



California

Trusts and Estates Quarterly

Volume 11, Issue 1 • Spring 2005

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WHEN DEATH AND DIVORCE COLLIDE

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INTRODUCTION

The purpose of this article is to identify the areas in which family law and probate law intersect, provide the relevant case law and statutes to help practitioners spot the critical state law and tax issues which arise when the two areas collide, and offer planning suggestions for both family law and probate law attorneys.

For many years California courts applied community property laws consistently in both family court and probate court. Results were expected to be the same in both courts because case law in either court was recognized as precedent in the other.¹ However, in recent years the California legislature has made dramatic changes in family law statutes, and the United States Supreme Court has clarified federal preemption in the application of the Employee Retirement Income Security Act of 1974 ("ERISA"). These developments have caused a divergence of results depending on whether a family court or probate court decides an issue. Part I of this Article discusses these differing results and what a practitioner can do to achieve an expected conclusion. Attorneys who can spot the key issues that a family court and probate court will decide differently can develop a litigation strategy that will achieve maximum return for the client. Failure to recognize the key issues can result in some nasty surprises.

Another area where family law and probate law overlap is the collection of child support after the payor or payee dies. Part II of this Article provides a road map for practitioners to use in the collection process following a death, with particular attention to tax and other "potholes" to avoid.

Finally, Parts III and IV address what estate planning attorneys who represent clients in second marriages should expect. Estate planning attorneys in these situations are often faced with thorny child support issues which are not immediately apparent. Since second marriages present fertile ground for will contests following the death of a spouse, careful attention to unpaid or future child support in the planning process can significantly reduce the chance of later litigation.

I. DEATH OF A PARTY DURING AN ACTION FOR DISSOLUTION OF MARRIAGE

A. Division of Community Property

The threshold question when a client dies during an action for

dissolution of marriage is which court has jurisdiction over the division of community property. Probate court has jurisdiction prior to termination of marital status.³ Family court has jurisdiction after termination of marital status, but before final judgment.⁴ Thus, bifurcation in family court of the issue of marital status from the issues of property division and support, and the termination of marital status, will move the locus of a postmortem determination of property rights from probate court to family court.

Once the appropriate forum for property division is determined, the next question is who will act as the personal representative for the deceased spouse in the respective courts.⁵ In probate court, the answer is obvious because there is either a court-appointed representative of the estate, or a successor trustee already in place. However, if the parties terminated their marital status prior to death, the deceased spouse's estate will need to be represented in family court.

The family court must accept the personal representative of the deceased spouse's estate as a party to the pending dissolution of marriage action.⁶ If the probate court has not appointed a personal representative, the deceased spouse's successor in interest may represent the deceased spouse in family court.⁷ "Successor in interest" is defined as the beneficiary of the decedent's estate or other person who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.⁸ One court has held that a successor trustee of a living trust qualifies as a "successor in interest."⁹

It is not always important which court decides the division of community property. However, in some cases it is critical. Failure to recognize the community property assets, the division of which will differ in family court or probate court, can leave your client at the mercy of the current capriciousness of California law regarding division of assets in the respective courts.

There are three critical issues of property division that the family court and the probate court will decide differently. The first is the allocation of joint tenancy real or personal property when a spouse dies before conclusion of the dissolution.¹⁰ The second is the right of a spouse who contributed separate property to acquire joint tenancy assets or community property during marriage to reimbursement based on tracing alone.¹¹ The third is the distribution of pension, profit sharing, or retirement plans proceeds to either the surviving spouse or the heirs of the deceased spouse.¹²

B. Apportionment Formulas Apply in Both Family Court and Probate Court

There are some areas where the result will be the same, regardless of which court presides over the division of community property. For example, the *Pereira* and *Van Camp* apportionment formulas apply in both courts.¹³ These two apportionment formulas dictate how the court apportions the profits realized

from a separate property business between the community and separate estates if the spouse devotes his or her efforts to the business.¹⁴ Although property and profits derived from separate property remain separate property,¹⁵ earnings from a spouse's efforts are characterized as community property.¹⁶ There are two ways to allocate profits and earnings. The family court may allocate a fair return on the separate property capital investment and characterize the remainder as community property.¹⁷ Alternatively, the family court may allocate a fair salary to the community and characterize the remainder as separate property.¹⁸ Although both of the seminal cases were family law cases, the Supreme Court¹⁹ and many other courts since²⁰ have affirmed that the formula can be applied with equal force in probate court.

Similarly, the *Moore/Marsden*²¹ rule also applies in both family court and probate court.²² The *Moore/Marsden* rule provides that "where community funds contribute to the owner's equity in separate property, the community obtains a pro tanto quasi-ownership stake in the property."²³ Historically, the *Moore/Marsden* rule was only consistently applied to community payments made to reduce an *encumbrance* on real property.²⁴ Recently, however, several courts in both the family law and probate law arenas have applied the "*Moore/Marsden*" rule to community expenditures made for *improvements* to one spouse's separate property.²⁵

C. Term Life Insurance Beneficiary Designations

Another rather obscure determination of property rights may occur with respect to the proceeds of a term life insurance policy. While the result should be the same whether the probate court or family court has jurisdiction, the issue will arise only if one of the parties dies, so family law practitioners may not recognize the issue until it is too late. Typically, a term life insurance policy has no value and will not be divided on dissolution. Nevertheless a surviving ex-spouse may have an interest in the proceeds of a term life insurance policy if the term life insurance was purchased with community funds and the insured spouse dies during the term of the policy, even if a judgment of dissolution was entered before the insured's death and the insured had already changed the beneficiary.²⁶

In addition, a surviving former spouse may have a claim to proceeds of a renewed term life insurance policy if the insured former spouse was "uninsurable" after the term expired. At least one court has held that the community may have an interest in a term life insurance policy even after the term has expired for which premiums were paid with community property, if the insured spouse becomes uninsurable, and the policy contained a right to renew.²⁷

D. ERISA Plan Beneficiary Designations

Normally, a judgment of dissolution (or annulment) automatically revokes certain provisions of the testator's will with respect to his or her former spouse.²⁸ Specifically, Probate Code § 6122(a)²⁹ provides the following:

(a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

- (1) Any disposition or appointment of property made by the will to the former spouse.
- (2) Any provision of the will conferring a general power of appointment on the former spouse.
- (3) Any provision of the will nominating the former spouse as executor, trustee, conservator or guardian.³⁰

In an age when most estate planning attorneys draft revocable living trusts and pourover wills for their clients, the recent enactment of Probate Code § 5600 is important, since it applies to non-probate transfers, including trusts.³¹ Probate Code § 5600 provides that . . . a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse . . . as a result of the dissolution of marriage or annulment of the marriage.³²

Therefore, parties to a dissolution can often depend on the fact that, although it may take them a while to see their estate planning attorney so soon after spending so much time with their family law attorney, the California legislature has set up an automatic safeguard in the interim.

Despite state legislation to the contrary,³³ the statutory safeguards do not apply to any employment-provided benefit plan that falls under the ambit of ERISA.³⁴ In 2001, the United States Supreme Court granted certiorari for *Egelhoff v. Egelhoff* in response to the growing conflict among the federal circuit courts regarding federal preemption under ERISA.³⁵ In *Egelhoff*, a Washington state statute provided that the designation of a spouse as a beneficiary of any nonprobate asset, including an employee benefit plan, was revoked automatically upon dissolution.³⁶ David A. Egelhoff, as a benefit of his employment with Boeing Company, received a life insurance policy and an employee benefit plan, both of which were governed by ERISA.³⁷ Mr. Egelhoff named his then-wife, Donna Rae Egelhoff, as the primary beneficiary under both policies.³⁸ The Egelhoffs divorced and two months following the dissolution of marriage, Mr. Egelhoff was killed in an automobile accident.³⁹ Mr. Egelhoff died intestate and the plan administrators paid the life insurance and pension benefits to the named beneficiary, his former spouse.⁴⁰ Relying on the Washington statute, Mr. Egelhoff's two children from a prior marriage sued Ms. Egelhoff, arguing that upon the Egelhoffs' dissolution of marriage, the beneficiary designations of the employee benefit plans were automatically revoked and thus, they were entitled to the benefits as Mr. Egelhoff's heirs.⁴¹ Ms. Egelhoff countered that the employee benefit plans were subject to ERISA and therefore the state statute was preempted. The Supreme Court agreed.⁴²



The Court majority provided two reasons why the Washington statute was preempted by federal law: 1) the state law related to, and had an impermissible connection with, ERISA plans⁴³ and 2) the state law “[had] a prohibited connection with ERISA plans because it interfere[d] with nationally uniform plan administration.”⁴⁴ Developing this second factor further, the Court stated:

The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified in the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary’s status has been “revoked” by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant’s former spouse lives in a third.⁴⁵

This so-called uniform plan administration reason is one the dissent found “inconsequential.”⁴⁶ Justice Breyer countered that plan administrators are constantly faced with competing state laws, such as “slayer statutes,”⁴⁷ and that the Washington statute furthers ERISA’s stated objective of “developing a fair system for protecting employee benefits”⁴⁸ to ensure that the participant’s benefits are properly paid to the participant’s heirs, rather than a former spouse.⁴⁹

Nonetheless, based on *Egelhoff*, both family law and estate planning attorneys must be wary of any qualified employee benefit plan and the effects of dissolution. Despite the California legislature’s 2001 enactment of Probate Code § 5600, it is likely that a beneficiary designation of an employee benefit plan will govern irrespective of a judgment of dissolution.⁵⁰ Therefore, heed the warning of Family Code § 2024 and immediately have your client review and, if desired, change all employee benefit plan beneficiary designations upon the final judgment of dissolution or, if appropriate, upon the termination of marital status.

E. Who Inherits Joint Tenancy Property Depends on Whether Probate Court or Family Court Determines Succession

It is textbook law that joint tenancy property carries with it a right of survivorship.⁵¹ This remains true in California except in family court following bifurcation of marital status. Family Code § 2581 creates a presumption that joint tenancy property is community property subject to division in an action for dissolution of marriage. Thus, if a party to a dissolution action dies after bifurcation (the family court retaining jurisdiction), the surviving joint tenant will not inherit the property by operation of law.⁵² The decedent’s half share of the joint tenancy property will pass according to the terms of the decedent’s will or by intestate succession (the ex-spouse having been eliminated as an heir of the decedent⁵³).

The family law practitioner should be aware of a potential problem that could arise if the client holds real property in joint tenancy and dies during the dissolution proceeding. If the death occurs after a petition for dissolution of marriage has been filed and served, but before bifurcation of marital status has been completed, the surviving spouse will inherit the property by operation of law, regardless of the pending marital dissolution action. If the client wishes to unilaterally sever the right of survivorship prior to bifurcation, he or she must follow the procedures set forth in Family Code § 2040(b)(3) and Civil Code § 683.2. Prior to severing the joint tenancy, the severing party must file with the court and serve on the opposing party a notice of intention to sever the joint tenancy, and then record a deed or declaration severing the joint tenancy in the official records of the county where the real estate is located.⁵⁴

If either spouse dies before either the joint tenancy is severed or bifurcation occurs, can the right of survivorship still be defeated? Possibly, if the parties have a joint estate plan. As part of their estate planning process, did the parties sign a typical “community property agreement” that transmuted all their joint tenancy property (sometimes excluding cash and cars) into community property? Many estate planners have married couples with real estate sign such a community property agreement as a matter of course to assure a “stepped-up” basis on both halves of the community property following a death.⁵⁵ With the advent of community property with a right of survivorship,⁵⁶ and the more generous exclusion of capital gain upon the sale of a residence,⁵⁷ the use of such community property agreements may become less common. Nevertheless, the existence of such a community property agreement may provide evidence of the parties’ intent and establish a defense to the right of survivorship that the surviving spouse is asserting.

The rules of survivorship in joint tenancy property also apply to personal property.⁵⁸ Thus, a party who allows autos and bank or stock accounts to remain in joint tenancy during the pendency of a dissolution of marriage runs the risk that upon his or her death prior to bifurcation, the surviving spouse will inherit those assets. The spouse who wishes to sever the joint tenancy must, of course, give notice of the severance *before* the change takes place.⁵⁹

F. Application of the Separate Property Reimbursement Rule of Family Code § 2640 Following Death Depends on Whether Probate Court or Family Court Makes the Decision

The predecessor statute to Family Code § 2640⁶⁰ was originally adopted in reaction to the 1990 Supreme Court case of *In re Marriage of Lucas*.⁶¹ In that case, the wife used her separate property as a down payment on the family home, title to which was taken in joint tenancy. Under then Civil Code § 164,⁶² such property was presumed to be community property in the Lucas’ dissolution of marriage action. After the trial court gave the wife credit for her separate property contribution to the purchase of the



residence, the California Supreme Court reversed, stating that the community property presumption of title trumped any tracing of separate property contributions by either spouse.⁶³ Thereafter, the Legislature decided that, in a dissolution of marriage action only, separate property contributed by a spouse toward the purchase of community property should be returned to the contributing spouse, without interest or appreciation.⁶⁴ However, the Legislature chose not to disturb the holding of *Lucas* regarding the presumption of title in a probate setting. Consequently, *Lucas* is still good law in proceedings under the Probate Code.

As a result of differing approaches to the efficacy of tracing separate property contributions to jointly titled property in family court and probate court, a family law practitioner should promptly determine if there are significant reimbursement claims under Family Code § 2640.⁶⁵ If there are such claims, he or she should develop a strategy either to preserve those claims in the event of death by seeking prompt bifurcation, or to defeat those claims in the event of death by delaying bifurcation as much as possible. In family court, the reimbursement of separate property contributions to community property under Family Code § 2640 is the applicable rule, whereas the title presumption still prevails in probate court.

G. Bifurcation Allows for the Division of Employer-Provided Retirement Plans According to Community Property Rules. Death Before Bifurcation Generally Prevents Such Division

The Retirement Equity Act of 1984 created an exception to ERISA's restriction on the assignment or alienation of pension plan proceeds for individuals who present Domestic Relations Orders⁶⁶ ("DROs") to plan administrators.⁶⁷ Thus, family law attorneys deal with Qualified Domestic Relations Orders⁶⁸ ("QDROs") on a regular basis. These orders allow the family court to divide funds in employer-created retirement plans according to traditional community property rules. However, a probate court cannot enter a DRO.⁶⁹ Accordingly, family law attorneys must pay careful attention to which court will enter orders that most benefit their clients. For example, an attorney who represents an ill non-participant spouse in an ERISA plan should move to bifurcate as soon as possible.⁷⁰ Once the bifurcation is successful, the family court retains jurisdiction following death and will have the authority to direct the plan to distribute the deceased party's share of the plan assets to his or her estate. If the non-participant spouse dies before bifurcation, the matter moves to probate court, where no QDRO is possible. As a result, the deceased party's "community share" of the plan disappears,⁷¹ and the surviving spouse owns 100% of the assets in the plan. This result is dictated by federal preemption of state law for all ERISA plans.⁷²

There may be a strategy for an ill non-participant spouse to preserve his or her interest in the participant spouse's ERISA plan, even if prior to bifurcation. Once the dissolution action is "at

issue," the non-participant spouse should move the court to enter a Domestic Relations Order ("DRO"), dividing the participant spouse's ERISA plan according to normal community property rules. The motion should ask the family court to reserve jurisdiction to modify the DRO to allow it to be "qualified" under ERISA (i.e., a QDRO). If the court issues the DRO, counsel for the non-participant spouse should immediately serve it on the Plan Administrator. Receipt of the DRO by the Plan provides notice, forcing the Plan to segregate the benefits, which would be due the alternate payee under the DRO.⁷³ The Plan then has eighteen months to determine if the Order is "qualified."⁷⁴ Often the Plan will seek amendments to the DRO before qualifying it. If the Plan seeks revisions, counsel for the non-participant spouse may then return to the family court to have the court make the necessary changes in the order.

If the non-participant spouse dies before bifurcation, his or her attorney can argue that since the Plan had notice, the family court should retain jurisdiction over the ERISA plan to complete its job. There is a line of cases in California which approves of the family court retaining jurisdiction after a death to enforce an order it has previously entered.⁷⁵

Such a result also appears compatible with federal law. In *Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise*,⁷⁶ the United States Court of Appeals determined that a DRO issued after the participant's death was "qualified," and affirmed the District Court's order directing that a portion of the proceeds from the Plan be paid to the ex-spouse, rather than to the named beneficiary. The critical element cited by the court was that the Plan administrator must have received notice of the DRO prior to the participant's death. The court stated that the ERISA statute "necessarily permits an alternate payee who has obtained a state law DRO before the plan participant's retirement, death, or other benefit-triggering event to perfect the DRO into a QDRO thereafter (subject to the 18-month periodö)."⁷⁷ Although *Tise* dealt with the death of the participant spouse, rather than the non-participant spouse, the reasoning seems equally applicable to a DRO protecting a non-participant's share of the Plan. Upon receipt of the DRO, the Plan must segregate the benefits, thereby preventing any confusion on the Plan's part as to the pending claim. When the Plan finally qualifies the DRO, whether before or after the death of the non-participant, it is obligated to follow the terms of the QDRO.

A substantial number of pension and retirement plans are not subject to ERISA's requirement for division by a QDRO. They include STRS,⁷⁸ military pensions, PERS,⁷⁹ County or City Plans,⁸⁰ or any Section 457 Plans. Practitioners should check the specific statutes governing these plans to determine the best method to protect their clients' interests in the event of a death during the dissolution.

II. COLLECTION OF CHILD SUPPORT FROM A DECEDENT



A. The Legal Basis in California for a Parent's Duty to Support His or Her Children

The statutory basis for child support is found in Family Code § 3900 et seq. Parents have an equal duty to support their children until the children reach age nineteen, or graduate from high school, whichever occurs first.⁸¹ However, parents always have the duty to support their children until at least age eighteen.⁸² The duty of each parent to support his or her children does not end with the parent's death. The obligation to pay support becomes a charge against the deceased parent's estate.⁸³

The payor spouse must pay the child support directly to the payee spouse, who generally is the custodial parent. The payee spouse generally deposits the support check into his or her bank account, and uses it to defray day-to-day living expenses. The child benefits from the payment because the child's standard of living is thereby increased.⁸⁴ However, the payee spouse becomes the owner of the child support funds and may use them however he or she wishes.⁸⁵ When a payor spouse dies, the payee spouse may collect against the estate or trust of the payor spouse for both arrearages and future child support.⁸⁶ When the custodial parent dies and the surviving parent takes responsibility for the children, the surviving parent must seek to modify the existing child support order to reflect the new facts.⁸⁷ Although no California appellate court has yet dealt with the specific situation where a non-custodial parent has taken custody of the children following the death of the custodial parent and then sought child support from the estate of the former custodial parent,⁸⁸ there is no logical reason why the modified child support order should not be a charge against the estate of the deceased parent.⁸⁹

A payor's obligation to pay child support has priority over the payor's other debts.⁹⁰ The more critical issue, however, becomes how a court should calculate child support following the death of one parent. The California guideline is based upon allocating the income of the two parents according to a formula based on their respective "timeshares" and the percentage of income parents usually spend on their children.⁹¹ Application of this formula breaks down when one of the parents dies and can no longer produce income. Two appellate courts have considered the issue.⁹² In one case, the court of appeal affirmed the trial court decision that replaced the decedent's income with the decedent's pre-death expenses.⁹³ Presumably, the *Drake* trial court entered the expenses into the guideline formula as non-taxable income to the decedent before calculating the amount of child support due the custodial parent. However, in both cases the trial courts increased or maintained the post-death child support order, even though the minor child (or, in the *Drake* case, the disabled adult child) began receiving post-death Social Security payments of over \$400 per month.⁹⁴ Both courts held that the Social Security payments should not be credited against child support, but should be added as income to the custodial parent's side of the guideline formula.⁹⁵

Both the estate⁹⁶ and in some cases the trust⁹⁷ of a deceased

parent are responsible for payment of post-death child support.⁹⁸ Unless the personal representative of the decedent brings an action to modify the existing child support order following death, the order remains in effect.⁹⁹ Accordingly, one of the first actions an executor, administrator, or successor trustee should take following the death of either the payor or payee spouse is to consider filing an action in family court to modify the existing order.¹⁰⁰ Notwithstanding the dicta in *Marriage of Perry*¹⁰¹ that post-mortem increases in child support "would seriously destabilize estate planning,"¹⁰² there are at least two examples of the family court increasing child support following a death.¹⁰³ Death is, after all, a "change in circumstances"¹⁰⁴ justifying a modification of child support. Aside from the potential inclusion of radically different numbers in the guideline formula, there may also be significant changes to the "add ons," such as childcare or the cost of private schooling. As long as the estate planner recognizes the potential liability that both custodial and non-custodial parents have for post-mortem child support, he or she can take that liability into consideration in developing a testamentary plan. As mentioned above, both trial courts which considered application of the guideline formula following death increased the amount of child support to be paid to the surviving custodian of the child.

B. A Child Support Recipient May Collect Arrearages as well as Current and Future Child Support from the Estate of a Child Support Obligor

Following the death of a child support payor, the custodial parent may need to seek the appointment of a personal representative to administer the intestate estate in order to continue to collect support from the deceased parent's estate.¹⁰⁶ If no one steps forward to file a petition for probate of the estate, the custodial parent, as a creditor, has a right to do so.¹⁰⁷ Upon appointment as personal representative, the custodial parent has the right. The amount of family allowance to be paid is up to the sound discretion of the court,¹⁰⁸ but the statute clearly requires the court to enter an order allowing for the child's "maintenance according to [his or her] circumstances."¹⁰⁹ However, before filing such a petition, the lawyer should consider that a custodial parent could be paid either a family allowance or child support under an existing family court judgment, but not both.¹¹⁰ The custodial parent perfects the family court judgment in probate court by filing a claim in the estate proceeding.¹¹¹ Assuming the estate is solvent and that neither the custodial parent nor the personal representative of the estate moves to modify the order in family court, the probate court will honor the amount of the family court judgment as it existed at the time of the payor parent's death. Thus, the custodial parent knows that he or she will ultimately receive the family court-ordered child support, plus interest, when the claim is finally paid. And support due during the pendency of the estate will be paid as part of the payment of the entire claim.

As mentioned above, the amount of family allowance is purely discretionary in the probate court. The probate court judge may enter an amount less than the guideline amount of child support



ordered by the family court. By filing a petition for family allowance, does the custodial parent risk receiving a lesser amount of support while the probate is pending? No case has addressed this issue. However, there is a strong argument that the surviving parent should not face this election. The family court order is a judgment not subject to retroactive modification.¹¹² It remains in effect until the child reaches majority, or the family court modifies it. It therefore seems logical that any family allowance that a probate court orders would simply be a credit against the family court child support judgment. The arrearages plus interest on the family court judgment would be paid when the claim is finally settled.

If there is a danger that the estate may be insolvent, the custodial parent should file a petition for a family allowance. Family allowance has priority over other claims in an estate proceeding, following only expenses of administration, funeral expenses and expenses of last illness.¹¹³ A claim for child support under a family court judgment has no similar priority unless there is lien for the judgment against the decedent's real property.¹¹⁴

A custodial parent may file a petition for family allowance at any time prior to entry of a judgment of final distribution of an estate.¹¹⁵ The California Supreme Court sustained a trial court order that directed the estate to pay for the legal fees of the attorney who brought a successful petition for payment of a family allowance for a minor child.¹¹⁶ The rationale for the decision rested on the Supreme Court's analysis that the legislature's statutory scheme for protection of the family could only be realized if the estate paid the attorney's fees necessarily incurred in prosecuting the family allowance petition.¹¹⁷ Accordingly, every petition for a family allowance should include a prayer for the estate to reimburse the petitioner for attorney's fees.

As discussed, the custodial parent should promptly file a creditor's claim for child support against the estate of the deceased parent. The procedure for filing such claims is set forth in Probate Code § 9000 et seq. The claim must be filed within four months after the court issues letters.¹¹⁸ Failure to file a claim may operate as a waiver of the custodial parent to receive such support from the estate.¹¹⁹ Although a creditor can petition the probate court for an order to allow the filing of a late claim,¹²⁰ neither of the grounds for the court to grant leave has any application to a claim for child support.¹²¹ The claim itself should be filed on Judicial Council form DE-172. The claimant should attach a copy of the Judgment of Dissolution of Marriage (or Paternity Order) setting the original amount of child support and copies of any post-judgment modifications to the child support amount.¹²² The amount of the claim should include any arrearages, interest,¹²³ penalties,¹²⁴ and the value of future support until the child reaches the age of majority.

Once a personal representative receives a claim for child support, the issue arises whether the claim should be accepted¹²⁵ or rejected. If the personal representative takes no action within 30 days after receipt of the claim, it is deemed rejected.¹²⁶ If the per-

sonal representative formally rejects the claim (as opposed to simply taking no action), the claimant has three months to apply to family court to substitute the personal representative for the decedent in the pending child support action.¹²⁷ Issues regarding the modifiability of the existing child support amount, the calculation of interest and penalties, if any, and the determination of the amount of future support to be paid can then be litigated in family court, which has the needed expertise to resolve those questions.

Since future child support is an installment judgment, monthly amounts will continue to come due until the minor reaches majority. Because the personal representative generally will not wish to keep the estate open to pay the monthly child support, he or she could make provision to pay a liquidated sum to the custodial parent to dispose of the parent's claim for future support. If the claimant and the personal representative cannot agree on an amount to settle the claim, the personal representative may file a petition with the court to seek an order from the probate judge setting the amount "appropriate to provide adequately" for future child support.¹²⁸ As a result, the situation may arise where the family court sets the monthly amount of future child support, and the probate court then determines the present value of that support. The personal representative would pay the liquidated amount to the custodial parent, and then close the estate.

Finally, there are some unexpected tax results arising from an estate's payment of a family allowance. The estate's payment of the allowance is usually the first distribution out of an estate. As such, it must carry with it any undistributed net income.¹²⁹ In this manner, child support via the family allowance, normally tax neutral to both the payor and payee, may carry with it income that the custodial parent must report on his or her state and federal income tax returns and which the estate may deduct on its fiduciary income tax returns.¹³⁰ Regardless of whether the distributable net income rules require the payee to report a portion of the family allowance as income, the entire amount of family allowance and child support for a minor child should be deductible as a debt of the decedent on the Federal Estate Tax Return.¹³¹

C. A Child Support Recipient Can Also Collect Arrearages, and Current and Future Child Support from a Deceased Child Support Obligor's Revocable Living Trust

The increasing use of revocable living trusts means that a custodial parent attempting to collect child support from a deceased payor will often be seeking recourse from a revocable living trust, rather than a probate estate. It is now well established in California that the assets of a revocable living trust are legally obligated to be used for payment of child support.¹³² However, a custodial parent is not entitled to recover a family allowance or the equivalent during the post-mortem administration of the trust.¹³³ The parent must wait with other creditors for payment until the successor trustee is willing to pay. Yet, the custodial parent does have the benefit of an existing judgment, which accrues



interest at an annual rate of 10% per annum.¹³⁴ Such a high interest rate may motivate the successor trustee to quickly pay the child support claim.

If the successor trustee chooses to follow the optional creditor's claim procedure set forth in Probate Code § 19003, the successor trustee has a duty to notify any known creditor, including the parent or guardian of the decedent's minor child, of his or her right to file a claim against the trust. This reduces the time to file a claim to four months.¹³⁵ The trustee's failure to give notice to such a known creditor can expose the trustee to personal liability for payment of the claim.¹³⁶ Accordingly, regardless of whether the decedent was receiving or paying child support at the time of death, the successor trustee should give notice to the surviving parent or guardian of his or her right to file a claim.

If the successor trustee does not utilize the optional creditor's claim procedure, the surviving parent must file suit against the trust within one year after the decedent's date of death.¹³⁷ Will the custodial parent's failure to file a claim within the one-year period bar the claim? No case has yet dealt with this issue. However, an order from family court setting child support is an installment judgment. Do installment judgments need to be "perfected" after the death of the judgment debtor?

III. BEQUESTS AND CHILD SUPPORT

One of the most difficult subjects for both family and probate lawyers to understand is the unique relationship between bequests to a minor child and a parent's duty to support his or her minor child. As a general rule, and absent some other instruction in the decedent's testamentary instrument, post-mortem child support is a charge against the principal of the estate.¹³⁸ Consequently, child support, like any other debt, must be paid before any distributions are made to the beneficiaries. As previously discussed, the payment for child support is made directly to the custodial parent.¹³⁹ On the other hand, a bequest to a minor child is made directly to the child by payment to a guardianship account or a trust for the child's benefit.¹⁴⁰ The general rule is that funds in a guardianship or trust established for the benefit of a child cannot be used to defray the child's day-to-day expenses while a minor. It is the responsibility of the parent(s) to cover those costs.¹⁴¹ However, there are exceptions to this general rule. Probate Code § 2422 allows any interested person to file a petition to have the funds in a guardianship estate to be used to support a minor child if the petitioner can show "good cause." An example of such "good cause" would be the inability of the child's parents to support the child because of illness or incapacity. The section specifically states that the court can authorize the use of guardianship funds for the benefit of the minor child "notwithstanding the existence of a third party legally obligated to provide such support."¹⁴²

But can funds held *in trust* for the benefit of a minor child defray or eliminate a parent's duty to support? In *Lakenan v. Lakenan*,¹⁴³ a case decided before adoption of guideline child support, the Second District Court of Appeal upheld a trial court's

decision which allowed funds from two trusts established for the benefit of a ten-year-old girl to continue to be used to pay for tuition and uniforms for her private school, as well as certain lessons.¹⁴⁴ The independently wealthy father was ordered to pay only \$150 per month in child support.¹⁴⁵ The trial court appeared to be persuaded by two factors. First, the trust instrument provided that distribution of the trust funds for the benefit of the child was in the sole and absolute discretion of the trustee if the trustee determined that any "such distribution or expenditure [was] necessary for the proper education, support or maintenance of the Beneficiary."¹⁴⁶ Second, the father testified that it had been his practice since the trust was established to pay his daughter's tuition with trust money.¹⁴⁷ Although unstated, it appeared that the father was the trustee. The authors believe that the court's decision was wrong then, and is still wrong today. In effect, the court's decision allowed the minor's money to be used to pay for her own support, even when her father had more than sufficient resources to cover all the costs of her education. If in fact the father was trustee, and was using the daughter's funds to pay for private school, he was breaching his duty of loyalty to his daughter by using her money to pay for an obligation that was legally his.¹⁴⁸

One situation in which it is appropriate for a child's trust funds to be used for his or her support occurs when a deceased parent leaves a will or other testamentary instrument directing that the deceased parent's post-mortem support obligation for his or her minor child should be charged against a bequest or trust created for the child's benefit.¹⁴⁹ Naturally, the funds in the bequest or trust must be sufficient to satisfy the deceased parent's duty of support.¹⁵⁰ If there is both testamentary instruction and sufficient assets to pay the support, child support payments can properly be paid to the surviving parent from the child's bequest or trust.

IV. BEQUESTS AND LIFE INSURANCE

Life insurance policies that are intended to secure a spousal support obligation are an oft used arrow in the quiver of family law attorneys settling or trying issues of spousal support.¹⁵¹ Because a payor's duty to pay spousal support generally ends with his death,¹⁵² life insurance is an effective way to insure that a spousal support payee's lifestyle is not compromised by a former spouse's death. There is, however, no similar statutory authority for a family law court to order a party to keep life insurance in effect to benefit a minor child.¹⁵³ Whenever a family court orders a party to name his or her children as beneficiaries of a life insurance policy, confusion reigns. Did the court intend that such proceeds be used to pay a deceased payor's remaining child support obligation? If so, the deceased payor's ex-spouse should have been named as beneficiary since child support is payable to the custodial parent, not the child. Or did the court intend to impose upon the parent a legal duty to provide post-death funds to his or her children? If so, what statutory authority exists for such an order? Did the custodial parent give up certain rights in the dissolution of marriage action in exchange for the non-custodial par-

ent providing post-death funds to the children for, say, college tuition? If so, should not the marital settlement agreement have stated so explicitly in order to identify the consideration that was exchanged? The uncertainty engendered by such orders, which occur with some frequency, underlines how important it is for the estate planning lawyer to review a copy of the client's judgment of dissolution before developing an estate plan. In the face of a family court order directing the parent to keep a life insurance policy in effect in favor of his children, can the testator still take advantage of the holding in *Taylor v. George*¹⁵⁴ in which the Supreme 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."¹⁵⁵ On the other side of the coin, a court order directing a parent to name his or her children as beneficiaries of life insurance policies may exclude those policies from being included in the parent's taxable estate at death where, as in California, the decedent has an obligation to support his or her children after death.¹⁵⁶

V. CONCLUSION

Family law and probate lawyers who are forewarned about the issues discussed in this article are forearmed to avoid the pitfalls identified. The family law attorney's early attention to the consequences of either party's death during the pendency of a marital dissolution action will allow the attorney to take action that will achieve the most advantageous division of community property. Similarly, the estate planning lawyer's careful attention to the source of child support payments upon the death of either the custodial or non-custodial parent will foster a discussion of planning options that will assure that the client's goals are met.

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† The authors wish to extend their appreciation to Scott C. Abrams, Esq., of Nossaman, Guthner, Knox & Elliott, LLP who did the initial research and writing of this article in its outline form many years ago.

ENDNOTES

1. See, e.g., *In re Marriage of Lucas* (1980) 27 Cal.3d 808.
2. 29 U.S.C. § 1001 *et seq.*
3. See *In re Marriage of Lisi* (1995) 39 Cal.App.4th 1573, 1575.
4. See *In re Marriage of Hilke* (1992) 4 Cal.4th 215, 220; *McClenny v. Sup. Ct.* (1964) 62 Cal.2d 140, 144; *Stevenson v. Sup. Ct.* (1964) 62 Cal.2d 150. In some cases, the family court may also enter a decree of marriage dissolution nunc pro tunc "with respect to all issues, including marital status, submitted to the court for decision prior to the death of a party to a proceeding . . ." See *In re Marriage of Mallory* (1997) 55 Cal.App.4th 1165.
5. See Code of Civil Procedure §§ 368.5, 377.31, 377.41.
6. See Code of Civil Procedure § 377.31.
7. See *id.*
8. See Code of Civil Procedure § 377.11; see also *In re Marriage of Allen* (1992) 8 Cal.App.4th 1225, 1227-28.
9. See *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1153.
10. See discussion *infra* Part II.E.
11. See discussion *infra* Part II.F.
12. See discussion *infra* Part II.G.
13. See *In re Estate of Neilson* (1962) 57 Cal.2d 733.
14. See *Pereira v. Pereira* (1909) 156 Cal. 1; *Van Camp v. Van Camp* (1921) 53 Cal.App. 17.
15. See Family Code § 770.
16. See Family Code § 760.
17. See *Pereira*, 156 Cal. at 7 ("The separate property should have been credited with some amount as profit on this capital. It was not a losing business but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property. But without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long investment well secured.").
18. See, *Van Camp*, 53 Cal. App. At 27-28 (1921) ("In our opinion, the circumstances attending the *Pereira* case are not applicable to the facts involved herein. While it may be true that the success of the corporation of which defendant was president and manager was to a large extent due to his capacity and ability, nevertheless without the investment of his and other capital in the corporation he could not have conducted the business, and while he devoted his energies and personal efforts to making it a success, he was by the corporation paid what the evidence shows was an adequate salary, and for which another than himself with equal capacity could have been secured.").
19. See, *In re Estate of Neilson* (1962) 57 Cal. 2d 733. Decedent husband owned several parcels of farming land prior to his marriage. In his will, the husband disinherited his wife and left all his property to his children from a prior marriage. The wife elected to take her community property share of the estate under Probate Code § 201. Citing the *Pereira* case, the court held that when a husband owns a business as his separate property and devotes his efforts to the enterprise, there must be an apportionment of the profits between his separate property and the community property.
20. See, *In re Estate of Brady* (1915) 171 Cal. 1; *In re Estate of Murphy* (1976) 15 Cal.3d 907; *In re Estate of Adams* (1955) 132 Cal.App.2d 190; *In re Estate of Bishop* (1962) 209 Cal. App.2d 48; *In re Estate of Nereson* (1987) 194 Cal.App.3d 865.
21. See *In re Marriage of Moore* (1980) 28 Cal.3d 366; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.
22. See *In re Estate of Neilson* (1962) 57 Cal. 2d 733. (Decided before *Moore* and *Marsden* but applying the same principles. The court apportioned between the separate estate of the husband and the community estate interest in the real property purchased by husband prior to marriage but paid for in part after marriage with community funds.)
23. *In re Marriage of Allen* (2002) 96 Cal. App.4th 497, 502.
24. See *id.* at 503.
25. See *Bono v. Clark* (2002) 103 Cal.App.4th 1409; *In re Marriage of Wolfe* (2001) 91 Cal. App.4th 962 (holding where community funds are consensually used to improve one spouse's separate property, the community is entitled to reimbursement.); *In re Marriage of Allen* (2002) 96 Cal. App.4th 497, 501 ("Where community funds are used to make capital improvements to a



spouse's separate real property, the community is entitled to reimbursement or a pro tanto interest under the *Moore/Marsden* rule . . .").

26. See *In re Marriage of Spengler* (1992) 5 Cal. App. 4th 288, 296. ("term life insurance covering a spouse who remains insurable is community property ... for the period beyond the date of separation for which community funds were used to pay the premium.")
27. See *In re Estate of Logan* (1987) 191 Cal. App. 3d 319, 326 (citing *Bowman v. Bowman* (1985) 171 Cal. App. 3d 148 (reversed on other grounds)).
28. See Probate Code § 6122; see also Family Code § 2024. The authors would also like to point out a recent Third Appellate District decision in *In re Estate of Jones* (2004) 122 Cal.App.4th 326. In *Jones*, the appellate court found that a stepdaughter's rights as executor and as a residuary beneficiary of her stepfather's estate were automatically revoked upon her mother's dissolution from her stepfather. The appellate court found that, absent a contrary intent in the will, the stepfather intended to exclude his stepchildren after the divorce. The court also reasoned that the stepdaughters were designated as such, and therefore part of a class that no longer existed. To the authors, this result seems contrary to the one in *Egelhoff v. Egelhoff*. Unlike the sudden death in *Egelhoff*, the *Jones* stepfather died ten years after the dissolution and never made any attempt to change his will. Furthermore, the Supreme Court found the "wife" designation in *Egelhoff* to be only a means of identification. Thus, the designation could not support the argument that since she was no longer the spouse, she is not entitled to the benefits. See *Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 149 n.2.
29. All textual references will be made to California statutes, unless otherwise noted.
30. Probate Code § 6122(a).
31. See Probate Code §§ 5000(e)(1) & 5600(a).
32. See Probate Code § 5600. A "nonprobate transfer" is defined as the following:

A provision for a nonprobate transfer in a[] . . . contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreements, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, *employee benefit plan*, *trust*, conveyance, deed of gift mutual property agreement, or other written instrument of a similar nature . . .
- Probate Code § 5000(e)(1) (emphasis added); see also Probate Code § 5600(a).
33. See Probate Code §§ 5000(a) and 5600.
34. See *Egelhoff v. Egelhoff* (2001) 532 U.S. 141 (citing *Manning v. Hayes* (5th Cir.2000) 212 F.2d 866; *Metro. Ins. v. Hanslip* (10th Cir. 1991) 939 F.2d 904; *Emard v. Hughes Aircraft Co.* (9th Cir. 1998) 153 F.3d 949.
35. See *Egelhoff*, 532 U.S. at 146.
36. See *id.* at 144.
37. See *id.*
38. See *id.*
39. See *id.*
40. See *id.*
41. See *id.*
42. See *id.* at 147.
43. See *id.* at 146-47.
44. *Id.* at 148.
45. See *id.* at 148-49.
46. See *id.* at 159 (Breyer, J., dissenting).
47. "Slayer statutes" are what the dissent dubs "rules that prohibit a husband who kills a wife from receiving benefits as a result of the wrongful death."

Id. at 159 (Breyer, J., dissenting). See also Probate Code § 250.

48. See *id.* at 158-60 (Breyer, J., dissenting).
49. See *id.* at 159 (Breyer, J., dissenting). Justice Breyer comments that Ms. Egelhoff received her "fair share" of the community property in the dissolution proceeding, while Mr. Egelhoff was awarded "100% of his pension benefits." *Id.*
50. Even the California legislature recognized the threat of preemption with respect to Probate Code § 5600. In reviewing the Law Revision Commission Comments, one finds the following *caveat*: "This section may be preempted by federal laws with respect to employer-provided benefits."
51. 4 Witkin, Summary of California Law (9th ed. 1990) § 257.
52. See *In re Marriage of Hilke* (1992) 4 Cal.4th 215; see also *In re Estate of Mitchell* (1999) 76 Cal. App.4th 1378. However, in one factually driven case, *In re Estate of Layton* (1996) 44 Cal.App.4th 1337, a court of appeal determined that keeping joint tenancy property as joint tenancy for ten years after a bifurcation was sufficient proof that the parties intended to keep its joint tenancy right of survivorship. See also Family Code § 802.
53. See Probate Code § 6122.
54. See Family Code § 2040(b)(3).
55. See I.R.C. § 1014(b)(6).
56. See Civil Code § 682.1.
57. See I.R.C. § 121.
58. See *In re Estate of Propst* (1990) 50 Cal.3d 448; see also 4 Witkin, Summary of California Law § 21 (9th ed. 1990).
59. See Family Code § 2040(b)(3).
60. See Civil Code § 4800.1.
61. 27 Cal.3d 808 (1980).
62. Now Family Code § 760.
63. See *Lucas*, 27 Cal.3d at 815-18.
64. See Family Code § 2640, formerly Civil Code § 4800.1.
65. The legislature further expanded the right to reimbursement in 2004 by adding the right of reimbursement for separate property contributions to the acquisition of the other spouse's separate property estate during the marriage. See Family Code § 2640(c).
66. See 29 U.S.C. § 1056(d)(3)(ii). A DRO is any order relating to "the provision of child support, alimony, or marital property rights to a spouse, former spouse, child, or other dependent of a plan participant . . . made pursuant to a State domestic relations law." *Id.* For California authority for the division of retirement plans, see Family Code § 2610.
67. See 29 U.S.C. § 1056(d)(3).
68. See *id.* In order the be "qualified," the DRO must (1) create or recognize "the existence of an alternate payee's right to . . . all, or part of the benefits payable with respect to a participant under a[n ERISA] plan;" (2) provide the name and mailing address of the alternate payee; (3) not increase any benefits of the plan; and (4) be approved by the plan administrator. See 29 U.S.C. § 1056(d)(3)(B)-(D), (K).
69. See *Ablamis v. Roper* (9th Cir. 1991) 937 F.2d 1450; see also *Samaroo v. Samaroo* (3d Cir. 1999) 193 F.3d 185.
70. Concurrently with filing the motion to bifurcate, the attorney should also ask for a DRO that awards the alternate payee his/her community property share of the plan. Please note that the question of whether to bifurcate often depends on the terms of the plan and every family law attorney should familiarize himself or herself with the terms before making the decision to bifurcate. For example, a defined benefit plan does not have individual accounts for the participants and provides the participant with a defined retirement benefit usually determined by a salary percentage. If the participant is married, the benefit must be made in a form that provides an annuity to the sur-

viving spouse. Upon bifurcation, without a QDRO, the spouse immediately loses the status of surviving spouse. Pursuant to a QDRO, a former spouse can be treated as a surviving spouse for purposes of surviving spouse benefits. See 29 U.S.C. § 1056(d)(3)(F). However, if there is no QDRO, and no surviving spouse, no one receives the benefits, the default is not the estate. On the other hand, a defined contribution plan (e.g. ESOPs, 401(k) plans) maintains separate individual accounts for participants, with employer contributions. If the participant dies, the surviving spouse may or may not receive benefits. Upon bifurcation, depending on the terms of the plan, the former spouse may remain the beneficiary until the participant takes some action. Some plans provide that termination of the marriage, without a QDRO, automatically eliminates the spouse from receiving a distribution. In most cases, the participant's estate is the default beneficiary. Despite the foregoing caveat, remember the terms of the plan always govern. See discussion *supra* Part II.D regarding *Egelhoff*.

71. This would have been the result under the old "terminable interest rule" in California. See *Waite v. Waite* (1972) 6 Cal.3d 461; *Benson v. Los Angeles* (1963) 60 Cal.2d 355, 361. However, the California legislature abolished the rule in 1987. See Family Code § 2610(c).
72. *Boggs v. Boggs* (1997) 520 U.S. 833.
73. 29 U.S.C. § 1056(d)(3)(G)(II).
74. *Id.*
75. See *McClenny v. Sup. Ct.* (1964) 62 Cal.2d 140, 145; *In re Marriage of Lisi* (1995) 39 Cal.App.4th 1573.
76. 255 F.3d 661 (9th Cir. 2000).
77. *Id.* at 669.
78. See Education Code § 22650 *et seq.*; Education Code § 27400 *et seq.*
79. See Government Code § 21290 *et seq.*
80. See Government Code § 31685 *et seq.*
81. See Family Code § 3901(a).
82. See *id.*
83. See Family Code §§ 3585, 3601; see also *Taylor v. George* (1949) 34 Cal.2d 552, 556; *In re Marriage of Bertrand* (1995) 33 Cal.App.4th 437, 440; *In re Marriage of Gregory* (1991) 230 Cal.App.3d 112, 115.
84. See Family Code § 4053(f).
85. "Guideline child support" in California was established on the principle that the earnings of the two parents would be combined, and then the total earnings of the parents would be divided according to a formula based on the parents' timeshare and the percentage of income parents generally spent on their children. Inherent in the formula is a transfer of money from one parent's ownership to the other. See Family Code § 4055; see also Family Code § 4000; California Rules of Court 5.102; *In re Marriage of Utigard* (1981) 126 Cal.App.3d 133; *In re Marriage of Lackey* (1983) 143 Cal.App.3d 698, 706.
86. See *Taylor v. George* (1949) 34 Cal. 2d 552; *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.
87. See *Bell v. Krause* (1915) 169 Cal. 387; *In re Marriage of McCann* (1994) 27 Cal. App. 4th 102, 106-08; *Gregory*, 230 Cal.App.3d at 116-17.
88. See *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104. However, the *Perry* court, in dicta, claims that a post death increase in child support would "severely destabilize estate planning." *Id.* at 1110.
89. Note that in discussing the collection of child support from a decedent's estate and/or trust, the authors assume that there is an existing child support obligation pursuant to a divorce decree or settlement agreement. However, in one circumstance, a court of appeal denied a minor child's request for child support from her deceased father's estate where there was no prior child support order in a divorce decree or property settlement agreement. See *Jacobs*

v. Gerecht (1970) 6 Cal.App.3d 808.

In *Jacobs*, plaintiff minor filed a claim against her father's estate for future child support. After the trial court affirmed the executor's rejection of the claim, the minor appealed. The trial court found that plaintiff's parents were divorced and that the divorce decree did not provide for child support. Furthermore, under the father's will, plaintiff was entitled to 15 percent of the residue of the estate. Recognizing that *Taylor v. George* provides that where there is a child support obligation pursuant to a divorce decree or property settlement agreement, the obligation is a charge upon the obligor's estate, the appellate court found that *Taylor* did not apply since there "was no implementing order nor is there any agreement for child support which would ripen into an enforceable claim against the defendant executor." *Id.* at 813. The court also took note that "the father had another minor child to consider, nor did he cut off plaintiff 'without a penny.'" *Id.* at 814.

Frankly, the authors believe that *Jacobs* was both incorrectly decided and that the situation will never repeat itself. First, a parent cannot waive a right that belongs to the child. See generally *Marriage of Hamer* (2000) 81 Cal. App. 4th 712, 720 n.7. Although the custodial parent is the ultimate recipient of the child support, child support is owed to the child. Second, in the unlikely event that a divorce decree or property settlement agreement did not have a provision for child support, the authors suggest that, after a death, the custodial parent should return to family court to obtain a child support order. Armed with that order, the custodial parent should be able to avoid the holding in *Jacobs* and perfect a claim against the decedent's estate or trust.

90. See Family Code § 4011. However, Probate Code § 11420 does not give a debt for child support priority over any other debts of decedent (except to the extent that child support is paid as a family allowance during the pendency of the estate). When an estate is insolvent, should, as a matter of public policy, the decedent's financial obligation to raise a minor child be met in full, while other creditors receive a reduced share of the estate?
91. See Family Code § 4055.
92. See *In re Marriage of Drake* (1997) 53 Cal.App.4th 1129; *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104.
93. See *Drake*, 53 Cal.App.4th at 1162-63 (holding the trial court did not abuse its discretion by making adjustments to the guideline formula "including increasing the trust's income figures by a sum equal to [the decedent's] living expenses (as if she were still alive)").
94. See *Drake*, 53 Cal.App.4th at 1162-63; *Perry*, 58 Cal.App.4th at 1111.
95. See *Drake*, 53 Cal.App.4th at 1162; *Perry*, 58 Cal.App.4th at 1107. The courts' rulings are consistent with the provisions of Family Code § 4504, which provides that federal benefits can be credited against the payor parent's child support "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." See also *In re Marriage of Bertrand* (1995) 33 Cal.App.4th 437.
96. See *Taylor v. George* (1949) 34 Cal.2d 552.
97. See Probate Code §19001; *Perry*, 58 Cal.App.4th at 1108.
98. See *infra* sections II.B and II.C, for a discussion of collection techniques against both estates and trusts.
99. See *In re Marriage of McCann* (1994) 27 Cal.App.4th 102, 106; *In re Marriage of Gregory* (1991) 230 Cal.App.3d 112, 116.
100. It is also very important to note that an order modifying or terminating child support may be made retroactive only to the date of filing of the notice of motion, or another subsequent date. See Family Code § 3653. Therefore, the personal representative should not expect to have the child support order modified or terminated retroactively as of the decedent's date of death.
101. 58 Cal.App.4th 1104.
102. See *id.* at 1110.
103. *In re Marriage of Drake* (1997) 53 Cal.App.4th 1129.
104. Family Code § 4010 provides:



In a proceeding in which the court orders a payment for the support of a child, the court shall, at the time of providing written notice of the order, provide the parties with a document describing the procedure by which the order may be modified.

To that end, the Judicial Council has drafted form FL-192 "Information Sheet on Changing a Child Support Order." The form explains when a child support order may be modified, including "when there has been a significant change in one of the parent's net income."

105. See discussion *infra* Part II. for the method to collect child support from a trust following the death of the payor parent.
106. See Probate Code § 8461.
107. See Probate Code § 6540.
108. See *In re Estate of Rosin* (1964) 226 Cal.App.2d 166, 174.
109. Probate Code § 6540(a).
110. See *In re Estate of Schumacher* (1971) 18 Cal. App. 3d 146.
111. See discussion *infra* regarding the method for filing a claim for child support in probate proceeding.
112. See Family Code § 4009.
113. See Probate Code §§ 11420, 11421.
114. See Probate Code § 11420(a)(2).
115. See *In re Estate of Fretwell* (1908) 154 Cal. 638; *In re Estate of Coons* (1951) 107 Cal. App. 2d 531, 536.
116. See *In re Estate of Filtzer* (1949) 33 Cal. 2d 776.
117. See *id.* at 783.
118. See Probate Code § 9100(a)(1). For a thorough discussion of creditor claims against decedents, see "Alice in Tulsa-land: The Dobbler Effect on Creditors of Revocable Trusts," CALIFORNIA TRUSTS AND ESTATES QUARTERLY, Volume 10, No. 2 (Spring 2004).
119. See Probate Code § 9002(b).
120. See Probate Code § 9103(a).
121. The two grounds described in California Probate Code § 9103(a) are failure to give "proper and timely" notice of the administration of the estate and the creditor's lack of knowledge of the claim. The child, as an heir of the decedent, must be sent notice of the commencement of a probate proceeding, and the custodial parent must have known of the court order entered setting the amount of child support.
122. See Probate Code § 9152.
123. See *In re Marriage of Hoffee* (1976) 60 Cal.App.3d 337.
124. See Family Code § 4722.
125. See Probate Code § 9255.
126. See Probate Code § 9256.
127. See Probate Code § 9370(a)(3). In order to gain the benefit of the three-month limitation period, the personal representative must include within his or her formal rejection notice that the claimant has only three months to apply for an order of substitution. See also Code of Civil Procedure § 368.5; *Kress v. Kress* (1963) 219 Cal.App.2d 173.
128. See Probate Code §§ 11460, 11461.
129. See Treas. Reg. § 1.662(a)-2(c); I.R.S. Publication No. 559 at 17 (2003).
130. See Treas. Reg. § 1.661(a)-2(e); *Cameron v. Comm'r* (1977) 68 TC 744.
131. See *Bosworth v. United States* (1956) 57-1 U.S. Tax Cas. (CCH) ¶ 11,662.
132. See *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104.
133. See *Parson v. Parson* (1996) 49 Cal. App. 4th 537. Although a custodial parent is not entitled to recover a family allowance during a trust administration, the custodial parent could file a petition for a "dry" probate in order to obtain a family allowance. As mentioned, the custodial parent, as a creditor, would

file a petition to be appointed administrator. See discussion *supra* II.B. Once the probate is open, the custodial parent would then file a petition for a family allowance. After the court orders the family allowance, the custodial parent would then submit the order to the trustee of the trust for payment under Probate Code § 19001.

134. See Code of Civil Procedure § 695.211.
135. See Probate Code § 19050.
136. See Probate Code § 19053.
137. See Code of Civil Procedure § 366.2.
138. See *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104.
139. See discussion *supra* Part II.A.
140. Such trusts can include those created under the California Uniform Transfer to Minors Act, Probate Code § 3900 *et seq.*, a testamentary trust created by a Will, or a trust created by a revocable living trust.
141. See Family Code § 3900.
142. Probate Code § 2422(a).
143. 256 Cal.App.2d 615 (1967).
144. See *id.* at 622-23.
145. See *id.* at 621.
146. *Id.* at 622.
147. See *id.*
148. There may also have been tax implications arising from the court's decision. If the grandfather had set up this irrevocable trust for the benefit of his granddaughter with the intent of removing the trust funds from his son's taxable estate at the time of his son's death, the court's decision may have thwarted his plan. If the trust funds could be used to satisfy a legal obligation of the son, the funds in the trust could be swept back into his taxable estate under the operation of Internal Revenue Code §§ 2031, 2033.
149. See *Taylor v. George* (1949) 34 Cal.2d 552, 556.
150. See *In re Estate of Schumacher* (1971) 18 Cal.App.3d 146, 152.
151. See Family Code § 4360.
152. See Family Code § 4337.
153. See *Miller v. Miller* (1942) 52 Cal.App.2d 443. "The word 'security,' as ... used [in former Civil Code § 140] does not contemplate protection against the possibility of death by the building up of an independent insurance estate." But see *Franklin Life Insurance Co. v. Kitchens* (1969) 249 Cal.App.2d 623; *In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, where the appellate courts appear to make no distinction between life insurance which is used to secure spousal support (which is authorized by statute) and child support (which is not).
154. 34 Cal.2d 552 (1949).
155. *Taylor*, 34 Cal.2d at 558.
156. See Rev. Rul. 78-379, 1978-2 C.B. 238. In Revenue Ruling 78-379, the Internal Revenue Service suggested that life insurance proceeds payable to the decedent's children under a divorce decree, where the child support obligation terminated at death, are not deductible from the decedent's gross estate for federal estate tax purposes. The Internal Revenue Service found that because there was no obligation to pay child support after death, the life insurance proceeds were a "testamentary disposition since it was neither in satisfaction of a legal duty to support the children nor contracted for a full and adequate consideration." *Id.* Therefore, the authors suggest that any marital settlement agreement clearly specify that the life insurance secures the child support obligation. This precise language would bolster an argument that the life insurance proceeds should be deducted from the decedent's gross estate as a claim against the estate, since there is an obligation to pay child support after death in California and the life insurance proceeds were required to satisfy that legal duty.