good reasons to the contrary, the spousal support obligation does not arise from such a public policy reasoning. Maybe it should; if so, I would think that the Recommendation should analyze this aspect rather than the "marriage relationship" analogy.

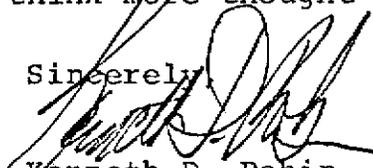
(2) The Recommendation pays too little attention to the practical effect of having the situation with spousal support governed by marital settlement agreements, a rather curious omission given the high percentage of dissolutions that are resolved in this manner. If public policy dictates that the

supported spouse should continue receiving support for some period of time after the death of the supporting spouse, I would think that public policy would outweigh the provisions of an MSA to the contrary, in much the same way that an MSA providing for the cessation of child support obligations upon the death of the supporting parent would also be ineffective.

(3) Also, I would like to comment on your recommended provision that the spousal support order would not be subject to modification after the death of the support obligor. Unless the "except . . ." proviso is extremely broad (as it may be!), I would think that such a provision would be inconsistent with the purported purposes and justification for the main recommendation. I can understand the reason for this provision; obviously an attempt to make it "fairer" for the now dead supporting spouse or his estate. However, if the basis for the support obligation itself is one of need and the needs change then isn't modification required as a matter of practicality and consistency?

(4) Finally, one reading the tentative recommendation might feel that its purport is to place the ex-wife in a favored position vis-a-vis general creditors. One immediately pictures that if the money doesn't go to continued support payments for the ex-spouse, it will go to some nasty corporate general creditor who doesn't need the money anyway and, with this picture, one immediately develops a gut reaction that "yes, indeed", this recommendation makes sense. But what about the reality that at the time of his death the supporting spouse may have a new spouse and that the monies going to the ex-spouse in continued payments might very well be taking food out of the mouth or the home from under the feet of the second spouse. It doesn't appear to me that any thought at all has been given to such a "creditor". If the purpose of the statute is to simply give a priority amongst true creditors of the estate to an ex-spouse, that's one thing---but if the practical effect is to substantially reduce funds available in an estate which would otherwise go to subsequent spouses and children of subsequent marriages, I think more thought must be given to this result.

Sincerely,



Kenneth D. Robin

## Exhibit 9

**BURRISS, LOWMAN & RICE**

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
OLD MILL OFFICE CENTER  
201 SAN ANTONIO CIRCLE  
SUITE 160  
MOUNTAIN VIEW, CALIFORNIA 94040

(415) 948-7127

February 24, 1983

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94306

Re: Tentative Recommendation concerning Continuation of  
Support Obligation after Death of Support Obligor

Gentlemen:

Please note my opposition in general to your tentative recommendation that existing law as it relates to spousal support be reversed so as to provide for continuation of support obligation after death.

I am generally opposed to the proposition because the parties are free to negotiate between themselves and otherwise provide for adequate security for a spouse who will need continuing support. Continuation of the obligation after the death of the support obligor, especially where it may continue for an indefinite period of time, simply creates unnecessary and potentially complex administrative problems for the decedent's personal representative.

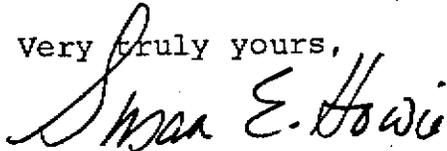
Furthermore, the concept of continuing spousal support after the death of the obligor simply does not parallel reality, simply because the obligor is no longer gainfully employed. A surviving spouse of a marriage terminated by death would, if your proposal were to become law, conceivably be placed in a worse position than a surviving ex-spouse! Presumably, when a marriage is terminated by dissolution, the community property is divided equally. This puts the divorced spouse on the same footing as a non-divorced spouse if decedent does not provide for the non-divorced spouse in his or her will. To automatically add to the divorced spouse's expectancies, perhaps at the risk of depleting a non-divorced surviving spouse's share of the community, simply doesn't make sense.

CALIFORNIA LAW REVISION COMMISSION

Re: Tentative Recommendation concerning Continuation  
of Support Obligation after Death of Support Obligor  
February 22, 1983  
Page two

Finally, I call to your attention that the proposal as you have worded it provides that the support obligation may not be modified or revoked after the death of the obligor, "except to reflect testamentary dispositions to the other party or in extraordinary circumstances to mitigate manifest injustice to persons dependent on the party for support." The concept of "manifest injustice" is not explored either in proposed legislation or in the comment. Furthermore, it is conceivable that a surviving divorced spouse would no longer qualify for support (e.g. by reason of having become self-supporting) and decedent's survivors would not be able to modify or terminate the order for support unless "manifest injustice" could be shown. The potential for procedural and proof problems which would necessarily result if a decedent's survivors will wind up squaring off in court with decedent's ex-spouse are tremendous. I personally would not enjoy such a contest with my husband's ex-wife in the event of his premature death, and as a family law practitioner I envision numerous ontoward enforcement problems which would surely end up in the appeals court.

Very truly yours,



SUSAN E. HOWIE  
Attorney at Law

SEH:jl

Encl.

cc: Mr. Alan Nobler  
Chairman, Family Law Executive Committee  
Santa Clara County Bar Association

## Exhibit 10

JACK E. COOPER  
ATTORNEY AT LAW  
225 BROADWAY, SUITE 1500  
SAN DIEGO, CALIFORNIA 92101  
(619) 232-4525

February 25, 1983

Law Revision Commission  
4000 Middlefield Road, Ste. D-2  
Palo Alto, CA 94306

Re: Tentative Recommendation re: Continuation Of  
Support Obligation After Death Of Support Obligor

Gentlemen:

I interpret your proposal concerning the support obligations of a decedent to require the court sitting in probate to direct payment of support to children and spouse of a prior marriage, to the possible exclusion of the widow and her children. I respectfully submit that this would be manifestly unfair.

You do provide in the proposed amendment to Civil Code, section 4801, that the order of support for the divorced spouse can be modified in extraordinary circumstances. This implies to me that the widow, or some other party, would have to bring a separate proceeding in the domestic court where the dissolution matter was heard. Such a proceeding would be time consuming and expensive in those situations where time and money is already short.

I offer two alternate suggestions:

1. If a court is going to order spousal support, why not require that the party required to pay support maintain insurance to provide a substitute in event of death? Of course, this is usually what is done, but why not require it so that any future spouse and children will not suffer unnecessarily?

2. Why not provide for the probate court determining what amount of support and family allowance should be paid, based upon the facts that exist at that time, rather than requiring that the support obligations of the prior marriage be given priority?

Very truly yours,

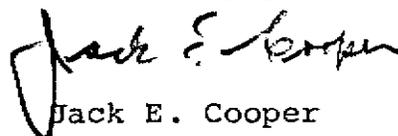
  
Jack E. Cooper

Exhibit 11

HENRY ANGERBAUER, CPA  
4401 WILLOW GLEN CT.  
CONCORD, CA 94521

2/26/83

California Law Revision Commission:

I am in agreement with the conclusions  
and recommendations of the California Law  
Revision Commission relating to the Continuation  
of support obligations after the death of the  
support obligor and recommend that this proposed  
legislation be implemented by the legislature.

Sincerely,  
Henry Angerbauer



## DISTRICT ATTORNEY

SACRAMENTO COUNTY

JOHN DOUGHERTY  
District AttorneyKATHRYN CANLIS  
Chief Deputy

Exhibit 12

February 28, 1983

Mr. Robert A. Barton  
Department of Social Services  
744 P Street  
Sacramento, CA 95814Re: Your letter of February 24, 1983; Report Regarding  
Continuation of Support Obligation After Death of  
Support Obligor

Dear Bob:

The proposal sounds fine to me; however, I believe that, in the event claims for both spousal and child support are filed with the estate, some consideration should be given to an order of priority which gives child support priority over spousal support. Aside from that, I found the memo both constructive and informative.

Very truly yours,

JOHN DOUGHERTY  
DISTRICT ATTORNEY*Michael E. Barber*  
Michael E. Barber  
Supvr. Deputy District Attorney

MEB:sm

cc: John H. DeMouilly  
Greg Thompson  
Deputy District Attorneys

## DOMESTIC RELATIONS

P.O. Box 160937 20 Bicentennial Circle  
Sacramento, CA 95816-0937 (916) 440-5811 Sacramento, CA 95826

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

CONTINUATION OF SUPPORT OBLIGATION AFTER  
DEATH OF SUPPORT OBLIGOR

January 22, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN MARCH 4, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94306

## TENTATIVE RECOMMENDATION

relating toCONTINUATION 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>

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>6</sup>

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).
6. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4646-47 (8th ed. 1974).

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 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>7</sup>

Despite the conclusory and question-begging nature of this reasoning, 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>8</sup> The cases were codified in 1951.<sup>9</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>10</sup>

The reasons in favor of the existing California rule are technical and unconvincing compared with the policy of providing adequate support

7. Parker v. Parker, 193 Cal. 478, 480-81, 225 P. 447 (1924).

8. 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).

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

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

for a person dependent on, and entitled to, support.<sup>11</sup> A spousal support order is often inadequate for the needs of the former spouse,<sup>12</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.

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> The spousal support order would not be subject to modification after the death of the support obligor except to take into account testamentary dispositions to the supported spouse or to mitigate a manifest injustice to other persons dependent on the decedent due to limited resources of the estate.

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 purchase an annuity or 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

11. Among the criticisms directed at the California spousal support scheme is precisely 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).
12. 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).
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, at 5074-75 (8th ed. 1974).
14. See, e.g., Prob. Code §§ 953 (payment into court to cover contingent claims or claims not yet due); 953.1 (payment to trustee).

law in the case of a child support obligation, which survives the death of the support obligor, as well as in the case of a spousal support obligation that survives death by agreement of the parties.<sup>15</sup>

In the case of either a spousal support or a child support obligation, the obligation should be given a preference over the claims of general creditors of the decedent.<sup>16</sup> The support obligation is analogous to the family allowance of the decedent, and should receive the same preference as the family allowance.<sup>17</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, and to amend Sections 680, 950, and 951 of the Probate Code, relating to child and spousal support.

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

2953

Civil Code § 4801 (amended)

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.

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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. Existing law gives no preference to support obligations. See, e.g., *Estate of Ettliger*, 56 Cal. App.2d 603, 132 P.2d 895 (1943); *Newhall v. Newhall*, 227 Cal. App.2d 800, 39 Cal. Rptr. 144 (1964).

17. See Prob. Code §§ 680, 950, 951.

- (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.
- (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. The order may not be modified or revoked after the death of the party except to reflect testamentary dispositions to the other party or in extraordinary circumstances to mitigate manifest injustice to other persons dependent on the party for support. This paragraph applies to an order made or modified on or after January 1, 1984. An order made before January 1, 1984, and not modified on or after January 1, 1984, is governed by the law applicable 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 P.2d 1 (1957) (support agreement terminates on death of obligor absent contrary agreement in writing). For the preference given support obligations in probate, see Probate Code § 950. The other changes in subdivision (b) are technical.

3131

Probate Code § 680 (amended)

SEC. 2. Section 680 of the Probate Code is amended to read:

680. (a) The surviving spouse, minor children, and adult children who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate.

(b) Other adult children who were actually dependent in whole or in part upon the decedent for support may be given such reasonable allowance out of the estate as the court in its discretion determines is necessary for their maintenance according to their circumstances during the progress of the settlement of the estate.

(c) In case of an insolvent estate, a family allowance must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness, child and spousal support obligations, and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Comment. Section 680 is amended to conform to Section 950, which gives the family allowance and child and support obligations of the decedent the same preference in probate.

3252

Probate Code § 950 (amended)

SEC. 3. Section 950 of the Probate Code is amended to read:

950. The debts of the decedent, the expenses of administration and the charges against the estate shall be paid in the following order:

(1) Expenses of administration;

(2) Funeral expenses;

(3) Expenses of last illness;

(4) Family allowance and child and spousal support obligations;

(5) Debts having preference by the laws of the United States;

(6) Wages, to the extent of nine hundred dollars (\$900), of each employee of the decedent, for work done or personal services rendered within 90 days prior to the death of the employer. If there is not sufficient money with which to pay all such labor claims in full the money available shall be distributed among the claimants in accordance with the amount of their respective claims;

(7) Mortgages, judgments that are liens, and other liens, in the order of their priority, so far as they may be paid out of the proceeds of the encumbered property. If such proceeds are insufficient for that purpose, the part of the debt remaining unsatisfied shall be classed with the general demands against the estate;

(8) Judgments that are not liens rendered against the decedent in his lifetime and all other demands against the estate, without preference or priority one over another.

Comment. Section 950 is amended to reflect the rule that a spousal support obligation survives the death of the support obligor. Civil Code § 4801. The amendment creates a preference in probate for child and spousal support obligations; under former law such obligations were classed with general claims against the decedent's estate. See, e.g., Estate of Ettliger, 56 Cal. App.2d 603, 132 P.2d 895 (1943); Newhall v. Newhall, 227 Cal. App.2d 800, 39 Cal. Rptr. 144 (1964).

3315

Probate Code § 951 (amended)

SEC. 4. Section 951 of the Probate Code is amended to read:

951. As soon as ~~he~~ the executor or administrator has sufficient funds ~~in his hands~~, after retaining sufficient funds to pay the expenses of administration, the executor or administrator must pay the funeral expenses, the expenses of the last illness, the family allowance and child and spousal support obligations, and wage claims to the extent of nine hundred dollars (\$900) of each employee of decedent for work done or personal services rendered within 90 days prior to the death of the employer; ~~but he~~. The executor or administrator is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

Comment. Section 951 is amended to conform to Section 950 and to make other technical changes.