NO EASY EXIT
WHEN CONSERVATORSHIP AND MARITAL DISSOLUTION PROCEDURES COLLIDE

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As medical science and technology prolong lives — and in some cases resuscitate individuals after a debilitating medical event such as a stroke — it is more likely that a person will become involved in concurrent marital dissolution and conservatorship proceedings. In two recent cases, a spouse was brought to probate court for conservatorship proceedings and concurrently (or shortly after) was required to initiate or respond to a marriage dissolution petition filed in the family court. Each case presented unique problems, both legal and practical. Both of the marriage dissolution proceedings were in Contra Costa County, although they were in different family law departments. One of the conservatorship proceedings was venued in Alameda County; the other in a court in Southern California. The judicial philosophy of the probate court judges heavily influenced the outcome of both cases. One case was difficult to commence; the other was difficult to conclude.

Conservatorship-Dissolution Facts Patterns

If you have not seen a case of this type, you will: A 60-something year old, once divorced, well-heeled fellow married a younger woman whose financial situation is not as comfortable or established as his. There is no pre-marital agreement. He has adult children from his first marriage. Shortly after a round-the-world trip, they acquire a multi-million dollar home in joint tenancy. He makes a $1 million-plus down payment on the property. Not long after the purchase, he suffers a significant stroke and is substantially incapacitated. His children and siblings take an interest in his health care and his property.

In this first case, the gentleman's new wife began to quarrel with his siblings and children about care and maintenance — and the management and disposition of his property. The wife filed a conservatorship proceeding. Legal counsel was contacted by one of the gentleman's siblings. Should the new wife be her husband's conservator, and is undue influence being exercised by the new wife on her husband?

There were two matters of immediate concern. First, federal law requires that the new wife must be the beneficiary of her husband's 401(k) plan. The balance in that account exceeded $2 million. Second, the house was held in joint tenancy. If the prospective conservatee died prior to the commencement of a marriage dissolution proceeding in which his appointed authorized agent could terminate the joint tenancy and establish his separate property contribution, the house would devolve to his spouse by right of survivorship. If he died before a judgment terminating the parties' marital status was entered, his 401(k) would pass to her as well.

The probate court was urged to authorize the filing of the dissolution proceeding on behalf of the conservatee, to protect the conservatee's property and avoid dissipation of his estate. The probate judge was clearly more interested in protecting the health and well being of the conservatee than in the ultimate disposition of his property. It indicated that the property issues were of no particular concern to the court; it wanted to ensure the conservatee's health, safety and comfort.

How Does the Dissolution Case Begin?

The leading cases in this area are *In Re Marriage of Higgason* (1973) 10 Cal.3d 476, disapproved on other grounds; *In Re Marriage of Dawley* (1976) 17 Cal.3d 342; and *In Re Marriage of Caballero* (1994) 27 Cal.App.4th 1139. In Caballero, an incapacitated spouse had an institutional conservator to manage her financial affairs. Her son from a prior marriage attempted to initiate a legal separation proceeding in the family court on her behalf. He filed a petition to be appointed her guardian ad litem in the to-be-filed marriage dissolution proceeding. The family court granted the husband's motion to quash the service of the summons and dismissed the action. The Court of Appeal held that the wife's son, who was her attorney-in-fact and her nominee as conservator, established his entitlement to be appointed guardian ad litem and to seek that designation in the family court for the purpose of filing a legal separation proceeding.

Anyone who has the conservatee/dissolution case should read Caballero carefully. Starting at page 1152 of its decision, the Court of Appeal enumerated many of the remedies available to a conservatee in a dissolution proceeding that would otherwise not be available to her in a conservatorship proceeding. Some remedies available to the incapacitated spouse are:

•Immediate temporary support consistent with parties' marital standard of living and the avoidance of a situation where the incapacitated spouse is required to support herself/himself out of separate property.

•The potential to recover legal fees and costs.

•The jurisdiction and power to issue restraining orders to preclude conduct contrary to her rights (now embodied in the standard family law restraining orders).

•An accounting of assets and obligations incident to marriage and the ability to require cooperation and complete disclosure within a relatively short period of time.

It was important to file the petition in the family court, after which the first steps taken would be to terminate the joint tenancy and perfect the incapacitated husband's separate property interest in the family residence, and terminate marital status for the purpose of ensuring the incapacitated spouse could lawfully redesignate a beneficiary of his 401(k). Under the Caballero guidelines, an Order to Show Cause was filed in the family court, requesting that one of the siblings of the proposed conservatee be appointed as his guardian ad litem and be given permission to file suit for legal separation.[1]

This caused difficulty in the family court: under standard rules, all petitions are required to be "filed." The petition was not held, as counsel had requested, for delivery to the judge for the purpose of his conducting a hearing on whether a guardian ad litem should be appointed and the petition for legal separation filed. The petition was filed before the guardian ad litem was appointed. On the wife's motion to strike the petition on the grounds that the guardian ad litem had not been appointed, the court issued a tentative ruling that indicated it would grant the motion to strike; and thereafter the hearing was put over at the parties' joint request so a property agreement could be negotiated.

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[1] CCP §372 requires an incompetent person, including a conservatee, to appear through a guardian ad litem appointed by the court in which the action is pending or by his conservator. A guardian ad litem may be appointed upon application of a "friend" or a relative, CCP §373.

How Does the Dissolution Case End?

A complete property agreement was quickly reached. Wife was represented by an experienced family law practitioner who understood that it was inevitable and in the best interests of all parties to resolve the case on the best terms that could be negotiated under the circumstances. Given the husband's condition, the parties could no longer live as man and wife.

Once the terms of the formal agreement were put together, the legal separation proceeding was converted to a dissolution proceeding, the family court entered a judgment into which the terms of the parties' agreement were incorporated, and the marriage was terminated. The probate court played no role in the approval of the terms of the judgment that divided the parties' property. The husband's heirs at law were fully apprised of the terms and conditions of the settlement and approved them in advance.

The facts and circumstances of the other case were different. The husband resided in, and was being treated at, a Southern California facility. The facility was the best in the state to provide continuing 24-hour care to him, which he needed by reason of the effects of his stroke. Unlike the first case, the parties had been married for a long time, approximately 20 years at the time of the debilitating event. They remained married for a period of about nine years thereafter. At that time, the conservatee's brothers took an interest in what they perceived to be his wealth and attempted to cut off his spouse from the financial benefits that derived from generous disability payments he was receiving from policies that had been acquired during the marriage. This precipitated the wife's filing a marriage dissolution pro-ceeding. A valuable home and 401(k) were also the major assets in this marriage. A global settlement ultimately was reached with guidance from a proactive Southern California probate court.

In the latter case, the conservator also acted as the guardian ad litem for the conservatee/respondent in the marriage dissolution proceeding. The probate court prodded him into settlement negotiations with the wife; then it conducted hearings on the terms of the settlement proposals, which were being exchanged between the parties to the family court proceedings. In the end, the probate court required all of the interested parties in the probate proceeding to authorize and approve the terms of the settlement in a formal stipulation and order. The probate court judge required that he sign the Judgment of Dissolution on its face, indicating his approval of the document, after which it was approved by Contra Costa County's family court judge.

In the latter case, the settlement process took four months to conclude after the deal was struck. In the first case, the transaction was closed in four days after the deal was made.

Conclusion

There is little science to this practice. Similar cases have different stories, different endings. Know your judge. Know your local rules. Wage your battle in the proper arena. Be prepared. Work hard. Hope for a little luck.