#F-100 10/24/78

Memorandum 78-67

Subject: Study F-100 - Guardianship-Conservatorship Revision (Preliminary Portion of Recommendation)

Attached to this memorandum are two copies of a staff draft of the preliminary portion of the Recommendation Relating to Guardianship-Conservatorship Law. This material is presented for approval for printing.

The significant portions of the material are the Summary of Report and the Recommendation. The Summary of Report outlines the basic objectives of the proposed legislation and points out the major changes the proposed legislation makes in existing law. The Summary of Report is for use by the person who wants to have a general idea of what is proposed but is not interested in reading more than a few pages.

The Recommendation does not attempt to explain the entire statute; rather the Recommendation seeks to point out the significant changes and additions that are proposed to be made to the existing law. Many portions of the proposed legislation that make no significant change in existing law are not mentioned in the Recommendation.

Both the Summary of Report and the Recommendation necessarily assume that the reader has some familiarity with the subject matter of the proposed legislation. The Comment to each section of the proposed legislation (not included in the material attached to this memorandum) will point out the source of each section of the new statute and the changes, additions, or clarifications the section makes in existing law.

The staff plans to edit the attached material and to check it for technical accuracy as we check the text and Comments to the proposed legislation. We urge the members of the Commission and others who receive this memorandum to read the attached material with care and to mark any editorial corrections or suggested revisions on one of the attached copies and to return the copy to the staff so that the corrections and suggested revisions can be taken into account when the material is prepared for printing. Retain the other copy for you files. If you believe that any change in existing law mentioned in the Recommendation portion of the attached material requires justification or additional justification, we urge you to supply your justification for the change in your suggested revisions so that it can be incoporated in our printed report.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Staff Draft - October 24, 1978

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

GUARDIANSHIP-CONSERVATORSHIP LAW

November 1978

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CONTENTS

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

CALIFORNIA LAW REVISION COMMISSION
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November 6, 1978

To: The Honorable Edmund G. Brown, Jr.
Governor of California and
The Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 27 of the Statutes of 1972 to make a study to determine whether the law relating to guardianship and related matters should be revised. Pursuant to this authorization, the Commission submits this recommendation proposing a new guardianship-conservatorship law.

The proposed law is the result of a joint effort of the Commission and a special subcommittee of the Subcommittee on Guardianships and Conservatorships of the Estate Planning, Trust, and Probate Law Section of the State Bar of California. The members of the State Bar subcommittee are: Arne S. Lindgren, Chairman (Los Angeles), William S. Johnstone, Jr. (Pasadena), Commissioner David C. Lee (Oakland), Judge Arthur K. Marshall (Los Angeles), Matthew S. Rae, Jr. (Los Angeles), and Commissioner Ann E. Stodden (Los Angeles). Commissioner Lee and Messrs. Lindgren, Johnstone, and Rae attended Commission meetings and the Commission drew heavily on their expert advice and experience in preparing the proposed legislation. Judge Marshall submitted written comments on preliminary drafts of the proposed legislation.

The California Land Title Association created a special committee to work with the Commission on this project. The members of the special committee are Edward J. Wise, Chairman (Los Angeles), Helen Byard (Los Angeles), Michael Melton (Van Nuys), Harvey Pederson (San Diego), and Dean A. Swift (San Francisco). Mr. Wise regularly attended Commission meetings and assisted with his comments and suggestions.

A number of other persons attended Commission meetings and gave generously of their time and expertise. W. Allen Bidwell, Los Angeles County Counsel's Office, and G. Sinclair Price, United California Bank

(San Francisco) regularly attended the meetings and were particularly helpful. Margaret Fraser, Assemblyman Lanterman's office (Sacramento) provided useful information by telephone and at a Commission meeting concerning recent legislation affecting Probate Code conservatorships and guardianships of incompetent adults. Neal Dudovitz (Los Angeles), and Martin Levine (Los Angeles), both of the State Bar Legal Services Section, also attended a Commission meeting.

The Commission also received valuable written comments from various persons, including Almon B. McCallum, California Bankers Association (San Francisco), John K. Spencer (San Francisco), Judge Bruce W. Sumner (Santa Ana), and the State Department of Health Services.

The Commission is especially indebted to Garrett H. Elmore, who served as the primary consultant to the Commission on this topic and provided invaluable counsel at the Commission meetings, and to Professor Brigitte M. Bodenheimer of the U.C. Davis Law School, who serves as the Commission's consultant on child custody matters and submitted written comments.

While the contribution of the persons listed above and others who assisted in this project is gratefully acknowledged, the members of the Commission necessarily must assume the sole responsibility for the content of this recommendation.

Respectfully submitted,

Howard R. Williams
Chairperson

PREFACE

This report contains the new guardianship-conservatorship law recommended by the Commission to replace the existing guardianship and conservatorship statutes and a few other statutes that provide protective proceedings for adults and minors.

Three bills are recommended and are set out in this report. The first bill is the proposed new guardianship-conservatorship law. The second bill adds provisions to the Probate Code to provide rules of construction for that code similar to those found in other codes. The third bill makes the necessary conforming revisions (additions, amendments, and repeals) of other statutes that will be required upon enactment of the proposed guardianship-conservatorship law.

The sections recommended by the Commission and the Comments to them are drafted as if all the bills were enacted. Thus, when a reference is made to a section by another section, or by a comment, the reference is to the section as it would exist if all the bills were enacted.

The text of the existing guardianship and conservatorship statutes is set out in the Appendix to this report. The disposition of each section in the Appendix is noted in the Comment following that section. The Comments to the sections of the proposed guardianship-conservatorship law (set out following the text of the section in this report) include references to the comparable provisions of the existing guardianship and conservatorship statutes.

SUMMARY OF REPORT

The proposed law recommended by the Commission is a new comprehensive statute relating to Probate Code guardianships and conservatorships and certain other protective proceedings under the Probate Code.

The major purposes of the proposed law are (1) to clarify the standard for appointment of a guardian of the person of a minor, (2) to limit guardianships to minors and to retain conservatorships for adults, and (3) to consolidate procedural and other provisions common to guardianship and conservatorship law. The proposed law largely continues the substance of existing guardianship and conservatorship law, but makes some substantive changes and numerous minor, technical, and drafting improvements. The proposed law will not become operative until January 1, 1981, and includes transitional provisions. The major changes made by the proposed law are summarized below.

Common Provisions

Because the guardianship and conservatorship statutes are each largely self-contained, there is a great amount of duplication of provisions such as those concerning jurisdiction, venue, temporary appointments, oaths, letters, bonds, powers, duties, inventories, and accounts. To avoid needless repetition and inadvertent variances, the proposed law consolidates the common provisions into a uniform statute.

Scope of Guardianship and Conservatorship

The proposed law eliminates guardianship for incompetent adults since conservatorship is an existing and preferable alternative for such persons. The court in the conservatorship proceeding may restrict or withdraw the legal capacity of the conservatee if necessary to protect the estate.

The proposed law also eliminates guardianship of the person for married minors; protection of the person of a married minor is governed by the conservatorship law. Guardianship is retained for unmarried minors; this is the traditional form of protective proceeding for minors in California.

Nomination and Appointment of Guardian

Existing law provides for testamentary "appointment" of a guardian by will or deed, subject to confirmation by the court. The proposed law changes the nomenclature so that initially the guardian is "nominated," and the appointment is made by the court. The proposed law permits such a nomination to be made by any signed writing and also permits a nomination to be made in the petition for appointment of the guardian or at the hearing on the petition. The existing law makes provision for testamentary appointment of a guardian for particular property a minor may receive from the person making the appointment. The proposed law broadens this provision so that a nomination may be made with respect to any property the minor may receive from the nominator, whether inter vivos or upon death. The proposed law also permits a will nominating a guardian to grant the guardian additional powers. For good cause, the court may limit the powers granted by the will.

The standards of guardianship law for appointment of a guardian of the person of a minor conflict with the standards of the Family Law Act for awarding custody of a minor. The proposed law makes clear that the Family Law Act controls; this codifies recent court decisions. The Family Law Act is also revised to make clear that a nomination of a guardian of the minor's person by a parent is to be given due weight, subject to the paramount consideration of the best interest of the minor.

The present statutory order of preference for appointment of a guardian of the estate of a minor is replaced by a general requirement that the guardian be selected in accordance with the best interest of the minor. The court is required to appoint a person nominated as guardian of the estate or as guardian of particular property unless the court determines that the nominee is unsuitable. If the minor is of sufficient age to form an intelligent preference as to the person to be appointed as guardian, that preference is to be considered by the court in determining the person to be appointed.

Streamlining 1976 Procedural Reforms

The proposed law resolves a number of practical problems in the legislation adopted in 1976 providing for biennial court review of

guardianships and conservatorships, investigation by a court investigator, advice of rights, right to counsel, and trial by jury. The provisions relating to mandatory appointment of counsel and attendance of the proposed conservatee at the hearing are slightly modified to accommodate cases where they would serve no useful purpose or be harmful to the proposed conservatee. The requirement that petitions concerning powers and duties of guardians and conservators be set for hearing within 30 days of the filing of the petition is eliminated as is the 1978 provision requiring the trial on a petition for the appointment of a conservator to commence within 10 judicial days of the date of demand.

Capacity of Conservatee

The proposed law makes clear that a conservatee retains the capacity to affect the conservatorship estate by such transactions as a reasonably prudent person might enter into. The court may broaden or limit this capacity in appropriate circumstances. If the court finds the conservatee to be seriously incapacitated, the conservatee lacks capacity to take any action that affects the estate.

Medical Treatment

Existing law does not clearly indicate the extent to which a guardian or conservator may require the ward or conservatee to submit to medical treatment. The proposed law grants a guardian the same authority a custodial parent has to require a child to receive medical treatment. However, if the minor is 14 or over, court authorization is required for involuntary surgery except in emergency situations. For any medical treatment of a conservatee (other than in emergency situations), the proposed law requires consent of the conservatee, an adjudication of lack of capacity to give consent, or court authorization.

The proposed law extends to minors the existing prohibition against involuntary commitment to a mental health facility except pursuant to the Lanterman-Petris-Short Act.

Court Supervision

Existing statutes are based upon the principle that the guardian or conservator should generally act under court supervision but are unclear as to what acts of estate management are permitted by the guardian or

conservator without prior court authorization. The court may grant a conservator authority to exercise some powers independently without prior court authorization.

The proposed law relieves the guardian or conservator from the need to make court application for authorization of certain types of transactions such as (1) sales of tangible personal property (subject to limitations) and (2) investment of funds in, or sale of, government bonds or listed securities. The proposed law also permits a guardian, as well as a conservator, to apply to the court for authority to exercise one or more specified powers independently without prior court authorization.

The proposed law makes clear that any power exercised or duty performed by a guardian or conservator is subject to a general duty to use ordinary care and diligence.

Doctrine of Substituted Judgment

California cases--relying on the doctrine of substituted judgment--recognize that a guardian of an adult or a conservator may make gifts of surplus income or assets in accordance with the presumed intent of the ward or conservatee. The proposed law codifies this doctrine and makes clear that the court may authorize a conservator on behalf of the conservatee to perform a variety of acts that are necessary or desirable in modern estate planning or management. The proposed law does not extend this authority to the guardian of a minor since the estate of the minor ordinarily needs to be fully preserved.

Procedural Matters

The proposed law permits a guardianship or conservatorship proceeding to be maintained in a county other than the county of residence of the proposed ward or conservatee if to do so is in the best interest of the ward or conservatee.

The proposed law expands the notice requirements to assure that notice of the hearing on the guardianship petition is given to all persons who may have an interest in the proceeding. Notice is required to be given to the minor if 14 or over, to the person having legal custody of the minor, to the person having the care of the minor if other than the person having custody, to the minor's spouse (if any), and to relatives within the second degree. The court may dispense with notice only

if the court determines that notice cannot be given with the exercise of reasonable diligence or that the giving of notice would be contrary to the interests of justice. After establishment of a guardianship or conservatorship, notices in the course of administration are required to be given to a ward who is 14 or over or to the conservatee, and to the spouse of the ward or conservatee, unless the court for good cause dispenses with the notice.

The proposed law resolves present uncertainty as to when a right to jury trial exists by providing that there is no right to a jury except where expressly authorized by statute. Existing statutes expressly authorizing jury trial are preserved with one exception: proceedings to remove the guardian or conservator will be determined by the court.

The proposed law includes a new provision that authorizes the guardian or conservator, with court approval, to submit a dispute to arbitration. Another new provision permits reference of a claim against the ward or conservatee or the estate to a commissioner, referee, or judge pro tempore for summary determination. Existing provisions for the conveyance of real property subject to a preexisting contract and for the conveyance or transfer of real or personal property claimed to belong to another are broadened and revised.

New provisions are added to permit the court to authorize periodic payments on account for fees of a guardian or conservator of the person, estate, or both, and to the attorney for such guardian or conservator, and to authorize the guardian or conservator to make a contingent fee contract with an attorney when the matter is of a type that is customarily the subject of a contingent fee contract and the contract is in the best interest of the ward, conservatee, or the estate.

The proposed law creates a uniform scheme of appealable orders in guardianship and conservatorship proceedings. The scheme broadens the orders appealable in guardianship and narrows the orders appealable in conservatorship. The new scheme is drawn from the provisions that apply to decedents' estates.

Nonresident Ward or Conservatee

Existing law provides for the transfer of a guardianship or conservatorship proceeding out of state in the case of a nonresident ward

or conservatee. The proposed law revises these provisions to permit transfer of some or all of the assets in the California proceeding to a guardian, conservator, or similar fiduciary in another jurisdiction, rather than transfer of the proceeding itself.

Community or Homestead Property of Incompetent Persons

Existing provisions relating to community and homestead property of an incompetent spouse provide for management and control of the property by a competent husband, disposition of the property with the consent of a conservator, and disposition of the property if there is no conservator upon court authorization. The proposed law revises these provisions to reflect the enactment of legislation giving each spouse the right of management and control of community property. The proposed law also broadens the existing provisions to permit a court to authorize transactions in a few situations not presently covered or, as an alternative, to make a determination that either or both spouses are competent to participate in the transaction.

Authorization of Medical Treatment for Adult Without Conservator

The proposed law provides a new procedure to obtain court authorization for a medically recommended course of medical treatment for an adult who has no conservator but who, because of lack of capacity or some other reason, is unable to give an informed consent to the treatment. The proposed law provides for petition, notice, appointed counsel if necessary, hearing, and continuing jurisdiction of the court to revoke or modify its order.

Other Protective Proceedings

The proposed law eliminates the requirement of court approval of a compromise by a guardian of the estate of some, but not all, disputed claims of a minor.

With respect to money or property of a minor, the proposed law:

(1) Increases to $5.000 the amount which may be delivered to a parent to be held in trust for the minor without further court supervision.

(2) Increases from $10,000 to $20,000 the amount which the court may order be held subject to such conditions as the court specifies.

(3) Eliminates the $20,000 maximum limit on the amount of money that may be deposited or invested in a court-controlled account without the creation of a guardianship.

The proposed law also increases from $5,000 to $20,000 the amount of personal property of an absentee (prisoners of war and persons missing in action) that may be set aside by the court to the absentee's family for the maintenance of a reasonable and adequate standard of living.

RECOMMENDATION

The conservatorship statute is largely self-contained.[6] It duplicates many of the provisions of the guardianship statute.[7] In some cases, the guardianship and conservatorship provisions are virtually identical. In other cases, the conservatorship provision is an improved version of the comparable guardianship provision. In still other cases, comparable provisions of the two statutes are inconsistent without apparent reason.

The proposed law replaces the separate guardianship and conservatorship statutes with a new comprehensive statute. The proposed law limits guardianships to minors, retains conservatorships for adults,[8] and consolidates provisions common to guardianships and conservatorships

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6. The conservatorship statute also contains a provision that, where no specific provision of the statute is applicable to a particular situation, the provisions of the statutes governing guardianships and decedent's estates govern insofar as those provisions are applicable to like situations. Prob. Code § 1702.

7. Compare, for example, the following Probate Code guardianship provisions with the corresponding conservatorship provisions.

Guardianship	Conservatorship
§ 1483.1	§ 1803
§ 1486	§ 1805
§ 1519	§ 1862
§ 1550	§ 1901
§ 1554	§ 1905
§ 1554.1	§ 1906
§ 1555	§ 1907
§ 1559	§ 1909
§ 1560	§ 1911
§ 1561	§ 1910
§ 1580	§ 1951
§ 1640	§ 2201
§ 1641	§ 2202
§ 1642	§ 2203
§ 1643	§ 2204
§ 1644	§ 2205
§ 1645	§ 2206
§ 1646	§ 2207

8. Under the Lanterman-Petris-Short Act, there may be conservatorships for minors. See Welf. & Inst. Code §§ 5008(h), 5350. The Commission's proposed law does not disturb the scheme under the Lanterman-Petris-Short Act.

in one comprehensive set of statutory provisions.[9] The new statutory scheme is consistent with recommendations made in 1974 by the Assembly Interim Committee on Judiciary[10] and by the former Probate and Trust Law Committee of the California State Bar.[11]

Legislation authored by Assemblyman Frank Lanterman and enacted in 1976[12] made important procedural and substantive changes in the Probate Code provisions relating to guardianships for incompetents and conservatorships.[13] The proposed law continues the provisions of the 1976

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9. A few provisions are appropriate for guardianship only or for conservatorship only. Examples of such provisions are additional powers granted a guardian by will, special procedural protections for a temporary conservatee, waiver of bond by a conservatee, waiver of bond in nomination of a guardian, differences in manner of authorization of medical treatment of wards and conservatees, payment of surplus income to relatives of a conservatee, application of the doctrine of substituted judgment in conservatorship proceedings, and settlement of accounts with the guardian by a ward who has reached majority.

10. The Assembly Interim Committee held hearings in 1974 on the subject of Probate Code guardianships and conservatorships and concluded that the guardianship and conservatorship statutes should be revised into one workable statute. See Report of the Assembly Interim Committee on Judiciary on Probate Code Guardianships and Conservatorships 16 (1974).

11. The former Probate and Trust Law Committee of the State Bar concluded in 1974 that guardianships should be limited to minors, that conservatorships should be retained for adults, and that the guardianship and conservatorship statutes should be consolidated to eliminate unnecessary inconsistencies and duplication. Recognizing the magnitude of the task of drafting legislation to accomplish those objectives, the State Bar Committee suggested that the matter be referred to the Law Revision Commission for study.

12. 1976 Cal. Stats., Ch. 1357.

13. Important changes or additions made by the 1976 legislation include: New criteria for appointment of a conservator are provided; notice requirements to the conservatee are expanded; excuse from personal attendance of the proposed conservatee at the hearing on the appointment is limited; a procedure for periodic review of the need for the conservatorship is established; the right to legal counsel (including the requirement that legal counsel be appointed for a person unable to obtain legal counsel) and the right to jury trial are recognized by express statutory provision; an express prohibition against involuntary mental health treatment under the Probate Code is added. Similar changes were made in the guardianship law applicable to adult incompetents.

legislation with a few modifications to deal with practical problems that have arisen under the provisions.[14]

The proposed law makes a number of other substantive changes and clarifications in existing law and includes new provisions to deal with matters not adequately covered by the existing statutes. The major changes and additions are discussed below. Minor changes, additions, and clarifications are noted in the Comments following the text of the sections of the recommended legislation.

The operative date of the proposed law is delayed until January 1, 1981.[15]

ESTABLISHMENT OF GUARDIANSHIP

Nomination of Guardian

Substitution of nomination procedure for testamentary appointments. Existing law permits a parent to make a testamentary appointment of a guardian for a child.[1] Any person, including a parent, may by will appoint a guardian for particular property a minor may take under the will.[2] These testamentary appointments are subject to court confirmation.[3] Although it is not entirely clear, it appears that a testamentary appointment is persuasive with the court rather than absolutely

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14. The changes that the Commission recommends are discussed in connection with the discussion of the particular subject matter.

15. The proposed law is recommended for enactment by the Legislature in 1979. The delayed operative date will allow time for affected persons to become familiar with the law, for the Judicial Council to prepare necessary forms, and for law publishers to print the law.

1. Prob. Code § 1403. The testamentary guardian may be appointed as a guardian of the person or estate or both. The written consent of the other parent is required if consent would be required for an adoption of the child. Id.

2. Prob. Code § 1402. If the appointment of a guardian as to particular property is made by a parent, it may be done by deed as well as by will. Id.

3. Prob. Code § 1405.

binding upon it.[4] It is therefore somewhat misleading, especially to nonlawyers, to refer to a designation of a testamentary guardian as an "appointment."

Under the proposed law, the parent or other person will "nominate" the guardian and the "appointment" will be made by the court.[5] The use of these terms more accurately distinguishes between the role of the parent or other person and role of the court, simplifies the drafting of the provisions concerning appointment and qualification of guardians, and makes the guardianship provisions consistent with the provisions relating to nomination of conservators.

Manner of making nomination. Under existing law, a parent may appoint a testamentary guardian only by will or by deed, a nonparent may appoint by will only, and the appointment is effective only upon death.[6] This is too restrictive. For example, it does not permit a sole surviving parent to nominate a guardian for a child to take effect in the event of the parent's subsequent incapacity. The proposed law broadens the manner of making a nomination so that the nomination may be made in the petition for appointment of a guardian, at the hearing on the petition, or in a writing signed either before or after the petition is filed.

Inter vivos as well as testamentary effect of nomination. The existing provisions making testamentary appointments effective only upon death[7] are broadened by the proposed law so that the nomination is effective when made, although a writing nominating a guardian may provide that the nomination becomes effective only upon the occurrence

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4. See G. Hemmerling, California Will Drafting Supplement § 10.6, at 72 (Cal. Cont. Ed. Bar 1976); Schlesinger, Testamentary Guardianships for Minors and Incompetents, in California Will Drafting § 10.10, at 312-13 (Cal. Cont. Ed. Bar 1965); 3 N. Condee, California Probate Court Practice § 2029, at 151 (2d ed. 1964).

5. Under the proposed law, a nomination may be made by a person permitted to make an appointment under existing law, and consent of the other parent is required under the same circumstances as under existing law. See note 1 supra.

6. See Prob. Code §§ 1402, 1403.

7. Prob. Code §§ 1402, 1403.

of a specified condition such as the legal incapacity or death of the nominator.[8]

Expansion in types of property subject to guardianship for particular property. Under existing law, a guardian for particular property may be appointed only as to property received by will or succession.[9] The proposed law broadens this provision so that a guardian for particular property may be nominated for any property that the minor receives from or by designation of the nominator (whether during the lifetime or upon the death of the nominator). The proposed law, for example, expands the existing provision to include property received by the minor by virtue of an inter vivos gift, trust, insurance, or benefits of any kind.[10]

Degree to which nomination binds the court. Under the proposed law, the degree to which a nomination affects the discretion of the court depends on whether the nomination is of a guardian of the minor's person or of the minor's estate. If the nomination is of a guardian of the person, the proposed law makes clear that the court in appointing the guardian is governed by the provisions of the Family Law Act (Civil Code Section 4600) which apply to any proceeding where there is at issue

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8. The proposed law also provides that, unless the writing in which the nomination is made expressly provides otherwise, the nomination will remain effective notwithstanding the subsequent legal incapacity or death of the person making the nomination.

9. If a guardian for particular property is appointed by a parent, the guardianship may apply to property received by the child from the parent by will or succession. Prob. Code § 1402. If the appointment is made by any other person, the guardianship may apply to property received from the person by will only. Id.

10. The proposed law will change the rule in Estate of Welfer, 110 Cal. App.2d 262, 242 P.2d 655 (1952) (father's desire expressed in his will that designated person be guardian with respect to proceeds of insurance policy on father's life not given effect because existing Probate Code Section 1402 covers only property taken by "will or succession"). The proposed law also clarifies the manner in which the nominator of a guardian for particular property may broaden the powers of the guardian by an appropriate provision in the will. See discussion under "Additional Powers of Guardian Nominated by Will" infra.

the custody of a minor, including a guardianship proceeding.[11] This will make clear that the nomination does not bind the court and is consistent with the rule in custody matters generally that the paramount consideration in the exercise of the court's discretion is the best interest of the child.[12]

The proposed law also amends the Family Law Act to require the court in choosing between nonparents competing for custody of the child to consider and give due weight to a nomination of a guardian of the minor's person made by a parent under the guardianship law. This will give some effect to the parent's wishes regardless of the nature of the custody proceeding.[13]

Where a guardian of the estate is nominated, whether of the general estate or of particular property, the proposed law requires that the court appoint the nominee unless the court determines that the nominee

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11. Guardianship of Pankey, 38 Cal. App.3d 919, 934, 113 Cal. Rptr. 858, ___ (1974); Guardianship of Marino, 30 Cal. App.3d 952, 958-59, 106 Cal. Rptr. 655, ___ (1973); cf. In re B.G., 11 Cal.3d 679, 695-96, 523 P.2d 244, ___, 114 Cal. Rptr. 444, ___ (1974) (applying Civil Code Section 4600 to juvenile court proceeding); In re Reyna, 55 Cal. App.3d 288, 295-96, 126 Cal. Rptr. 138, ___ (1976) (applying Civil Code Section 4600 to habeas corpus proceeding involving minor).

12. E.g., In re Russo, 21 Cal. App.3d 72, 85, 98 Cal. Rptr. 501, ___ (1971) (Family Law Act proceeding: welfare of child is the "primary consideration"); cf. In re Reyna, 55 Cal. App.3d 288, 301, 126 Cal. Rptr. 138, ___ (1976) (habeas corpus proceeding: best interest of child is the "overriding concern"); Guardianship of Aviles, 133 Cal. App.2d 277, 281, 284 P.2d 176, ___ (1955) (guardianship proceeding: welfare of child is "chief concern").

13. The child custody provisions of the Family Law Act apply "[i]n any proceeding where there is at issue the custody of a minor child . . . ." Civil Code § 4600; see cases cited note 11 supra.

is unsuitable.[14] The greater binding effect of a nomination of a guardian where only property is involved is similar to the free hand that the creator of a trust has in selecting the trustee.[15]

Petition for Appointment of Guardian

The proposed law expands the required contents of the petition for appointment of a guardian to conform to existing practice,[16] including the existing Judicial Council requirement[17] that the petition disclose any pending adoption, juvenile court, marriage dissolution, domestic relations, or other similar proceeding affecting the proposed ward of which the petitioner has knowledge. The proposed law imposes a new requirement that the petitioner amend the guardianship petition to disclose any other pending proceeding affecting custody of the proposed ward if the petitioner becomes aware of any such proceeding not disclosed in the guardianship petition. These requirements will alert the court in which the guardianship petition is filed to the other pending proceeding.

Notice of Hearing on Petition

Under existing law, before a guardian may be appointed for a minor, such notice as the court deems reasonable must be given to the person having the care of the minor, to such relatives of the minor residing in

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14. Existing law permits a parent of an unmarried incompetent adult child to appoint a guardian of the person, estate, or both, for the incompetent, to take effect on the parent's death. Prob. Code § 1404. If the incompetent person is married, the appointment may be made by the spouse. Id. These provisions are omitted from the proposed legislation along with the other guardianship provisions relating to adult incompetents. The proposed legislation does, however, contain new provisions relating to nomination of a conservator by a proposed conservatee or by the spouse or a relative of the proposed conservatee.

15. See generally 7 B. Witkin, Summary of California Law Trusts §§ 30, 32, at 5392-95 (8th ed. 1974).

16. The proposed law also requires that the petition contain information necessary to comply with the expanded notice provisions. See "Notice of Hearing on Petition" infra.

17. See Petition for Appointment of Guardian of Minor (Form Approved by Judicial Council of California, effective January 1, 1969).

California as the court deems proper and, if possible, to the minor's parents.[18]

The proposed law significantly expands the notice requirements to assure that notice of the hearing on the guardianship petition (accompanied by a copy of the petition) is given at least 15 days before the hearing to all persons who may have an interest in the proceeding. Service of the notice is required to be made on those persons most directly affected by the proceeding: (1) The proposed ward if 14 years of age or older,[19] (2) the person having legal custody of the proposed ward, (3) the parents of the proposed ward, and (4) any person nominated as a guardian for the proposed ward. In addition, notice by mail or in such manner as is authorized by the court is required to be given to: (1) the spouse, if any, of the proposed ward, (2) all relatives of the proposed ward within the second degree, whether living in California or elsewhere, and (3) the person having the care of the proposed ward if other than the person having legal custody.[20]

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18. Prob. Code § 1441. Section 1441 also provides that notice shall not be given to the parents or other relatives of a minor who has been relinquished to a licensed adoption agency or who has been declared free from parental custody and control. The proposed law permits the court to order that notice be given to the parents or relatives in such a case.

19. It has recently been held that a minor over the age of 14 has an independent right to assert the protections of the due process clause; the court declined to consider whether there might be circumstances in which a minor younger than 14 would have such a right. In re Roger S., 19 Cal.3d 921, 931, 569 P.2d 1286, 1292, 141 Cal. Rptr. 298, 304 (1977).

20. The proposed law also requires notice to the State Department of Mental Health or the State Department of Developmental Services when the minor is a patient in or on leave from a state hospital under the jurisdiction of one of these departments. The existing provision for notice to the State Department of Mental Health or the State Department of Developmental Services applies only to guardianships for adult incompetents. See Prob. Code § 1461.3. Since the apparent purpose of the provision is to permit the state to make a claim for expenses incurred on the ward's behalf (see Prob. Code §§ 1554, 1554.1), the provision is made applicable to guardianships of minors.

The proposed law requires notice to be given to the Veterans Administration when the minor is receiving or is entitled to receive VA benefits. Under existing law, notice to the Veterans

The proposed law permits the court to dispense with notice to any person if the court determines that the person cannot with reasonable diligence be given the notice or that the giving of the notice would be contrary to the interest of justice.[21]

Investigation of Suitability of Proposed Guardian

Under existing law, the court may require that the probation officer make an investigation of the proposed guardianship.[22] The proposed law expands this provision to allow the investigation to be made by the court investigator[23] or domestic relations investigator,[24] as well as by the probation officer, at the discretion of the court. The proposed law also includes provisions, adapted from the similar provisions of the Family Law Act,[25] that deal with the confidentiality of the investigator's report and permit the court, in its discretion, to order that the county be paid for the expense of the investigation by the parents or by the proposed ward's estate.

Administration is required when the petition for appointment of a guardian is filed under the Uniform Veterans' Guardianship Act. See Prob. Code § 1655. However, it appears that, when the guardian receives VA benefits for the ward, the guardian must give notice of the account to the Veterans Administration whether the guardianship proceeding was brought under the Uniform Veterans' Guardianship Act or otherwise. See Prob. Code § 1657. It is therefore advisable to require notice to the VA upon commencement of guardianship proceedings when the minor is receiving or is entitled to VA benefits.

21. The court might determine that the giving of notice would be contrary to the interest of justice, for example, if the parents or relatives of the proposed ward were in Vietnam and the giving of the notice might be dangerous to them or where a mother had abandoned the proposed ward, remarried, established a new family, and indicated in writing that she wanted to receive no further communications concerning her child because she was concealing its existence from her new family.

22. Prob. Code § 1443.

23. See Prob. Code § 1754 ("court investigator" defined).

24. The inclusion of the domestic relations investigator will make the guardianship provision consistent with the Family Law Act. See Civil Code § 4602.

25. Civil Code § 4602.

Existing law does not permit the court to order an investigation if the guardianship petition discloses that proceedings to adopt the proposed ward have been commenced by the petitioner or that the petitioner's home is licensed as a foster family home.[26] In these cases, a report on the suitability of the petitioner for guardianship must be filed with the guardianship court by the agency investigating the adoption or by a local public social services agency.[27] The proposed law permits the court to order an investigation notwithstanding that in these cases a report is otherwise required. This authority is useful, for example, if the court believes that the agency making the report has such an adverse interest in the matter that the report is not likely to be objective.

Selection of Guardian

Guardian of the person. The Probate Code prescribes the order of preference for appointment as guardian of a minor, authorizes a minor over 14 years of age and residing in California to nominate his or her own guardian, and provides other special rules for appointment.[28] However, the standards for child custody in the Family Law Act[29] have been held to apply to guardianship proceedings and to take precedence over the inconsistent Probate Code provisions.[30] The proposed law codifies existing law by substituting a provision incorporating the child custody standards of the Family Law Act for the inconsistent provisions in the guardianship statute relating to guardianship of the minor's person.[31] Thus, first preference for guardianship will be given to

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26. Prob. Code § 1443.

27. Prob. Code § 1440.1.

28. Prob. Code §§ 1406-1409.

29. Civil Code Section 4600 prescribes standards that apply "to any proceeding where there is at issue the custody of a minor child."

30. Guardianship of Pankey, 38 Cal. App.3d 919, 934, 113 Cal. Rptr. 858, ___ (1974); Guardianship of Marino, 30 Cal. App.3d 952, 958-59, 106 Cal. Rptr. 655, ___ (1973).

31. This implements a recommendation of the Commission's consultant on child custody, Professor Brigitte M. Bodenheimer of the U.C. Davis Law School. See Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 Stan. L. Rev. 703, 731 (1971).

either parent, then to the person or persons in whose home the child has been living in a wholesome and stable environment, and then to any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.[32] If the child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court is required to consider and give due weight to the child's preference.[33] If a parent has nominated a guardian of the child's person and the custody contest is between nonparents, the court is also required to consider and give due weight to the nomination.[34]

Guardian of the estate. Section 1407 of the Probate Code states the order of preference for selection of a guardian. This provision is designed primarily for guardianship of the person and is inadequate for guardianship of the estate.[35] The proposed law replaces the statutory order of preference by a general standard directing the court to appoint a guardian of the estate in accordance with the minor's best interest, taking into account the proposed guardian's ability to manage and preserve the estate as well as the proposed guardian's concern for and interest in the minor's welfare.[36]

The court presently has discretion to consider the minor's preference for a guardian if the minor is of sufficient age to form an intelligent preference.[37] If the minor is over 14 and resides in California, the minor may nominate a guardian; however, the court must be satisfied

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32. See Civil Code § 4600.

33. See Civil Code § 4600.

34. See discussion under "Nomination of Guardian--Degree to which nomination binds the court" supra.

35. See Estate of Rosin, 226 Cal. App.2d 166, 170, 37 Cal. Rptr. 830, ___ (1964).

36. The proposed law requires the court to appoint a nominated guardian unless the court determines that the guardian is unsuitable. See discussion under "Nomination of Guardian--Degree to which nomination binds the court" supra.

37. Prob. Code § 1406; Guardianship of Turk, 194 Cal. App.2d 736, 741, 15 Cal. Rptr. 256, ___ (1961).

that guardianship is necessary or convenient and that the nominee is a suitable person before it approves the nominee.[38] The proposed law does not continue the provision for nomination of a guardian of the estate by the minor. Instead, a minor who is 14 years of age or older is permitted to file a petition for the appointment of a guardian, specifying in the petition the name of the proposed guardian. This will result in the petitioning minor being able to propose a guardian. In addition, the minor's preference will be considered, whether or not the minor is the petitioner, if the minor is of sufficient age to form an intelligent preference, but the preference will not override the court's judgment in selecting a guardian of the estate consistent with the minor's best interest.

ESTABLISHMENT OF THE CONSERVATORSHIP

The proposed law reorganizes and clarifies the existing provisions relating to the establishment of the conservatorship and makes a few substantive changes. No substantive change is made in the existing provisions that specify the persons for whom a conservator may be appointed. The important substantive changes are noted below.

Nomination of Conservator

The "nominee" of the proposed conservatee and of specified relatives is entitled to a preference for appointment under the conservatorship statute.[1] There is no express provision in the existing statute for testamentary appointment of a conservator.[2]

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38. Guardianship of Kentera, 41 Cal.2d 639, 642-43, 262 P.2d 317, ___ (1953); Guardianship of Turk, 194 Cal. App.2d 736, 741-42, 15 Cal. Rptr. 256, ___ (1961); Guardianship of Rose, 171 Cal. App.2d 677, 680-81, 340 P.2d 1045, ___ (1959); see Prob. Code §§ 1405, 1406; Guardianship of Kostors, 167 Cal. App.2d 389, 390-91, 334 P.2d 305, ___ (1959).

1. See Prob. Code § 1753.

2. Schlesinger, Testamentary Guardianships for Minors and Incompetents, in California Will Drafting § 10.8, at 312 (Cal. Cont. Ed. Bar 1965). If faced with the question under existing law, the court may well give consideration to a testamentary designation of a conservator, either by applying Section 1405 of the Probate Code as incorporated by Section 1702 (see Schlesinger, supra) or by treating the designation as a nomination under Section 1753. Cf. Guardianship of Walsh, 100 Cal. App.2d 194, 195-97, 223 P.2d 322, ___ (1950) (copy of will not yet probated nonetheless admitted into evidence to show "wishes of a deceased parent" under Probate Code Section 1407).

The proposed law continues the provision of existing law[3] that permits a proposed conservatee to nominate the conservator. If prior to the operative date of the proposed law an adult has made a written nomination of a person to be appointed as guardian in case he or she should need one in the future, the proposed law converts the nomination into the nomination of a conservator.[4]

The proposed law specifies a procedure by which the spouse or a relative of the proposed conservatee may nominate the conservator[5] and also makes clear that the spouse or a parent of the proposed conservatee may nominate a conservator in an instrument that remains effective after the death or incapacity of the spouse or parent.[6]

Petition for Appointment of Conservator

A petition for the appointment of a conservator may be filed by the proposed conservatee or by any relative or friend of the proposed conservatee other than a creditor of the proposed conservatee.[7] The proposed law authorizes a relative of the proposed conservatee to file a petition even though the relative is also a creditor of the proposed conservatee.

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3. Prob. Code § 1752.

4. Under existing law, a nomination of one's own guardian must be made in a written instrument executed in the same manner as a witnessed will. Prob. Code § 1463. However, a nomination of one's own conservator may be made in a written instrument which need not comply with the formalities of a witnessed will, provided that the person making the nomination must have at that time sufficient capacity to form an intelligent preference. See Prob. Code § 1752; W. Johnstone & G. Zillgitt, California Conservatorships § 1.5, at 4 (Cal. Cont. Ed. Bar 1968). The proposed law continues the substance of the latter provision and gives effect not only to a nomination of a guardian which met the stricter formalities of prior law, but also to a purported nomination of a guardian which would have been defective under prior guardianship law but satisfies the requirements of the conservatorship provision.

5. No procedure is provided in the existing statute.

6. This is consistent with existing guardianship law which permits a testamentary appointment of a guardian for an incompetent adult by either parent if the incompetent person is unmarried or by the spouse if married. See Prob. Code § 1404.

7. See Prob. Code § 1754; W. Johnstone & G. Zillgitt, California Conservatorships §§ 3.22, 3.23, at 62 (Cal. Cont. Ed. Bar 1968).

The proposed law authorizes the filing of a conservatorship petition for a minor who is approaching majority so that a minor suffering from mental disability may have a conservator appointed immediately upon reaching majority. This will avoid a possible hiatus between the end of guardianship and the beginning of conservatorship in such a case.

Presence of Conservatee at Hearing

Under existing law, the proposed conservatee must be produced at the hearing on the petition for appointment of a conservator if able to attend.[8] The proposed conservatee may be excused from attending the hearing if medically unable to attend and the inability is established by an affidavit or certificate of a physician.[9] Experience has shown, however, that physicians are reluctant to certify that the proposed conservatee is medically unable to attend the hearing except in the most extreme, life-threatening situations. The result has been that proposed conservatees have been brought into the courtroom in an unconscious or semi-conscious state. In other cases, the court appearance has been a degrading, shameful, or traumatic experience for a person humiliated by public exposure of his or her infirmity.

The proposed conservatee should be excused from attending the hearing if he or she is not willing to attend, does not wish to contest the establishment of the conservatorship, and neither objects to the person who is proposed as conservator nor prefers that another person be appointed. If the court investigator reports these facts to the court, the proposed law authorizes the court to make an order excusing the proposed conservatee from attending the hearing.

LEGAL CAPACITY OF CONSERVATEE

Under existing conservatorship law, the appointment of a conservator does not of itself render the conservatee legally incompetent to make binding contracts; this may be accomplished by the court, however, by providing in the order of appointment that the conservatee is a

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8. Prob. Code § 1754.

9. Prob. Code § 1754.

person "for whom a guardian could be appointed under Division 4."[1] The other consequences of a determination of legal incompetence in the conservatorship proceeding are not clear.[2]

Capacity to Bind or Obligate Conservatorship Estate

The division of responsibilities between conservator and conservatee in managing and controlling the conservatorship estate is not clear under existing law. Before enactment of the conservatorship statute in 1957, a guardian could be appointed for an adult only if the adult were insane or incompetent.[3] While appointment of a guardian settled the issue of the ward's capacity to handle the guardianship property, all wards were stigmatized by the finding of insanity or incompetence. It was primarily to avoid this stigmatization, and to permit protective proceedings for adults in need of assistance who were not necessarily insane or incompetent, that the conservatorship statute was enacted.[4]

In attempting to clarify the capacity of the conservatee to bind or obligate the conservatorship estate, the Commission has balanced the need for certainty and ease of management and control by the conservator against the desirability of a statutory scheme that does not automatically render all persons in need of protective assistance incompetent. The proposed law strikes the following balance:

(1) Upon appointment of a conservator, the conservatee may enter into transactions that bind or obligate the conservatorship estate, but only to the extent the transactions are such that a reasonably prudent

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1. Board of Regents State Univs. v. Davis, 14 Cal.3d 33, 38 n.6, 43, 533 P.2d 1047, ___ n.6, ___, 120 Cal. Rptr. 407, ___ n.6, ___ (1975); see Prob. Code § 1751. This is a euphemistic way of saying that the conservatee is incompetent. See W. Johnstone & G. Zillgitt, California Conservatorships § 3.28, at 68 (Cal. Cont. Ed. Bar 1968).

2. Whether the finding of incompetence in a conservatorship proceeding affects the right to do such diverse things as hold public office (Govt. Code § 1770(b)), serve as a juror (Code Civ. Proc. § 198), marry (Civil Code § 4100), or have custody of children (Welf. & Inst. Code § 600(a)), for example, has not been determined.

3. 1931 Cal. Stats., Ch. 281, § 1460.

4. Lord, Conservatorship vs. Guardianship, 33 L.A. B. Bull. 5, 5-6 (1957); 32 Cal. St. B.J. 585 (1957); W. Johnstone & G. Zillgitt, California Conservatorships § 1.2, 3.1, at 3, 53 (Cal. Cont. Ed. Bar 1968).

person might make.[5] A person seeking to enforce such a transaction will attempt to obtain performance from the conservator, who makes the initial determination whether the transaction is appropriate. If the conservator refuses to execute the transaction, the person seeking enforcement has the remedy of court instructions to the conservator.

(2) Depending on the circumstances of the particular conservatee and conservatorship estate, the court (at the time of appointment of the conservator or at a later time) has the flexibility to fashion an appropriate order broadening or limiting the capacity of the conservatee to affect the estate.[6]

(3) If the court makes an order adjudging the conservatee to be seriously incapacitated, the conservatee lacks capacity to bind or obligate the estate except for necessaries.[7] This preserves in appropriate cases the ability the court has under existing law to adjudge the conservatee to be an incompetent.

This three-layered scheme--capacity for reasonably prudent transactions, court expansion or limitation of capacity, and court adjudication that conservatee is seriously incapacitated--is implemented by procedures that safeguard the rights of the conservatee. These procedures are discussed immediately below.

Procedure for Order Affecting Capacity

Under the proposed law, an order of the court limiting or withdrawing the capacity of the conservatee to bind or obligate the conservatorship estate may only be made as part of the order appointing a

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5. This is in accordance with the rule of Probate Code Section 1858 that the conservator must pay the debts incurred by the conservatee if they appear to be such as a reasonably prudent person might incur.

6. There is precedent for this approach in Lanterman-Petris-Short Act conservatorships. See Welf. & Inst. Code § 5357.

7. The exception for necessaries is consistent with existing law. See Civil Code § 38 (no conservatorship); Prob. Code § 1858 (conservatorship).

8. The proposed law does not grant the right of jury trial on the capacity issue. The conservatee has the right to a jury trial on creation of the conservatorship, which is sufficient to assure that only persons in need of basic conservatorship protection may have their capacity to affect the conservatorship estate restricted or withdrawn.

conservator or subsequently upon petition following the procedures for appointment of a conservator. This ensures that the rights of the conservatee are safeguarded by the same protections that apply on appointment of a conservator.[8] These protections include adequate notice to the conservatee and spouse and relatives of the conservatee, attendance of conservatee at hearing, investigation by court investigator, information by court, right to representation by counsel, and mandatory appointment of counsel if the conservatee is unable to obtain one.

Because of the impact on the powers of the conservatee of an order withdrawing or limiting capacity, the proposed law also includes additional procedural protections. The court may limit the duration of the order. The court may modify or revoke the order. The conservatee, as well as the conservator and other interested persons, may petition for modification or revocation. The continued appropriateness of the order is reviewed at the time of the biennial review of the conservatorship.[9]

Other Legal Consequences of Order Affecting Capacity

The rules discussed above should resolve the most direct and immediate problems that now exist concerning the power of the conservatee to affect the conservatorship estate. The proposed law does not, however, attempt to clarify all the legal consequences of the appointment of a conservator or of an adjudication that the conservatee lacks legal capacity to affect the conservatorship estate.[10] Each legal right or power of a conservatee is governed by a standard based on the social

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9. See discussion under "Biennial Review of Conservatorship" infra.

10. The proposed law also contains provisions relating to the capacity of the conservatee to vote and to give an informed consent for medical treatment. The provision relating to voting denies capacity only on a court finding that the conservatee is not capable of completing an affidavit of voter registration; this continues a provision of Probate Code Section 1462, enacted by 1978 Cal. Stats., Ch. 1363, § 8. The provisions relating to medical consent are discussed under "Medical treatment of ward or conservatee" infra.

policies applicable to that right or power,[11] and a review of those social policies is beyond the scope of this recommendation.[12]

MARRIED MINORS

Under the Civil Code, a minor who has entered into a valid marriage is emancipated whether or not the marriage is terminated by dissolution.[1] Consistent with this rule, a guardian may not be appointed for the person of a married minor solely by reason of minority.[2] This is because the minor's marital obligations are viewed as inconsistent with and superior to the control which a guardian of the person is expected to exercise.[3]

The proposed law continues the prohibition against appointment of a guardian of the person of a minor who is married and makes clear that this extends to a minor whose marriage has been dissolved.[4] In the occasional case where such a minor is suffering from a mental disability

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11. See generally Allen, Ferster, and Weihofen, Mental Impairment and Legal Incompetency (1968); American Bar Foundation, The Mentally Disabled and the Law (rev. ed. 1971).

12. The fact that the Law Revision Commission in this recommendation proposes to clarify only limited aspects of the law relating to the legal capacity of conservatees should not be taken as a determination that existing law in this area is adequate. The Commission plans to request that the 1979 Legislature authorize a Commission study of the entire area of the law relating to the rights and powers of minors and incompetent persons to determine whether the law should be revised.

1. Civil Code § 62(a). See also Civil Code § 204.

2. Prob. Code § 1433. If a minor is under guardianship and the appointment was made solely because of the ward's minority, marriage of the ward terminates the guardianship of the person. Prob. Code §§ 1500, 1590(1).

3. See 39 Am. Jur.2d Guardian and Ward § 55 (1968).

4. Under the proposed law, if the minor's marriage is adjudged a nullity, the minor may be placed under a guardianship of the person just as though the minor had never been married. However, if a conservatorship of the person has been established for a married minor and the marriage is adjudged a nullity, the conservatorship does not terminate.

and needs protective supervision of the person, the proposed law provides for conservatorship of the minor's person rather than guardianship. This avoids the need to duplicate in the guardianship statute the many conservatorship provisions relating to legal capacity, restoration to capacity, and the like.

The proposed law continues the rule of existing law[5] that the marriage of a minor does not preclude appointment of a guardian of the estate or terminate a guardianship of the estate.[6]

LEGAL COUNSEL FOR WARD OR CONSERVATEE

Mandatory Appointment of Counsel

Conservatorship proceedings. Under existing law, if the conservatee or proposed conservatee chooses to be represented by legal counsel but is unable to retain counsel, the court is required to appoint the public defender or other attorney in a proceeding for the appointment of a conservator[1] or in a proceeding to remove a temporary conservatee from his or her place of residence.[2] The proposed law limits this requirement to cases where the conservatee or proposed conservatee opposes the proceeding or where the court determines that appointment of counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee. This

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5. See Prob. Code §§ 1433, 1500, 1590(1).

6. It will thus be unnecessary to inquire into the mental capacity of a married minor where the proceedings are for protection of the estate. The minority of the proposed ward, together with a showing of the need for appointment of a guardian of the estate, will constitute the grounds for such an appointment. The result that a married but mentally disabled minor may simultaneously be subject to a conservatorship of the person and a guardianship of the estate, though seemingly anomalous, is recommended as a practical resolution of the conflicting policies involved.

1. Prob. Code § 2006. See also Prob. Code §§ 1754, 1754.1 (advice of rights). The proposed law breaks down the proceeding for the appointment of a conservator into three aspects: (1) establishment of the conservatorship, (2) selection of the conservator, and (3) restriction or withdrawal of the conservatee's legal capacity with respect to the estate. The right to appointed counsel under the proposed law applies to all three aspects of the proceeding.

2. Prob. Code § 2201.

will avoid the need to appoint counsel in a case where the appointment would serve no useful purpose.

Existing law also requires the court to appoint the public defender or other attorney in a proceeding initiated by the court or by the conservatee for termination of the conservatorship or for removal of the existing conservator when the conservatee has no attorney of record, apparently without regard to whether or not the conservatee requests the appointment of counsel.[3] A separate provision of existing law requires the court to appoint the public defender or other attorney in a proceeding by whomever initiated for termination of the conservatorship, if the conservatee requests the appointment of counsel.[4]

The proposed law continues the requirement of appointed counsel in proceedings to terminate the conservatorship or to remove the existing conservator only in the following cases:

(1) When the proceeding is initiated by the conservatee and the conservatee is unable to retain counsel and requests appointed counsel.

(2) When the proceeding is initiated by the court and the conservatee has no attorney of record, whether or not the conservatee requests appointed counsel.

(3) When the court determines that appointment of counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee.

As under existing law,[5] the conservatee or proposed conservatee furnished appointed counsel must pay the cost of such counsel if able to pay. Otherwise, the county bears the cost of the public defender or makes the payment to appointed private counsel.[6]

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3. See Prob. Code § 1851.1.

4. Prob. Code § 2006.

5. Prob. Code § 2006.

6. Probate Code Section 2006 refers to the person's "present ability to pay," while the proposed law refers merely to the person's "ability to pay." Thus, under the proposed law the court may take into account the person's future economic prospects in determining whether the person should be ordered to pay all or a portion of the costs of appointed counsel.

Proceedings in lieu of conservatorship. Existing law provides for court authorization of a proposed transaction involving community or homestead property where one of the spouses is incompetent without the need to establish a guardianship or conservatorship.[7] However, the law makes no provision for appointed counsel for the incompetent spouse. The proposed law continues these provisions in revised form[8] and adds a requirement that the court appoint the public defender or private counsel for the spouse alleged to lack legal capacity where he or she opposes the proceeding, is unable to retain counsel, and requests appointed counsel. This added requirement gives the spouse the same right the spouse would have if a conservatorship proceeding were commenced and will ensure that the spouse's procedural rights are protected.

The proposed law provides a new proceeding for court authorization of medical treatment for an adult without the need to appoint a conservator of the person.[9] Appointment of counsel is required in such a proceeding if the person opposes the proceeding, is unable to retain counsel, and requests appointed counsel. This requirement will ensure procedural due process where a person's basic right to give or withhold consent to medical treatment is at stake.

As in the case of mandatory appointment of counsel in conservatorship proceedings, the person for whom counsel is appointed is responsible for the cost of counsel to the extent able to pay; otherwise, the county bears the cost.[10]

Discretionary Appointment of Private Counsel

A provision was recently added to the Family Law Act to allow the court to appoint private counsel to represent the interests of a minor

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7. Prob. Code §§ 1435.1-1435.18.

8. See discussion under "Community or Homestead Property of Incompetent Persons" infra.

9. See discussion under "Authorization for Medical Treatment for Adult Without Conservator" infra.

10. See discussion in text accompanying notes 5 and 6 supra.

when the minor's custody is in issue.[11] There is no comparable provision in existing guardianship law.[12]

The proposed law provides general authority for discretionary appointment of private counsel (but not the public defender) for a ward, proposed ward, conservatee, or proposed conservatee whenever the person is not otherwise represented and the provisions for mandatory appointment of counsel do not apply. The court has authority to appoint counsel under the discretionary appointment provision if the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests. As under the Family Law Act, the attorney's fees are payable privately and the county is not responsible.[13]

BIENNIAL REVIEW OF CONSERVATORSHIP

Existing law requires a review of each conservatorship one year after appointment of the conservator and biennially thereafter.[1] When a review is required, the court investigator must visit the conservatee, inform the conservatee that the conservatee is under conservatorship, and tell the conservatee the name of the conservator. The court investigator must also determine whether the conservatee wishes to petition the court to terminate the conservatorship, whether the conservatee still needs the conservatorship, and whether the present conservator is acting in the best interests of the conservatee. The investigator's findings, including the facts upon which the findings are based, are certified in writing to the court. Based either upon the conservatee's

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11. 1976 Cal. Stats., Ch. 588 (codified at Civil Code § 4606).

12. It has been recommended that legislation be enacted to authorize the court to appoint a legal representative for a minor in all custody proceedings. See Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 Stan. L. Rev. 703, 733 (1971).

13. The attorney's fees are to be fixed by the court and paid from the guardianship or conservatorship estate or, in the case of a minor, by the minor's parent or parents or from the estate, or both, in such proportions as the court deems just.

1. Prob. Code § 1851.1.

wishes or the court's independent determination, proceedings for the termination of the conservatorship or the removal of the existing conservator may follow.

The proposed law continues the existing law with a number of minor modifications:

(1) The review is dispensed with if the conservatee resides outside of California and is not present in this state.[2] The benefits of the review in such a case are offset by the high cost of an out-of-state visit by the court investigator.

(2) It is made clear that no review is required where the conservatee is a member of the United States Armed Forces, or is one of certain other specified federal employees, and is in missing status.[3]

(3) The court investigator is given the additional duty of reviewing any court order expanding, limiting, or withdrawing legal capacity of the conservatee to determine whether the order continues to be appropriate or should be modified or revoked.

(4) A copy of the court investigator's report is required to be mailed to the conservator at the same time it is certified to the court.

(5) The existing provision which permits the court to require a hearing for termination of the conservatorship or for removal of the conservatee based on information contained in the court investigator's report[4] is broadened so that the court may act upon information from whatever source received.

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2. This provision is analogous to the provision of existing law which excuses the personal attendance of the proposed conservatee at the hearing on the petition for appointment of a conservator if the proposed conservatee is not the petitioner and is not in California when served with the citation and copy of the petition. See Prob. Code 1754.

3. Under existing law, a conservator may be appointed for a person who is an "absentee." Prob. Code § 1751. "Absentee" means U.S. military and other specified personnel in missing status as defined under federal law. See Prob. Code § 1751.1.

4. Prob. Code § 1851.1.

Under existing law, if the court investigator is unable to locate the conservatee, the court directs the conservator to produce the conservatee.[5] If the conservator fails to do so without good cause, the court is required to terminate the conservatorship.[6] Under the proposed law, the sanction for the conservator's failure to produce the conservatee without good cause is removal of the conservator[7] rather than termination of the conservatorship. This is a more appropriate sanction since the conservatee presumably still requires protective supervision and someone should be appointed to take control of the conservatee's estate until the conservatee can be located.

TEMPORARY GUARDIAN OR CONSERVATOR

Temporary Guardian of the Person

Existing law provides for temporary conservators of the person, estate, or both,[1] and temporary guardians of the estate,[2] but there is no provision for a temporary guardian of the person. The guardianship law does, however, provide for temporary custody order if the minor's welfare would be imperiled if the minor were allowed to remain in the custody of the person then having care of the minor.[3] The proposed law

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5. Prob. Code § 1851.1. The proposed law makes some technical improvements in the procedure for ordering production of the conservatee.

6. Prob. Code § 1851.1.

7. The proposed law places the duty to produce the conservatee on the conservator of the person if there is a conservator of the person; if there is no conservator of the person, the duty is placed on the conservator of the estate. This clarifies existing law.

1. Prob. Code § 2201.

2. Prob. Code § 1640. Under existing law, a temporary guardian is referred to as a "special" guardian. See Prob. Code §§ 1640-1646.

3. Prob. Code § 1442. In such situation, the court may cause a warrant to be issued directing a sheriff, coroner, or constable to take the minor into custody. Although Probate Code Section 1442 applies by its terms to guardianship proceedings, it has been applied in a custody proceeding between parents. See Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206 (1934). In this respect, the section would appear to be superseded by provisions of the Family Law Act (Civil Code Sections 4600 and 4600.1).

replaces the provision for temporary custody of a minor in a guardianship proceeding with new provisions for temporary guardianship of the person of a minor.[4] These new provisions deal comprehensively with the problems that may arise during the interim pending the appointment of the permanent guardian.[5]

Removal of Temporary Conservatee From Place of Residence

Under existing law, if a temporary conservator proposes to change the place of residence of the temporary conservatee, the temporary conservator must make a written request to the court.[6] Court approval may be obtained after the change of residence if the former residence is unfit for habitation or if the temporary conservatee has a medical condition which presents an immediate threat to his or her physical survival.[7] A hearing must be held on the request. The temporary conservatee must be present at the hearing unless it would jeopardize his or her physical survival.[8]

The proposed law permits removal of the temporary conservatee from the place of residence without prior court authorization[9] where the temporary conservator determines in good faith based upon medical advice that the case is an emergency case in which such removal is required to provide medical treatment to alleviate severe pain or to diagnose or

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4. The new provisions for temporary guardianship of the minor's person are consolidated with the provisions for temporary conservatorship of the person, so that there will be one uniform set of provisions.

5. The proposed law gives the temporary guardian such powers as are necessary to provide for the temporary care, maintenance, and support of the ward, the same authority as a permanent guardian to require and to give consent for medical treatment needed by the ward, and such additional powers and duties as may be ordered by the court.

6. Prob. Code § 2201.

7. Prob. Code § 2201.5.

8. Prob. Code § 2201.

9. The proposed law continues the existing requirement that the temporary conservator file a written request for authorization to change the place of residence not later than one judicial day after the emergency removal.

treat a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death. The provision of existing law which permits such removal only where the temporary conservatee has a medical condition which presents an immediate threat to physical survival is too stringent and may delay essential medical treatment during the period required to obtain a court hearing and order.

The proposed law also conforms the provisions for excusing the temporary conservatee from attending the hearing to the proposed provisions for excusing a conservatee from attending the hearing on a petition to appoint a conservator.[10] Under the proposed law, the court may, in its discretion, send a court investigator to interview the temporary conservatee and determine whether he or she is willing to attend the hearing, wishes to oppose the request, and desires counsel. If the court investigator reports to the court that the temporary conservatee is not willing to attend the hearing and does not oppose the proposed change of residence, the court may excuse the temporary conservatee from attending the hearing. This will avoid the need to produce the temporary conservatee at the hearing when to do so would serve no useful purpose.

The proposed law also conforms the standard for excusing the temporary conservatee from the hearing for medical reasons to the standard applicable on appointment of a conservator.[11]

GUARDIAN OR CONSERVATOR OF THE PERSON

General Duties

A guardian of the person has the care and custody of the ward's person, has charge of the education of a minor ward, may fix the ward's residence and domicile at any place within this state but not elsewhere without permission of court, and must advise the court promptly in

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10. See discussion under "Presence of Conservatee at Hearing" supra.

11. See Prob. Code § 1754. "Medical inability" to attend the hearing is substituted for jeopardy to the temporary conservatee's physical survival. See discussion under "Presence of Conservatee at Hearing" supra.

writing of all changes in the ward's residence and domicile.[1] A conservator of the person has the same powers and duties except that the conservator lacks express authority to provide for the conservatee's education.[2] The proposed law expressly grants this power to conservators since it may be desirable to provide for the education of the conservatee.

The guardianship statute authorizes the court, with consent of the guardian, to insert in the order of appointment conditions not otherwise obligatory for the care, treatment, education, and welfare of a minor.[3] The proposed law expands this provision to apply to conservatorships of the person as well.

The guardianship statute permits the court to give instructions to a guardian of the estate upon petition where no other or different procedure is provided but fails to permit instructions to a guardian of the person.[4] The provisions in the conservatorship statute for intructions by the court are broader in that (1) they apply to a conservator of the person as well as of the estate, (2) they are not restricted to cases where no other or different procedure is provided, and (3) the conservator may seek approval of actions already taken as well as of proposed actions.[5] The proposed law generalizes the broader conservatorship provision to apply both to guardians and conservators of the person and also both to guardians and conservators of the estate.

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1. Prob. Code § 1500. See Schlesinger, Testamentary Guardianships for Minors and Incompetents, in California Will Drafting §§ 10.12, 10.35, at 313-14, 324 (Cal. Cont. Ed. Bar 1965).

2. See Prob. Code § 1851. A conservator of the person also has "control" of the conservatee although this language makes no practical difference. W. Johnstone & G. Zillgitt, California Conservatorships § 5.3, at 152-53 (Cal. Cont. Ed. Bar 1968). The proposed law applies this language also to guardianships of the person for purposes of uniformity.

3. Prob. Code § 1512.

4. See Prob. Code § 1516.

5. Prob. Code § 1860; W. Johnstone & G. Zillgitt, California Conservatorships § 5.9, at 156 (Cal. Cont. Ed. Bar 1968).

Medical Treatment for Ward or Conservatee

The extent to which a guardian or conservator of the person has the power to make necessary medical decisions for the ward or conservatee is unclear under existing law.[6] The proposed law grants the guardian the same power as a custodial parent to require the ward to receive medical treatment but requires a court order for surgery on a minor over 14 unless the minor consents or an emergency exists in which the minor faces loss of life or serious bodily injury.[7] Under the proposed law, a conservator may require the conservatee to receive medical treatment only if a court order is obtained specifically authorizing the medical treatment, unless an emergency exists[8] or the court has previously determined that the conservatee lacks the capacity to give informed consent to medical treatment.[9] If the conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the conservator may only require treatment by an accredited practitioner of that religion or must obtain a court order authorizing conventional medical treatment.

Under the proposed law as under existing law, involuntary commitment of a conservatee to a mental health facility is not permitted except pursuant to the Lanterman-Petris-Short Act,[10] and the proposed law extends this prohibition to include minor wards as well.

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6. See 60 Ops. Cal. Att'y Gen. 375 (1977).

7. This provision is drawn from the Lanterman-Petris-Short Act (Welf. & Inst. Code § 5358).

8. An emergency exists "where the conservator determines in good faith based upon medical advice that the case is an emergency case in which medical treatment is required because (1) such treatment is required for the alleviation of severe pain or (2) the conservatee has a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death."

9. Concerning the requirement of informed consent, see Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

10. See Prob. Code §§ 1500, 1851.

The proposed law also clarifies the interrelationship of the medical treatment provisions of guardianship-conservatorship law with provisions of other codes relating to medical treatment.[11]

GUARDIAN OR CONSERVATOR OF THE ESTATE

Introduction

The existing statutory provisions governing powers and duties of guardians and conservators of the estate[1] are confusing, conflicting, and often difficult to locate.[2] The guardianship statute sets forth a fairly detailed listing of powers and duties.[3] The conservatorship statute, on the other hand, largely relies on incorporation by reference

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11. The proposed law provides that an experimental drug may be administered to a ward or conservatee only in accordance with the applicable provisions of the Health and Safety Code (Sections 26668-26668.9), and that convulsive treatment and sterilization may be performed on a ward or conservatee only as provided in the applicable provisions of the Welfare and Institutions Code (convulsive treatment: Sections 5326.7-5326.95; sterilization: Section 7254). The proposed law also makes clear that a valid and effective directive made by a conservatee to withhold or withdraw life-sustaining procedures if the conservatee is in a terminal condition (popularly known as a "living will") is not affected by the conservatorship. See Health & Saf. Code §§ 7185-7195.

1. The proposed law changes the term "conservator of the property" to "conservator of the estate." Existing conservatorship provisions use the two terms interchangeably. However, the term "estate" is probably more apt and is more widely used. W. Johnstone & G. Zillgitt, California Conservatorships § 3.3, at 54 (Cal. Cont. Ed. Bar 1968).

2. For example, the guardianship provisions are contained principally in Chapters 7 (powers and duties) and 8 (sales, mortgages, leases, and conveyances) of Division 4 of the Probate Code. However, some provisions are found in Chapter 9 (inventory and accounting) and others are scattered elsewhere throughout Division 4. See, e.g., Prob. Code §§ 1405, 1405.1, 1484, 1557, 1557.1, 1557.2, 1558, 1560, 1561. See also Prob. Code §§ 1571 (powers and duties of guardian of estate of nonresident ward), 1642 (powers and duties of special guardian of the estate).

3. Prob. Code §§ 1500-1561.

of the powers and duties of a guardian of the estate.[4] The conservatorship statute also authorizes the court to give a conservator of the estate specified powers thereafter independently exercisable, thereby avoiding the need for prior case-by-case authorization by the court.[5]

The proposed law consolidates the powers and duties provisions into a single consistent scheme. The powers and duties of guardians and conservators of the estate are virtually identical under the proposed law.[6] The proposed law also gives the guardian or conservator more latitude to act without court approval, thus saving judicial resources and reducing expenses to the estate.

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4. See Prob. Code § 1852. In addition, the conservatorship provisions set forth a few specific powers, but these largely duplicate or overlap parallel provisions of the guardianship law. See, e.g., Prob. Code §§ 1855-1858, 1861. The duplicative or overlapping powers and duties provisions of guardianship and conservatorship law are as follows:

Guardianship	Conservatorship
§ 1502	§ 1855
§ 1558	§ 1856
§ 1504	§ 1857
§ 1501	§ 1858
§ 1503	§ 1859
§ 1516	§ 1860
§ 1519	§ 1862

Despite the conservatorship provision incorporating and applying the powers and duties from the guardianship statute (Prob. Code § 1852), the specific powers in the conservatorship statute take precedence over the inconsistent guardianship provisions in a conservatorship proceeding. W. Johnstone & G. Zillgitt, California Conservatorships § 5.7, at 155 (Cal. Cont. Ed. Bar 1968).

5. See Prob. Code § 1853. There appears to be a conflict between this provision and the concept of incorporation by reference of the guardianship provisions. Compare Place v. Trent, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, 843 (1972), with Olson v. United States, 437 F.2d 981, 985 (Ct. Cl. 1971).

6. The proposed law broadens the existing provision permitting a conservator to pay a reasonable allowance for personal use of the conservatee (Prob. Code § 1861) to apply to guardianships as well. However, the provisions authorizing payment of surplus income to the next of kin (Prob. Code § 1856) and the new provisions codifying the substitution of judgment doctrine are limited to conservatorships because those provisions are not appropriate for use in the case of a minor. See discussion of "Gifts on Conservatee's Behalf; Estate Planning for Conservatee" infra.

Duty to Use Ordinary Care and Diligence

The proposed law provides that the guardian or conservator, in managing and controlling the estate, shall use ordinary care and diligence. This standard is consistent with trust principles that apply to guardianships and conservatorships under existing law.[7] What constitutes ordinary care and diligence is to be determined according to all the circumstances of the particular estate.

The proposed law also makes clear that the standard of ordinary care and diligence determines when a power otherwise granted by statute should or should not be exercised. A number of duties of the guardian or conservator under existing law have been recast as powers under proposed law since the proposed law adopts the concept that whether the exercise of a power is mandatory or discretionary depends on the circumstances in light of the basic duty to use ordinary care and diligence.[8]

Court Supervision Generally

A significant problem with the existing law is the uncertainty when the guardian or conservator of the estate may act without prior court authorization and when prior court authorization is required. While some provisions specifically indicate whether court authorization is or is not required for exercise of a power,[1] many are silent on the question.[2]

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7. See Prob. Code §§ 1400, 1702; W. Johnstone & Zillgitt, California Conservatorships § 5.2, at 152 (Cal. Cont. Ed. Bar 1968). Under general trust law, a trustee must use at least ordinary care and diligence in the execution of the trust. Civil Code § 2259.

8. It has been said that there is no clear distinction between a power and a duty in conservatorship law, and each may usually be spoken of interchangeably. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.1, at 152 (Cal. Cont. Ed. Bar 1968).

1. E.g., Prob. Code §§ 1504-1507, 1515, 1515.5, 1518, 1530-1532, 1534a, 1537-1538.5, 1540, 1557-1558, 1856, 1857, 1861 (court approval required); Prob. Code §§ 1508, 1538.6 (court approval not required).

2. E.g., Prob. Code §§ 1500, 1501-1502, 1513, 1514, 1517, 1520, 1533, 1855.

There are a number of possible approaches to court supervision of the guardian or conservator. The Uniform Probate Code, for example, gives a conservator all of the powers of a trustee, exercisable without court authorization or confirmation.[3] This approach does not afford sufficient protection for the estate. On the other hand, it would be inefficient and uneconomical to require the guardian or conservator to obtain prior court authorization for every action.

The proposed law adopts a middle ground. Prior court authorization is not required for routine actions (unless the court upon petition or upon its own motion specifically limits the authority of the guardian or conservator) but is required for actions that have a significant impact on the estate. The proposed law gives the guardian or conservator somewhat more freedom to act without prior court authorization than the existing law. The proposed law also makes clear that the guardian or conservator may seek instructions from the court concerning exercise of a power that does not require prior court authorization.[4]

The powers and duties exercisable under the proposed law without prior court authorization (unless the court otherwise orders) include:

(1) Endorsing, cashing, or depositing checks payable to the ward or conservatee which constitute property of the estate.

(2) Depositing money in banks, savings and loan associations, or credit unions and personal property of the estate with a trust company.

(3) Maintaining in good condition and repair the home of the ward or conservatee or the home of those legally entitled to such maintenance and repair from the ward or conservatee.

(4) Obtaining, renewing, modifying, or terminating health and disability insurance.

(5) Insuring the property of the estate against loss or damage.

(6) Insuring the ward or conservatee, the guardian or conservator, and the estate against liability to third persons.

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3. See Uniform Probate Code §§ 5-424, 5-425.

4. This provision is based on the conservatorship provision (Prob. Code § 1860) which covers the entire range of the conservator's activities (W. Johnstone & G. Zillgitt, California Conservatorships § 5.9, at 156 (Cal. Cont. Ed. Bar 1968)), rather than on the guardianship provision (Prob. Code § 1516) which by its terms is limited to cases where no other or different procedure is provided by statute.

(7) Paying, contesting, or compromising taxes and making tax returns.

(8) Instituting and maintaining actions[5] for the benefit of the ward or conservatee or the estate and defending actions and proceedings against the ward or conservatee or the estate.

(9) Disposing of or abandoning valueless property.

(10) Compromising claims or actions (other than claims for personal injury or wrongful death, certain claims affecting real property, certain support claims, claims of the ward or conservatee against the guardian or conservator, or compromises involving the transfer or encumbrance of assets of the estate or the creation of a liability against the estate in excess of $25,000).[6]

(11) Buying and selling stocks, bonds, and other securities which are listed on an established exchange in the United States and direct obligations of the United States.[7]

(12) Selling or exchanging tangible personal property in any calendar year not in excess of $5,000, subject to certain limitations.[8]

(13) Renting real property for a term not exceeding two years and a rental not exceeding $750 monthly or, regardless of the amount of the rental, when the lease is from month to month.[9]

Compromising Claims and Actions

Under existing law, a guardian or conservator of the estate may, with court approval, compromise any suit, claim, or demand by or against the ward, conservatee, the estate, or the guardian or conservator as

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5. Court authorization is required to commence a partition action.

6. See discussion under "Compromising Claims and Actions" infra.

7. See discussion under "Sales Permitted Without Court Authorization" and "Investments Permitted Without Court Authorization" infra.

8. See discussion under "Sales Permitted Without Court Authorization" infra.

9. This changes existing law to increase the term from one year to two years and the amount from $250 to $750 a month. See Prob. Code § 1538.6. This increase takes into account the effect of inflation on the value of real property in recent years.

such.[1] The court may also authorize the guardian or conservator to extend, renew, or modify the terms of any obligation owing to the ward, conservatee, or the estate.[2]

The proposed law permits the guardian or conservator to compromise a claim, action, or proceeding, or to extend, renew, or modify an obligation, without prior court approval except to the extent the court limits the authority of the guardian or conservator and except where court approval is otherwise specifically required. Court approval is specifically required:

(1) Where real property is affected.

(2) Where the transaction requires a transfer or encumbrance of assets of the estate, or creates a liability of the estate, in excess of $25,000.

(3) Where the claim is by the ward or conservatee against the guardian or conservator.

(4) Where the debt to be extended, renewed, or modified is owed by the guardian or conservator to the ward, conservatee, or the estate.

(5) Where the claim is for the support, maintenance, or education of the ward or conservatee or of a person the ward or conservatee is legally obligated to support.

(6) Where the claim is by the ward or conservatee for wrongful death or physical or nonphysical harm to the person.

The reduction of the instances where court approval is required for compromises by the guardian or conservator is consistent with the general objective of the proposed law to economize on judicial resources and to minimize expenses incurred by the estate.

The proposed law also makes clear the rules that determine the court that is a proper court for approval of a compromise of a claim or matter. If the claim or matter is the subject of a pending action or proceeding, the proper court is the court where the action or proceeding is pending. However, if the action or proceeding is pending in a federal court, sister state court, or court outside the United States, the

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1. See Prob. Code §§ 1530a, 1852. See also Prob. Code § 1501.

2. Prob. Code § 1530a, 1852.

required approval may be obtained either from the court in which the action or proceeding is pending or from the guardianship or conservatorship court. If the claim or matter is not the subject of a pending action or proceeding, court approval may be obtained from any of the following: (1) the guardianship or conservatorship court, (2) the superior court of the county where the ward or conservatee or guardian or conservator resides, or (3) the superior court of any county where suit on the claim or matter properly could be brought.

The proposed provisions do not affect Section 372 of the Code of Civil Procedure (compromise of pending action or proceeding) or any other statute that may be applicable to a particular case. Where approval of a compromise of an administrative proceeding is required in such administrative proceeding in order for the compromise to be valid,[3] the approval is governed by that statute, and approval in the guardianship or conservatorship proceeding is not required.

Special Procedures for Determining Disputes or Adverse Claims

Arbitration. The proposed law makes clear that the guardian or conservator may make a written agreement submitting a dispute to arbitration[4] if the agreement is approved by the court and the approved agreement is filed in the guardianship or conservatorship proceeding.

Summary determination. The proposed law authorizes the guardian or conservator to make a written agreement with a person who has a claim against the ward, conservatee, or the estate, to refer the matter for summary determination to a commissioner or referee who is regularly attached to the court and designated in the agreement or to a judge pro tempore designated in the agreement. The agreement may provide for referral to a probate judge for summary determination with the written consent of the judge. The matter is heard and determined by summary procedure, without pleadings, discovery, or jury trial. Judgment is entered on the decision of the designated person and is as valid and effective as an ordinary judgment. Like the comparable provisions

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3. E.g., Labor Code § 5001 (compromise of worker's compensation proceeding).

4. This is consistent with the rule in other U.S. jurisdictions. See 5 Am. Jur.2d Arbitration and Award § 63, at 566-67 (1962).

applicable to the administration of estates of decedents,[5] the new procedure is designed to save costs to the guardianship or conservatorship estate and to ease the court's workload by encouraging the summary disposition of claims against the estate.[6]

Conveyance or Transfer of Property Claimed to Belong to Ward, Conservatee, or Other Person

Under existing law, the court may authorize and direct a guardian of the estate to convey real property to the person entitled to the property when (1) an adult ward is bound to do so by a contract in writing executed by the ward while competent or executed by the ward's predecessor in interest or (2) a minor ward has succeeded to the interest of a person bound by a contract in writing to do so.[7] Under a separate provision of existing law, the court may authorize and direct a guardian of the estate to convey real property, or to transfer personal property which is claimed to belong to another, unless (1) a civil action concerning the matter is pending, (2) an objection is made that the venue would be improper for a civil action, or (3) the court determines that the matter should be determined by civil action.[8] These provisions are also made applicable to conservatorship proceedings.[9]

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5. Prob. Code § 718.

6. See Review of Selected 1968 Code Legislation, at 226-27 (Cal. Cont. Ed. Bar 1968).

7. Prob. Code § 1537. There is similar authority in the provisions relating to the administration of decedent's estates. See Prob. Code § 1850. These latter provisions authorize the court to direct the transfer of personal property as well as the conveyance of real property. Id.

8. See Prob. Code § 1537.5 (incorporating Prob. Code § 851.5). There is similar authority in the provisions relating to the administration of decedent's estates. See Prob. Code § 851.5. These latter provisions permit the court to authorize and direct another person to convey real property or to transfer personal property to the executor or administrator under certain circumstances. Prob. Code §§ 851.5, 852.

9. See Prob. Code § 1852.

The proposed law consolidates and continues these provisions and broadens them in several respects.[10] The provision for enforcement of a preexisting contract to convey real property is broadened to include specifically enforceable contracts to transfer personal property.[11] The provision for conveyance or transfer of real or personal property claimed to belong to another is broadened to include the situation where the property is owned or held by another and is claimed by the ward or conservatee.[12]

Under existing law, there are a number of procedural protections which apply in a proceeding to determine an adverse claim to property[13] but do not apply in a proceeding to enforce a preexisting contract:[14] (1) The proceeding may not go forward if there is an objection that the venue would not be proper for a civil action or if a civil action concerning the matter is pending or if the court determines that the matter should be determined by civil action[15] and (2) there is a right to a

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10. The notice provisions of the proposed law do not include posting and publication requirements. Compare Prob. Code §§ 851.5, 1200. However, an express provision permitting notice of the pendency of a proceeding affecting real property is included in the proposed law.

11. This change will make the guardianship-conservatorship law the same in substance as the law relating to executors and administrators. See Prob. Code § 850.

12. This change will make the guardianship-conservatorship law the same in substance as the law relating to executors and administrators. See Prob. Code § 851.5.

13. See Prob. Code §§ 1537.5, 851.5, 852.

14. See Prob. Code §§ 1537, 850, 852.

15. Prob. Code §§ 851.5, 852.

reasonable continuance to conduct discovery or to make other preparations for the hearing.[16] The proposed law extends these provisions to apply to proceedings to enforce preexisting contracts.[17]

Sales Permitted Without Prior Court Authorization

Under existing law, sales in guardianship and conservatorship proceedings generally must to conform to the provisions concerning sales by administrators.[1] Under the latter provisions, notice of most sales must be published or posted, and the court must confirm the sale before title passes.[2] In the case of stocks, bonds, and certain other securities, a simplified procedure is permitted: The representative seeks court authorization before the sale, advising the court of the proposed minimum sale price or that the sale will be made on an established stock exchange; if the court authorizes the sale, no subsequent confirmation is necessary.[3]

The proposed law generally continues existing law except that the procedure for sales of securities and tangible personal property is

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16. Prob. Code § 851.5.

17. The application of the abatement provisions (note 15 supra) to the enforcement of preexisting contracts in guardianship and conservatorship proceedings will result in such proceedings being abated under circumstances where proceedings for the administration of decedent's estates would not be abated. However, the abatement provisions provide desirable protections that should apply when one party seeks to enforce a preexisting contract in the guardianship or conservatorship proceeding instead of in a civil action.

1. See Prob. Code §§ 1534, 1852; W. Johnstone & G. Zillgitt, California Conservatorships § 5.55, at 202 (Cal. Cont. Ed. Bar 1968). The provisions concerning sales by administrators are in Sections 750-814 of the Probate Code.

2. See Prob. Code §§ 755, 772, 780; Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.17, at 511 (Cal. Cont. Ed. Bar 1971). An exception is made in the case of perishable or depreciating personal property. Prob. Code § 770.

3. Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.64, at 549 (Cal. Cont. Ed. Bar 1971); see Prob. Code § 771; W. Johnstone & G. Zillgitt, California Conservatorships § 5.55, at 202 (Cal. Cont. Ed. Bar 1968).

further simplified in the interest of saving judicial resources and expense to the estate. Except as specifically limited by court order, the guardian or conservator, without court authorization or confirmation, may sell stocks, bonds, and other securities traded on an established exchange in the United States and direct obligations of the United States. The market price of these securities is readily ascertainable at the time of sale. Similarly, the guardian or conservator may sell or exchange tangible personal property of the estate without court authorization or confirmation so long as the aggregate of the sales or exchanges made during any calendar year do not exceed $5,000. However, sale or exchange of personal effects or of household furnishings may be made only with the consent of the ward if 14 years of age or over or with the consent of the conservatee if such consent is within the conservatee's capacity. This authorization will permit sale of a motor vehicle or other excess tangible personal property without the waste of judicial resources and will avoid the expense of court proceedings to the estate. The interest of the ward or conservatee will be adequately protected since sales of securities or tangible personal property under the proposed provision are subject to an express requirement that the sale be in the best interest of the ward, conservatee, or the estate and the sale is subject to review on settlement of the accounts of the guardian or conservator.

Investments Permitted Without Prior Court Authorization

Under existing law, investments by the guardian or conservator generally require prior court authorization.[4] The proposed law liberalizes existing law to permits investment of estate funds without prior authorization in:

(1) Stocks, bonds, and other securities that are purchased on an established exchange in the United States.

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4. See Prob. Code §§ 1557, 1852; W. Johnstone & G. Zillgitt, California Conservatorships § 5.73, at 217 (Cal. Cont. Ed. Bar 1968); Cupp, McCarroll, & McClanahan, Guardianship of Minors, in 1 California Family Lawyer § 16.64, at 654 (Cal. Cont. Ed. Bar 1962).

(2) Direct obligations that will mature within five years after the time of acquisition issued by the United States or by the State of California.

(3) United States Treasury bonds redeemable at par value on the death of the holder for payment of federal estate taxes regardless of the maturity date.

The market price of these investments is readily ascertainable at the time of purchase.

Independent Exercise of Powers

The conservatorship law authorizes the court to grant the conservator one or more "additional" powers which the conservator may thereafter exercise independently without case-by-case court authorization.[5] The proposed law continues this authority,[6] expands it to apply to guardianships, and makes clear that the court may impose restrictions, conditions, and limitations on the exercise of the powers granted.[7]

Gifts on Conservatee's Behalf; Estate Planning for Conservatee

Payment of surplus income to relatives. Under existing law, the court may direct a guardian of the estate of an incompetent adult or a conservator to pay surplus income to the "next of kin" whom the ward or conservatee in the court's judgment would have aided if able.[1] However, the meaning of "next of kin" is not clear in this context.[2] The proposed law permits payments to the spouse and to relatives within the

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5. Prob. Code § 1853; W. Johnstone & G. Zillgitt, California Conservatorships § 5.74, at 217-18 (Cal. Cont. Ed. Bar 1968).

6. The authority is more accurately characterized in the proposed law as "independent exercise of powers."

7. The court probably has the power under existing law to attach restrictions or conditions on the exercise of such powers. W. Johnstone & G. Zillgitt, California Conservatorships § 5.75, at 218 (Cal. Cont. Ed. Bar 1968).

1. Prob. Code §§ 1558, 1856.

2. W. Johnstone & G. Zillgitt, California Conservatorships § 5.33, at 181 (Cal. Cont. Ed. Bar 1968).

second degree of the conservatee[3] and codifies case law permitting the court to impose conditions on the payment of surplus income if the court finds that the conservatee would have imposed them.[4]

Substituted judgment. The estate of a conservatee may substantially exceed the amount needed for the conservatee. Such an estate may be subject to income and inheritance or estate taxes that a reasonably prudent person similarly situated would minimize through estate planning techniques. In addition, there may be persons whom the conservatee would consider proper objects of bounty, and there may be charities or other activities that the conservatee supported while competent. The conservator may seek to minimize taxes through estate planning techniques or to make gifts from excess income or assets to charities, relatives, friends, and other objects of bounty that would be likely recipients of gifts from the conservatee. Persons interested in the estate may attempt to compel the conservator to take these actions.

In Estate of Christiansen,[5] the California Court of Appeal held that the "doctrine of substituted judgment" enables the guardian of an adult incompetent person to make gifts from the estate to carry out the presumed donative intent of the ward. In Conservatorship of Wemyss,[6] the California Court of Appeal extended the use of the doctrine of substituted judgment to conservatorships.

The proposed law gives statutory recognition to the doctrine of substituted judgment and lists by way of illustration matters that are to be considered in applying the doctrine. At the same time, the proposed law gives the court discretion and flexibility in applying the doctrine under the circumstances of each case. The proposed law applies

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3. The proposed law does not extend the existing authority for payment of surplus income to apply to guardianship proceedings since it would not be appropriate to make gifts from a minor's estate. It is not possible to predict the minor's needs during the minor's lifetime.

4. See Guardianship of Hudelson, 18 Cal.2d 401, 115 P.2d 805 (1941).

5. 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967).

6. 20 Cal. App.3d 877, 880, 98 Cal. Rptr. 85, 87 (1971).

only to conservators and not to guardians; the estate planning considerations that are important for the estate of an adult are not ordinarily present for the estate of a minor.

The proposed law also clarifies a number of matters that are uncertain under existing law. For example, the proposed law makes clear that the court may authorize the conservator to:

(1) Exercise the right of the conservatee as a surviving spouse to elect to take under or against the will of a deceased spouse.[7]

(2) Exercise a disclaimer on behalf of the conservatee.[8]

(3) Exercise or release a power of appointment of which the conservatee is the donee.[9]

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7. A will that leaves community property in trust, including the community property interest of the surviving spouse, may contain a provision that, if the surviving spouse elects to take a statutory share of the community property, the surviving spouse forfeits benefits under the will. Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965). It has been argued that a conservator ought to be able to exercise the right of the conservatee who is the surviving spouse to make this election. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.72, at 216-17 (Cal. Cont. Ed. Bar 1968).

8. Probate Code Sections 190-190.10 allow beneficiaries to disclaim inter vivos gifts (outright or in trust), powers of appointment, and interests passing by will or by intestate succession, thereby avoiding inheritance taxation. G. Hemmerling, California Will Drafting Supplement § 14.23, at 115 (Cal. Cont. Ed. Bar 1976). Probate Code Section 190.2 provides that a disclaimer on behalf of a conservatee shall be made by the conservator of the estate, but the statute contains no guidelines for determining when a conservator should make the disclaimer and does not address the question of whether prior court authorization is required.

9. The authority of a conservator to exercise a power of appointment on behalf of the conservatee is not clear, but it has been suggested that "a conservator attempting to exercise a power should seek court authority." W. Johnstone & G. Zillgitt, California Conservatorships § 1.26, at 13 (Cal. Cont. Ed. Bar 1968). It is the prevailing American rule that a guardian may exercise a power of appointment for a ward unless a contrary intention appears in the instrument creating the power. 39 Am. Jur.2d Guardian and Ward § 104 (1968). If the power permits the conservatee to appoint to himself or herself, an appointment to a third person will affect the conservatorship estate. See California Will Drafting §§ 13.22-13.24, at 466 (Cal. Cont. Ed. Bar 1965) (tax consequences). Yet existing law provides no standards for determining when a conservator should exercise or release a power of appointment.

(4) Exercise the power of the conservatee to revoke a revocable trust.[10]

The proposed law gives the court discretion to require the production of the conservatee's estate plan (including the conservatee's will) for confidential examination in a proceeding requesting approval of a proposed action involving the exercise of substituted judgment.[11] In exercising its discretion, the court must necessarily balance any expressed or implied desire of the conservatee to keep a relevant document confidential against the importance of the document as a factor to be considered in making a determination on the proposed action that will be in accord with the conservatee's desires as determined from the document.

ADDITIONAL POWERS OF GUARDIAN NOMINATED BY WILL

Under existing law, the powers and duties of a testamentary guardian appointed by will may be "legally modified, enlarged, or changed" by the will.[12] However, the extent to which the will can change the statutory powers and duties is not clear.[13]

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10. Existing law is unclear whether a conservator, even with court authority, may revoke a revocable trust created by the conservatee while competent. W. Johnstone, M. Levine, & G. Zillgitt, California Conservatorships Supplement § 5.72A, at 78 (Cal. Cont. Ed. Bar 1978); Drafting California Revocable Inter Vivos Trusts § 5.9, at 141 (Cal. Cont. Ed. Bar 1972). However, it has been urged that the conservator should have such power. W. Johnstone, M. Levine, & G. Zillgitt, supra.

11. Vigne v. Superior Court, 37 Cal. App.2d 346, 99 P.2d 589 (1940), held that the probate court lacked statutory authority to require the custodian of an incompetent ward's will (the custodian was not the lawyer who drafted the will) to deliver the will to the ward's guardian. The proposed law provides a limited exception to this holding by giving the court discretion to compel the custodian to deliver the will to the court for confidential consideration by the court and the attorneys in connection with a petition involving the exercise of substituted judgment. The court may adjudge any person disclosing the content of the will to be in contempt of court.

12. Prob. Code § 1484.

13. Schlesinger, Testamentary Guardianships for Minors and Incompetents, in 1 California Will Drafting § 10.48, at 329 (Cal. Cont. Ed. Bar 1965). It has been said that a draftsman attempting to use the statutory provision and to modify the guardian's powers by will is "embarking on uncharted seas." Id.

The proposed law replaces the vague provision of existing law with more detailed provisions for guardians nominated[14] by will. With respect to a guardian of the person, the will may give the guardian the same authority that a custodial parent would have.[15] With respect to a guardian of the estate, the will may give the guardian the authority to exercise, without notice, hearing, or court authorization, any one or more of the powers that may be granted by the court under the provision concerning independent exercise of powers.[16] The court for good cause may limit the powers granted by the will.

COURT CONFIRMATION OR INSTRUCTIONS

Under existing law, a conservator may petition the court for instructions in advance of a proposed action or for confirmation of an action already taken.[1] A guardian, however, may only obtain instructions in advance,[2] and only where no other or different procedure is provided by statute.[3]

The proposed law continues the conservatorship provisions and extends them to guardianships. This will give guardians the same flexibility as conservators now have to obtain instructions or confirmation from the court.

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14. Under the proposed law, the guardian is "nominated" rather than "appointed" by will.

15. Although a guardian of the person is said to stand in loco parentis, 39 Am. Jur.2d Guardian and Ward § 65 (1968), the guardianship law places some limits on the guardian's power to act as a parent. For example, the guardian may not change the ward's residence and domicile to a place outside California without obtaining court permission. Prob. Code § 1500. Under the proposed law, the will could grant the guardian the power to change the residence and domicile of the ward without court permission.

16. See discussion under "Independent Exercise of Powers" supra.

1. W. Johnstone & G. Zillgitt, California Conservatorships § 5.9, at 156 (Cal. Cont. Ed. Bar 1968); see Prob. Code § 1860; Place v. Trent, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, ___ (1972). The petition for instructions may also be filed by a creditor or other interested party. Prob. Code § 1860.

2. W. Johnstone & G. Zillgitt, supra note 1; see Prob. Code § 1516.

3. Prob. Code § 1516.

COMPENSATION OF GUARDIAN OR CONSERVATOR OR ATTORNEY

Compensation Generally

Under existing law, every guardian and conservator is allowed just and reasonable compensation for services, and reasonable expenses, including attorney's fees.[4] The guardianship provisions authorize an attorney who has rendered services to a guardian to petition the court for compensation,[5] and these provisions appear also to apply to conservatorship.[6] There is no express authority in the existing statutes for either (1) periodic payments on account to a guardian, conservator, or attorney or (2) a contingent fee contract between a guardian or conservator and an attorney for services to be rendered by the attorney.[7]

Periodic Payments

The proposed law permits the court to give advance authority for periodic payments on account to the guardian or conservator, whether of the person, estate, or both, and to the attorney for such guardian or conservator. In fixing the amount of the periodic payment, the court is required to take into account the services to be rendered on a periodic basis and the reasonable value of such services. The guardian or conservator of the estate may make the periodic payments authorized by the court only if the services for which the payment is authorized are actually rendered. The payments are subject to review by the court at the next regular accounting, and the court is required to take appropriate action if the court determines that the payments are excessive or inadequate in view of the services actually rendered.

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4. Prob. Code §§ 1556, 1908.

5. Prob. Code § 1556.1.

6. See Prob. Code § 1702 (law applicable to conservatorship where no specific provision of Division 5 applies); W. Johnstone & G. Zillgitt, California Conservatorships §§ 6.8, 6.25, at 233, 244 (Cal. Cont. Ed. Bar 1968).

7. See generally Estate of Muhammad, 16 Cal. App.3d 726, 733, 94 Cal. Rptr. 856, ___ (1971) (contingent fee contract authorized under Prob. Code § 1020.1); Leonard v. Alexander, 50 Cal. App.2d 385, 387, 122 P.2d 984, ___ (1942) (attorney's fees in malpractice action brought on behalf of minor).

This new authority for periodic payments may afford tax advantages to the estate in certain situations[8] and will ensure that fees are received nearer to the time when the services are performed.

Attorney Contingent Fee Contracts

The proposed law includes an express provision to make clear that the guardian or conservator, with court approval, may make a contingent fee contract with an attorney in advance of the rendering of legal service when the matter is of a type that is customarily the subject of a contingent fee contract and the contract is in the best interest of the ward or conservatee or the estate.[9] This authorization will provide desirable flexibility and certainty to the guardian or conservator in making contracts with attorneys in cases where a contingent fee contract would customarily be used and would be appropriate under the circumstances.

Petition by Attorney or Conservator of the Person for Compensation

The proposed law makes clear that an attorney who has rendered legal services to the guardian or conservator may petition on his or her own behalf for an award of fees in both guardianship and conservatorship proceedings.[10] The proposed law also makes clear that a guardian or conservator of the person may petition for compensation.[11]

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8. See W. Johnstone & G. Zillgitt, California Conservatorships § 6.12, at 235 (Cal. Cont. Ed. Bar 1968).

9. The most extensive use of the attorney's contingent fee contract is in personal injury and estate litigation. 1 B. Witkin, California Procedure Attorneys § 83, at 88 (2d ed. 1970).

10. This is consistent with what appears to be existing law. See notes 5 and 6 supra.

11. Although the existing statute is unclear as to whether a guardian or conservator of the person may independently petition the court for an allowance of compensation (see Prob. Code § 1556), it is standard practice for the guardian or conservator of the person to do so. See W. Johnstone & G. Zillgitt, California Conservatorships § 6.26, at 244 (Cal. Cont. Ed. Bar 1968).

NOTICES

Notice of Hearings Generally

Many provisions of existing guardianship and conservatorship law require that notice of hearing be given as required by Section 1200 of the Probate Code.[1] Section 1200 deals with the notice required in proceedings for the administration of decedent's estates, and the section is not well tailored to the requirements of guardianship and conservatorship proceedings.[2]

The proposed law eliminates the references to Section 1200[3] and substitutes a general requirement of mailed notice to the guardian or conservator and, unless the court for good cause dispenses with notice, to the ward if 14 years of age or older, to the conservatee, to the spouse (if any) of the ward or conservatee, and to any interested person who has appeared, or has served and filed a notice of appearance, in the particular matter to which the hearing relates. The provision of Section 1200 for posting of notice is narrowed in the proposed law so that posting is required only in connection with certain sales.

Existing conservatorship law permits the court to dispense with any notice required in conservatorship proceedings, or to require such further or additional notice as the court deems proper.[4] The proposed

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1. Prob. Code §§ 1483.1, 1515, 1515.5, 1516, 1530a, 1556, 1556.1, 1557, 1557.1, 1803, 1853, 1856, 1859, 1860, 1861, 1901.5, 2001, 2053; see Prob. Code §§ 1558, 1606, 1702. See also Prob. Code § 1655.

2. Section 1200 of the Probate Code provides for posting of notice at the courthouse by the clerk and mailing to the personal representative and all persons who have appeared or have requested special notice.

3. In a few instances, the proposed law incorporates by reference procedural provisions applicable to executors or administrators. Because of this, the proposed law contains a provision that, when such incorporation by reference is made, a reference to Section 1200 in the provisions applicable to executors or administrators shall be deemed to be a reference to the notice provisions of the new guardianship-conservatorship law.

4. Prob. Code § 2001. These provisions do not apply to the additional powers of a conservator authorized under Section 1853. W. Johnstone, M. Levine, & G. Zillgitt, California Conservatorships Supplement § 2.8, at 10 (Cal. Cont. Ed. Bar 1978).

law continues the authority to dispense with notice only with respect to the mailed notice otherwise required to be given to the ward or conservatee, to a spouse of the ward or conservatee, or to a person who has appeared. Under the proposed law, the court may not dispense with notice to the guardian or conservator or to persons who have requested special notice. The proposed law continues the court's authority to require further or additional notice, and makes clear that this includes a longer period of notice.[5] The proposed law includes general authority for the court for good cause to shorten the time for any notice required by the guardianship-conservatorship law except for notice of hearing on a petition for appointment of a guardian or conservator.

Express authority is included in the proposed law for the court to continue or postpone any hearing in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.[6] The Judicial Council is given statutory authority to prescribe the form in which notice is given.

Requests for Special Notice

The proposed law consolidates the existing guardianship and conservatorship provisions relating to requests for special notice[7] and adds new provisions permitting requests for special notice of the following:[8]

(1) A petition for transfer of the proceeding to another county.

(2) The filing of an inventory and appraisement of the estate.

(3) A petition to direct or allow payment of a debt or claim or for attorney's fees.

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5. This appears to be the meaning of the existing provisions of Probate Code Section 2001. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.8, at 30 (Cal. Cont. Ed. Bar 1968).

6. This is consistent with Probate Code Section 1205 (decedent's estate).

7. Prob. Code §§ 1600-1602 (guardianship), 2002-2005 (conservatorship).

8. Some of the matters listed merely make specific matters now covered under the broad language of subdivision (5) of existing Probate Code Section 1600 ("Petitions for allowances of any nature payable from the ward's estate").

(4) A petition to allow compensation or expenses of the guardian or conservator.

(5) Petitions concerning the support, maintenance, or education of the ward or conservatee or of a person legally entitled to support from the ward or conservatee.

(6) A petition for payment of surplus income to relatives of the conservatee or for gifts or other disposition of the conservatee's assets under the doctrine of substituted judgment.

(7) A petition for instruction or confirmation by the court.

(8) A petition for independent exercise of powers by the guardian or conservator.

(9) A petition for conveyance or transfer of property to complete a preexisting contract or to resolve adverse claims to property.

(10) A petition to compromise a claim or to extend, renew, or modify an obligation.

VENUE

Guardianship and conservatorship proceedings are brought in the superior court of the county in which the ward or conservatee resides or is temporarily domiciled; a guardianship proceeding for an incompetent person may be brought in any county; and a guardianship or conservatorship proceeding for a nonresident may be brought in the county in which the ward or conservatee is temporarily living or in which property is located.[9]

Under the proposed law, the proper county for commencement of a guardianship or conservatorship proceeding for a California resident is the county of residence or such other county as may be in the best interests of the proposed ward or conservatee. If the proposed ward or conservatee is a nonresident, the proper county for commencement of a proceeding for guardianship or conservatorship of the person or estate, or both, is the county where the proposed ward or conservatee is temporarily living or such other county as may be in the best interests of the proposed ward or conservatee. In the case of a guardianship or conservatorship of the estate of a nonresident, any county where the proposed ward or conservatee has property is also a proper county. The

9. Prob. Code §§ 1440, 1460, 1570, 2051.

addition of authority to commence a guardianship or conservatorship proceeding in any county which will serve the best interest of the proposed ward or conservatee avoids the need to litigate the issue of residence or domicile when it is in dispute.[10]

JURY TRIAL

There is no right to a jury in guardianship or conservatorship proceedings unless the right is granted by statute.[11] In guardianship proceedings, a right to a jury exists in a hearing on a petition for appointment of a guardian for an alleged incompetent adult, for restoration to capacity of an incompetent adult, and for removal of a guardian.[12] In conservatorship proceedings, the right exists in a hearing on a petition for appointment of a conservator, for termination of conservatorship, and for removal of a conservator.[13]

The proposed law preserves the right to a jury in a hearing on a petition for the establishment of a conservatorship or for the termination of conservatorship.[14] The substance of the right to a jury in

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10. See Guardianship of Smith, 147 Cal. App.2d 686, 306 P.2d 86 (1957); Hillman v. Stults, 263 Cal. App.2d 848, 70 Cal. Rptr. 295 (1968).

11. Estate of Beach, 15 Cal.3d 623, 642, 542 P.2d 994, ___, 125 Cal. Rptr. 570, ___ (1975). See also In re Bundy, 44 Cal. App. 466, 186 P. 811 (1920). The proposed law makes clear that only express statutory jury trial rights are recognized.

12. Prob. Code §§ 1471, 1580, 1606.5. See also Prob. Code §§ 1435.14, 1461, 1461.1, 1461.5 (advice of rights).

13. Prob. Code §§ 1951, 2006. See also Prob. Code §§ 1754, 1754.1 (advice of rights), 1755. It has been suggested that there also may be a right to a jury to try objections to a petition for transfer of a conservatorship proceeding. W. Johnstone & G. Zillgitt, California Conservatorships § 2.26, at 44 (Cal. Cont. Ed. Bar 1968).

14. The proposed law does not grant a jury trial on the extent to which the conservatee's legal capacity should be limited by court order. The conservatee has the right to a jury trial on the creation of the conservatorship, which is sufficient to assure that only persons in need of basic conservatorship protection may have their capacity to affect the conservatorship estate restricted or withdrawn.

adult guardianship proceedings is continued in the conservatorship statute.

The proposed law eliminates right to trial by jury on a petition for removal of a guardian or conservator. The protection of jury trial for the guardian or conservator is not appropriate. The court should have the sole power to judge the performance of the guardian or conservator and to remove the guardian or conservator if necessary.[15]

PREFERENCES IN SETTING FOR TRIAL OR HEARING

Legislation enacted in 1978[1] added to conservatorship law the requirement that, in a proceeding for the appointment of a conservator, court or jury trial shall commence within 10 judicial days of the date of demand and that any continuance shall not exceed 15 days.[2] This time period is unrealistically short, particularly where jury trial has been demanded. The proposed law does not continue this priority for trial.[3]

Existing law also requires that all petitions "filed under" the chapter on powers and duties of guardians and conservators shall be set

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15. The guardian or conservator is an officer of the court and is subject to the court's supervision. See Prob. Code §§ 1400, 1702; Guardianship of Reynolds, 60 Cal. App.2d 669, 674, 141 P.2d 498, 501 (1943); 39 Am. Jur.2d Guardian and Ward § 1 (1968).

1. 1978 Cal. Stats., Ch. 1315.

2. Prob. Code § 2006. There is an identical provision in guardianship law applicable to incompetent adults. See Prob. Code § 1606.5.

3. It should be noted that the court may appoint a temporary conservator to serve while the case is awaiting trial.

   The proposed law also eliminates the provision enacted in 1978 (1978 Cal. Stats., Ch. 1315) that demand for court or jury trial shall be made within five days after the hearing on the conservatorship petition. See Prob. Code § 2006. This is a matter better left to court rule. If the proposed conservatee has an attorney at the initial hearing, for example, there is no sound reason to permit the attorney to delay demand for jury trial until several days after the hearing. See generally W. Johnstone & G. Zillgitt, California Conservatorships § 3.46, at 88 (Cal. Cont. Ed. Bar 1968) ("if the estimated trial time is short and no jury is demanded, the matter will generally be heard on the day set for hearing, at the end of the calendar or in the afternoon").

for hearing within 30 days of the filing of the petition.[4] There appears to be no justification for giving special priority to this limited class of petitions. The proposed law does not continue the priority.

OATH, LETTERS, AND BOND

Existing law sets the bond requirements for guardians and conservators by reference to probate law.[1] The bond of a guardian is fixed by the court in an amount not less than that for administrators and executors[2] and the bond of a conservator is fixed by the court in an amount not to exceed that for administrators and executors.[3] Guardians and conservators perform the same function with respect to the estate of the protected person, and there is no justification for different standards for determining the amount of the required bond. The proposed law fixes the amount of the bond at the lowest amount permitted under the provision applicable to administrators and executors, but the court is authorized, upon a showing of good cause, to increase or decrease the amount of the bond that otherwise would be required.

The conservatorship statute authorizes reduction of the amount of the bond in the case of the deposit of personal assets in a trust company.[4] The guardianship statute provides similar authority in the case

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4. Prob. Code §§ 1500(b) (guardianship), 1851(a) (conservatorship). The provisions were added by 1976 Cal. Stats., Ch. 1357, a measure designed to provide procedural safeguards to the proposed ward or conservatee when a guardianship or conservatorship petition is filed. See 7 Pac. L.J., Review of Selected 1976 California Legislation 175 (1977). However, the provisions fail to accomplish this purpose since they do not apply to petitions to establish a guardianship or conservatorship under the Probate Code.

1. Probate Code Section 541 requires that the administrator or executor provide a bond in an amount not less than twice the value of the personal property and the probable annual income from the real property belonging to the estate, if the bond is given by individual persons, or in an amount not less than the value of the personal property and the probable value of the annual rents, issues, and profits of all the property belonging to the estate, if the bond is given by an authorized surety company.

2. Prob. Code § 1480.

3. Prob. Code § 1802.

4. Prob. Code 1804.

of the deposit of money or securities (but not other property) in a bank, trust company, or insured savings and loan association.[5] The proposed law includes a uniform provision to cover the case where money, securities, or other property of the guardianship or conservatorship estate is deposited in a bank or trust company, or money is invested in an account in an insured savings and loan association, subject to withdrawal only upon authorization of the court.

The guardianship statute provides a three-year statute of limitations for an action against the sureties on the bond,[6] and the conservatorship statute provides a two-year limitation period.[7] The proposed law provides a uniform three-year statute of limitations.

ACCOUNTS

A guardian or conservator must file a first account one year after appointment.[8] A guardian must thereafter file accounts no less frequently than biennially, but the court may require more frequent accounting.[9] A conservator must file subsequent accounts biennially unless the court orders more or less frequent accounts.[10] The more flexible requirements of the conservatorship statute permit less frequent accountings if, for example, the circumstances of the particular estate are such that the costs of a biennial accounting would not be in the best interests of the estate. The proposed law adopts this provision for both guardians and conservators.

Neither the guardianship nor conservatorship statute specifies the contents of the account. The proposed law includes a provision, drawn from existing local court rules, outlining the contents of the account.

Neither the guardianship nor conservatorship statute contains a provision relating to objections to the account. However, the existing

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5. Prob. Code § 1405.1.

6. Prob. Code § 1487.

7. Prob. Code § 1806.

8. Prob. Code §§ 1553 (guardian), 1904 (conservator).

9. Prob. Code § 1553.

10. Prob. Code § 1904.

practice appears to be that the ward or conservatee, any relative or friend of the ward or conservatee, or any creditor or other person interested in the estate may file written objections to items of the account.[11] The proposed law codifies existing practice.

REMOVAL OR RESIGNATION

A guardian or conservator may be removed when the guardianship or conservatorship is no longer necessary.[12] The proposed law eliminates this ground for removal. If the guardianship or conservatorship is no longer necessary, the proceeding should be terminated.

A conservator's resignation, when allowed by the court, takes effect upon settlement of the conservator's accounts.[13] The proposed law revises this provision to give the court latitude in determining when the resignation of a guardian or conservator becomes effective. It may be desirable, for example, for the resignation to become effective immediately and for the court to appoint a successor even though the accounts of the resigning guardian or conservator have not yet been settled.[14]

APPEALS

Appealable orders in a guardianship proceeding are limited by existing law to orders granting or revoking letters, settling an account, instructing or directing the guardian, or refusing to make one of the foregoing.[15] Conservatorship orders, on the other hand, are given the broadest possible appealability--an appeal may be taken from "any" order except appointment of a temporary conservator.[16]

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11. See W. Johnstone & G. Zillgitt, California Conservatorships § 6.42, at 253 (Cal. Cont. Ed. Bar 1968).

12. Prob. Code §§ 1580, 1951.

13. Prob. Code § 1953.

14. See W. Johnstone & G. Zillgitt, California Conservatorships §§ 7.16-7.18, at 272-73 (Cal. Cont. Ed. Bar 1968).

15. Prob. Code § 1630.

16. Prob. Code § 2101.

The appealability of guardianship orders is too narrow, and the appealability of conservatorship orders is too broad.[17] The proposed statute provides for appeal in a guardianship or conservatorship proceeding from those types of orders listed in the existing guardianship statute and, in addition, from the making or refusal to make any of the following orders:

(1) Directing, authorizing, or confirming property transactions.

(2) Adjudicating the merits of a claim to property made by a party.

(3) Granting permission to fix the residence and domicile of the ward or conservatee at a place not within this state.

(4) Directing or allowing payment of a debt, claim, or attorney's fee.

(5) Fixing, directing, or allowing payment of the compensation or expenses of a guardian or conservator.

(6) Directing, approving, or modifying payments for the support, maintenance, or education of the ward or conservatee or of a person legally entitled to support, maintenance, or education from the ward or conservatee.

(7) Directing transfer of the assets to an out-of-state fiduciary.

(8) Approving payment of surplus income to relatives of the conservatee.

(9) Approving a gift or other disposition of the conservatee's assets under the doctrine of substituted judgment.

This scheme is adapted from the provisions governing estates in probate.[18]

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17. See, e.g., Conservatorship of Smith, 9 Cal. App.3d 324, 88 Cal. Rptr. 119 (1970) (notwithstanding the broad language of Prob. Code § 2101, appeals are limited).

18. See Prob. Code § 1240.

NONRESIDENT WARD OR CONSERVATEE

If a guardianship or conservatorship has been established for a nonresident[1] or for a person who is no longer a resident, existing law provides a procedure for transfer of the proceeding to the appropriate court in any other state in which the ward or conservatee resides at the time of the application for the transfer.[2] Although transfer of the

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1. A guardianship or conservatorship of the person of a nonresident who is temporarily in California may be necessary where there is a great and immediate need, such as in a medical emergency. See Guardianship of Cameron, 66 Cal. App.2d 884, 153 P.2d 385 (1944). Appointment in this situation is authorized by Probate Code Sections 1570 (guardianship) and 2051 (conservatorship). Despite the broad language of the statutory provisions, if the nonresident is not present in California, local court rules indicate that the court will not appoint a guardian or conservator of the person for a nonresident not present in California. See, e.g., Contra Costa County Probate Policy Manual para. 702, Fresno County Probate Policy Memoranda para. 812, Los Angeles County Policy Memoranda para. 17.03, Marin County Rules of Probate Practice para. 1126, Orange County Probate Policy Memorandum para. 9.16, San Bernardino County Probate Policy Memoranda para. 901, San Francisco County Probate Policy Manual para. 16.24, and Stanislaus County Probate Policy Manual para. 1402, in California Local Probate Rules (2d ed. Cal. Cont. Ed. Bar 1977). See also Grinbaum v. Superior Court, 192 Cal. 566, 221 P. 651 (1923) (former Code Civ. Proc. § 1793, now Prob. Code § 1570, did not give California court jurisdiction to appoint a guardian of the person for a nonresident not present in California).

   Where a nonresident has property in California, it may be desirable or necessary to appoint a guardian or conservator of the estate. Appointment in this situation is authorized by Probate Code Sections 1570 (guardianship) and 2051 (conservatorship). In some instances, it may be in the best interest of the nonresident not to have a guardian or conservator in California. For example, if the property in California is personal property insignificant in relation to property outside the state, it may be desirable to remove the property to the other jurisdiction where it can be administered by the guardian, conservator, or other fiduciary administering the estate in the place of residence. Probate Code Sections 1572-1574 provide a procedure for removal of property to the state of residence where there is no California guardian or conservator upon application of the guardian or conservator or other fiduciary in the state of residence. The substance of these sections is continued in the proposed law.

2. Prob. Code §§ 1603 (guardianship, adopting by reference the procedure provided in the conservatorship statute), 2051-2055 (conservatorship).

proceeding may work well if the transfer is to another county in California,[3] transfer outside the state creates a number of difficulties and uncertainties.[4]

In the case of a guardianship or conservatorship of the person, transfer of the proceeding is unnecessary. If the guardianship or conservatorship was established for a nonresident, the guardianship or conservatorship needs only to be terminated when the need for the California proceeding no longer exists; and, if a guardianship or conservatorship in the place of residence is required, appropriate proceedings can be commenced in that place. If the guardianship or conservatorship was established for a person who is no longer a resident, the existing transfer procedure is cumbersome.[5] The proposed law authorizes the California court to issue a conditional order terminating the California guardianship or conservatorship of the person (1) upon the appointment and qualification of a guardian or conservator of the person in the other state or (2) upon the determination by an appropriate court of the other state that a guardianship or conservatorship of the person is not

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3. The provisions for transfer of the proceeding outside California are combined in the existing statute with the provisions for transfer of the proceeding to another county within California. To avoid confusion, the proposed law covers transfers to other California counties in a separate set of statutory provisions.

4. One troublesome problem is that of sending the papers in the file to the transferee court in the other state. Although the existing statute directs the California court clerk to send all the papers in the file to the court in the other state (Prob. Code § 2053), some courts are understandably reluctant to do so, and the practice varies among the counties. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.34, at 49 (Cal. Cont. Ed. Bar 1968). The proposed law eliminates this problem since the papers on file in the California proceeding will be retained as in any other closed case.

5. Because the ward or conservatee must reside in the other state when the application for transfer is made, the guardian or conservator must first obtain permission of the California court to move the residence and domicile of the ward or conservatee, then commence proceedings in the other state to have the same or a different guardian or conservator appointed, and then petition in California to transfer the California proceedings. Prob. Code §§ 1500, 1603 (guardianship), 1851, 2052 (conservatorship).

needed.[6] This procedure would appropriately leave to the state of residence the decisions as to whether the ward or conservatee is in need of a guardian or conservator of the person and, if so, who would be a proper person to serve in that capacity.

In the case of a guardianship or conservatorship of the estate, the existing statute appears to assume that all the property will be transferred to the other state and the California proceeding terminated.[7] Yet, if the estate includes real property in California, it is not clear that the California proceeding can be transferred to another state, or even whether all of the other assets may be transferred to the out-of-state guardian or conservator and the California proceeding retained only for the real property in this state.[8] The proposed law replaces the existing scheme with provisions authorizing the court to order the transfer of some or all of the assets to a guardian or conservator in a jurisdiction outside California where the ward or conservatee is a resident.[9] If all the assets of the estate are so transferred, the guardian or conservator can petition for the termination of the California proceeding on that ground.[10] Otherwise, the California proceeding can be continued as long as is necessary.

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6. Such an order could be made at the time the court makes the order authorizing the establishment of the residence and domicile of the ward or conservatee in the other state. The court would also have discretion to decline to issue such a conditional order and instead to consider the matter on a petition to terminate the California guardianship or conservatorship after the guardian or conservator has been appointed in the other state.

7. See Prob. Code § 2055. See also W. Johnstone & G. Zillgitt, California Conservatorships § 2.31, at 47 (Cal. Cont. Ed. Bar 1968).

8. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.28, at 45 (Cal. Cont. Ed. Bar 1968).

9. The new provisions are drawn from provisions enacted in 1971 providing a procedure for the transfer of some or all of the assets of a trust to another jurisdiction outside of California. Prob. Code §§ 1139-1139.7 (1971 Cal. Stats., Ch. 958).

10. Transfer of the proceeding under existing law does not avoid the need to make a final accounting and to petition for discharge. Prob. Code §§ 1603 (guardianship), 2055 (conservatorship).

EFFECT ON EXISTING GUARDIANSHIPS AND CONSERVATORSHIPS

The proposed law converts a guardianship of an adult or of the person of a married minor[11] in existence on the operative date (January 1, 1981) into a conservatorship. In such a case, until the court orders otherwise, the ward is deemed to be a conservatee who has been adjudged to be seriously incapacitated.[12] Guardianships of unmarried minors, guardianships of the estate of married minors, and conservatorships in existence on the operative date will continue as such and will be governed by the proposed law.

The proposed law authorizes the Judicial Council to make additional rules for the orderly transition of pending guardianship and conservatorship proceedings.

UNIFORM VETERANS' GUARDIANSHIP ACT

The proposed law continues provisions of the Uniform Veterans' Guardianship Act[13] that provide for appointment of a guardian or conservator for the purpose of receiving, investing, and disbursing money received on behalf of the ward or conservatee from the Veterans' Administration.[14]

Two provisions of the Uniform Veterans' Guardianship Act are not continued. Probate Code Section 1663 provides for commitment or transfer of persons of unsound mind to a facility operated by the Veterans

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11. Under existing law, "[n]o guardian shall be appointed of the person of a married minor solely by reason of such minority." Prob. Code § 1433. And, "[w]here the appointment of a guardian was made solely because of the ward's minority, the marriage of a minor ward terminates the guardianship of the person." Prob. Code § 1590. It thus appears that, where there is an existing guardianship of the person of a married minor, there has been at least an implied finding that the minor is suffering from some mental disability or impairment and that the minor will need the continuing protection of a conservatorship under the new law.

12. A conservatee who has been adjudged to be seriously incapacitated lacks capacity to bind or obligate the conservatorship estate under the proposed law.

13. Prob. Code §§ 1650-1700.

14. The proposed law makes a few technical or clarifying revisions in the existing statute. These are noted in the Comments to the particular sections of the proposed law.

Administration or other agency of the United States government, and Probate Code Section 1664 provides for discharge of such persons from such facilities. These provisions are superseded by the Lanterman-Petris-Short Act,[15] which generally eliminates judicial commitments for mentally disordered persons and persons gravely disabled as a result of mental disorder. Treatment of such persons is authorized under the Lanterman-Petris-Short Act in United States government hospitals.[16]

COMMUNITY OR HOMESTEAD PROPERTY OF INCOMPETENT PERSONS

Introduction

In 1973, the applicable Civil Code provisions were revised[1] to provide that, where both spouses are competent,[2] either spouse has the management and control of community real[3] and personal[4] property. However, a spouse may not convey community real property unless the other spouse joins in executing the conveyance,[5] and may not, without the written consent of the other spouse, make a gift of community personal property or convey wearing apparel or household furnishings which are community personal property.[6] The homestead of a married person can be conveyed, encumbered, or abandoned only if both spouses execute the appropriate instrument.[7]

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15. Welf. & Inst. Code §§ 5000-5404.1.

16. See Welf. & Inst. Code §§ 5008(c), 5358. See also Welf. & Inst. Code §§ 4123 (transfer to federal institution from state institution), 5366.1 (persons detained as of June 30, 1969, in facility of Veterans Administration or other agency of United States government).

1. 1973 Cal. Stats., Ch. 987.

2. See Civil Code § 5128.

3. Civil Code § 5127.

4. Civil Code § 5125.

5. Civil Code § 5127.

6. Civil Code § 5125.

7. Civil Code §§ 1242, 1243. The restrictions on conveyances of homesteads do not apply to a married person's separate homestead (Civil Code §§ 1300-1304).

Where one or both of the spouses are incompetent, the Civil Code[8] provides that Chapter 2A (commencing with Section 1435.1) of Division 4 of the Probate Code[9] governs the management and control and disposition of community property and the procedure for conveying, encumbering, or abandoning a homestead. However, Chapter 2A is based on the former concept that the husband had the right of management and control of community property and contains provisions made obsolete by the 1973 revisions of California community property law which vest each spouse with equal rights to manage, control, and dispose of community property, subject to joinder or consent requirements.[10] Chapter 2A is obscure in its treatment of community personal property transactions by a competent spouse. The chapter is complex and difficult to follow.

For these reasons, the proposed law includes a modernized form of Chapter 2A that is consistent with the recent changes in community and homestead property law, that clarifies the interrelation of the different procedures for authorizing transactions involving community or homestead property, and that is consistent in form and substance with the proposed conservatorship law revision.[11]

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8. Civil Code §§ 1242, 1243, 5128.

9. Chapter 2A derives from prior provisions of a more limited character. As early as 1873-1874, a special proceeding could be maintained to authorize a transaction involving homestead property of an incompetent person. This remedy was the exclusive means by which such a transaction could be made. Flege v. Garvey, 47 Cal. 371 (1874). A similar special proceeding was added for community real property in 1919. 1919 Cal. Stats., Ch. 615. These procedures were consolidated in 1941 and were expanded to include community personal property in 1959. 1941 Cal. Stats. Ch. 1220; 1959 Cal. Stats., Ch. 125. Alternative procedures for disposition in a guardianship or conservatorship estate or with consent of the guardian or conservator were also added in 1959.

10. Civil Code §§ 5125 (community personal property), 5127 (community real property).

11. For example, the unnecessary distinctions between community real property and community real property subject to a homestead are eliminated. The terms "competent" and "incompetent" are replaced by more precise references to legal capacity or lack of legal capacity.

Management, Control, and Disposition Generally

Under existing law, the right of the husband to manage, control, and dispose of the community property is not affected by the incompetency of the wife, whether or not the wife has a conservator.[12] The proposed law extends this rule to the wife; subject to the joinder or consent requirement for disposition, the right of either spouse to manage and control community property, including the right to dispose of community property, is not affected by the lack or alleged lack of legal capacity of the other spouse.

Under existing law, where the husband is competent and the wife has a guardian or conservator, the husband has the right of management, control, and disposition of the community property, but the guardian or conservator must join in any disposition for which joinder is otherwise required after obtaining authorization from the court.[13] The proposed law extends this rule to the wife; if one spouse has legal capacity and the other has a conservator, the spouse having legal capacity has the exclusive management and control of the community property including, subject to the joinder or consent requirement, the exclusive power to dispose of the community property. In such a case, the community property is not part of the conservatorship estate. However, the proposed law adds a new provision permitting the spouse having legal capacity and the conservator of the other spouse to agree that all or part of the community property will be included in and, subject to the joinder or consent requirement, be managed, controlled, and disposed of as a part of the conservatorship estate. This new authority will provide desirable flexibility in determining how to handle the community property.

The proposed law continues a provision of existing law[14] that, where the husband and wife each have a conservator of the estate, an

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12. See Prob. Code §§ 1435.1 (last sentence), 1435.17(b). The husband's right of management and control is subject to the requirement of joinder for disposition where joinder was otherwise required by Section 172a of the Civil Code which has been repealed.

13. See Prob. Code § 1435.17(b).

14. Prob. Code § 1435.17(c).

undivided one-half interest in the community property may be included in and disposed of as a part of each estate, but both conservators must concur in dispositions under appropriate orders of the court. The proposed law adds a new provision permitting the two conservators by agreement to include all or specific parts of the community property in one or the other of the conservatorship estates to be managed, controlled, and disposed of as a part of that conservatorship estate, subject to the requirement that the other conservator (after obtaining court authorization) join in dispositions of property in cases where joinder is otherwise required.

Transactions Involving Community or Homestead Property

The proposed law continues the procedure provided under existing law for court authorization of a transaction involving community or homestead[15] property where one spouse is incompetent and has no conservator of the estate,[16] but broadens it to permit the court to make a declaration that the spouse whose legal capacity is doubtful does in fact have capacity for a proposed transaction and may consummate the transaction on his or her own behalf.[17] The proposed law also permits the court to authorize a community personal property transaction which

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15. The proposed law makes clear that it does not impose a requirement of consent or joinder where a married person's separate homestead is concerned.

16. As under existing law, the proposed law permits the petition for court authorization to be brought by a conservator of one spouse where the other spouse is incompetent but has no conservator. See Prob. Code §§ 1435.3 (guardian may petition), 1435.18 ("guardian" includes "conservator"). Whether the petition is brought by a competent spouse or by a conservator, there will be a legally competent person to present the petition to the court and to carry out the court's orders in connection with the transaction if it is authorized.

17. Such a declaration might be particularly useful, for example, where the buyer in a real property transaction is concerned about a possible later challenge to the transaction based upon questionable capacity of one of the selling spouses. An affirmative declaration of legal capacity may permit the transaction to be consummated free of such unresolved questions.

could be effected by one spouse alone without the consent of the other spouse under the Civil Code.[18]

If one or both of the spouses have a conservator of the estate, the proposed law requires that the conservator join in or consent to the transaction in lieu of joinder or consent by the conservatee, whether or not the conservatee has been adjudicated to lack legal capacity. This makes clear with whom a buyer must deal and gives needed certainty to affected transactions, particularly those involving real property. Prior court authorization for joinder or consent by the conservator is required in all cases involving real property and in most cases involving personal property.[19]

Under the proposed law, unlike existing law,[20] if both spouses have conservators of the estate, the special proceeding for court authorization of a transaction involving community or homestead property may nonetheless be used to obtain court authorization of the transaction. However, if both conservatorship proceedings are pending in the same county, the proposed law requires the special proceeding for court authorization to be brought in that county.

AUTHORIZATION OF MEDICAL TREATMENT FOR ADULT WITHOUT CONSERVATOR

In the ordinary, nonemergency case, medical treatment may be given to an adult only with that person's informed consent.[21] If the person

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18. This procedure also may have the effect of declaratory relief, and forestall a later challenge to the legal capacity of the conveying spouse.

19. Prior court authorization is not required for the conservator to join in or consent to a transaction involving wearing apparel or household furnishings which are community property if the aggregate value of such transactions does not exceed $5,000 in any calendar year and the conservatee either consents to the transaction or has been adjudicated to lack the capacity to give such consent.

20. Under existing law, where there are guardians or conservators of the respective estates of both husband and wife, court authorization for transactions affecting community or homestead property must be obtained in the guardianship or conservatorship proceeding and not under Chapter 2A. See Prob. Code §§ 1435.16(c), 1435.17(c).

21. Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

is incompetent or is otherwise unable to give informed consent, a substitute decision-making process is necessary.[22] One alternative is the establishment of a conservatorship of the person so that the court or conservator may make medical decisions for the conservatee. However, in some cases there is no ongoing need for conservatorship; all that is needed is an expeditious means of obtaining authorization for a specific course of medically recommended treatment.

The proposed law therefore includes new provisions for a special court proceeding for court authorization of medical treatment when the patient has no conservator but is unable to give an informed consent to the treatment. The petition may be filed by the patient, the spouse of the patient, a relative or friend of the patient, a person acting on behalf of a medical facility in which the patient is located, the patient's physician, or by any other interested person. The petition may be filed in the county where the patient resides or is temporarily living or in such other county as may be in the patient's best interest. The petition is required to set forth the pertinent medical details. If the patient has not retained an attorney and does not plan to retain one, the court is required to appoint the public defender or private counsel. Notice of the hearing must be given to the patient, the patient's attorney, and to such other persons as the court may require. The attorneys for the petitioner and for the patient may stipulate that the matter be decided on the basis of the medical affidavits submitted. The court may make an order authorizing treatment only if the court determines that (1) the condition of the patient requires the treatment, (2) if untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical health of the patient, and (3) the patient is unable to give an informed consent for the treatment. The court has continuing jurisdiction to revoke or modify its order.

The new procedure for court authorization of medical treatment where the patient has no conservator is not the exclusive method of

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22. See Aden v. Younger, 57 Cal. App.3d 662, 682, 684, 129 Cal. Rptr. 535, ___, ___ (1976).

authorizing such treatment, but is in addition to the methods that exist under present law.[23]

OTHER PROTECTIVE PROCEEDINGS

The guardianship and conservatorship statutes include a number of provisions that relate to transactions and situations not requiring a guardianship or conservatorship.[1] These provisions are compiled in a portion of the proposed law separate from the guardianship and conservatorship provisions. Many of the provisions are carried forward into the proposed law without substantive change. The major changes made by the proposed law are summarized below.[2]

Compromise of Minor's Disputed Claim

A parent or guardian of the estate of a minor has the right, with prior court approval, to compromise a disputed claim of the minor.[3] The proposed law continues this right of the guardian of the estate and eliminates the requirement of court approval in some instances where the claim is not the subject of a pending action or proceeding.[4] The parent's right to compromise a minor's claim also is continued in the

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23. See generally Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

1. E.g., Prob. Code §§ 1430 (minor's estate under $2,500), 1430.5 (minor's estate between $2,000 and $20,000), 1431 (compromise of minor's disputed claim), 1432 (duty of parent to account to minor), 1444 (consent of court to permit hospital or medical care or enlistment in armed forces), 1509 (fees of attorney for minor), 1510 (disposition of money or other property paid or delivered pursuant to compromise or judgment for minor or incompetent), 1511 (payment of fees of attorney for minor), 1776-1783 (setting aside property for family of military and other personnel who are in missing status). See also Prob. Code §§ 1435.1-1435.18 (transfer or disposal of community property or homestead where spouse incompetent).

2. See also discussion supra under "Community or Homestead Property."

3. Prob. Code § 1431. Claims that are the subject of a pending action or proceeding are governed by Section 372 of the Code of Civil Procedure.

4. See discussion under "Guardian or Conservator of the Estate--Compromising Claims and Actions" supra.

proposed law but is limited to cases where the minor has no guardian of the estate.[5]

Proceeds of Compromise or Judgment for Minor or Incompetent Person

The guardianship statute contains provisions for the control of money or other property to be paid or delivered pursuant to a compromise of a minor's disputed claim, a compromise of a pending action or proceeding to which a minor or incompetent person is a party, or a judgment for a minor or incompetent person.[6] If the amount or value of the money or property is $10,000 or less, the court has broad discretion to order that the money or other property be held subject to such conditions as the court deems to be in the best interest of the minor or incompetent person. If the amount or value is $1,000 or less, the court may direct that the money or property be paid to a parent to be held in trust for the minor. If the amount or value is greater than $10,000, the court's discretion is more narrowly circumscribed: The court must either (1) require that a guardian or conservator of the estate be appointed to receive the property or (2) require that any money be deposited in an account in a bank, trust company, insured credit union, or insured savings and loan institution, subject to withdrawal only upon order of the court.

The court should be permitted greater discretion in making the disposition of the proceeds of a compromise or judgment that is in the best interest of the minor or incompetent person. The proposed law increases to $5,000 the amount the court may order be paid directly to the parent of a minor and increases to $20,000[7] the amount subject to broad court discretion.

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5. The proposed law also makes clear that a parent may, subject to court approval, execute a covenant not to enforce a judgment on a minor's disputed claim.

6. Prob. Code § 1510.

7. The amount was set at $10,000 in 1963. 1963 Cal. Stats., Ch. 127, § 3. The increase will conform to the increase from $10,000 to $20,000 in 1973 (1973 Cal. Stats., Ch. 400, § 2) in Probate Code Section 1430.5. The authority given the court under the proposed law is similar to that given the court under existing Section 1430.5. Under that section, a guardianship may be terminated where the guardianship estate consists of money not exceeding $20,000 and the court may order the money deposited in a court controlled account or may prescribe such other conditions for the control of the money as the court deems in the best interest of the minor.

Administration of Estate of Minor Without a Guardian

Existing law provides for administration of a small estate of a minor without the need for a guardian. Assets of $2,000 or less can be paid directly to a parent to hold in trust for the minor until the minor reaches majority.[8] Money in excess of $2,000 (but not exceeding $20,000) may, pursuant to a court order, be deposited or invested in an insured account in a financial institution, withdrawable only upon court order, without the creation of a guardianship.[9]

These provisions can provide a substantial saving when compared to the cost of a guardianship in administering the estate of a minor. To increase the usefulness of the provisions, the proposed law increases the amount that may be paid to a parent in trust from $2,000 to $5,000[10] and removes the minimum ($2,000 under existing law) so that the court may order that an amount less than the minimum be deposited or invested in a court-controlled account as an alternative to ordering it paid to a parent.[11] The proposed law also removes the $20,000 maximum limit on the amount that may be deposited or invested pursuant to court order in court-controlled accounts without the creation of a guardianship.[12]

Personal Property of Absentees

Chapter 2.5 (commencing with Section 1776) of Division 5 of the Probate Code, enacted as part of the P.O.W.-M.I.A. Family Relief Act of 1972, concerns personal property of absentees--prisoners of war and

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8. Prob. Code § 1430.

9. Prob. Code § 1430.5.

10. The provision of existing law requiring a parent receiving money belonging to a minor to account to the minor upon majority is expanded to include any property received pursuant to this provision. See Prob. Code § 1432.

11. This provision is consistent with Probate Code Section 1510, which places no minimum limit on the amount the court may order placed in a court controlled account.

12. This provision parallels Probate Code Section 1510, which places no maximum limit on the amount received from a compromise or judgment that the court may order deposited in a court controlled account.

persons missing in action. The chapter permits the court, if the court finds that it will be in the best interests of the absentee, to set aside to the family of the absentee, personal property of the absentee situated in California in which the absentee's interest does not exceed $5,000, for the purpose of managing, controlling, encumbering, selling, conveying, or otherwise engaging in any transaction with respect to such property.[13] The proposed law adds language to make clear that the court may set aside the property of the absentee in order to provide for the support of the dependents of the absentee[14] and increases the amount from $5,000 to $20,000. This increase will avoid the expense of creation and administration of a conservatorship of the estate for the absentee merely in order to provide support for the dependents.

RULES OF CONSTRUCTION FOR PROBATE CODE

Certain standard rules of construction found in many of the California codes are needed to aid in the construction of the proposed law.[15] However, since these provisions should be of general application to the entire Probate Code, they are recommended for enactment as a separate bill which will locate the new rules of construction at the beginning of the Probate Code.

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13. Prob. Code § 1777.

14. This accomplishes the purpose of the 1972 legislation which is not only to avoid "prejudice to the estates of such missing persons" but also to avoid "difficulty and hardship to their families [caused] by their inability to consummate transactions, such as to sell property, withdraw funds, cash checks, transfer securities and the like, upon which the families are dependent." 1972 Cal. Stats., Ch. 988, § 9. Cf. Prob. Code § 295.1 (administration of estate of absentee); C. Stephenson & G. Cole, Supplement to 1 California Decedent Estate Administration § 3.31, at 36 (Cal. Cont. Ed. Bar 1976) (intended to provide for support of dependents of absentee).

15. The new rules of construction to be added to the Probate Code relate to references to statutes (see Evid. Code § 6; Veh. Code § 10); meaning of "division," "part," "chapter," "article," "section," "subdivision," and "paragraph" (see Evid. Code § 7); construction of tenses (see Evid. Code § 8; Veh. Code § 12); construction of singular and plural (see Evid. Code § 10; Veh. Code § 14); and severability of provisions (see Com. Code § 1108; Evid. Code § 3).

CONFORMING ADDITIONS, AMENDMENTS, AND REPEALS

Numerous sections throughout the codes are amended to reflect the elimination of guardianships for incompetent adults,[1] to insert references to conservatorship where appropriate,[2] to correct cross-references to revised and recodified provisions of guardianship-conservatorship law, and to eliminate other inconsistencies.

Although most of the conforming revisions are technical, in a few cases substantive revisions are made. The requirement that a certificate of appointment of a guardian bear the court's seal[3] is broadened to apply to conservatorship. The requirement in the Code of Civil Procedure that a guardian's bond be in the name of and payable to the State of California[4] is deleted in view of the inconsistent provision of the recommended guardianship-conservatorship law that the guardian's bond is to protect the ward.[5] The Probate Code provisions which authorize a guardian or conservator of the estate of a surviving spouse to elect to have community property administered in the estate of the deceased spouse,[6] or to petition for a determination that the community property not be so administered,[7] are revised to make clear that approval of the guardianship or conservatorship court is not required for such action.

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1. Existing references to a guardian of an adult incompetent have been retained in those instances where it appears that the reference was intended to include a foreign guardian. See, e.g., Code Civ. Proc. § 416.70.

2. Numerous sections of the California codes refer to guardians or guardianship in a context where it is apparent that the section should also refer to conservators or conservatorship. When the conservatorship law was added to the Probate Code in 1957 (1957 Cal. Stats., Ch. 1902), the other codes were not conformed to add these parallel references. About two-thirds of the conforming revisions being recommended by the Commission are to add the appropriate parallel references to conservators or conservatorship.

3. Code Civ. Proc. § 153.

4. Code Civ. Proc. §§ 304, 304.1.

5. See proposed Section 2320 (based in part on existing Section 1480: guardian "must furnish a bond to the ward"). See also existing Section 1805 (conservator's bond "may be sued upon for the use and benefit of the conservatee").

6. Prob. Code § 202.

7. Prob. Code § 650.