

Reprinted from Issue  
18 of Receivership  
News, A Publication  
of the California  
Receivers Forum

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# RECEIVERSHIP

# NEWS



## RESOLUTION OF DISSOLUTION?

## Family Law Court Receivers Can Solve Community Property Preservation and Protection Problems

By M. DANIEL CLOSE, CPA/ABV, CVA\* AND COMMISSIONER GRETCHEN WELLMAN TAYLOR, LOS ANGELES COUNTY SUPERIOR COURT\*\*

*(This discussion of the many uses for receivers in a family law court written by experts from both sides of the bench begins with a hypothetical that, according to the authors, is all too realistic.)*

**J**ohn and Mary Smith are separated and have filed for dissolution of their marriage. The Smith's community property includes a closely held business, ACME Corp. (“ACME”) that is managed by Mary Smith. John Smith has no involvement in the business. In fact, John is a busy UPS driver who has relied on his wife to take care of family and business financial items like preparing and filing tax returns and reconciling the community bank account.

John has a friend who works in the accounting department in ACME, however, and has learned that Mary Smith has been taking large checks and depositing them in an account in Nevada. John notified his attorney, who successfully obtained a temporary restraining order -- a TRO -- to prevent Mary from hiding assets of ACME.

Since the issuance of the TRO Mary Smith has begun taking frequent trips outside California, supposedly on business. John has now learned that Mary's trips are not business-related, but are actually visits to members of her family in Canada and in the Eastern United States. John has also learned that large disbursements have been made from ACME bank accounts to questionable vendors. John has notified his attorney, who is considering filing an ex parte application for the appointment of a receiver for ACME.

## APPOINT A RECEIVER!

Situations like this do arise in family law matters (and in other dissolutions) where an “in-spouse” -- the spouse with control of assets -- threatens to liquidate community assets, is uncooperative, or attempts to hide, destroy or “waste” community assets prior to the case conclusion. These threats are often ignored, due to the emotional nature of divorce. The court will often grant a specific property restraining order, with the hope that the restriction will prevent future dissipation of assets.

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But another alternative, one perhaps more costly but arguably more effective, is to seek and obtain appointment of a receiver to preserve assets. Just seeking the appointment of a receiver may have benefits -- even if the attorney's initial request for appointment of a receiver is denied by the court, the bringing of the application puts the court on notice that there exists the potential for community assets disappearing before the court can divide them.

Violation of the court's temporary restraining order should provide an adequate basis for bringing an ex parte application for appointment of a receiver. Bringing an application on an ex parte basis also underscores the exigencies of the situation and may bring the parties to a quicker resolution / settlement prior to trial.

### **WHY APPOINT A RECEIVER IN A FAMILY LAW PROCEEDING?**

The appointment of a receiver may be necessary whenever a party (spouse) threatens to or begins to liquidate community property, or when there is a community business operated by both spouses that becomes the dissolution battleground. In these situations, other remedies are unlikely to preserve the marital estate until the community assets can be divided. The problem may be particularly acute where it is a "cash" business (and there are allegations of asset waste or outright deception), or where management and control authority in the business is not clear and the spouses countermand one-another's operating decisions.

Receivers in this scenario need to be alert to the following abuses: sabotage of the business, such as stealing clients; diverting business to

a new corporate shell or business entity; the all-too-frequent disappearing "cash" component; the existence of several sets of books; fraudulent tax filings; spy employees; and the predictable disruption of business caused by the dissolution proceedings and business uncertainty.

### **WHEN SHOULD A RECEIVER BE APPOINTED?**

A receiver is usually appointed in urgent situations, and the appointment is considered a drastic remedy. A receiver may not be appropriate where a restraining order will meet the needs of the case. The best time to suggest appointment of a receiver may be at the initial order to show cause ("OSC") hearing, or even earlier when practical.

In certain instances a "limited receiver" may be appointed to simply conduct an audit of a business and make a report to the court. This allows quick approbation by the Court, limits the scope and cost of the receivership to the parties, preserves community assets and allows the court to assess the need for stronger measures (i.e. a full receivership). Judicial Council Form, No. RC-310, Order Appointing Receiver, along with addenda explicitly defining the powers and restraints of a "limited" receiver, may be used in obtaining such an appointment.

### **AUTHORITY FOR RECEIVER APPOINTMENT**

The authority for the family law court to appoint a Receiver is contained in Family Law Code §290 (subject to §291), that provides: "...a judgment or order made or entered pursuant to this code may be enforced by the court by

execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary."

Additionally, California Code of Civil Procedure §708.620 states, "The court may appoint a receiver to enforce the judgment where the judgment creditor shows that, considering the interest of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment." CCP §708.610 indicates that CCP §564 (Chapter 5) and CCP §571 (Chapter 5a) of Title 7 "govern the appointment, qualifications, powers, rights and duties of a receiver appointed under this article." Counsel may also look to California case law, both family law and general civil decisions, for examples of when a receiver may be useful in marital dissolution actions.

### **RECEIVERS FROM A JUDICIAL PERSPECTIVE**

A receiver is considered an officer or representative of the court and, as such, is generally protected from personal liability, unless the court determines the receiver has committed a breach of fiduciary duty or a negligent tort. See, generally, *Aviation Brake Sys. Ltd. v. Voorhis*, 133 Cal. App. 3d 230, 183 Cal.Rptr.766 (1982) and *Smith v Hill*, 237 Cal. App. 2d 374, 47 Cal. Rptr. 49 (1965).

The family law court has a duty to preserve the community assets during the pendency of the case. The usual situation requiring a receivership in family law is where community assets need to be both

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valued and, at the same time, preserved. Receivers can be also be used to marshal property in the face of threatened violation of a property division order. See, generally, *Darter v Magnussen*, 172 Cal.App2d 714, 342 P.2d 528 (1956).

The “if I can't have it, no one will” mentality permeates the type of case requiring a receivership, where the asset will deteriorate in value over a period of time to the detriment of all concerned. See, generally, *Marriage of Economou*, 224 Cal.App.3d 1466, 274 Cal. Rptr. 473 (1990).

The court can only adopt a management approach and operate 'hands on' pursuant to stipulation of the parties, according to Family Law Code §2450. However, courts' sua sponte orders for appointment of a receiver have been upheld on appeal.

The heart of these cases requiring appointment of a receiver is the parties' apparent dysfunction, an inability to stipulate to anything despite the presence of skilled counsel and / or the unwillingness of one of the parties to cooperate. Many times a receiver is invaluable in protecting property that can be used to satisfy a support order. See, generally, *Huellmantel v. Huellmantel* 124 C. 583; 57 P.582 (1899); *Alderson v. Alderson*, 180 Cal.App.3d 450 (1986).

Other significant California family law decisions relating to receiverships include:

- *Venza v Venza*, 94 Cal. App. 2d 878, 883, 211 P.2d 913 (1949), providing that a receiver may be appointed on the court's own motion, though appointment often is

accomplished by ex parte application.

- *Nichols v Superior Court*, 1 Cal. 2d 589, 596-7 (1934), where the soon-to-be-ex-husband moved out of California, and the wife was successful in having a receiver appointed to keep the husband from disposing of community property. In this case a receiver was used to preserve the community property so the court could properly divide marital property.
- *Quaglino v. Quaglino*, 88 Cal App. 3d 542, 546-7 (1979), where the husband / father murdered his wife. The father was imprisoned and the children sued their incarcerated father for support. The children were successful in having a receiver appointed to take charge of the imprisoned father's properties before a court order for support was made, to allow the court to gather sufficient information on which to base its support order. The court ruled that, under Civil Code §4380 and Code of Civil Procedure §564, appointment of a receiver is appropriate to preserve assets that might be used to satisfy future support obligations, even though a specific order for support had not yet been entered.

Cases dealing with factual situations outside the family law arena also provide guidance in situations that may require a receiver. In *Olsan v. Comora*, 73 Cal. App. 3d 642, 647-8 (1977), the appellate court affirmed that a receiver can be appointed to collect

a simple money judgment. In that case, a judge in Los Angeles County appointed a receiver to take possession of all earnings, cash, bank deposits and checks received by the defendant-appellant for services performed by him as a dentist. The defendant appealed the order appointing the receiver, primarily on the grounds that a receiver cannot be appointed to collect a simple money judgment.

The receiver was appointed pursuant to CCP §564(a) which states “A receiver may be appointed by the court in which an action or proceeding is pending.... in the following cases:” [ §564(b) (4)] “After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or pursuant to the Enforcement of Judgments Law Title 9 (commencing with Section 680.010)....” and [§564(b) (9)] “In all other cases where necessary to preserve the property or rights of any party.” [All code section citations have been updated to reflect current statutes.]

Most family law courts with direct calendar assignments coax a case management order, without objection, from the parties that serves the goal of preserving the community property (if not also the sanity of the judicial officer!). Counsel's greatest weakness in these cases is waiting too long to request orders and the appointment of receivers, with significant value and important paper trails being lost because of the delay. Counsel should be creative with their court requests and courts orders. When in doubt, it never hurts to ask. Judges will always be receptive to a receivership when the alternative is a “fight without end.”

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Attorney's fees and receiver's fees should be assessed at an early stage in the case, and incremental payments should be ordered so the case does not end up with a large dispute over fees without available liquid assets to pay them.

Receiverships in difficult cases may require the approval of retention of experienced civil counsel to represent the receiver in court and in dealings with the parties. An attorney with business savvy is invaluable when the receiver is seeking appropriate direction from the court at significant junctures in the case.

### PRACTICAL ASPECTS OF A RECEIVERSHIP

Accountants and other professionals who act as receivers in family law cases should keep in mind that the primary purposes for their appointment are to (a) prevent premature or deliberate dissipation of community assets and, (b) fulfill court orders. The receiver should work with the court to structure an order that covers the basics of the appointment -- duties, responsibilities, court reporting, discharge, bonding and being paid for services. A well-written court order should include the following:

- A description of the business and any personal /real property that will be the subject of the receivership;
- The amount of the receiver's bond (usually statutory);
- The receiver's authorization to employ legal counsel;
- A provision that the receiver shall take possession of the business and all related assets, either real, personal, or both;

- A direction that the receiver shall demand and collect all monies due and hereafter coming due from any operations of the business, and to care for, preserve, maintain and incur the expenses necessary for care and preservation of the above-described business assets;
- If appropriate, a direction that the receiver shall sell all assets of the business (or, as may occur in a marital dissolution, operate the business in order to comply with other court orders, such as payment of child/spousal support and/or to prevent premature disposition of assets until the formal hearing);
- An appropriately detailed description of the powers of the receiver, such as: to operate and manage the business; to collect / disburse monies; to collect income and profits; to control operation of the equipment or apparatus of the business; to operate, manage and control all books, financial records, writings, etc of the business; to enter into contracts; to reconstruct or trace prior transactions; and to have those other powers granted receivers by California

statute, including those found in CCP §564, et. seq.;

- A schedule of when the receiver is to file certain documents with the court and with all parties to the matter;
- A provision that the receiver may, at any time, apply to the court for further instructions or powers necessary to enable the receiver to perform her or his duties properly;
- Additional provisions specific to the facts of the case.

Open, continuing communication with the appointing court and with the parties by the receiver is essential to the successful fulfillment of the goals of a family law receivership.

In conclusion, while the appointment of a receiver may be a drastic step to take in a family law matter, receiverships are a tool that should be used by many family law practitioners to assist in the resolution of the case and to prevent future malpractice claims or complaints to the California State Bar. ■



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