Selected Sections of the Probate Code

Probate Code §21310

As used in this part:

(a) "Contest" means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) "Direct contest" means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

(4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section 6112, 21350, or 21380.

(c) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) "Protected instrument" means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause. (Am Stats 2010, C620)

Probate Code §8252

(a) At the trial, the proponents of the will have the burden of proof of due execution. The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. If the will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate.

(b) The court shall try and determine any contested issue of fact that affects the validity of the will. (Enacted Stats 1990, C79)

Probate Code §8004

(a) If appointment of the personal representative is contested, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the contest asserts the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner provided in Article 2 (commencing with Section 8110) of Chapter 2, and the court shall hear the two petitions together.

(b) If a will is contested, the applicable procedure is that provided in Article 3 (commencing with Section 8250) of Chapter 3.

Probate Code §5000

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, revocable transfer on death deed, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(b) Included within subdivision (a) are the following:

(1) A written provision that moneys or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that moneys due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law. (Am Stats 2015, C293)

Probate Code §6401

(a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100.

(b) As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent under Section 101.

(c) As to separate property, the intestate share of the surviving spouse is as follows:

(1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.

(2) One-half of the intestate estate in the following cases:

(A) Where the decedent leaves only one child or the issue of one deceased child.

(B) Where the decedent leaves no issue, but leaves a parent or parents or their issue or the issue of either of them.

(3) One-third of the intestate estate in the following cases:

(A) Where the decedent leaves more than one child.

(B) Where the decedent leaves one child and the issue of one or more deceased children.

(C) Where the decedent leaves issue of two or more deceased children. (Am Stats 2014, C913)

Probate Code §8461

Subject to the provisions of this article, a person in the following relation to the decedent is entitled to appointment as administrator in the following order of priority:

(a) Surviving spouse or domestic partner as defined in Section 37.

(b) Children.

(c) Grandchildren.

(d) Other issue.

(e) Parents.

(f) Brothers and sisters.

(g) Issue of brothers and sisters.

(h) Grandparents.

(i) Issue of grandparents.

(j) Children of a predeceased spouse or domestic partner.

(k) Other issue of a predeceased spouse or domestic partner.

(l) Other next of kin.

(m) Parents of a predeceased spouse or domestic partner.

(n) Issue of parents of a predeceased spouse or domestic partner.

(o) Conservator or guardian of the estate acting in that capacity at the time of death who has filed a first account and is not acting as conservator or guardian for any other person.

(p) Public administrator.

(q) Creditors.

(r) Any other person. (Am Stats 2001, C893)

Probate Code §19001

(a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's probate estate and to the expenses of administration of the probate estate to the extent that the deceased settlor's probate estate is inadequate to satisfy those claims and expenses.

(b) The deceased settlor, by appropriate direction in the trust instrument, may direct the priority of sources of payment of debts among subtrusts or other gifts established by the trust at the deceased settlor's death. Notwithstanding this subdivision, no direction by the settlor shall alter the priority of payment, from whatever source, of the matters set forth in Section 11420 which shall be applied to the trust as it applies to a probate estate. (Am Stats 2015, C48)

Probate Code §78

"Surviving spouse" does not include any of the following:

(a) A person whose marriage to, or registered domestic partnership with, the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage or registered domestic partnership, the person is married to, or in a registered domestic partnership with, the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage or termination of registered domestic partnership from the decedent or a final decree or judgment of annulment of their marriage or termination of registered domestic partnership, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as spouses.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage or registered domestic partnership obtained by the decedent, participates in a marriage ceremony with a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital or registered domestic partnership property rights. (Am Stats 2016, C50)

Selected Sections of the Family Code

Family Code §233

(a) Upon filing the petition and issuance of the summons and upon personal service of the petition and summons on the respondent or upon waiver and acceptance of service by the respondent, the temporary restraining order under this part shall be in effect against the parties until the final judgment is entered or the petition is dismissed, or until further order of the court.

(b) The temporary restraining order is enforceable in any place in this state, but is not enforceable by a law enforcement agency of a political subdivision unless that law enforcement agency has received mailed notice of the order or has otherwise received a copy of the order or the officer enforcing the order has been shown a copy of the order.

(c) A willful and knowing violation of the order included in the summons by removing a child from the state without the written consent of the other party or an order of the court is punishable as provided in Section 278.5 of the Penal Code. A willful and knowing violation of any of the other orders included in the summons is punishable as provided in Section 273.6 of the Penal Code. (Ad Stats 1992, C 162)

Family Code §2040

(a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

(1) Restraining both parties from removing the minor child or children of the parties, if any, from the state, or from applying for a new or replacement passport for the minor child or children, without the prior written consent of the other party or an order of the court.

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life, and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party.

Notwithstanding the foregoing, nothing in the restraining order shall preclude a party from using community property, quasi-community property, or the party's own separate property to pay reasonable attorney's fees and costs in order to retain legal counsel in the proceeding. A party who uses community property or quasi-community property to pay his or her attorney's retainer for fees and

costs under this provision shall account to the community for the use of the property. A party who uses other property that is subsequently determined to be the separate property of the other party to pay his or her attorney's retainer for fees and costs under this provision shall account to the other party for the use of the property.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered.

(4) Restraining both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court.

(b) Nothing in this section restrains any of the following:

(1) Creation, modification, or revocation of a will.

(2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect.

(3) Elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect.

(4) Creation of an unfunded revocable or irrevocable trust.

(5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

(c) In all actions filed on and after January 1, 1995, the summons shall contain the following notice:

"WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property."

(d) For the purposes of this section:

(1) "Nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property, revocable transfer on death deed, or other instrument of a type described in Section 5000 of the Probate Code.

(2) "Nonprobate transfer" does not include a provision for the transfer of property on death in an insurance policy or other coverage held for the benefit of the parties and their child or children for

whom support may be ordered, to the extent that the provision is subject to paragraph (3) of subdivision (a).

(e) The restraining order included in the summons shall include descriptions of the notices required by paragraphs (2) and (3) of subdivision (b). (Am Stats 2015, C293)

Family Code §310

Marriage is dissolved only by one of the following:

(a) The death of one of the parties.

(b) A judgment of dissolution of marriage.

(c) A judgment of nullity of marriage. (Ad Stats 1992, C 162)

Family Code §7540

(a) Except as provided in Section 7541, the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage.

(b) The conclusive marital presumption in subdivision (a) does not apply if the court determines that the husband of the woman who gave birth was impotent or sterile at the time of conception and that the child was not conceived through assisted reproduction. (Rep & Ad Stats 2018, C876)

Family Code §7573
(a) Except as provided in Sections 7575, 7576, 7577, and 7612, a completed voluntary declaration of paternity, as described in Section 7574, that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support.

(b) This section shall remain in effect only until January 1, 2020, and as of that date is repealed. (Am Stats 2018, C876)

[Version operative 1/1/20]

(a) The following persons may sign a voluntary declaration of parentage to establish the parentage of the child:

(1) An unmarried woman who gave birth to the child and another person who is a genetic parent.

(2) A married or unmarried woman who gave birth to the child and another person who is a parent under Section 7613 of a child conceived through assisted reproduction.

(b) A voluntary declaration of parentage shall be in a record signed by the woman who gave birth to the child and by either the only possible genetic parent other than the woman who gave birth or the intended parent of a child conceived through assisted reproduction, and the signatures shall be attested by a notary or witnessed.

(c) Except as provided by Section 7580, a voluntary declaration of parentage takes effect on the filing of the document with the Department of Child Support Services.

(d) Except as provided in Sections 7573.5, 7575, 7576, 7577, and 7580, a completed voluntary declaration of parentage that complies with this chapter and that has been filed with the Department of Child Support Services is equivalent to a judgment of parentage of the child and confers on the declarant all rights and duties of a parent.

(e) The court shall give full faith and credit to a voluntary declaration of parentage effective in another state if the declaration was in a signed record and otherwise complies with the law of the other state.

(f) This section shall become operative on January 1, 2020. (Ad Stats 2018, C876)

Family Code §7611

A person is presumed to be the natural parent of a child if the person meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) The presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, the presumed parent and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, the presumed parent and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his or her consent, the presumed parent is named as the child's parent on the child's birth certificate.

(2) The presumed parent is obligated to support the child under a written voluntary promise or by court order.

(d) The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied. (Am Stats 2013, C510)

Family Code §7551

(a) Except as provided in subdivisions (b) and (c), in a civil action or proceeding in which parentage is a relevant fact, the court may, upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the woman who gave birth, the child, and the alleged genetic parent to submit to genetic testing.

(b) (1) Genetic testing shall not be used for any of the following purposes:

(A) To challenge the parentage of a person who is a parent pursuant to subdivision (a) of Section 7613, except to resolve a dispute whether the child was conceived through assisted reproduction.

(B) To challenge the parentage of a person who is a parent pursuant to Section 7962, except to resolve a dispute whether the gestational carrier surrogate is a genetic parent.

(C) To establish the parentage of a person who is a donor pursuant to subdivision (b) or (c) of Section 7613, except to resolve a dispute whether the child was conceived through assisted reproduction.

(2) If the child has a presumed parent pursuant to Section 7540, a motion for genetic testing is governed by Section 7541.

(3) If the child has a parent whose parentage has been previously established in a judgment, a request for genetic testing shall be governed by Section 7647.7.

(4) A court shall not order genetic testing if the genetic testing would be used to establish the parentage of a person who is prohibited under this division from establishing parentage based on evidence of genetic testing.

(c) A court shall not order in utero genetic testing.

(d) In any case under this division in which genetic testing is ordered, the following shall apply:

(1) If a party refuses to submit to genetic testing, the court may resolve the question of parentage against that party or enforce its order if the rights of others and the interests of justice so require.

(2) The refusal of a party to submit to genetic testing is admissible in evidence in any proceeding to determine parentage.

(3) If two or more persons are subject to court-ordered genetic testing, the court may order that the testing be completed concurrently or sequentially.

(4) Genetic testing of a woman who gave birth to a child is not a condition precedent to the testing of the child and a person whose genetic parentage of the child is being determined. If the woman is unavailable for genetic testing, the court may order genetic testing of the child and each person whose genetic parentage of the child is at issue.

Family Code §7562
If a person seeking genetic testing demonstrates good cause, the court may order genetic testing of a deceased person. (Ad Stats 2018, C876)

Family Code §7633
An action under this chapter may be brought, an order or judgment may be entered before the birth of the child, and enforcement of that order or judgment shall be stayed until the birth of the child. (Am Stats 2006, C806)

Selected Cases

Williams, In re Marriage of (1980) 101 Cal.App.3d 507, 161 Cal.Rptr. 808

TITLE: In re the Marriage of TERRY JANE and CLAYTON STARKEY WILLIAMS. MARY MARKHAM et al., Appellants, v. CLAYTON STARKEY WILLIAMS, Respondent.

CITE: 101 Cal.App.3d 507, 161 Cal.Rptr. 808

DOCKET: 57195

DATE: January 29, 1980

COURT: California Court of Appeal, Second District, Division One

COUNSEL: Peter N. Priamos for Appellants.
Dale & Dale and Louise D. Dale for Respondent.

(p.509)

OPINION

EPSTEIN, J. — This is an appeal from a denial of a joinder motion in a marriage dissolution. The motion was presented by the mother and brother of the petitioning spouse (the wife) seeking custody and visitation rights with respect to the children of the marriage. The appeal lies. (County of Alameda v. Carleson (1971) 5 Cal.3d 730, 736; In re Marriage of Meier (1975) 51 Cal.App.3d 120, 122, fn. 1.) We have concluded that the order was proper, and we affirm.

PROCEDURAL HISTORY

Terry Jane Williams (petitioner) filed a petition seeking dissolution of her marriage to Clayton Williams (respondent) in July 1978. She sought custody of the two minor children of the marriage, spousal support and child support. In her declaration under uniform custody of minors act, she declared that no one other than herself and her husband claimed any visitation or custody right with respect to the children. The court issued a pendente lite order awarding custody to petitioner. The father's response, filed a few days later, also asked that custody of the children be awarded to petitioner, but asked for reasonable visitation rights. He too, declared that no one other than himself and his wife claimed any custody or visitation rights with respect to the children.

Declarations filed with the court by the parties to this appeal establish that petitioner became critically ill in December 1978, and that she entered a hospital, became comatose and was surviving by means of a life support system. Based on these changed circumstances, respondent petitioned the court, on February 6, 1979, for an order transferring custody to himself. On the same day, petitioner's mother and brother (claimants) noticed a motion to be joined in the dissolution proceedings. They alleged an "active interest in the childrens' welfare" and claimed custody and visitation rights over the children based on allegations that respondent father was unfit.

(p.509*)

Two days later, on February 8, 1979, petitioner died. On February 27, 1979, the court granted custody to respondent, without prejudice to claimants' petition. In subsequent papers, respondent sought dismissal of the proceeding on the grounds of petitioner's death. On May 1, 1979, a hearing was held on the petition for joinder and the motion to dismiss. Acting expressly on the basis that petitioner had died, the court concluded that the marriage dissolution proceeding had terminated as a matter of law, and hence that there was no pending action to which claimants could be joined. It denied the petition.

(p.510)

CLAIMANT'S MOTION FOR JOINDER WAS PROPERLY DENIED

Divorce is a personal action that does not survive the death of a party. (Kirschner v. Dietrich (1895) 110 Cal. 502, 504; Bevelle v. Bank of America (1947) 80 Cal.App.2d 333, 334-335.) When one of the parties dies, dissolution occurs as a matter of law, and there is nothing left for a court to dissolve or annul. "The dissolution is final, irrevocable, nonmodifiable, and nonappealable." (Greene v. Williams (1970) 9 Cal.App.3d 559, 562.) This rule, established early in our cases remains applicable in dissolution proceedings under the Family Law Act. (In re Marriage of Shayman (1973) 35 Cal.App.3d 648, 651.)

(p.510*)

Claimants argue that they are entitled to join in the proceedings, and that Civil Code section 4600, #1 read with California Rules of Court, rule 1252(b) #2 creates a cause of action in themselves which survives the marriage dissolution, since they filed their joinder motion while petitioner was still alive. They cite the provision in section 387 of the Code of Civil Procedure permitting joinder "upon timely application" by a person "who has an interest in the matter in litigation." The reference to timeliness, they say, implies that their cause of action must survive so long as it was in existence when the motion to intervene was filed.

(p.511)

Claimants' interest in the proceedings, as it stood before petitioner's death when they filed their motion, may have been too remote to satisfy traditional rules for intervention. #3 There is, however, authority that would have supported joinder at that point. (In re Marriage of Meier, supra, 51 Cal.App.3d at p. 123, fn. 3.) This is an issue we need not decide, since petitioner's death dissolved the marriage and terminated whatever right claimants may have had in the marriage dissolution proceedings.

Upon the death of a party to a marriage dissolution or divorce proceeding, the court retains the power to enter judgment in conformity with matters already adjudicated before the death. But it can make no further adjudication of issues. (In re Marriage of Shayman, supra, 35 Cal.App.3d at p. 651; Bevelle v. Bank of America, supra, 80 Cal.App. 2d at p. 334; see also McClenny v. Superior Court (1964) 62 Cal.2d 140, 145-147.)

In this case there had been no determination that respondent was unfit; in fact, the judge's temporary award of custody to respondent made after interviewing the children and ascertaining their wish to live with respondent (see Civ. Code, §4600) is indicative of the father's fitness to have custody of the children.

Further, such fitness is presumed as against a nonparent. (Guardianship of Barassi (1968) 265 Cal.App. 2d 282, 287.)

The court was faced with the fact of petitioner's death during the pendency of the dissolution proceedings and before any adjudication on claimant's motion for joinder. Under these circumstances it had no choice but to deny the motion.

(p.511*)

Because the trial court's decision was based on its conclusion that denial of the joinder motion was required as a matter of law, we do not reach other contentions of the parties on appeal about the exercise of discretion by a trial judge in deciding questions of custody or of intervention.

(p.512)

Of course, our decision does not mean that a surviving parent having custody of the children of a marriage cannot be deprived of that custody in appropriate independent proceedings, such as an action under Civil Code section 232 to declare a minor free from the custody and control of parents. (See In re Carmalita B. (1978) 21 Cal.3d 482.) Finally, we note that Civil Code section 197.5 authorizes the granting of visitation rights to a grandparent of a deceased parent. (Cf. Adoption of Berman (1975) 44 Cal.App.3d 687, 696.)

The order appealed from is affirmed.

Lillie, Acting P. J., and Hanson, J., concurred.

FOOTNOTES

#1 "In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

"(a) To either parent according to the best interests of the child.

"(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

"(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child. "Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue."

#2 "(b) A person who has or claims custody or physical control of any of the minor children of the marriage or visitation rights with respect to such children may apply to the court for an order joining him as a party to the proceeding."

#3 See Klinghoffer v. Barasch (1970) 4 Cal.App.3d 258, 261; Bernheimer v. Bernheimer (1948) 87 Cal.App.2d 242, 247; Muller v. Robinson (1959) 174 Cal.App.2d 511, 515.

-END OF CASE-

Estate of Lahey (1999) 76 Cal.App.4th 1056
[No. A085550. First Dist., Div. Five. Dec 8, 1999.]
Estate of CLARENCE G. LAHEY, Deceased. FRANCES LAHEY, Petitioner and Appellant, v. DOROTHY BIANCHI, as Administrator, etc., Objector and Respondent.
[Opinion certified for partial publication. fn. *]
(Superior Court of San Mateo County, No. 402227, Phrasel L. Shelton, Judge.)
(Opinion by Jones, P. J., with Haning and Stevens, JJ., concurring.)

COUNSEL
Edward W. Suman for Petitioner and Appellant.
Cotter & Del Carlo and Richard A. Canatella for Objector and Respondent.

OPINION

JONES, P. J.

The question presented in this proceeding is whether a spouse who obtained a judgment of legal separation qualifies as a surviving spouse for purposes of intestate succession. We agree with the trial court that the decedent's widow here does not qualify as a surviving spouse. We affirm the judgment.

Factual and Procedural History

Frances Lahey and decedent Clarence G. Lahey were married in 1984; they separated in March 1995. In April 1995 Frances, acting in propria persona, petitioned for legal separation. She alleged that there were no known community debts or assets. She requested termination of the court's [76 Cal. App. 4th 1058] jurisdiction to award spousal support to Clarence, and she gave up her own right to receive spousal support. Clarence's default was eventually entered, and in July 1995 a judgment for legal separation was filed, declaring as follows: "There are no children or items of community property subject to the disposition by this Court. Spousal support for Respondent is terminated by default. The Court's jurisdiction to award spousal support to either party is terminated."

In December 1996 Clarence died intestate survived by Frances and by his daughter from a prior marriage, Dorothy Bianchi, who was appointed administrator of his estate. Apparently the main estate asset consists of decedent's separate property residence at 237 Glenwood Avenue in Daly City. Frances filed a creditor's claim seeking her intestate share of the estate as the surviving spouse, but the claim was rejected by the administrator. She then filed the instant action alleging entitlement to one-half of the decedent's estate as the surviving spouse. fn. 1

After a court trial, the trial court concluded that Frances did not qualify by statute as the surviving spouse inasmuch as she had obtained a judgment resolving her marital property rights. Frances appeals.

Discussion

I. Judgment of Legal Separation

[1] When a decedent dies intestate, the surviving spouse is entitled to a share of the community property belonging to the decedent and a share of the decedent's separate property. (Prob. Code, § 6401.) "Surviving spouse" is defined by statute to exclude a person whose marriage to the decedent was dissolved or annulled and also to exclude "[a] person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights." (Prob. Code, § 78, subd. (d).) fn. 2

There is no question that Frances's marriage to the decedent had not been dissolved or annulled. A judgment of legal separation leaves the marriage bonds intact. (See Fam. Code, § 2347; Faught v. Faught (1973) 30 Cal. App. 3d 875, 878 [106 Cal. Rptr. 751]; Elam v. Elam (1969) 2 Cal.App.3d [76 Cal. App. 4th 1059] 1013, 1019-1020 [83 Cal. Rptr. 275].) fn. 3 However, it is obvious that a surviving spouse for purposes of intestate succession is distinct from the legal wife or husband of the decedent. Probate Code section 78 excludes not only a spouse whose marital status has been terminated but also a spouse whose marital property rights have been terminated. The issue before us, then, is whether the judgment of legal separation constitutes an "order purporting to terminate all marital property rights" so as to disqualify Frances as the surviving spouse.

The concept of divisible divorce permits issues of marital status and financial responsibility to be litigated at separate times and in different forums. (Faught v. Faught, supra, 30 Cal.App.3d at p. 878.) As Frances acknowledges , a judgment of legal separation (formerly a decree of separate maintenance) is designed to resolve the financial issues between the parties, including division of community assets and liabilities and determination of support obligations. (See Krier v. Krier (1946) 28 Cal. 2d 841 [172 P.2d 681]; Faught v. Faught, supra, 30 Cal.App.3d at p. 878.) A judgment for legal separation, however, is not an interim order. It serves as a final adjudication of the parties' property rights and is conclusive and res judicata even in a subsequent proceeding to dissolve the marriage. fn. 4 (Krier v. Krier, supra, 28 Cal. 2d 841; Faught v. Faught, supra, 30 Cal.App.3d at p. 878.)

Frances argues that her petition for legal separation sought only limited relief, and the judgment of legal separation cannot be read to exceed the relief prayed for. The Judicial Council form petition for legal separation includes several boxes to be checked to indicate, e.g., a request for confirmation of separate property assets and obligations, a request for spousal support, a request for termination of jurisdiction to award spousal support, and a request that property rights be determined. Frances did not check the box seeking a determination of property rights, nor did she check the box requesting confirmation of separate property. She checked only the box declaring that there were no community assets or liabilities and the box requesting termination of jurisdiction to award spousal support. Frances argues because she made no request in her petition that all property rights be [76 Cal. App. 4th 1060] determined, the judgment was not a determination of all her marital property rights.

We reject the argument. Under the statutory scheme, the court in a legal separation proceeding must divide the known community assets and must characterize the parties' liabilities as community or separate. (Fam. Code, §§ 2550, 2551.) The court may also make orders for spousal support. (Fam. Code, § 4330.) Here, Frances's petition declared that there was no community property to divide, and the

judgment for legal separation said the same. The judgment also terminated the rights of both parties to spousal support. That determination of the marital property rights was final and conclusive and served to terminate Frances's community property rights. There were no other property rights that could have been determined.

Frances contends that nothing in the judgment for legal separation adjudicated the parties' separate property and therefore she retained her rights to succeed to the decedent's separate property residence. This contention, however, ignores the import of Probate Code section 78. fn. 5 That statute excludes from the definition of surviving spouse one whose marital property rights have been terminated. Nothing in the language or meaning of the statute requires in addition an express termination of inheritance rights, for the obvious effect of the statute itself is to terminate the inheritance rights of such a spouse.

II. Exclusion of Evidence

* * *

Disposition

The judgment is affirmed.

Haning, J., and Stevens, J., concurred.

Appellant's petition for review by the Supreme Court was denied March 1, 2000.

FN *. Pursuant to California Rules of Court, rules 976 and 976.1, this opinion is certified for publication, except for part II.

FN 1. Frances also alleged causes of action for negligent and intentional spoliation of evidence, based upon Bianchi's refusal to allow her access to the property to retrieve her own separate property. Bianchi's demurrer was sustained as to those causes of action.

FN 2. The surviving spouse may also waive her rights to take from the decedent's estate by entering into a written property settlement agreement. (Prob. Code, §§ 140-147; see Estate of Smith (1966) 241 Cal. App. 2d 205, 209 [50 Cal. Rptr. 374].) No such agreement or waiver is involved in the present case.

FN 3. The petition and judgment were for legal separation only. However, the clerk's notice of entry of judgment mistakenly contains a statement that the marital status terminated as of October 27, 1995.

FN 4. No issue is raised in this case concerning the court's continuing jurisdiction over property and support issues. The court has continuing jurisdiction to divide community assets or liabilities not previously adjudicated. (Fam. Code, § 2556.) However, Frances makes no assertion that any community assets were left unadjudicated by the legal separation decree. Moreover, unless the court terminates spousal support, the court retains jurisdiction over spousal support when the marriage was of long duration. (Fam. Code, § 4336.) Here, of course, the court terminated its jurisdiction to award future spousal support.

FN 5. Frances's argument also mistakenly presupposes that the court would have had reason to confirm the decedent's house as his separate property. The court in a legal separation proceeding divides

community property. (Fam. Code, § 2550.) Unless there is a dispute over whether a particular asset qualifies as community property, the court does not adjudicate separate property. Frances declared in her petition that there was no community property; she plainly recognized the house as decedent's separate property.

Goldberg, In re Marriage of (1994) 22 Cal.App.4th 265, 27 Cal.Rptr.2d 298

TITLE: In re the Marriage of JACK and DOROTHY GOLDBERG.
SCOTTY D. HILL, as Special Administrator, etc.,
Appellant, v. DOROTHY GOLDBERG, Respondent.

CITE: 22 Cal.App.4th 265, 27 Cal.Rptr.2d 298

DOCKET: No. E011377

DATE: February 7, 1994

COURT: California Court of Appeal, Fourth District, Division Two

TRIAL J.: P. F. Magers, J., Riverside County

COUNSEL: Butterwick, Bright & O'Laughlin, Inc., and Michael
Train Bright, for Appellant.
James O. Cripps, William E. Windham and Gilbert Y.
Nishino, for Respondent.

OPINION

(p. 266•)

MCDANIEL, J.*— This appeal presents, on undisputed facts, an issue of first impression, namely whether, under section 573, subdivision (a) of the Probate Code, *N.1 decedent's cause of action for nullity of marriage survived his death. The issue was joined when the special administrator of decedent's estate moved for an order substituting himself in as petitioner in decedent's action insofar as it sought to nullify the marriage, an action filed by decedent before his death. The trial court denied the motion. In its extensive minute order, the trial court stated, "[t]he issue framed by the • motion is whether a nullity action prosecuted by a party survives his death. [Paragraph] The answer to this question is in the negative." The court then cited, as controlling, Greene v. Williams (1970) 9 Cal.App.3d 559 (Greene).
(•p. 267)

In Greene, the issue presented was "[c]an a parent annul a minor child's marriage after the child's death because the child married without parental consent?" (Greene, supra, 9 Cal.App.3d 559, 561.) In our view, the issue there presented is not the same as the one here. In Greene, the action was initiated by the decedent's mother after her son's death and involved no identified property issues; here, the action was initiated by decedent himself before he died and does involve identified property issues. In Greene, the trial court sustained the widow's demurrer interposed on the ground that the court had no power to alter the marriage status after it had been dissolved by the boy's death. The judgment of dismissal was affirmed on appeal. For reasons which we shall explain, Greene is inapposite to the issue here under review. Otherwise, it is our further view that section 573, subdivision (a), is controlling, and so we shall reverse with directions the order appealed from.

FACTUAL AND PROCEDURAL BACKGROUND

At age 90, Jack Goldberg (decedent) married Dorothy Guffey Goldberg (respondent). After only four months of marriage, decedent moved to the Hemet Retirement Center (Center) and there established a separate residence. We note in passing that respondent accompanied decedent to the Center. At the time of decedent's admission to the Center, respondent concealed from the administrator of the Center the marital status of the parties, stating that she was not married to decedent but was only a friend trying to help him and that she no longer wished to have anything to do with him. Respondent further stated to Konnie Adams, a member of the Center's admitting staff, that decedent would be solely responsible for any obligations to the Center arising by reason of his admission.

About two months later, decedent filed a petition for dissolution and, in the alternative, for nullity of the marriage. The count for nullity cited fraud per section 4425, subdivision (d) of the Civil Code as the basis for the relief sought. In her response, respondent concurred in the request for dissolution of the marriage but opposed the request for nullity of the marriage. Both parties, in their pleadings, alleged that there were no community assets to be distributed.

(p. 267•)
By April of 1990, about five months after the nullity action was filed, because of a fall resulting in a fractured hip, decedent was no longer able to • care for himself. As a consequence, he was moved to Colonial Convalescent Center. As a further result of his physical disability, decedent was unable to attend a mandatory settlement conference in the case he had initiated; the case was eventually removed from the trial setting calendar.
(•p. 268)

On May 3, 1990, respondent filed a petition seeking appointment as conservator of the person and estate of decedent, alleging therein that the estate had a value of $320,000 and that decedent was a full-time resident of a total care convalescent hospital. Several months later, the court found respondent disqualified to act as conservator of decedent's person and estate by reason of the content of the verified pleadings in the nullity action. Instead, the court appointed the public guardian as conservator of decedent's person and estate.

About three weeks later, decedent died. Within nine days, respondent had petitioned for letters of administration of decedent's estate. In the probate proceedings, decedent's four nieces and nephews all filed nominations of the public administrator as the person to receive letters of administration of decedent's $320,000 estate. Eventually, letters of special administration with special powers were issued to Scotty D. Hill (appellant), Riverside County's Public Administrator. There- after, appellant moved for an order substituting himself into decedent's nullity action as petitioner. After extensive written filings both in support of and in opposition to the motion, it was orally argued and then submitted for decision. Thereafter, the court issued its minute order indicating its decision to deny the motion. About two weeks later, a written order reflecting such decision was signed and filed. This appeal followed.

DISCUSSION

In pursuing this appeal, appellant has narrowed consideration of the issue we announced at the outset by focusing on the fundamental difference between the objective of an action to dissolve a marriage and one to annul it. The former is concerned with marital status as such; the latter is concerned with whether a

contract was validly entered into at all. While it is true that a decree of nullity may, in the popular sense, affect the marital status, the legal reality is that a successful action for nullity of marriage results in a judicial determination that there never was a contract and hence there never was a marriage.

(p. 268•)
At this point, we must observe that respondent's position on appeal is at best misguided, at worst disingenuous. In her brief, she states, ". . . appellant's opening brief is fatally flawed because it does not attempt to brief or • explain why a marriage is not terminated by death especially in light of Cal. Civil Code section 4350 which states there are only three ways in California of terminating marriage and the first way is by the death of one of the parties. Appellant does not explain or confront the issue once a marriage is terminated how it can be created and reterminated a second time. This is an absurdity on the face of it."
(•p. 269)

It is the foregoing characterization of appellant's position which is an absurdity. What respondent herself has failed to confront and to deal with is that decedent's action is not about termination of marriage; it is about whether a marriage ever existed in the first place.

In the circumstances surrounding this case, the distinction which appellant has drawn between an action for dissolution of marriage and one for nullity of marriage is not just a theoretical legal quibble. Significant financial consequences attend the resolution of the dispositive issue. Decedent has four nieces and nephews who, under California's law of intestate succession, stand to inherit decedent's estate in its entirety. However, if it turns out that respondent was validly married to decedent and is therefore a surviving spouse, she stands to inherit one-half of decedent's estate.

It is also significant to us that, for reasons sufficient to decedent, he chose to file an action seeking nullity of his marriage to respondent, and to do so based on fraud. Respondent has chided appellant for including in his recitation of facts references to the conservatorship and other matters outside the precise framework of the nullity action. In our view, those events, as we have recounted them above, are useful indeed in providing a compelling inference of what was really going on and hence a relevant background for the technical legal dispute here presented. Such events are useful because they validate the decedent's motives for initiating the nullity portion of the litigation and in turn justify our seeking a sound rationalization of this case under section 573 of the Probate Code, thus assuring that decedent's nullity case is not denied the chance to play out to its fully adjudicated conclusion, whatever that may be.

(p. 269•)
Turning then to such rationalization, the starting point of course is section 573 of the Probate Code, the text of which has been earlier quoted in the margin. Its language is categorical; an action "may be maintained by . . . the [decedent's] personal representative." The enactment of this statute in 1961 was intended to supplant a hodgepodge of random provisions dealing with the survivorship of actions for or against a person after his/her death. The initial thrust of the Law Revision Commission's effort to evolve comprehensive survival legislation was directed initially at tort actions. To limit • the effect of the proposed legislation to tort actions proved to be difficult indeed. The commission's comment preceding its proposals (which were later enacted) explained that "1. The proposed legislation provides for survival of all causes of action. The Commission attempted originally to draft a statute limited to effectuating its view that all tort causes of action should survive, but encountered great difficulty in attempting to draft technically accurate and satisfactory language to accomplish this more limited objective. Legislation limited to 'causes of action in tort,' would create problems because there simply is not a satisfactory definition of the meaning and scope of the term 'tort.' Moreover, such language would raise questions as

to whether actions arising from breaches of trust and purely statutory actions, whether or not 'sounding in tort,' were included. Similar questions would arise if a statute of limited scope were written in other terms. The Commission therefore recommends the enactment of a broad and inclusive provision for the following reasons: [Paragraph] (a) A comprehensive survival statute would have the advantage of simplicity and clarity by eliminating difficult questions of construction which would result from the use of more restrictive language. [Paragraph] (b) Such a statute is sound in theory since there does not appear to be any rational basis upon which to determine that some actions should survive while others do not. [Paragraph] (c) A comprehensive survival statute would make little or no substantive change in the present law with respect to survival of non-tort causes of action. The Commission's study of the present law has shown that actions based on contract, quasi-contract, trusts, actions to recover possession of property or to establish an interest therein, and most statutory actions already survive." (Fn. omitted.)
(•p. 270)

Otherwise, it should be observed that the substance of section 573 of the Probate Code was reenacted variously in 1987 and 1990 and yet again in 1992 (see fn. 1); whereas, Greene, supra, 9 Cal.App.3d 559, and In re Marriage of Williams (1980) 101 Cal.App.3d 507, which purports to rely on Greene, were both decided well before the reenactments noted. Thus, under orthodox canons of statutory construction, assuming that the two cited cases actually militate in favor of the trial court's ruling (which we do not concede), it must be accepted that the Legislature was reaffirming its intention that section 573 be all inclusive. In this connection, if it be determined that Greene is apposite to the facts here, we decline to follow it.

(p. 270•)
However, in our view there is no precedential tension here. This is so because of the fundamental difference, earlier noted, between an action for dissolution of marriage and one for nullity. One seeks to terminate the marital status; the other seeks to inquire whether any such status ever existed. Thus, an action to dissolve a marriage does not "survive" because its purpose has been abruptly accomplished by the death of one of the spouses. • In other words, the issue of survival of a cause of action for dissolution of marriage is subsumed by the fulfillment of the purpose of such action by reason of a more precipitous event. In short, the dissolution action has been made moot by the death of one of the spouses. The same cannot be said with regard to an action for nullity. Whether one of the putative spouses dies after the action was commenced is wholly irrelevant to a judicial inquiry into whether the marital contract had been induced by fraud.
(•p. 271)

Looking at the end results of the two actions, a decree of dissolution results in a determination that, although the parties at one time were legally married, irreconcilable differences between them were such as to lead to a termination of the marriage. Such decree recognizes the validity of the marriage contract in the first instance and then declares under an applicable statute that grounds exist to terminate the contract and dissolve the marital status. On the other hand, a decree of nullity results in a determination that no legal contract of marriage ever came into being because the consent of one party was obtained by fraud. Hence, the marital status never legally existed between the parties and the decree relates back to the date of the purported marriage and erases all of the consequences of any mistaken reliance on there being such a relationship. (Sefton v. Sefton (1955) 45 Cal.2d 872, 874.)

In view of the foregoing and especially the categorical nature of the Probate Code section 573 language itself, the burden is on the respondent to demonstrate why there should be an exception carved out from the clear import of the statute for an action for nullity of marriage. This she has failed to do. It is no

refutation of the statute's application to an action for nullity of marriage to argue that death "terminated" the marriage, with the result that there is nothing to adjudicate in an action for nullity, the marriage already having been terminated. To reiterate, an action for nullity of marriage has as its objective a judicial determination that there never was a marriage at all.

(p. 271•)
At oral argument, counsel for respondent urged that section 4350 of the Civil Code rendered the result we have reached logically impossible to reach. Section 4350 provides "Marriage is dissolved only by (1) the death of one of the parties, (2) the judgment of a court of competent jurisdiction decreeing a dissolution of the marriage, or (3) a judgment of nullity." Although we had difficulty following counsel's argument, it seemed to amount to this: because (1) renders pursuit of (2) moot, it necessarily follows that (1) also renders pursuit of (3) moot. This amounts to arguing that "it is so because I say it is so." What counsel neglected to consider in making his argument is, because of the inherent differences in the objectives of an action for dissolution and one for nullity, that the death of one of the parties • likewise has a different impact in terms of the prospective outcome of the respective actions. Thus, while a judgment of nullity may terminate a putative marriage, it also, unlike a judgment of dissolution, makes an adjudication that there never was a marriage. In short, it does not immutably follow that the death of a spouse before a judgment of nullity preempts the application of section 573 of the Probate Code by precluding a judicial inquiry into whether a marriage ever existed at all.
(•p. 272)
Turning to more technical aspects of the main issue, the applicable statute requires that an action for nullity of marriage, based on fraud, must be initiated by the party alleged to be the victim of the fraud and that such action must be commenced within four years of discovery of the fraud. (Civ. Code, Section 4426, subd. (d).) Here the action for nullity of marriage, in which appellant sought to intervene, was initiated by the decedent and well within the period of limitation. That brings us back to the application of section 573 of the Probate Code. None of the authorities cited and relied upon by respondent involve an action for nullity of marriage, based on fraud, brought by a decedent in his or her lifetime.

We agree with appellant that his endeavor here is in substance substantially analogous to what occurred in Estate of Denton (1971) 17 Cal.App.3d 1070 (Denton). In that case, the executor sought instructions under section 588 *N.2 of the Probate Code under which it (the corporate executor) would initiate a lawsuit to recover estate assets, the divesture of which was allegedly procured by fraud. (Id. at p. 1073.) The trial court denied the petition and, on appeal, the reviewing court affirmed the order of denial.

In the course of rationalizing its decision, the reviewing court stated, "[t]he personal representative has not only the power but the duty to sue to set aside a conveyance or transfer of property obtained from a decedent by fraud or undue influence. [Citing cases.] Previously such actions were specifically authorized by and against executors by Probate Code section 573. In 1961, that section was completely rewritten and is now a general survival statute. The effect of the 1961 amendment was to broaden rather than restrict the right to sue for violation of a decedent's property rights." (Denton, supra, 17 Cal.App.3d 1070, 1075.) Otherwise, the court explained that it interpreted the trial court's denial of the petition for instructions as "neither approving or disapproving the proposed lawsuit. It was exercising its discretion to reserve judgment until a later time." (Id. at p. 1076.)

(p. 273)

The significance here of Denton is compelling. We see little difference, on the one hand, in an administrator's instituting a lawsuit to recover, for the benefit of the estate, property of which the

decedent was divested in his lifetime by reason of another's fraud (as in Denton) and, on the other hand, in an administrator's substituting in as petitioner in an action for nullity of marriage based on fraud (as here) where the net result of success in each instance is financially the same. In Denton a successful action would restore assets to the estate divested by fraud; here, a successful action of nullity would preclude respondent's succeeding to one-half of decedent's estate by exposing her fraud in inducing the marriage. In this connection, the evidence may well show respondent to be wholly blameless. However, justice compels and the plain language of section 573 of the Probate Code permits the cause against her to be tried.

Although the language of section 573 of the Probate Code is unequivocal, discussion of three additional cases will illustrate that the importance of property rights between spouses and the jurisdiction of California courts to litigate such rights despite the death of one of the spouses is fundamental under our jurisprudence. In other words, where more than marital status is involved, actions to resolve property rights among spouses survive the death of one of them.

(p. 273•)
The first such case is McClenny v. Superior Court (1964) 62 Cal.2d 140 (McClenny). In McClenny, the wife initiated a divorce action against the husband. During the course of certain pretrial proceedings, the husband was ordered to pay child support to the wife, as well as to discharge the wife's medical, hospital, and other expenses. The husband failed to do so, and the court appointed a receiver to take possession and control of all the community assets to assure payment of the amounts ordered by the court. Later, the court expanded that order by directing that actual title to the community assets be vested in the receiver. Thereafter, the court granted the wife an interlocutory judgment of divorce on the ground of extreme cruelty, bifurcating the proceedings and reserving the issue of division of community property. At the time of the decision in McClenny, divorce proceedings in California involved the issuance of interlocutory judgments declaring that the innocent spouse was entitled to have the marriage dissolved, with the result that the marriage was not dissolved until the entry of a final judgment. In McClenny, before a final judgment had been entered, and before any adjudication on the reserved issue of property rights of the parties had occurred, the wife died. The special administrator of the wife's estate then sought to intervene in the divorce action, asserting that the wife had willed her property in trust for the benefit of her three minor children and requesting that the court render a • decision dividing the property, title to which had been then vested in a receiver. The husband urged the court to strike the special administrator's complaint in intervention, dismiss the action and wind up the receivership on the ground that the death of the wife had abated the divorce action and deprived the superior court of jurisdiction to adjudicate the rights of the parties in the community property. The court denied the husband's motion to strike the complaint in intervention; however, it also granted the special administrator's motion to be substituted as plaintiff in the place and stead of the deceased wife, thus rendering the complaint in intervention moot. The husband thereafter filed a petition for writ of mandate to compel termination of the receivership and for a writ of prohibition to prevent the trial court from proceeding to divide the property.
(•p. 274)

The Supreme Court denied the husband's petition and, in so doing, held that the death of the wife did not deprive the trial court of jurisdiction to divide the community property. The court stated, [Paragraph] "Although the death of one of the spouses in such a case abates the divorce action, the abatement relates to the status of the parties and not to the property rights theretofore adjudicated. The death destroys the cause of action for the dissolution of the marriage; it does not liquidate the property rights which crystallized in the interlocutory decree." (McClenny, supra, 62 Cal.2d 140, 144.)

Continuing, the court further stated, [Paragraph] "In the instant case the interlocutory decree created in Mrs. McClenny a valuable property right which her death cannot destroy. The court granted Mrs. McClenny an interlocutory decree of divorce on the ground of extreme cruelty; such a decree necessarily constitutes an adjudication that in the absence of unusual circumstances, Mrs. McClenny is entitled to more than one-half of the community property. [Citations.] The decree thus created in Mrs. McClenny, and ultimately in her estate, a property right to a share of the community property in excess of the one-half portion to which the estate would have been entitled if the court had failed to grant Mrs. McClenny a divorce upon the ground of extreme cruelty." (McClenny, supra, 62 Cal.2d 140, 145-146.)

As above noted, McClenny dealt with a divorce and not a nullity action. Even so, the court, recognizing that the wife was potentially entitled to receive more than one-half of the estate, held, despite her death, that those property issues remained subject to litigation and permitted the special administrator to be substituted in the place of the deceased wife. Because the issue in the case before us here is whether a marriage actually came into being, and, because that determination will dictate whether respondent is to receive one- half of the estate or nothing, it is clear that a property-right issue is the purpose of judicial inquiry here, just as it was in McClenny.

(p. 275)

In its recent unanimous opinion dealing with In re Marriage of Hilke (1992) 4 Cal.4th 215, the Supreme Court cited McClenny with approval in stating that "[t]he death of one of the spouses abates a cause of action for dissolution, but does not deprive the court of its retained jurisdiction to determine collateral property rights [even] if the court has previously rendered judgment dissolving the marriage." (Id. at p. 220.)

The other of the three cases above referred to is Poon v. Poon (1966) 244 Cal.App.2d 746 (Poon.) Poon was also an action for divorce in which the wife's complaint contained three counts. The first sought a divorce and requested division of the community property. The second was one sounding in fraud in which the wife sought to set aside a written agreement pursuant to which she had conveyed to the husband certain properties for a consideration which later turned out not to be fair or reasonable. The third sought to establish a trust and to quiet title to property on the ground of a breach of the confidential relationship owed the wife by the husband. The husband's answer to the wife's complaint denied all of its allegations; he also cross-complained for divorce, specifying that the parties had executed a property settlement agreement, settling all their property rights. The case proceeded to trial. During the trial, the court recited that the wife had established a prima facie case entitling her to a divorce and that otherwise a trial was thereupon required to determine the validity of the property settlement agreement. The attorney for the wife acquiesced in the trial court's ruling; no objection was made thereto by the attorney for the husband. The wife and her corroborating witness then testified on the issue of extreme cruelty and the cause proceeded to trial on the validity of the property settlement agreement. Before the trial was concluded, the husband killed the wife. The administrator of the wife's estate then moved for an order substituting himself as plaintiff in the action. The trial court denied such motion on the ground that the court lacked jurisdiction to order the requested substitution; the administrator appealed. On appeal, the husband argued that the action for divorce abated upon the wife's death and that the trial court therefore lost jurisdiction to determine the validity of the property settlement agreement. The wife's special administrator argued that the second and third counts of wife's complaint, as above described, survived her death.

(p. 275•)

The reviewing court reversed the trial court, holding that the wife's second and third counts did survive her death and that the special administrator of the wife's estate was entitled to be substituted for the wife to pursue those two counts. In so holding, the Poon court stated, "Prior to 1961 and the amendment to Probate Code section 573 it was recognized by virtue of Civil • Code section 954 and Probate Code section 574 that all causes of action relating to the recovery of property and to the setting aside of a fraudulent conveyance survived. (1 Witkin, Cal. Procedure (1954) Actions, Section 179, page 693; see Hardy v. Marcus, 15 Cal.App.2d 244, 244-245 [citation omitted]; Harris v. Harris, 57 Cal.2d 367, 370 [citation omitted]; Vragnizan v. Savings Union etc. Co., 31 Cal.App. 709, 712-714 [citation omitted]; see also, with respect to the assignability of a cause of action to recover property obtained by fraud or to set aside a fraudulent conveyance: Michal v. Adair, 66 Cal.App.2d 382, 388- 389 [citation omitted]; American Trust Company v. California etc. Ins. Co., 15 Cal.2d 42, 67 [citation omitted]; Jackson v. Deauville Holding Co., 219 Cal, 498, 502 [citation omitted].) In Harris it was held that the right to set aside a gift of community property made by a husband without the wife's consent survived the wife's death and could be exercised by her personal representative. Likewise in Vragnizan where the contentions were quite similar to those made in the present case, it was held that an action to recover one-half of the value of certain property allegedly concealed by a husband from his wife upon the settlement of their property rights during the pendency of an action for divorce did not abate with the death of the husband because the nature of the action was one for the recovery of an interest in property founded upon contract and not purely a personal action for tort. [Paragraph] We perceive nothing in the enactment of the 1961 amendment to Probate Code section 573 which would change the long-established rule that a cause of action for the violation of a property right survives the death of the owner of the right. ([Citing] Harris v. Harris, supra, p. 370.)" (Poon, supra, 244 Cal.App.2d 746, 752-753.)
(•p. 276)

Continuing, the court stated, "As to respondents' contention that the issues raised by the second and third causes of action in Rose's complaint were merely incidental to the divorce action and arose out of the marital relation, we point out initially that the fact that a cause of action arises out of a marital relationship does not prevent survival of that cause of action upon the death of one of the spouses. [Citations.]" (Poon, supra, 244 Cal.App.2d 746, 754.)

These three cases clearly announce a policy of the law in this state that the death of one party to a marriage does not preclude the later resolution of property issues raised in litigation pending before the death. Here, we have an a fortiori case; the action which respondent argues did not survive was for nullity of marriage, not dissolution. Because the determination of whether a marriage ever existed between decedent and respondent will determine whether she is or is not entitled to inherit one-half of decedent's estate, the policy above announced and applied in McClenny, Hilke and Poon requires that appellant be allowed to carry on decedent's action for nullity of marriage to its rightful conclusion.

(p. 277)

Based upon the foregoing analysis, we hold that decedent's action for nullity of marriage, which he initiated against respondent, survived his death and that the trial court erred in not granting appellant's motion to be substituted into such action as petitioner.

DISPOSITION

The order of June 10, 1992, which denied the motion of Scotty D. Hill, as Special Administrator of the Estate of Jack Goldberg, Deceased, for an order granting him leave to substitute himself as petitioner in

the nullity portion of Case No. D87772 is reversed with directions to the trial court to enter a new and different order granting such motion.

Ramirez, P. J. and McKinster, J. concurred.

FOOTNOTES

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, Section 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

n1 In force at the time of the operative facts of the case here under review, section 573, subdivision (a) of the Probate Code read: "Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative." This provision was repealed by Statutes 1992, chapter 178 (S.B. 1496), section 31 and reenacted among sections 377.20, subdivision (a), 377.30 and 377.40 of the Code of Civil Procedure.

n2 By Statutes 1987, chapter 923, section 35, operative July 1, 1988, sections 575 to 591.9 of the Probate Code were repealed and reenacted under new designations. Section 588 became section 9611.

-END OF CASE-

Newhall v. Newhall (1932) 216 Cal.608
[Civ. No. 20787. First Dist., Div. One. June 15, 1964.]
DOROTHY M. NEWHALL, Plaintiff and Respondent, v. RUTHIE M. NEWHALL, as Executrix, etc., Defendant and Appellant.

COUNSEL

Dinkelspiel & Dinkelspiel, Richard C. Dinkelspiel and John Poppin for Defendant and Appellant.

Young, Rabinowitz & Chouteau and Walter C. Chouteau for Plaintiff and Respondent.

OPINION

SULLIVAN, J.

We hold here that the obligation of a deceased husband to make payments pursuant to an approved property settlement agreement and interlocutory judgment of divorce, for the support of his minor children until their respective ages of majority, did not cease upon his death but survived as a charge against his estate. The trial court properly determined that decedent's former wife was entitled to judgment against his executrix upon the wife's creditor's claims for the amounts of such child support as well as for amounts to be paid under the agreement for the wife's own support. We therefore affirm those portions of the judgment appealed from.

The facts are not in dispute. Plaintiff Dorothy Newhall and George A. Newhall were married on November 21, 1942, in Carson City, Nevada. There are two minor children born issue of this marriage: George Almer Newhall III and Caroline Taylor Newhall. Plaintiff obtained an interlocutory judgment of divorce from Mr. Newhall in San Francisco on October 27, 1952, and a final decree of divorce on November 3, 1953. Under

the provisions of the interlocutory judgment, the custody of both children was awarded to the parties jointly with physical custody and general control in the plaintiff. The interlocutory judgment also ratified and approved a property settlement agreement executed by the parties on October 23, 1952.

This agreement provided among other things that George Newhall pay to plaintiff $5,000 annually in 12 equal monthly installments as his share of the support and maintenance of each of the minor children until their majority and to pay to [227 Cal. App. 2d 805] plaintiff $22,000 annually in 12 equal installments for her support and maintenance. It was also provided that the payments to plaintiff for her support should cease in the event of her death or the death of George Newhall, subject to the further proviso that if Newhall died within 10 years from October 23, 1952, plaintiff should nevertheless continue to receive such payments until October 23, 1962, unless she should sooner die or remarry.

Under the provisions of the interlocutory judgment, the agreement was ratified and approved and each of the parties was ordered to perform his or her obligations thereunder. In addition defendant was ordered pursuant to the agreement to make the payments to plaintiff for her support and the support of the children already summarized herein.

George Newhall died on July 13, 1958. His last will was admitted to probate and his second wife Ruthie M. Newhall, defendant herein, appointed executrix. Thereafter plaintiff timely filed in such estate proceeding creditor's claims for monies due and to become due from said decedent by virtue of the above mentioned property settlement agreement and the interlocutory and final decrees of divorce. Upon the rejection of such claims by defendant executrix, plaintiff on March 5, 1959, commenced the instant "action in equity to establish claims."

The trial court found, so far as is here pertinent, that on October 23, 1952, plaintiff and George Newhall entered into a written property settlement agreement which provided "that said George A. Newhall should pay to plaintiff the sum of $5,000.00 annually in twelve (12) installments as his share of the support and maintenance of each child until his or her majority respectively"; that at the time of the death of George Newhall $24,166.67 was due, owing and unpaid from said decedent to plaintiff for child support payments; that child support payments during the balance of the minority of George Almer Newhall III commencing on August 1, 1958, and continuing until February 28, 1965, would amount to $32,916.63, payable at the rate of $416.66 per month; that child support payments during the balance of the minority of Caroline Taylor Newhall commencing on August 1, 1958, and continuing until November 10, 1966, would amount to $41,666.65 payable at the rate of $416.66 per month; that at the time of said decedent's death, $37,833.22 was due, owing and unpaid from him to plaintiff for her own support and maintenance; and that from the date of death of said decedent [227 Cal. App. 2d 806] until the expiration of the 10-year period heretofore mentioned such support and maintenance payments would amount to $93,499.83 at the rate of $1,833.33 per month until October 1962, or until plaintiff's death or remarriage prior to October 1962. Judgment was rendered accordingly. fn. 1

We face two basic questions: (1) Did the decedent's obligation to make child support payments pursuant to the property settlement agreement continue after his death? (2) Was the judgment in plaintiff's favor for support payments for herself and her children, both due and to become due, sustained by the law and the evidence? We have concluded that both questions should be answered in the affirmative.

[1a] The property settlement agreement required decedent to make specified annual payments to plaintiff as his share of the support and maintenance of each child "until his or her majority." It contained no provision that such payments were to cease upon decedent's death. fn. 2 [2] "In California the rule is

that the obligation of a father to support his minor child which is fixed by divorce decree or property settlement agreement, does not cease upon the father's death, but survives as a charge against his estate." (Taylor v. George (1949) 34 Cal. 2d 552, 556 [212 P.2d 505]. In accord: Newman v. Burwell (1932) 216 Cal. 608, 612-613 [15 P.2d 511]; Estate of Smith (1927) 200 Cal. 654, 659-660 [254 [227 Cal. App. 2d 807] P. 567]; Estate of Caldwell (1933) 129 Cal. App. 613, 615 [19 P.2d 9]; Estate of Goulart (1963) 218 Cal. App. 2d 260, 263 [32 Cal. Rptr. 229].) In Newman v. Burwell, supra, at page 612 the court said: "It is true that in certain of the cited cases the father's obligation was to pay a designated sum monthly during the minority of the child, thus tending to irrefutably indicate that it was to survive the father, ..." (Last italics added.) [1b] Clearly under the settled rule declared in the above cases, decedent's estate was liable not only for child support payments accrued at the date of death but also for such payments after his death and during the balance of the minority of each of the children.

Defendant argues that an intent to have the child support payments terminate at death is evident from the fact that although the agreement made specific provision in respect to the wife's support payments after death, it is silent as to the continuance of the child support payments. We disagree. As already pointed out, the agreement expressly obligates the husband to make such payments for each of the children "until his or her majority." (See Newman v. Burwell, supra.) Nowhere in the agreement is there any limitation or restriction of this express obligation. If the parties had intended to terminate the child support payments upon the husband's death, it would have been very easy to so provide in the agreement. Each of the parties was represented by able counsel who endorsed their approval of the agreement at the end thereof.

Notwithstanding the express language of the agreement, defendant also argues that, because of certain other considerations of which there was evidence below, we must conclude that the only reasonable interpretation of the agreement is that the child support payments were not to continue after death. Assuming without deciding that the pertinent extrinsic evidence was properly before the trial court, we are not persuaded that it had a countervailing effect upon the agreement or that in the light of such evidence the trial court's interpretation of the agreement was unreasonable and erroneous.

[3] We briefly dispose of the points of defendant's argument. First, it is urged that at the time they executed the agreement the parties knew that upon George Newhall's death, his two children would receive substantial interests in the trust created under the will of Mr. Newhall's mother, [227 Cal. App. 2d 808] then deceased, fn. 3 and therefore must have intended that the husband's child support payments would terminate at his death. However it does not necessarily follow that because the children were to receive substantial assets from their grandmother's trust, such assets were to be a substitute for an obligation manifestly undertaken by a carefully prepared contract. Indeed these facts give rise to a contrary inference: that the husband being well apprised of them intended to charge his estate with the obligation of the agreement even though the children received benefits from the trust and that if the parties had intended to make the trust benefits a substitute for obligations of the agreement, they could have very easily so provided. [4] In addition we observe, as the trial court did, that decedent was required to make the payments in question "as his share" (see footnote 2, ante) of the children's support. The above quoted language is susceptible of the implication that the husband's payments were not the total amount necessary for their support; it does not of necessity suggest that the children might not receive other funds.

[5] Secondly, it is urged that an intent to have the so-called "grandmother's trust" relieve the husband's estate from the burden of supporting the children is evident from the fact that in the property settlement agreement, he agreed to assign his interest in said trust as security for his obligation to make payments

of support. fn. 4 It does not follow that because the obligation was to be secured during his lifetime, it of necessity was to be dissolved at his death. As the court said in Newman v. Burwell, supra, 216 Cal. 608, 613, "We conclude, therefore, both upon reason and authority, that the existence of security is neither a controlling circumstance nor an essential prerequisite to a determination of the continuing character of the decedent's obligation." Furthermore the husband agreed to assign his interest in the trust as security [227 Cal. App. 2d 809] for the wife's support payments as well as the children's. (See footnote 4, ante.) Defendant nowhere claims that as a result the husband's estate was to be relieved from the burden of the wife's payments as well.

[6] Finally defendant claims that the decedent's express exclusion of his children from any benefits under his will, shows his intent that his children (including another child born issue of decedent's marriage existing at the time of his death) should be provided for after his death by the grandmother's trust. The will in question was executed on March 26, 1958, approximately five and a half years after the execution of the agreement. Such a unilateral act is ineffective to release the husband from the obligations of his contract and clearly not a helpful, let alone controlling circumstance, in the construction of its terms. Taylor v. George, supra, 34 Cal. 2d 552, relied upon by defendant is distinguishable from the case before us since there a reasonable construction of the husband's will showed that he intended to and did fulfill his obligation of support by means of life insurance policies which were more than sufficient to meet the future payments required by the divorce decree. fn. 5

It is clear that the trial court declined to draw from the extrinsic evidence the inferences urged by defendant and concluded upon all the evidence before it that the parties to the agreement did not intend that under its provisions the child support payments would terminate upon decedent's death. Defendant's position that the inferences urged by her are the only reasonable inferences deducible from the evidence and that a conclusion against continuance of the payments after death is the only reasonable interpretation of the contract is untenable. [7] On the contrary we are of the opinion that the trial court's interpretation of the agreement is reasonable and consistent with the intent of the parties apparent in its language. Under such circumstances, we will not substitute another interpretation, even though it might seem (and none does here) equally tenable. (Tide Water Associated Oil Co. v. Curtin (1940) 41 Cal. App. 2d 884, 895 [107 P.2d 945]; Riccomini v. Riccomini (1947) 77 Cal. App. 2d 850, 853 [176 P.2d 750]; Alexander v. Alexander (1948) 88 Cal. App. 2d 724, 727 [199 P.2d 348]; La Jolla Casa de Manana v. Hopkins (1950) 98 Cal. App. 2d 339, 348 [219 P.2d [227 Cal. App. 2d 810] 871]; Shepard v. Shepard (1953) 116 Cal. App. 2d 594, 596 [254 P.2d 120].)

We therefore proceed to consider the second question presented by the appeal, that is whether the recovery granted by the court is supported by the law and the evidence. [8] As we have pointed out, plaintiff timely filed against decedent's estate creditor's claims not only for the child support payments but for payments of her own support as well. This she was required to do, even as to those support payments which were not yet due or were contingent. (Prob. Code, §§ 707, 732; Verdier v. Roach (1892) 96 Cal. 467, 478-479 [31 P. 554].) [9] Upon rejection of her claims, she was entitled to bring an action against defendant executrix in accordance with the provision of section 714 of the Probate Code. fn. 6 However she was not entitled to bring an action at law on that portion of the claim not yet due or contingent until within two months after such payments had become due. (Prob. Code, § 714; Southern Pac. Co. v. Catucci (1941) 47 Cal. App. 2d 596, 598 [118 P.2d 494].) [10] Plaintiff therefore commenced the instant "action in equity to establish claims," as her complaint is entitled, in order to recover those child support payments which had accrued at the date of decedent's death and in addition to secure a decree impounding and sequestering assets and funds belonging to the estate sufficient to meet those payments not yet due. It is settled that such a proceeding is one in equity and that the equity side of the

court may be invoked to protect the owners of contingent claims which will mature after the period within which distribution may take place. (Miller v. Miller (1915) 171 Cal. 269, 271-272 [152 P. 728]; Newman v. Burwell, supra, 216 Cal. 608, 614; Dabney v. Dabney (1935) 9 Cal. App. 2d 665, 672-673 [51 P.2d 108]; Jones v. Roberts (1958) 163 Cal. App. 2d 89, 94 [329 P.2d 50]; Prob. Code, §§ 953, 953.1.) fn. 7 [11] In such a proceeding, the plaintiff [227 Cal. App. 2d 811] must show the condition of the estate of the decedent, the ability of the executor or administrator to provide for the future payments, and the desirability of creating a fund to meet them. (Miller v. Miller, supra; Newman v. Burwell supra; Southern Pac. Co. v. Catucci, supra, 47 Cal. App. 2d 596, 599.)

In the instant case judgment was rendered in favor of plaintiff and against defendant executrix for all support payments both for the children and plaintiff herself which had accrued up to and including February 1962, the month preceding the entry of judgment. The court thus gave judgment against the estate for a total of $166,666.41. fn. 8

In addition the court rendered judgment in plaintiff's favor against the executrix as follows: For the sum of $416.66 per month for child support of George Almer Newhall III "commencing March, 1962 and continuing until said minor reaches his majority on February 28, 1965, or if said minor dies prior thereto until the date of his death" (paragraph I subdivision (c) of judgment); for the sum of [227 Cal. App. 2d 812] $416.66 per month for child support of Caroline Taylor Newhall "commencing March, 1962 and continuing until said minor reaches her majority on November 10, 1966, or if said minor dies prior thereto until the date of her death" (paragraph I, subdivision (d)); and for the sum of $1,833.33 per month for plaintiff's support "commencing March, 1962 and continuing up to and including October, 1962, or if the plaintiff dies or remarries prior to October, 1962, then until the date of such death or remarriage" (paragraph I, subdivision (g)). In separate paragraphs of the judgment (paragraphs IV and V) the court then made provision for the determination and payment upon final distribution of decedent's estate of those sums due under paragraph I, subdivisions (c), (d) and (g) fn. 9 and of those sums to become due thereafter under such subdivisions. In respect to the latter, the court directed that the "then present value" of the support payments be determined and that sufficient funds be distributed to a court appointed trustee pursuant to section 953.1 of the Probate Code (see footnote 7, ante) to meet all such support payments, the balance thereof to be returned to the estate upon the failure of any of the contingent claims. fn. 10 Finally, the judgment ordered "[t]hat all of the aforesaid sums be paid in due course of the probate administration of the Estate of George A. Newhall, deceased."

Defendant's first attack on the judgment asserts that it constitutes an "enforcement" of the support provisions of the agreement, that the trial court had the equitable power to [227 Cal. App. 2d 813] refuse such enforcement and that it should have done so. Although not expressly stated, the clear implication of the contention is that the court committed error in granting judgment for all support payments both accrued and accruing.

[12] Three arguments are advanced to support this position: The first is grounded on the premise that under section 139 of the Civil Code a decree of divorce "may be enforced by the court by execution or by such order or orders as in its discretion it may from time to time deem necessary." (Italics added.) Citing Messenger v. Messenger (1956) 46 Cal. 2d 619, 630 [297 P.2d 988]; Baum v. Baum (1959) 172 Cal. App. 2d 658, 664 [342 P.2d 940]; Tobin v. Tobin (1960) 181 Cal. App. 2d 789, 794 [5 Cal. Rptr. 712]; and Power v. California Bank (1962) 204 Cal. App. 2d 754 [22 Cal. Rptr. 629], defendant argues that the practical effect of section 139 and of the above cases is to make enforcement of the support provisions of an integrated property settlement agreement discretionary with the trial court. The instant action however is one brought on rejected creditor's claims and does not involve the question of the court's discretion in the

issuance of a writ of execution (cf. Messenger v. Messenger, supra), the appointment of a receiver (cf. Baum v. Baum, supra; Tobin v. Tobin, supra) or similar orders to which the above quoted language of section 139 relates. fn. 11

It is next urged that "the very terms of the property settlement agreement make the enforcement of the child support provisions discretionary with the court." This is so, says defendant, because the agreement states that the child support provisions are "[s]ubject to any future order of any court having jurisdiction of the subject matter." fn. 12 It is convenient to note at this point that the agreement now engaging [227 Cal. App. 2d 814] our attention was construed by this court in Newhall v. Newhall (1958) 157 Cal. App. 2d 786 [321 P.2d 818], an action between this plaintiff and decedent George Newhall. The same contention above-mentioned was made to and rejected by us on the appeal in that case. (See 157 Cal.App.2d at pp. 794-795.)

Finally defendant argues without citation of any authority that "Civil Code section 139 as amended, 1961, indicates a clear legislative intent that equitable considerations should be applied to the enforcement of support agreements." Defendant directs our attention to the second paragraph of section 139 as it then read. fn. 13 Here again defendant seeks to equate the instant action with the enforcement procedures referred to in the first paragraph of section 139. We have already explained that we are not here confronted with an enforcement problem arising under that section. [13] It is almost unnecessary to point out that the amendments enacted in 1959 and 1961 to the second paragraph of section 139 relied upon by defendant (see footnote 13, ante) and authorizing modification of an integrated property settlement agreement are not effective as to the agreement in the instant case. fn. 14 Thus the Legislature clearly indicated that integrated agreements entered into before 1959, such as the one here, are to remain unmodifiable unless altered by consent of the contracting parties. (See Taliaferro v. Taliaferro (1962) 200 Cal. App. 2d 190, 195 [19 Cal. Rptr. 220].)

Defendant's second attack on the judgment charges that the trial court "abused its discretion" in allowing recovery on plaintiff's rejected claims. It is to be noted that defendant applies this argument to payments both for the support of the children and for plaintiff's own support and to those payments which accrued before the death of decedent as well as to those accruing thereafter. Here again defendant's theory is that the instant action represents an "enforcement" [227 Cal. App. 2d 815] of a divorce decree under section 139 and that by rendering judgment in plaintiff's favor, the court below "abdicated" its equitable powers under that section. This convenient transposition of the concept of discretionary enforcement from procedures contemplated by section 139 to the instant action is, as we have said, totally unsupported by authority.

The real thrust and purpose of defendant's arguments is to secure the modification of an integrated agreement which this court has already held in the first Newhall case to be unmodifiable. To accomplish this, defendant equates the discretionary enforcement of decrees under section 139 with the complete nonrecognition of valid contractual obligations. [14] As was said in Bradley v. Superior Court (1957) 48 Cal. 2d 509, 519 [310 P.2d 634], "[n]either the court nor the Legislature may impair the obligation of a valid contract (Cal. Const., art. I, §§ 1, 16) and a court cannot lawfully disregard the provisions of such contracts or deny to either party his rights thereunder. [Citations.]"

There is accordingly no merit to defendant's argument that her decedent was "locked" into an inequitable agreement by our decision in the first Newhall case and that the trial court in the instant action abused its discretion in not releasing decedent's estate from such harsh imprisonment. We held in Newhall that the agreement now engaging our attention constituted an integrated inseverable property settlement

agreement, that decedent's obligation to make support payments to this plaintiff pursuant to the agreement became fixed and is not subject to modification, and that his additional obligation to make child support payments to this plaintiff also "could not be modified downward though it could be modified upward upon a showing of an appropriate change in circumstances ... unless incident to a change in the custody of the children." (Newhall v. Newhall, supra, 157 Cal. App. 2d 786, at pp. 790-794.) Accordingly we there affirmed the order of the lower court denying decedent George Newhall's motion to modify the final decree of divorce. Defendant's present argument represents an attempt to annul the decision in Newhall and, by urging nonenforcement of the agreement, to bring about in effect its modification. [15] The issue as to whether the agreement was integrated and its support provisions modifiable, was finally determined against decedent in the prior action and is binding upon him and defendant executrix, his successor in [227 Cal. App. 2d 816] interest, in the instant one. (Code Civ. Proc. § 1908, subd. 2; Zaragosa v. Craven (1949) 33 Cal. 2d 315, 317 [202 P.2d 73, 6 A.L.R.2d 461]; Basore v. Metropolitan Trust Co. (1951) 105 Cal. App. 2d 834, 837 [234 P.2d 296].) The obligations of such agreement were definite and fixed in amount and to the extent thereof were binding upon the decedent and his estate. The present case is therefore distinguishable from Power v. California Bank, supra, 204 Cal. App. 2d 754, relied on by defendant where the property settlement did not bind the husband to pay a definite amount for support but only such reasonable amount as might be determined by the court according to the station in life of the children in that case and the ability of the father's estate to pay.

Defendant complains that the net result of allowing plaintiff's claim is to deplete decedent's estate to the prejudice of his creditors and legatees. Therefore, she argues, the judgment is inequitable and constitutes an abuse of discretion. In this connection it is to be noted that the trial court found to be "not true" the allegations of defendant's ninth affirmative defense to the effect that if plaintiff's claims were granted, the assets of the estate would be so depleted by payment of them that it would be inequitable and contrary to the proper administration of justice to allow such claims as prayed for and to permit execution to issue on the basis thereof. We have concluded that the record supports this finding, that the court's action in allowing recovery on plaintiff's claim was proper under all of the circumstances of the case and that defendant's argument is without merit.

[16] The obligation on which plaintiff's creditor's claim was predicated was fixed, definite and binding on decedent and his estate. (See Taylor v. George, supra, 34 Cal. 2d 552 and other authorities cited supra; Bradley v. Superior Court, supra, 48 Cal. 2d 509.) As we have explained, the trial court first ordered judgment for all payments accrued to the date of the judgment, a total sum of $166,666.41. We cannot say that the court's action in this respect was improper. (Cf. Lisle v. Ragle (1936) 11 Cal. App. 2d 537 [54 P.2d 44].) Although some of the payments were not yet due at the time the instant action was commenced, March 5, 1959, all payments represented by the above sum of $166,666.41 had accrued at the time of the judgment. It would be technical to insist that, as to the payments becoming due in the interim, plaintiff should have commenced one or more independent actions. No inequity was worked on other creditors since the obligation involved was just as much a binding obligation of [227 Cal. App. 2d 817] decedent as his other contract obligations. Payment of the $166,666.41 was to be made only upon an appropriate order in probate. (Prob. Code, §§ 950, 951, 952.) [17] Even assuming arguendo that decedent's estate might be insufficient to pay all debts in the same class as the accrued payments, we must also assume that the probate court would order any payment thereof on a pro rata basis. (Prob. Code, § 952.)

[18] Nor can we find any impropriety in that portion of the court's judgment which ordered determination and payment on the final distribution of decedent's estate of support payments becoming due between the date of the judgment and the date of such final distribution. The amount of such monthly payments

ordered by the court was fixed by the property settlement agreement. Assuming arguendo that the estate might be insufficient to pay these and other debts in the same class, we must assume that in respect to these amounts also, the probate court would order any payment on a pro rata basis. (Prob. Code, § 952.) If defendant should desire to close the estate (there is no present indication that she does), she could avail herself of those provisions of the judgment directing payment at the time of final distribution to a court-appointed trustee pursuant to Probate Code section 953.1 of all payments becoming due thereafter. We observe that the matter of continuing monthly payments commencing with March 1962 has this realistic aspect: At the present time all payments for plaintiff's own support have long since accrued, the last payment being in October 1962. Most of the payments for the support of the children have now accrued. Decedent's son George Almer Newhall III is now over 20 years of age; unless he dies sooner, his support payments terminate on February 28, 1965. Decedent's daughter Caroline is approximately 19-1/2 years old; unless she dies sooner, her support payments terminate on November 10, 1966.

[19] Nor do we find any impropriety in the court's order directing distribution upon final distribution of decedent's estate of the then present value of any future support payments pursuant to Probate Code section 953.1. The trial court took judicial notice of the county clerk's file In the Matter of the Estate of George A. Newhall, alias, Deceased. This file which has been brought before us shows an inventory and appraisement filed therein on January 4, 1960, indicating decedent's assets at date of death to be of a value of $597,-636.48. In her opening brief, filed herein on December 14, [227 Cal. App. 2d 818] 1962, defendant asserts that the value of the assets in the estate "is" approximately $247,313. Plaintiff's reply brief did not take issue with this statement. However, it is not clear what defendant means by "value of the assets" in the above statement. As supportive of the statement she refers us to defendant's exhibits 4 (a bookkeeping transcript prepared by the estate's accountant and received in evidence over plaintiff's objection) and 5 (a copy of decedent's federal estate tax return). The latter document obviously includes not only those assets subject to probate but those assets which, while not subject to probate, constitute part of decedent's gross taxable estate. We are furnished with no reconcilement between the inventory and appraisement filed in the probate court and such return, and do not feel called upon to perform this task ourselves.

In a supplementary letter memorandum filed with us after oral argument, defendant asserts that the value of decedent's assets in the estate at the time of trial as computed from the inventory and appraisement is $267,291.28. Again plaintiff takes no issue with the statement. Defendant states that to determine the condition of the estate at the time of trial the inventory and appraisement must be read in conjunction with exhibit 4 above mentioned. The record and the exhibit show that none of the inventoried assets, except certain notes receivable, were listed on exhibit 4. The accountant for the estate testified that exhibit 4 "should reflect what items had gone out of the estate." However, we find nowhere in the record an adjustment of the inventory and appraisement which gives the assets in the estate at the time of trial. Defendant's letter to the court does not enlighten us on this matter. Defendant also advises us in said letter that the inventory and appraisement must be read in conjunction with a certain exhibit filed by defendant executrix with her first account on October 17, 1962. This occurred after the entry of judgment below and could not possibly have been judicially noticed by the trial court. Defendant asserts that "testimony" established that the assets listed in the exhibit attached to the first account of the executrix were the assets in the estate at the time of trial. However she furnishes us with no transcript references to support such statement. fn. 15 [227 Cal. App. 2d 819]

It is neither necessary nor possible for us to determine whether the trial court made any adjustment of the inventory value of the estate in the manner now urged upon us. In the light of the inventory and

appraisement in the sum of almost $600,000, we think that the court could have well concluded that there would be assets available to meet the payments of support accruing after judgment. Even if it subsequently appeared that the court was mistaken in this conclusion, no injustice would be done other creditors. Distribution to a court-appointed trustee was ordered to be made in due course of administration. If there were insufficient funds to meet this and other obligations of the same class, we must assume that any distribution would be pro rata. Nor do we see any merit in the claim that if the estate were depleted the legatees would be prejudiced. [20] The fact that the continuing obligations of a decedent survive as charges against his estate and may aggregate sufficiently to consume it entirely leaving nothing upon which either testamentary disposition or the laws of succession may operate, does not immunize the estate from the liability. (Cf. Newman v. Burwell, supra, 216 Cal. 608, 613-614; Estate of Smith, supra, 200 Cal. 654, 659-660.) These unfortunate consequences are not uncommon in probate administration generally.

[21] Finally we dispose of defendant's following claim that the court abused its discretion: In the agreement decedent undertook to assign to plaintiff his life interest in the so-called "grandmother's trust" as security for all support payments (see footnote 4, ante); plaintiff failed to take advantage of this security when the support payments were in arrears; therefore, defendant concludes, it was inequitable to allow plaintiff to enforce her claims for such arrearages against decedent's estate when the income from the trust which was intended to be used to pay the arrearages is now lost to the estate (the life interest having terminated) and became vested in decedent's children as remaindermen. The argument has no merit. At the trial plaintiff offered uncontradicted evidence that to the best of her knowledge decedent never executed any assignment. To permit decedent's estate to avoid wholly or in part liability on such grounds would in effect permit the decedent to take advantage of his own wrong (Civ. Code, § 3517). Furthermore as plaintiff correctly points out, the record is devoid of any evidence that the decedent did not receive the trust income during his lifetime and therefore the trial court could have well concluded that [227 Cal. App. 2d 820] no prejudice to decedent's creditors or to the beneficiaries of his will could have resulted from his apparent failure to assign the interest as security.

The judgment is affirmed as to those portions thereof appealed from.

Bray, P. J., and Molinari, J., concurred.

FN 1. The findings of fact and conclusions of law and the judgment were both filed on March 2, 1962. The judgment ordered payment to plaintiff of the above amounts of child support, specifying the amount thereof due up until decedent's death, accruing the amounts thereof due to and including February 1962 (the month preceding the judgment), and ordering monthly payments thereof ($416.66 for each child) commencing with March 1962. Similarly, the judgment ordered payment to plaintiff of her own support, specifying the amount due at decedent's death ($37,833.32), accruing the amount thereof due to and including February 1962 ($78,833.19 as corrected by amendment of final judgment entered nunc pro tunc), and ordering monthly payments thereof ($1,833.33) to and including October 1962, unless plaintiff died or remarried. We explain infra those portions of the judgment relating to (a) support payments to be made from March 1962 until the final distribution of the estate and (b) payments to be made after such final distribution.

It is to be noted that the court denied plaintiff recovery for her claim relating to attorneys' fees and costs. Defendant does not appeal from that portion of the judgment.

FN 2. The entire clause of the agreement is as follows: "Husband agrees to pay to wife the sum of Five Thousand ($5,000.00) Dollars annually, in twelve equal installments, as his share of the support and maintenance of each child until his or her majority."

FN 3. George Newhall was the life income beneficiary and his two children the remaindermen. At oral argument counsel for the parties agreed the value of each child's share is approximately $464,000 and the annual income of each share approximately $25,000.

FN 4. The agreement provides: "Husband agrees to assign to wife his interest under the trust created by the will of his mother for the purpose of securing the payment of all sums of money herein agreed to be paid to wife for the support and maintenance of herself and said minor children. Said assignment shall be in a form satisfactory to both husband and wife and also in a form satisfactory to the trustee under said trust."

FN 5. In Taylor the court said: "No reason appears why the testator could not, by his will, designate the fund out of which his obligations were to be met." (P. 558.)

FN 6. Section 714 of the Probate Code provides in part: "When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred. ..."

FN 7. Probate Code section 953 provides: "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If a creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered."

Probate Code section 953.1 in relevant part provides: "Notwithstanding any other provision of law, when a contingent claim is filed, which is payable in installments or upon the happening of a stated event, the court may in its discretion appoint a trustee to whom the funds shall be paid with the directions to said trustee to invest the money as authorized by court or in securities which are legal investment for savings banks, and the trustee shall make the payments as ordered by the court. The court in determining the amount of the contingent claim payable in installments or upon a stated event, will compute the present value thereof, giving consideration to a reasonable interest rate upon the funds to be invested; upon completing the payments as provided in the decree, order or judgment allowing said claim, any excess funds in possession of the trustee shall be paid in accordance with the decree of distribution."

FN 8. In summary this portion of the judgment is as follows: $24,166.67 for both children up to July 13, 1958, the date of decedent's death; $25,833.23 for both children from July 13, 1958 to and including February 1962; $37,833.32 for plaintiff's own support until July 13, 1958; and $78,833.19 for plaintiff's own support from July 13, 1958 to and including February 1962.

FN 9. Paragraph IV of the judgment provides: "That upon the final distribution of the Estate of George A. Newhall, deceased, the Court will determine the sums due to plaintiff, if any, under paragraph I, subdivisions (c), (d) and (g) of this Judgment, from and including March, 1962 to the date of final distribution of said estate and order the same to be paid to plaintiff by defendant as executrix of the Estate of George A. Newhall, deceased."

FN 10. Paragraph V of the judgment provides: "That upon the final distribution of the Estate of George A. Newhall, deceased, the Court will determine the then present value of the amounts to become due thereafter, if any, under paragraph I, subdivisions (c), (d), and (g) of this Judgment, based upon the formula for the then present value of an annuity payable in monthly installments invested at 4% interest per annum compounded quarterly. A separate computation to be made for each of said subdivisions. That said present value be distributed to a trustee pursuant to section 953.1 of the Probate Code of the State of California for payment to the plaintiff in conformance to the terms of said subdivisions. Upon the failure of any of said contingent claims then the trustee shall be directed upon such failure to return the balance of said sum held for that contingent claim to the aforesaid estate."

FN 11. Power v. California Bank, supra, did not involve the ordinary enforcement procedures under Civil Code section 139 but was an action in equity against the husband's estate. In Power, unlike the instant case, the property settlement agreement did not specify any definite sum to be paid by the husband's estate but provided that upon the husband's death, in the absence of any agreement, "any Court of competent jurisdiction shall fix the amount which ... his estate shall pay to" the wife for child support. The trial court's judgment in favor of the executor was sustained under all the circumstances there prevailing.

FN 12. This is the opening language of paragraph Sixth of the agreement which contains as subdivision A thereof the provisions as to custody and as subdivision B the provisions as to child support. (See footnote 2, ante.)

FN 13. The language of section 139 relied upon is as follows: "That portion of the decree or judgment making any such allowance or allowances, and the order or orders of the court to enforce the same, including any order for support of children or order for support of the other party based on a provision for such support in an integrated property settlement agreement, may be modified or revoked at any time at the discretion of the court except as to any amount that may have accrued prior to the order of modification or revocation. ..."

FN 14. The 1959 amendment specifically declared that it was "effective only with respect to property settlement agreements entered into after the effective date of such amendments."

FN 15. In her said letter defendant also submits information concerning the present condition of the estate, which she states is in response to our request. She is mistaken. We did not request it and decline to consider it. Our proper function is to review the evidence before the trial court.

Drake, In re Marriage of (1997) 53 Cal.App.4th 1139, 62 Cal.Rptr.2d 466

TITLE: In re the Marriage of MIRIAM J. and JAMES HUGHES DRAKE. JAMES R. ADAMOLI et al., Respondents, v. JAMES HUGHES DRAKE, Appellant.

CITE: 53 Cal.App.4th 1139, 62 Cal.Rptr.2d 466

DOCKET: No. B099548

DATE: March 27, 1997

COURT: California Court of Appeal, Second District, Division Four

TRIAL J.: I. R. Cohen, J., Los Angeles County

COUNSEL: Jeffrey W. Doeringer for Appellant.
Trope & Trope, Thomas Paine Dunlap and Bruce E. Cooperman for Respondents.

(p. 1148)

OPINION

BARON, J.—The record in this case depicts a millionaire father's resolute opposition to his former wife's petition for increased child support for their disabled adult son. Appellant James Hughes Drake challenges orders of the family court awarding child support, attorney fees, and sanctions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant James Hughes Drake (hereafter James) and Miriam J. Drake (hereafter Miriam) were married on November 6, 1945.*N1 Their son, David James Drake (hereafter David), was born on November 8, 1950.

On March 23, 1960, an interlocutory judgment of divorce concerning James and Miriam's marriage was filed in Los Angeles Superior Court (No. D566797). The final decree of divorce was entered on April 13, 1961.

In 1971, David was diagnosed as suffering from chronic schizophrenia, paranoid type. James retired in 1980 and remarried. Beginning in 1983, David lived with Miriam in Houston, Texas.

In 1983, Miriam created the David J. Drake 1983 Trust (hereafter the trust) to provide for David after her death. The residual beneficiaries of the trust were Miriam's nephews, James R. Adamoli and Mark A. Adamoli, who were also designated the trustees.

In 1988, David, through Miriam, his conservator, entered into a stipulated judgment with James in a civil case (Super. Ct. L.A. County, No. C644371). Under the terms of the judgment, James agreed to pay no less than $1,350 per month in child support and also to apply for Social Security retirement benefits, thereby enabling Miriam to seek federal disability benefits for David.

On April 28, 1995, Miriam filed an application for an order to show cause for modification of child support and for attorney fees and costs in their divorce case (No. D566797). Miriam's application sought guideline child support with "add-ons" pursuant to Family Code sections 4055, 4061, and 4062.

(p. 1149)

The application contained the following allegations: After the 1988 stipulated judgment, David continued to suffer from progressive schizophrenia that rendered him unable to care for himself, but Miriam had implemented a beneficial and cost-effective treatment program for David. In 1991, on the advice of David's psychiatrist, Miriam had moved out of the Houston townhouse owned by James Adamoli that Miriam and David had shared. Due to Miriam's worsening health, she could no longer tend David, and she had hired a live-in cook and housekeeper to replace her. In addition, James Adamoli, who had lived with Miriam and David, had moved out of the Houston townhouse and could no longer offer cost-free residence there to Miriam and David. These changes had increased the costs of David's care to $5,584 per month. In 1994, Miriam had paid 68 percent of these costs and James had paid 24 percent, although James's income was approximately twice as large as Miriam's income. Miriam requested that the court increase James's monthly child support payments to between $3,200 and $3,400, and require that James pay her attorney fees and costs.

On September 18, 1995, Miriam executed a will containing a "pour over" provision giving the substance of her estate to the trust. James and Mark Adamoli are the will's executors.

On October 23, 1995, Miriam filed an amended request for relief seeking, inter alia, a security order, and a separate hearing on the issue of attorney fees and costs.

On November 8, 1995, Miriam died. On November 21, 1995, James and Mark Adamoli applied for an order declaring them to be Miriam's successors in interest to her action for a modification of the child support order. James filed motions seeking to terminate the governing child support order and the proceedings to modify this order.

(p. 1149•)
At hearings in December 1995, the trial court substituted James and Mark Adamoli as Miriam's successors in interest, denied James's motion to terminate Miriam's action, ruled that the Family Code guidelines apply in cases involving adult children, and bifurcated the issue of attorney fees. The trial court made findings based on the guidelines,*N2 but reserved certain issues for later determination, including whether changes in James's child support obligations should be effective as of the date Miriam filed her application for a modification of the obligation. Finally, the trial court ordered James to pay • a total of $3,715 in child support per month on an interim basis pending an assessment of the trust estate, as well as a $30,000 interim award of attorney fees. James appealed from the written orders following these rulings.
(•p. 1150)

On April 5, 1996, the reserved issues concerning Miriam's petition came on for hearing. The trial court made findings pertinent to the guidelines,*N3 and ordered James to pay a total of $3,670 per month in child support plus an arrearage for the period following May 1, 1995. The trial court also granted a security order requiring James to pledge securities worth $300,000 for David's benefit, and placing a lien on a parcel of real property owned by James. Finally, the trial court awarded the Adamolis another $10,000 in attorney fees.

James filed a motion for reconsideration of the security order. The Adamolis opposed this motion and requested $4,620 in sanctions.

On May 1, 1996, the trial court denied James's motion for reconsideration and sanctioned James. James appealed from these rulings and the written orders following the April 5 and May 1 hearings. James's two appeals were subsequently consolidated.

DISCUSSION

James contends that (1) the Adamolis were improperly deemed Miriam's successors in interest, (2) he has no obligation to support David, (3) the Family Code guidelines are inapplicable to cases involving adult children, (4) the trial court erred in calculating James's child support obligation under the guidelines, (5) the security order was an abuse of discretion, (6) the trial court improperly awarded attorney fees against James, (7) the trial court improperly awarded sanctions against James, (8) the retroactivity order was an abuse of discretion, and (9) the trial court improperly filed written orders prepared by the Adamolis that differed from its oral rulings.*N4

(p. 1150•)
"'[T]he trial court's determination to grant or deny a modification of a support order will ordinarily be upheld on appeal unless an abuse of • discretion is demonstrated.' [Citation.] Reversal will be ordered only if prejudicial error is found after examining the record of the proceedings below. [Citation.] However, questions relating to the interpretation of statutes are matters of law for the reviewing court. [Citation.]" (County of Tulare v. Campbell (1996) 50 Cal.App.4th 847, 850.)
(•p. 1151)

To the extent James challenges the trial court's factual findings, our review follows established principles concerning the existence of substantial evidence in support of the findings. On review for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. (In re Marriage of Catalano (1988) 204 Cal.App.3d 543, 548.) We accept all evidence favorable to the prevailing party as true and discard contrary evidence. (Ibid.)

A. Successors In Interest

The threshold issues concern whether Miriam's action against James to modify the support order abated with her death, and if not, whether the Adamolis were appropriately deemed her successors in interest. Absent certain exceptions, the only parties to a family law action are the husband and wife. (Cal. Rules of Court, rule 1211.) Nonetheless, in suitable circumstances, the court may substitute in place of a deceased spouse an appropriate representative of the deceased's estate. (In re Marriage of Allen (1992) 8 Cal.App.4th 1225, 1227-1228; Kinsler v. Superior Court (1981) 121 Cal.App.3d 808, 812.)

When the family court expressly reserves jurisdiction over collateral issues such as property rights, spousal support, costs, and attorney fees after rendering judgment dissolving a marriage, the death of a spouse does not abate the action or remove the family court's jurisdiction to resolve these issues. (See In re Marriage of Allen, supra, 8 Cal.App.4th at pp. 1231-1235; see also In re Marriage of Hilke (1992) 4 Cal.4th 215, 220.) In such cases, "the proper procedure is to substitute the personal representative of the deceased spouse's estate (or, if none, the spouse's successor in interest) as a party to the still-pending action ([Code Civ. Proc.] §§377.31, 377.41), whereupon the reserved issues are properly decided under the Family Code." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1996) ¶3:20, p. 3-8.)

(p. 1151•)

No California court has addressed whether a successor in interest may step into the shoes of a custodial spouse when the custodial spouse • seeks postjudgment modification of a child support order but dies prior to resolution of the matter. We begin by noting that the 1960 interlocutory judgment of divorce includes a term requiring James to pay $100 per month in child support throughout David's minority, and that the family court retains jurisdiction to modify such child support orders after entry of a marital status judgment. (See Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶17:2, p. 17-1.) Furthermore, "[a] pending action or proceeding does not abate by the death of a party if the cause of action survives" (Code Civ. Proc., §377.21), and "[e]xcept as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death . . . ." (Code Civ. Proc., §377.20.)
(•p. 1152)

No statute provides that Miriam's cause of action against James is lost by virtue of her death. Moreover, a parent's statutory duty to support an incapacitated adult child runs to the child (see Johnson v. Superior Court (1984) 159 Cal.App.3d 573, 582, fn. 3; Fam. Code, §3910), although this duty may be enforced by an action initiated by the other parent (see Johnson v. Superior Court, supra, at p. 582; Fam. Code, §4000.) Because James's duty is to David, James's duty of support did not expire with Miriam's death. (Cf. Chun v. Chun (1987) 190 Cal.App.3d 589, 597 [parents' duty to support disabled adult child "is closely akin to a joint and several obligation"]); In re Marriage of Gregory (1991) 230 Cal.App.3d 112, 116-117 [noncustodial parent's court-ordered duty to support minor child does not terminate when the custodial parent dies].) We therefore conclude that Miriam's action did not abate with her death.

The remaining issue is whether the Adamolis were properly deemed Miriam's successors in interest within the meaning of Code of Civil Procedure section 377.31, which provides that "[o]n motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." ([Emphasis] added.) For the purposes of section 377.31, "'decedent's successor in interest' means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (Code Civ. Proc., §377.11.)

(p. 1152•)
Here, Miriam's application sought child support from James sufficient to sustain the caring environment she had devised for David. Although Miriam brought her action in her own name, David, though not a party, was the real party in interest. (See County of Shasta v. Caruthers (1995) 31 Cal.App.4th • 1838, 1847-1849; Ruddock v. Ohls (1979) 91 Cal.App.3d 271, 281 [interpreting prior law]; Everett v. Everett (1976) 57 Cal.App.3d 65, 69 [same].)
(•p. 1153)

The Adamolis were named the executors and beneficiaries of Miriam's will and, as trustees of the trust, were expressly charged with maintaining David's environment after her death, including taking necessary legal action to protect David's interests.*N5 The terms of the trust clearly indicate that Miriam intended to create an instrument by which she could continue her parental care for David after her death. In view of these facts, we cannot conclude that the trial court erred in determining that the Adamolis were Miriam's appropriate successors in interest.

James contends that Miriam's action abated with her death, citing In re Marriage of Williams (1980) 101 Cal.App.3d 507 and In re Marriage of Lisi (1995) 39 Cal.App.4th 1573. However, unlike the present case,

the pertinent spouses in Williams and Lisi died before judgment of marriage dissolution. (See In re Marriage of Williams, supra, at p. 509; In re Marriage of Lisi, supra, at p. 1575.)

James also contends that the Adamolis could not be deemed Miriam's successors in interest until probate was completed. However, Code of Civil Procedure section 377.32 requires only that prospective successors certify that "'[n]o proceeding is . . . pending in California for the administration of the decedent's estate," a claim that was true when the Adamolis sought to become Miriam's successors in interest. ([Emphasis] added.)

In sum, the trial court did not err in substituting the Adamolis in place of Miriam.

(p. 1154)

B. Duty To Support

James contends that he has no obligation to support David. In the case of a minor child, it is well established that "parents bear the primary obligation to support their child and . . . resort may be had to the child's own resources for his basic needs only if the parents are financially unable to fulfill that obligation themselves." (Armstrong v. Armstrong (1976) 15 Cal.3d 942, 947; see Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶6:411, p. 6-119.) However, no case has addressed whether under the current statutory scheme, income from a trust established by one parent to support a disabled adult child directly discharges the other parent's statutory support duty.

The key issue presented here is whether income from the trust directly discharges James's support obligation under Family Code section 3910, which provides: "The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means." Although no court has interpreted the term "without sufficient means," we observe that a parent's duty to support an adult child does not arise only when the child would otherwise be "'turned into the street'" (Chun v. Chun, supra, 190 Cal.App.3d at pp. 595-596), and that "[t]he duty to support children of any age is legislatively designed 'to protect the public from the burden of supporting a person who has a parent . . . able to support him or her.' [Citations.]" (In re Marriage of Lambe & Meehan (1995) 37 Cal.App.4th 388, 393, quoting Chun v. Chun, supra, 190 Cal.App.3d at p. 594.) We therefore conclude that the question of "sufficient means" should be resolved in terms of the likelihood a child will become a public charge. (Cf. Chun v. Chun, supra, 190 Cal.App.3d at pp. 595-596 [under pre-guideline law, that a mother fully supports a disabled adult child does not discharge the father's support duty in view of the statutory purpose "of preventing a disabled person in need from becoming a public charge. [Citation.]"].)

(p. 1154•)
Here, the record discloses substantial evidence that David is incapacitated and "without sufficient means." There is no dispute that David cannot earn a living. Furthermore, although the evidence is in conflict, there is ample evidence that the trust will run dry long before David dies if the full burden of supporting David falls upon it, raising the prospect that David will become a public charge. Accordingly, the trial court properly concluded that • David fell within the class of children protected by Family Code section 3910, and that James owed a duty to support David.*N6
(•p. 1157)

C. Guidelines

James contends that the Family Code guidelines (Fam. Code, §4050 et seq.) concerning child support are inapplicable in cases involving adult children. Here, the trial court determined James's total child support obligation pursuant to the guidelines by adding the results of two calculations. First, the trial court calculated James's basic support obligation by applying the guideline formula found in Family Code section 4055. Second, the trial court calculated James's share of responsibility for David's medical expenses and other add-on costs in accordance with Family Code sections 4061 and 4062. The focus of James's challenge is the guideline formula, although he contends that the guidelines as a whole cannot be applied to adult children.

The applicability of the guidelines to adult children is an issue of first impression. "Absent persuasive precedent on the issue, resolution of the question presented requires this court to determine the Legislature's intent in enacting [the guidelines]. Our analysis follows 'accepted rules for statutory construction, including the overriding objective of adherence to the intention of the Legislature [citation] and recognition of the principle that legislative intent is best determined by the language of the statute. [Citation.]" (County of Tulare v. Campbell, supra, 50 Cal.App.4th at p. 853.)

We observe that Family Code section 4050 expressly provides: "In adopting the statewide uniform guideline . . . , it is the intention of the Legislature to ensure that this state remains in compliance with federal regulations for child support guidelines." The governing federal statutes accord each state the option of adopting guidelines and procedures that apply to adult children. (See 42 U.S.C. §666(e).) Accordingly, the issue is whether the guidelines encompass adult children.

(p. 1155•)
In our view, the express language of the pertinent Family Code sections resolves this question. With one exception, the Legislature uses the term • "child," rather than "minor child," throughout these provisions.*N7 Family Code section 58 expressly defines the term "'[c]hild for whom support may be ordered'" to cover a child falling under Family Code section 3910, that is, "a child of whatever age who is incapacitated from earning a living and without sufficient means." Subdivision (a) of Family Code section 4055, which describes the guideline formula, terms it "[t]he statewide uniform guideline for determining child support orders . . . ." Section 4053 enumerates the principles the courts shall follow in implementing the guidelines, including the principle that "[t]he guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula." (Fam. Code, §4053, subd. (k).) Section 4057 provides that "[t]he amount of child support established by the formula provided in . . . Section 4055 is presumed to be the correct amount of child support to be ordered," and that the presumption is rebutted only if the trial court finds by admissible evidence the presence of enumerated factors that render application of the formula "unjust or inappropriate in the particular case . . . ." (Fam. Code, §4057, subd. (b).) Finally, section 4074 provides broadly that "[t]his article applies to an award for the support of children, including those awards designated as 'family support,' that contain provisions for the support of children as well as for the support of the spouse."
(•p. 1156)

(p. 1156•)
In enacting most of these provisions, the Legislature also enacted two related provisions that separately establish the duties of a parent to support, respectively, a "minor child" and "a child of whatever age who is incapacitated from earning a living and without sufficient means." (See Fam. Code, §§3900, 3910.)*N8 We therefore infer that "the Legislature was fully aware of the need to differentiate between 'minor'

children or 'adult' children . . . where it intended to limit applicability of a particular provision to minor children on the one hand or adult children on the other," and we conclude • that the Legislature's use of the unqualified word "child" here "must be deemed to have been a conscious, deliberate choice intended to refer to any child owed a duty of support by a parent." (Johnson v. Superior Court, supra, 159 Cal.App.3d at p. 584.)
(•p. 1157)

James contends that Family Code section 3910 displaces the guidelines with respect to adult child support awards, citing the principle that specific statutes prevail over general statutes. We disagree. If James's reasoning is correct, section 3900, which establishes parental duties of support towards minors, would also displace the guidelines with respect to minor child support awards, rendering the guidelines redundant. We decline to interpret the statutory scheme in a manner that leads to absurd consequences. (County of Tulare v. Campbell, supra, 50 Cal.App.4th at p. 853.)

James also contends for several reasons that applying the guideline formula to adult children such as David leads to incongruous results.*N9 The common theme of these contentions is that the guideline formula embodies assumptions true of minor children, but not of disabled adult children. Before addressing the details of these contentions, we address their general theme. We recognize that the situations of disabled adult children and their parents may often differ from those typical of minor children and their parents. Furthermore, as we explain below, the guideline formula embodies various assumptions about children and their parents, as well as the Legislature's intent that the benchmark for the amount of child support should be the parents' standard of living.

(p. 1157•)
Nonetheless, we do not agree that the guidelines are fatally inflexible with respect to the special circumstances of disabled adult children and their parents. Generally speaking, when any assumption operating through the guideline formula produces an "unjust or inappropriate" result "due to special circumstances in the particular case," Family Code section 4057 "effectively vests trial courts with considerable discretion to approach unique cases on an ad hoc basis. [Citation.]" (County of Lake v. Antoni (1993) 18 Cal.App.4th 1102, 1106; see also Estevez v. Superior Court (1994) 22 Cal.App.4th 423, 430-431.) • We therefore conclude that the guidelines permit the trial court to adapt or depart from the formula when warranted by the special circumstances of particular disabled adult children or their parents.
(•p. 1158)

James first contention is that the guideline formula does not properly take into account the fact that adult children often have sources of support independent of their parents. He contends that the trust income should directly discharge or offset any support duty he has, citing Levy v. Levy (1966) 245 Cal.App.2d 341 and Lakenan v. Lakenan (1967) 256 Cal.App.2d 615.

The general concern raised here is not persuasive. We are aware that under the guideline formula the child's own estate, as such, is not a factor in computing the amount of child support owed by a parent. (Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶6:411, p. 6-119.) This feature of the formula reflects "the legislative intent that children [should] share in the standard of living of both of their parents" (Fam. Code, §4054, subd. (g); see Estevez v. Superior Court, supra, 22 Cal.App.4th at p. 428), and the principle that "[a] parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life" (Fam. Code, §4053, subd. (a)). Nonetheless, in suitable circumstances, the trial court may adjust parental support obligations in light of a child's independent income. (See Hogoboom & King, supra, ¶¶6:411 to 6:415, pp. 6-119 to 6-120.) Accordingly, when a

disabled adult child has independent income or assets, the trial court has the discretion to reduce the formula-calculated amount of child support.

In the context of this case, we do not discern any error in the manner in which the trial court used the trust income in the guideline formula. The trial court treated the trust as if it were one of David's parents in the formula calculation, rather than as an independent source of income available to David. In our view, this treatment was warranted by David's special circumstances. Here, Miriam's evident intention was that the trust should continue in her place after her death as a form of surrogate mother. The terms of the trust specifically directed the Adamolis to use the trust income to preserve and maintain the environment of care Miriam had designed and implemented for David before her death.*N10 The record discloses ample evidence that James Adamoli had been personally supervising David's care in a manner similar to Miriam.

(p. 1158•)
Nor was the result unfair or inappropriate. On the basis of the resulting calculations, the trial court ordered James to pay $3,715 in child support per • month on an interim basis, and later, $3,670 per month plus an arrearage. These monthly sums constitute between 66 and 70 percent of David's present monthly expenses, which the record indicates are $5,584 per month. The record also indicates that James's share of these expenses is roughly equivalent to James's share of the total net income jointly available to James and the trust (before support).
(•p. 1159)

Levy and Lakenan, which predate the current statutory scheme, do not disturb our conclusion on this matter. In Levy, the court held that the trial court could assess income to a disabled adult child from all sources, including the child's own estate, in determining the father's child support obligation. (Levy v. Levy, supra, 245 Cal.App.2d at pp. 355, 358.) Here, the trial court properly applied the holding in Levy, to the extent it remains viable under the current statutory scheme. In applying the guideline formula, the trial court assessed the income available to David from all sources.

In Lakenan, the court held that the trial court did not abuse its discretion in applying income to a minor child flowing from trusts established by a grandparent and an aunt as an offset against a parent's duty of support. (Lakenan v. Lakenan, supra, 256 Cal.App.2d at pp. 621-623.) As we have explained, the trial court did not err in the circumstances of this case in assigning the trust income to the Adamolis' side of the guideline formula, rather than using it as a direct offset against James's support obligation. We find no abuse of discretion here.

James's second contention is that the guideline formula does not respect the terms of Family Code section 3910 because the formula does not take the totality of a parent's financial situation into account. Whereas Family Code section 3900 imposes a duty on parents of a minor child "to support their child in the manner suitable to the child's circumstances," section 3910 imposes a duty on parents of an adult child "to maintain[] [the child] to the extent of their ability . . . ." James argues that determination of a parent's ability to pay adult child support requires an assessment of the totality of his or her financial circumstances, citing preguideline case authority concerning minor and adult children.

(p. 1159•)
Again we cannot agree. The present statutory scheme limits the broad discretion accorded the trial court under prior law and channels its remaining discretion within the new statutory parameters. (See In re Marriage of Carter (1994) 26 Cal.App.4th 1024, 1028.) With respect to the question concerning ability to

pay, section 4053 states that in implementing the guidelines, the courts should adhere to the principle that "[e]ach parent should pay for the support of the children according to his or her ability," • without distinguishing between minor children and disabled adult children. (Fam. Code, §4053, subd. (d), [emphasis added].) In view of section 4053 and the sweeping statutory language concerning the presumptive applicability of the guideline formula, we conclude that the Legislature has incorporated the appropriate assessment of ability to pay within the guidelines. As we have explained, the guidelines include an escape clause when this assessment produces an unfair or inappropriate result. No such result was presented here.
(•p. 1160)

James's third contention is that the guideline formula is inapplicable to disabled adult children because it incorporates "time-sharing" as a factor, although many disabled adult children, including David, are not in the custody of either parent. Again, we do not find any fatal inflexibility in the guideline formula concerning adjustments appropriate for cases involving children not under the supervision of either parent. (See Welf. & Inst. Code, §11350, subd. (c).)

Moreover, in the circumstances of this case, the trial court did not err in according Miriam and her successors in interest credit for full physical responsibility of David under the guideline formula. "The time-sharing adjustment is based on the parents' respective periods of primary physical 'responsibility' for the children rather than physical 'custody.' Use of this terminology is purposeful: i.e., to clarify that [section] 4050 et seq. is not intended to alter current child custody law in any manner." (See Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶6:168, p. 6-52.) The record here discloses substantial evidence that Miriam and her successors in interest have had full responsibility for David's physical situation and care, that James has no physical responsibility for David, and that James visited David only three times between May 1988 and June 1995.

James's fourth contention is that application of the guideline formula to disabled adult children precludes the trial court from issuing child support orders binding on both parents, in contravention of Chun v. Chun, supra, 190 Cal.App.3d 589. In Chun, a preguideline case, the court held that the trial court should have ordered both parents to pay support for their disabled adult child, reasoning that the statutory support duty was imposed on both parents and the defendant father had cross-complained for a mutual order. (See id. at pp. 592, 597-598.) James attributes the trial court's failure to issue a mutual support order to its application of the guideline formula.

(p. 1160•)
We are not persuaded that Chun poses an issue limited to disabled adult children. Under the present statutory scheme, the issue concerning mutual support orders arises for the duties of support imposed under Family Code • sections 3900 and 3910. These sections state that parents have an "equal responsibility" concerning, respectively, their minor and disabled adult children. Furthermore, Family Code section 3901 expressly states that the duty imposed under section 3900 continues with respect to certain children who have attained the age of 18 (see Fam. Code, §3901, subd. (a)), and Family Code section 4001, which applies to actions arising under sections 3901 and 3910, provides that ". . . the court may order either or both parents to pay an amount necessary for the support of the child." ([Emphasis] added.) However, the guideline formula calculates a single sum owed by one parent to the other. (See Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶6:177, p. 6-55.) Thus, sections 3900 and 3901, like section 3910, impose support duties on both parents, but the formula does not place a monetary figure on each parents' support duty.
(•p. 1161)

However, it is unnecessary for us to address this issue or the extent to which the current statutory scheme may abrogate the holding in Chun. Unlike the father in Chun, James did not file a petition for an order against Miriam or the Adamolis. Accordingly, the trial court did not err in failing to make such an order.*N11

James's final contentions strike a different theme, namely, that applying the guidelines was inequitable due to circumstances other than David's status as a disabled adult child. He contends that (1) the guideline-calculated support amount is too high due to James's "extraordinarily high income" (Fam. Code, §4057, subd. (b)(3)), (2) the guideline calculations did not take into account that David's living expenses are lower in Texas, and (3) the guideline calculations did not take into account James's significant living expenses attributable to his new spouse.

(p. 1161•)
These contentions do not disturb our conclusion that the trial court properly applied the guidelines. With respect to item (1), as we have • explained, the guideline formula did not produce an unjust or inappropriate result. Finally, on the record before us, we conclude that items (2) and (3) are meritless. (See Fam. Code, §4804 [Providing in pertinent part that "[d]uties of support arising under the law of this state . . . bind the obligor, present in this state, regardless of the presence or residence of the obligee."]; Haggard v. Haggard (1995) 38 Cal.App.4th 1566, 1572 [absent special circumstances, financial obligations due to new marriage do not rebut presumptive applicability of guideline formula].)
(•p. 1162)

In sum, the trial court did not err in determining that the guidelines and guideline formula were applicable in the present case.

D. Guideline Factors

James contends that in applying the guidelines, the trial court erred in (1) failing to give him a direct credit for the Social Security disability benefits paid to David, and (2) using his present wife's income figures in the guideline calculation.

With respect to item (1), the trial court charged the monthly disability benefits of $474 to the Adamolis' side of the guideline formula, indirectly reducing James's support obligation, rather than directly crediting these benefits as part of James's support payments. James does not dispute that the trial court's use of the disability benefits reduced his formula-calculated support duty from what it would have been had the benefits been disregarded altogether, but he contends that he was entitled to a greater reduction obtainable through a direct credit for these benefits.

The issue presented concerns Family Code section 4504, which provides that federal disability benefits arising from a noncustodial parent's retirement are credited against the noncustodial parent's child support obligations "unless the payments made by the federal government were taken into consideration by the court in determining the amount of support to be paid by the noncustodial parent." ([Emphasis] added.) No case authority has addressed when the trial court may take federal benefits into account when determining child support, in lieu of extending a direct credit for these benefits. However, because "[s]tatutes are to be interpreted to give significance to every word contained therein" (County of Tulare v. Campbell, supra, 50 Cal.App.4th at p. 853), we conclude that the matter is consigned to the trial court's sound discretion.
(p. 1162•)

Here, the trial court charged the benefits to the Adamolis' side of the guideline formula in the course of making other adjustments to that side of • the formula favorable to James, including increasing the trust's income figures by a sum equal to Miriam's living expenses (as if she were still alive). Furthermore, we observe that under the terms of the 1988 stipulated judgment, Miriam assumed the responsibility of applying for federal disability benefits for David's benefit. On this record, we cannot conclude that the trial court abused its discretion.
(•p. 1163)

With respect to item (2), the record discloses that the trial court took the income of James's present wife into account only for the purpose of facilitating an income tax computation. This use of the income figure was proper. (See In re Marriage of Carlsen (1996) 50 Cal.App.4th 212, 218-219; County of Tulare v. Campbell, supra, 50 Cal.App.4th at pp. 854-856.)

E. Security Order

James contends that the trial court abused its discretion in issuing the security order. Family Code section 4012 provides that "[u]pon a showing of good cause, the court may order a parent required to make a payment of child support to give reasonable security for the payment."

Here, the trial court found that (1) the court-ordered support was a charge upon James's estate, (2) David had an actuarial life expectancy of 37 years, (3) James had transferred some of his separate property to his present wife, and (4) James's transfers "reduces or minimizes his separate estate available to support [David] should [James] predecease his adult disabled child." Accordingly, the trial court granted a security order requiring James to pledge securities worth $300,000 for David's benefit, and placing a lien on a parcel of real property owned by James. The order states that James "shall be free to trade, invest, and reinvest within said segregated separate account, and shall be entitled to receive and utilize all interest and dividends produced thereby for his own purposes."

The key legal issue presented here is whether the court-ordered child support is a charge upon James's estate. Family Code section 4007 provides: "If a court orders a person to make specified payments for support of a child during the child's minority, or until the child is married or otherwise emancipated, or until the death of, or the occurrence of a specified event as to, a child for whom support is authorized under Section 3901 or 3910, the obligation of the person ordered to pay support terminates on the happening of the contingency." (Fam. Code, §4007, subd. (a).)

(p. 1163•)
No court has interpreted this statute in the context of court-ordered support for disabled adult children. However, in cases involving minor • children, it is settled that, absent the occurrence of a support-ending contingency cited in the pertinent child support order, such "support survives the death of the noncustodial parent and becomes a charge on his or her estate. [Citations.]" (See In re Marriage of Gregory, supra, 230 Cal.App.3d at p. 115.) Accordingly, we conclude that the support order will be a liability against James's estate.
(•p. 1164)

James does not dispute that substantial evidence supports the trial court's findings concerning James's transfers of real property to his present wife and David's life expectancy. There is also no dispute that James was 71 years old when the trial court issued the security order. Furthermore, we observe that the trial court crafted its order so as to limit its effect on James's income stream. On this record, we do not

discern an abuse of discretion with respect to the security order. (See Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal.App.2d 623, 627-632; Baylis v. Baylis (1941) 48 Cal.App.2d 674, 679-680.)

James challenges the trial court's ruling on many grounds. First, James contends the security order was unwarranted because James had a history of paying his court-ordered child support payments on time. Here, the trial court found "good cause" for the security order in James's property transfers that reduced the prospect his estate could pay his support obligations after his death. The issue thus presented concerns the interpretation of the term "good cause" within the meaning of Family Code section 4012.

There is little case law on section 4012. However, in Franklin Life Ins. Co. v. Kitchens, supra, 249 Cal.App.2d 623, the court concluded that an ancestor of this provision authorized the trial court to order a father to secure child support payments by carrying a life insurance policy, reasoning that the father's obligation was a charge against his estate and that he had little property to satisfy this obligation once he died. (See id. at pp. 627-632.) Furthermore, we note that in Baylis v. Baylis, supra, 48 Cal.App.2d 674, the court affirmed the trial court's imposition of a lien on a father's real property to secure child support payment, although there is no indication the father was derelict in making these payments. (See id. at pp. 678, 679-680.) We therefore conclude that concerns about the ability of a parent's estate to pay child support following the parent's death may constitute "good cause" to issue a security order.

(p. 1164•)
To the extent James's contention challenges the factual basis for the security order, it fails. "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a • different opinion . . . ." (Winick Corp. v. County Sanitation District No. 2 (1986) 185 Cal.App.3d 1170, 1176.)
(•p. 1165)

Second, James contends that the security order was an impermissible attempt to enforce James's promise to provide for David in his will prior to James's death, citing In re Marriage of Edwards (1995) 38 Cal.App.4th 456. The 1960 interlocutory judgment of divorce contains a term requiring James to "execute a Last Will and Testament which will provide that [David] . . . shall receive from [James] by way of devise or legacy upon [James's] death property from [James], or over which [James] has a power of appointment, having a value at least equal to that received by any other devisee or legatee described in said Last Will and Testament."

The trial court's security order states that it was aware of Edwards and that the order does not rest on James's promise concerning his will. Upon review, we conclude that the security order does not contravene our decision in Edwards. In Edwards, we held that a contract to make a will cannot be specifically enforced before the promisor's death. (See 38 Cal.App.4th at pp. 460-462.) By contrast, the security order does not direct James to include any specific terms in his will, but ensures instead that James's estate will have some assets to meet his court-ordered child support obligation following his death. As we have explained, this obligation survives James's death. When James dies, his estate will be liable for accrued amounts of child support then owing, and it must continue to pay child support absent a modification of the court order due to changed circumstances. (See In re Marriage of Bertrand (1995) 33 Cal.App.4th 437, 439-440.)

Third, James contends that security orders under section 4012 are governed and limited by Family Code section 4550 et seq., which permit the trial court to order that advance deposits of child support be made up to a maximum of $6,000. (See Fam. Code, §§4560, 4604, 4614.) We do not agree. Taylor v. Superior

Court (1990) 218 Cal.App.3d 1185, 1188-1190, concluded that the procedures for securing child support by lien and by deposit are distinct.

Fourth, James contends that the security order improperly imposes a conservatorship on his assets without a hearing, citing In re Marriage of Johnson (1982) 134 Cal.App.3d 148. Again, we cannot agree. In Johnson, the court concluded the trial court erred in imposing a lien of indefinite duration on the entirety of the father's share of the community property due to the father's drinking problem. (See id. at pp. 161-162.) The Johnson court found persuasive the father's contention that the lien effectively deprived him of any ability to acquire new property or start a new business. (See ibid.)

(p. 1166)

By contrast, the terms of the security order here have a limited effect on James's ability to invest and derive income from the pertinent assets. Moreover, when the court ruled, it had before it evidence that James's assets were valued at approximately $1.5 million, including approximately $790,000 in real and personal property. Thus, there was evidence the award concerned no more than 73 percent of James's assets, and probably less.*N12

Fifth, James contends that the security order is an impermissible restraint on alienation under Civil Code section 711, which provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void." However, section 711 has no application to "disabling restraints established by express statute . . . ." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §405, p. 593.)

Finally, James contends in conclusory terms that the security order violates his rights to due process and to equal protection of the laws. On this record, we do not discern unfairness, deprivation of procedural rights, or unequal application of the law that rises to a constitutional injury.

In sum, the trial court did not err in issuing the security order.

F. Attorney Fees

James contends that the trial court erred in awarding Miriam and her successors in interest their attorney fees. Family Code section 2030 provides: "For services rendered or costs incurred after entry of judgment, the court may award the attorney's fees and costs reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify an award so made, including after an appeal has been concluded." (Fam. Code, §2030, subd. (c).)

(p. 1166•)
Awards of attorney fees are reviewed for abuse of discretion. (See In re Marriage of Ananeh-Firempong (1990) 219 Cal.App.3d 272, 279-280.) Guidance concerning the use of the trial court's discretion is found in Family Code section 2032, which provides in pertinent part: "(a) The court may make an award of attorney's fees and costs under Section 2030 . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties. [¶] (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to • enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately . . . . The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested.

Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances."
(•p. 1167)

In view of Family Code section 2032, "[a] disparity in the parties' respective circumstances may itself demonstrate relative 'need' even though the applicant spouse admittedly has the funds to pay his or her fees." (Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶14:159, p. 14-35, original [emphasis].) In assessing one party's relative "need" and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties. (See id. at ¶14:160.) Furthermore, in determining whether to award attorney fees to one party, the court may also consider the other party's trial tactics. (See In re Marriage of Dick (1993) 15 Cal.App.4th 144, 166-168 [$750,000 award affirmed under predecessor of section 2032 because the record "reveals a case of stunning complexity, occasioned, for the most part, by husband's intransigence"].)

During the December 1995 hearings, the Adamolis requested an interim attorney fee award of at least $35,000.*N13 The trial court awarded the Adamolis a $30,000 interim award of attorney fees "without prejudice [and] subject to redecision and correction" upon the Adamolis' representation that Miriam's assets were then inaccessible. On April 5, 1996, the issue of attorney fees came on for hearing and final resolution. The Adamolis requested an additional award of $45,000 pursuant to Family Code sections 2030 and 271.*N14 The trial court determined that the prior award was proper, and that the Adamolis were entitled to another $10,000 in attorney fees under section 2030 in view of "the needs and abilities of both of the parties and the disparity between the estates, both [sic] income and the larger picture of total assets."

(p. 1168)

The trial court's conclusion that James's assets and income is supported by substantial evidence. The record discloses that James's assets and monthly gross income are, respectively, $1.5 million and $15,353, whereas after payment of estate taxes, the trust's assets and monthly gross income are, respectively, $925,000 and $5,985.

In sum, the trial court did not abuse its discretion in awarding attorney fees.

G. Sanctions

James contends that the trial court erred in awarding sanctions after denying his motion for reconsideration. Under Code of Civil Procedure section 1008, a party seeking reconsideration of a prior ruling upon an alleged different set of facts must "provide both newly discovered evidence and an explanation for the failure to have produced such evidence earlier. [Citation.]" (Robbins v. Los Angeles Unified School Dist. (1992) 3 Cal.App.4th 313, 317.) Subdivision (d) of section 1008 provides that "[a] violation of this section may be punished . . . with sanctions as allowed by Section 128.5." An action or tactic is subject to sanctions under Code of Civil Procedure section 128.5 only if it is in bad faith and is frivolous or solely intended to cause unnecessary delay. (Dolan v. Buena Engineers, Inc. (1994) 24 Cal.App.4th 1500, 1505-1507.) Sanction awards are reviewed for abuse of discretion. (See Winick Corp. v. County Sanitation District No. 2, supra, 185 Cal.App.3d at p. 1176.)

Here, the trial court awarded sanctions, finding that ". . . [James's] action of filing a Motion for Reconsideration . . . without showing new or different facts, and without providing any explanation for not having earlier produced the facts proffered . . . constitutes a bad faith tactic which was totally and completely without merit and frivolous within the meaning of [Code of Civil Procedure section 128.5]." The record discloses that James filed his motion one week after the hearing on the security order, alleging as a different set of facts that the security order concerned approximately one-half of his assets. He submitted a declaration from a real estate broker that the affected real property was worth $440,000.

(p. 1168•)
On the record before us, we do not discern an abuse of discretion. No credible explanation was offered concerning James's failure to obtain this evidence earlier. Moreover, because the trial court had before it evidence that the security order touched no more than 73 percent of James's assets when it issued the security order (see section E., ante), the purported newly • discovered facts were not material to a reconsideration of the ruling. When an action utterly lacks merit, the trial court is entitled to infer that the action was taken in bad faith. (Dolan v. Buena Engineers, Inc., supra, 24 Cal.App.4th at p. 1505.)
(•p. 1169)

James contends that the sanctions award was improper because section 128.5 is applicable only to "actions or tactics [that] arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994" (Code Civ. Proc, §128.5, subd. (b)(1)), and Miriam's petition was filed in April 1995. However, because the underlying divorce action here was filed in 1960 or earlier, the sanctions award was not barred by the section 128.5 time limit.

In sum, the trial court did not abuse its discretion in awarding attorney fees.

H. Retroactivity Order

James contends in conclusory terms that the trial court erred in ordering him to pay an arrearage for the period following the filing of Miriam's petition. Family Code section 4009 provides in pertinent part that "[a]n order for child support may be made retroactive to the date of filing the notice of motion or order to show cause . . . ." We observe that Miriam's petition alleges that as of the date of the petition, she was bearing a disproportionately large share of David's expenses, and the record contains substantial evidence to support this allegation. David's care cost $5,584 per month, of which Miriam had paid approximately 68 percent, even though James's income was approximately twice as large as Miriam's income. Accordingly, we conclude that the retroactivity order was not an abuse of discretion.

I. Written Orders

Finally, James contends that three of the trial court's written orders on the aforementioned matters are infirm because they differ from the trial court's oral rulings. Following the trial court's rulings at the hearings in December 1995, April 1996, and May 1996, the Adamolis prepared written orders to which James objected. The trial court held hearings on James's objections to the first two proposed orders and filed them, with some modifications. James did not request a hearing on his objections to the third proposed order, which the trial court filed as prepared.

(p. 1169•)
The crux of James's contention is that the trial court improperly allowed the Adamolis to modify the trial court's original rulings. Our analysis of this • contention follows established principles. A trial court's oral

ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes. (Pacific Home v. County of Los Angeles (1953) 41 Cal.2d 855, 857; Ketscher v. Superior Court (1970) 9 Cal.App.3d 601, 604; see 7 Witkin, Cal. Procedure, supra, Judgment, §51, pp. 488-489; id. §56, pp. 492-493.) Accordingly, the trial court may properly file a written order differing from its oral rulings when the rulings have not been entered in the minutes of the court. (See Miller v. Stein (1956) 145 Cal.App.2d 381, 385.) Furthermore, when the trial court's minute order expressly indicates that a written order will be filed, only the written order is the effective order. (See 7 Witkin, supra, §56, pp. 492-493; Cal. Rules of Court, rule 2(b).)
(•p. 1170)

Nothing in the record before us shows that the trial court's oral rulings became effective before the relevant written orders were filed. The record does not disclose that the trial court's oral rulings following the December hearings were entered by minute order. Moreover, the minute orders for the April and May hearings direct the Adamolis to prepare written orders.

Because only the written orders were effective, the trial court did not err in filing written orders that differed from its earlier oral rulings.

DISPOSITION

The trial court's orders are affirmed. Respondents are to recover their costs.

Vogel (C.S.), P.J., and Hastings, J., concurred.

On April 18, 1997, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied June 11, 1997.

FOOTNOTES

n1 Because the key parties share a surname, we refer to them by their proper names.

n2 The trial court found that James's gross income was approximately $15,000 per month, applied the trust income to the Adamolis' side of the guideline calculation, and determined that James's basic support obligation was $1,924. In addition, the trial court also found that David's add-on expenses for medical care and treatment totalled $3,582 per month, which it allocated equally between James and the trust.

n3 At this hearing, the trial court again applied the trust's income to the Adamolis' side of the guideline calculation. The trial court found that James's basic child support obligation was $1,879 per month, and that he was responsible for add-on expenses of $1,791 per month.

n4 We observe that James also contends the trial court erred in resolving the matters before it on the basis of declarations rather than on the basis of oral testimony. Section 2009 of the Code of Civil Procedure accords trial courts discretion to determine an order to show cause upon declarations alone, and to exclude or admit oral testimony. (See Reifler v. Superior Court (1974) 39 Cal.App.3d 479, 483-485.) Because James did not object to this procedure before the trial court, he has waived this contention of error. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§305-310, pp. 316-321.)

n5 Miriam modified the terms of the trust on November 3, 1995, just prior to her death. The amended trust instrument provides that following Miriam's death, "the Trustee . . . shall pay to or apply for the benefit of [Miriam's] son, [David], as much of the income and principal of the Trust as the Trustee, in the Trustee's discretion, considers necessary for his proper support, care, maintenance, health, and education. The Trustee may also pay or apply income or principal for reasonable legal fees and expenses to pursue any legal action or actions deemed necessary or advisable for the benefit of [David]. Any income of the Trust that is not distributed . . . shall be accumulated and added to the principal." Furthermore, the modified terms provide that "[i]t is the direction of [Miriam] that, for so long as is reasonably possible, [David] shall be maintained in a living environment the same as or similar to the environment that [Miriam] has provided for him, to wit: his living in a private dwelling place under constant supervision by competent companions." Finally, the amended terms state that "[i]n making payment or application of principal or income to or for [David], the Trustee shall take into consideration any other resources available to [David], in addition to the income and principal of the Trust Estate, including the resources of [James] . . . ."

n6 We observe that this evidence was not before the trial court when it ordered interim child support. Nonetheless, the trial court received this evidence prior to its final ruling on child support. Because the trial court properly awarded child support retroactively (see pt. I., post) and credited James's interim child support payments against this arrearage, we conclude that any error here was not prejudicial.

n7 In section 4053, the Legislature enumerated a set of principles "the courts shall adhere to" "[i]n implementing the statewide uniform guideline . . . ." All but one principle is couched in terms of the unqualified term "children." The exception is that "[a] parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life." (See Fam. Code, §4053, subd. (a).)

n8 Family Code section 3900 provides that ". . . the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances."

Family Code sections 3900 and 3910 were enacted in their present form in 1992, along with the precursors of Family Code sections 4050, 4053, 4055, and 4057. (See Stats. 1992, ch. 162, §10.) However, the precursors of the latter sections failed to become operative because they were replaced before their operative date by amended successor provisions. (See Stats. 1993, ch. 219, §137; Stats. 1993, ch. 1156, §§1-8; Stats. 1993, ch. 935, §§1-4.) The pertinent amendments did not involve the term "child." Family Code sections 58 and 4074 were enacted during the same session as the present versions (absent minor amendments) of sections 4050, 4055, and 4057. (See Stats. 1993, ch. 219, §79; id. §138.)

n9 The guideline formula is as follows: "CS = K [HN - (H%) (TN)]." (Fam. Code, §4055, subd. (a).) The variables here are defined as follows:

"(A) CS = child support amount.
"(B) K = amount of both parents' income to be allocated for child support . . . .
"(C) HN = high earner's net monthly disposable income.
"(D) H% = approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent. . . .
"(E) TN = total net monthly disposable income of both parties." (Fam. Code, §4055, subd. (b)(1).)

n10 See footnote 5, ante.

n11 James also contends that adult children fall outside the guidelines, citing In re Marriage of Cooper (1985) 170 Cal.App.3d 883. In Cooper, a disabled adult child who lived with his mother in the family home tried to enjoin sale of the home following his parents' divorce under former Civil Code section 4800.7, which permitted a temporary award of the family home to the divorced spouse having custody of a minor child. (See 170 Cal.App.3d at pp. 884-885.) The court held the statute was inapplicable to an adult child, citing the language of the statute and the proposition that "[t]here is a rational basis for distinguishing between an incapacitated adult child and a well minor child." (Id. at p. 886.)

Respondents have requested that we take judicial notice of legislative history indicating that following the ruling in Cooper, the Legislature amended section 4800.7 (now Fam. Code, §3800) to permit temporary home awards in cases involving disabled adult children. We hereby do so. (See Evid. Code, §459; Diamond View Limited v. Herz (1986) 180 Cal.App.3d 612, 619.) Upon review, we find that neither the holding nor the reasoning in Cooper undermines our conclusion that the guidelines are applicable in cases involving adult children.

n12 We also observe that, in connection with James's motion for reconsideration, James submitted evidence that the affected real property was worth $440,000, indicating that the security order actually touched approximately one-half his assets.

n13 With respect to such requests, Family Code section 2031 provides that a party may apply for a temporary award of attorney fees "without notice by an oral motion in open court . . . [a]t the time of the hearing of the cause on the merits." (Fam. Code, §2031, subd. (b)(1).)

n14 Family Code section 271 provides in part: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

-END OF CASE-

Perry, In re Marriage of (1997) 58 Cal.App.4th 1104, 68 Cal.Rptr.2d 445

TITLE: In re Marriage of TAMMY LYNN and KEITH COLLINS PERRY.
TAMMY LYNN PERRY, Respondent, v. BEVERLY PERRY,
Appellant.

CITE: 58 Cal.App.4th 1104, 68 Cal.Rptr.2d 445

DOCKET: No. G018273

DATE: October 29, 1997

COURT: California Court of Appeal, Fourth District, Division Three

TRIAL J.: W. D. Posey, T.J., Orange County

COUNSEL: Mathews & Kluck, Francis B. Mathews and Kelly M. Walsh for Appellant.
Richard M. Hawkins for Respondent.

(p. 1106)

OPINION

SILLS, P.J.—

INTRODUCTION

It is well established that a child support obligation survives the death of the supporting parent and is a charge against his or her estate. (Taylor v. George (1949) 34 Cal.2d 552, 556 ["In California the rule is that the obligation of a father to support his minor child which is fixed by divorce decree . . . does not cease upon the father's death, but survives as a charge against his estate."]; In re Marriage of Bertrand (1995) 33 Cal.App.4th 437, 440 ["Although husband has since died, his support obligation survives his death and is a charge against his estate . . . ."]; In re Marriage of Gregory (1991) 230 Cal.App.3d 112, 115 [". . . it has been established that court ordered child support survives the death of the noncustodial parent and becomes a charge upon his or her estate"].)

But what happens when the supporting parent's property is put into a "living trust" so that there is, technically speaking, no probate estate to come into existence upon the supporting parent's death? The family law judge in the present case was not fooled by the living trust device, and made an order against the trustee, requiring child support payments to be made from the trust property. Moreover, his order required that the payments be made from such amounts of the trust as would otherwise be immediately distributed to the deceased supporting parent's own parents and siblings. We affirm because, for purposes of the surviving child support obligation, there is no difference in substance between an estate which might be properly charged with the child support obligation and property held by a living trust.

(p. 1107)

FACTS

The facts are simple and undisputed. Tammy and Keith had a daughter, Tamitha, in 1983. Keith was badly injured in an auto accident in 1987 and obtained a structured settlement from the manufacturer of the automobile involved. The structured settlement entitled Keith to an income stream consisting of payments of around $5,000 to $6,000 a month, plus larger, periodic, lump sum payments at less frequent intervals.

In 1989 the marriage was dissolved, and an order made requiring Keith to pay $350 a month in child support. In June 1991 Keith transferred all his rights in the structured settlement to a living trust controlled by his mother Beverly as trustee, under the terms of which half was to be distributed outright to any surviving parents, a fifth was to be distributed to his brothers and sisters, and the remaining 30 percent was to remain in the trust and be distributed to his daughter, Tamitha, when she turns 40.

Keith died in 1992. Tamitha was now eligible for payments of $434 a month under Social Security survivors' benefits, so in February 1992 Beverly unilaterally discontinued making child support payments.

In late 1994 Tammy filed an order to show cause proceeding in the dissolution action to modify the child support order upward, and for an order that one-half of the structured settlement money be awarded to her as a missed asset. The child support increase request was in part based on the money freed up because (needless to say) Keith no longer needed it for personal and medical expenses.

Beverly was joined to the family law proceeding. In May 1995 the family law judge handed down a tentative decision in which he ruled that the "estate of the father"--which he specifically identified as "The Trust"--owed back child support of $350 from February 1992 to December 1994 ($16,170 with interest). He also increased child support as of January 1995 to $800 per month. The judge specifically took Tamitha's $434 payment into account in making the increase order. (The arrearage on the additional payments was $2,250.) The order was finalized in June 1995. In its last paragraph it required Beverly, as trustee, to make the required payments out of the funds held by the trust, as distinct from any funds being held by Beverly "as trustee for Tamitha." In essence, the child support payments were to be made "off the top" of the trust income as it came in. Also, the "missed asset" request was denied.

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The next month Beverly brought a motion for a new trial, arguing that it was "an impossibility" for her to pay the support out of the trust fund but not • out of the 30 percent held in trust for Tamitha, because the 30 percent "was all that remains" of the trust. That motion was denied and Beverly's notice of appeal soon followed. Tammy filed a cross-appeal from the order denying her request for half the settlement proceeds as a missed asset.
(•p. 1108)

DISCUSSION

A Supporting Parent's "Estate" For Purposes of a
Child Support Order Includes Property Put Into a Living Trust

Living trusts are popular estate planning devices. (See generally Fisch, Spiegler, Ginsburg & Ladner v. Appel (1992) 10 Cal.App.4th 1810, 1813 for a discussion of their uses, including, of course, avoidance of probate.) Technically speaking, they are not "estates" in themselves, but devices to manage an "estate." (For examples of such a use, see Estate of MacDonald (1990) 51 Cal.3d 262, 276, and Estate of Steele (1980) 113 Cal.App.3d 106, 111.)

In Belshé v. Hope (1995) 33 Cal.App.4th 161, a panel of the Fifth District Court of Appeal had occasion to meditate on the meaning of "estate" in a context only superficially dissimilar from the one before us. In Belshé, the Department of Health Services sought reimbursement for Medi-Cal payments made to a trustor who--like Keith--had put property into a living trust. Upon the trustor's death the "trust estate" was to be delivered to her husband or, if he predeceased her, to her four children. After the trustor's death, the Department sued the children under a federal statute which, at the time, did not define "estate." The children argued, much as Beverly argues here, that the real property was not "within the estate" of the decedent when she died and therefore was exempt from any claim by the Department. (See id. at p. 164.)

The Belshé court rejected the children's "no estate" argument. The court noted that "[t]he word 'estate' is ambiguous and could mean probate estate or taxable estate." (33 Cal.App.4th at p. 173.) Significantly, the term can be broader than "just the portion of the estate which passes by will or intestacy." (Ibid.) Giving the word a broad meaning in the context of the state's reimbursement action effectuated the

purpose of the federal reimbursement statutes. Any other interpretation of "estate" would have made the state's right to reimbursement depend on "technical differences in the character of how property is owned." (Id. at p. 174.)

(p. 1108•)
If the word estate is to be given a broad meaning to implement the purposes of a Medicaid reimbursement statute, it should likewise be given • such a meaning where child support is involved. Like the court in Belshé, we cannot countenance allowing the technical difference between a living trust and a will to protect property otherwise subject to a support obligation. To do so would be to allow Keith's heirs--and we do not use the word "heirs" in its technical sense, but in its basic sense of those people on whom Keith would naturally want to bestow his property--to reap a windfall. Indeed, there is even more reason here than in Belshé, because the present case involves an equitable proceeding arising in the family law court, while the Belshé case involved a claim at law.*N1
(•p. 1109)

After all, if a will cannot insulate property from child support claims, a living trust should not either. The rule cannot be in California that if you make a will your property will be subject to an existing child support order but if you put everything in a living trust your property will be immune. That would be, to paraphrase a famous aphorism, the estate planning equivalent of a free lunch.

If there remains any doubt as a matter of family law, the clincher is to be found under the law governing living trusts themselves. Probate Code section 19001, subdivision (a) (which uses the word "settlor" instead of "trustor"*N2) provides: "Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate . . . to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses." In the context of an existing child support order the statute is a clear statement of legislative intent that property put into a living trust (i.e., subject to the trustor's power of revocation) must be available to satisfy a valid child support obligation, no matter what the trust's terms of distribution. Accordingly, Beverly's argument that there is no "estate" left to pay Keith's child support obligation must fail.

(p. 1110)

It is important to note that this is not a case where the deceased supporting parent established a fund or made some other provision in his or her lifetime for the payment of an existing child support order. (Cf. Taylor v. George, supra, 34 Cal.2d at pp. 555, 558 [supporting parent had life insurance policies worth $6,176 on which child was named beneficiary; these policies were more than sufficient to meet future support payments totaling $5,500, therefore ex-spouse could not properly bring claim against estate for that amount].) The 30 percent of the living trust property which Keith ostensibly reserved for Tamitha is, by the terms of the trust, beyond her reach until she is 40 years old, so it was obviously not intended to meet his existing child support obligation. Indeed, the terms of the trust indicate an intention to avoid any child support obligation whatsoever. Accordingly, the family law court could properly make a child support order payable from the whole of the trust property, not just the 30 percent which was earmarked to go to Tamitha eventually.

One more aspect of the case must be noted, if only to make clear that we do not decide it, and that is the problem of the postdeath increase in the child support order qua increase. Perhaps because she has

focused on the operation of the living trust (which ostensibly put 70 percent of Keith's property into the hands of his parents and siblings) Beverly has not argued in this appeal that the family law court should not have made an upward modification of an existing child support order after Keith's death. What she has argued is that any support order could not reach the 70 percent of the trust property to be distributed to the parents and siblings. The question of whether postdeath upward modifications of existing child support orders are ever permissible is a question which can be left for another day, when it is properly raised in the briefs. Our opinion is limited only to situations where the deceased supporting parent has attempted to put his or her property beyond the reach of an existing child support obligation through the device of a living trust, and only then to the question of whether the property in that trust, including amounts ostensibly to be distributed to third parties, is available to satisfy a child support order. (Answer: yes.) For purposes of what we need to decide to resolve this appeal, it makes no difference whether we are dealing with an existing child support order or an increased one.

Needless to say, to allow a postdeath increase in an existing child support order on the theory that the death frees up money otherwise needed by the decedent would severely destabilize estate planning. (See Taylor, supra, 34 Cal.2d at p. 558 [because decedent's life insurance covered total amount of support payments, additional claim could not be made against estate].) The circumstances of exactly when such an increase might be allowed, if ever, are not before us.

(p. 1111)

A Family Court Has Jurisdiction To Make An Order Against the Trustee
of a Living Trust Established by a Deceased Supporting Parent

The next question is whether the claim against the trust was properly within the subject matter jurisdiction of the family law court, as distinct from the probate court. (See generally Saks v. Damon Raike & Co. (1992) 7 Cal.App.4th 419, 423, 432 [claims that trust assets were looted by trust attorney and real estate broker should have been exclusively litigated in probate department of superior court].) Our concern with this point prompted us to ask for supplemental briefing.

We are satisfied that the family law court was a correct forum. The subject matter jurisdiction of the probate court is set forth in Probate Code section 17000. The statute gives the probate court exclusive jurisdiction over the "internal affairs of trusts" (see Cal. Law Revision Com. com., 54A West's Ann. Prob. Code, (1991 ed.) §17000, p. 182) but only gives it concurrent jurisdiction over "proceedings" by "creditors . . . of trusts." (See Prob. Code, §17000, subd. (b)(2).)

The child support modification proceeding in the family law case here is--in substance--a proceeding by a creditor of the trust, not a proceeding confined to the trust's internal affairs. Tammy's claim involves what the trust owes a third party, independent of the trust's internal terms of distribution. The family court thus had the jurisdictional authority to join Beverly to a dissolution proceeding and order payments from the trust corpus.

There Was No Need to Join the Beneficiaries of the Trust

Beverly further claims that Tammy failed to join certain supposedly indispensable parties to the family law proceeding, namely Keith's father, Keith's brothers and sisters, and Beverly in her individual capacity. These persons were indispensable parties, she reasons, because their interests are affected by the family law decree.

Beverly forgets that it is the trust to which Keith assigned his rights under the structured settlement. It is the trust which takes in each payment under that settlement. Tammy's claim is as a creditor of the trust, not against Keith's relatives individually. There was no more need to join those relatives here than there would be a need to join the stockholders of General Motors to a lawsuit against it based on money it owed to unpaid vendors. The relatives' interests are affected only indirectly.

Half of the Structured Settlement Did Not Constitute a "Missed Asset"

(p. 1111•)
The final issue arises out of Tammy's cross-appeal, in which she contends that the family court erred in not treating half the annuity payments otherwise going to the trust as a "missed asset" from the 1989 dissolution. (Cf. • Henn v. Henn (1980) 26 Cal.3d 323, 332 [discussing assets left unadjudicated in family law proceeding].) In particular she contends that Keith would have wanted her to receive half the structured settlement upon his death, as reflected in written agreements between them made during their marriage.
(•p. 1112)

Tammy's contention is meritless. As Tammy acknowledges, the family law judge in the original dissolution proceeding assigned all the payments to Keith because of his need. Whatever else it was, the "asset" represented by the entirety of the structured settlement payments was obviously not missed. Tammy forgets that California law has directed family law judges to award all money received in satisfaction of a personal injury judgment to the spouse who suffered the injury unless "taking into account the economic condition and needs of each party" the "interests of justice" require another disposition. (See current Fam. Code, §2603; former Civ. Code, §4800, subd. (b)(4).) The time to argue that the interests of justice--encompassing, for example, any written agreement during the marriage or rights of survivorship set forth in the structured settlement itself--required something other than an award of all the personal injury settlement to Keith was in the dissolution, not in a postjudgment modification proceeding.*N3 Any other result would turn the family law court into a probate court by allowing the reopening of property awards upon the death of an ex-spouse so as to give intent to his or her wishes.

DISPOSITION

The family court's orders are affirmed. Because each side has prevailed on at least one issue, in the interests of justice the parties will bear their costs on appeal.

CROSBY, J., and RYLAARSDAM, J., concurred.

FOOTNOTES:

n1 Because the property of the trust is the right to receive monthly and periodic payments we are, serendipitously, spared the need to comment on the practical problem of recovering or otherwise seeking reimbursement for money already distributed by the trust. In this case it isn't as if there was a bank account the proceeds of which were disbursed on the death of the trustor. Here, there is a steady stream of payments, and there is more than enough to meet the child support obligation even when those payments are paid first from the trust's income as it comes in. When Beverly argues that everything in the trust (except the 30 percent to go to Tamitha anyway) has already been "distributed" and "nothing remains," she is relying on an unspoken assumption which we do not accept--namely, that the trust terms

were legally effective in removing 70 percent of the payments coming in from the reach of a child support order. Her argument is essentially a tautology: "The Trust has no money to pay child support because the terms of the Trust say it has no money to pay child support."

n2 Black's Law Dictionary defines "Trustor" as "One who creates a trust. Also called settlor." (Black's Law Dict. (5th ed. 1979) p. 1358, col. 1.)

n3 Keith was severely burned and eventually died at the age of 31. From what we are able to tell, any attempt on Tammy's part to argue that she should get any share of the settlement would have been doomed. Keith's death, of course, was not an occasion to relitigate the award.

-END OF CASE-