Date of Meeting: June 13-14, 1958

Date of Memo: May 29, 1958

Memorandum No. 3

Subject: Study No. 20 - Guardianship for Nonresidents.

The 1956 Session of the Legislature authorized the Commission to make a study to determine whether the procedures for appointing guardians for nonresident incompetents and nonresident minors should be clarified.

A Staff study on this subject is attached.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

May 29, 1958

A STUDY TO DETERMINE WHETHER THE STATUTES RELATING TO PROCEDURES FOR APPOINTING GUARDIANS FOR NON-RESIDENT INCOMPETENTS AND INSANE PERSONS AND NONRESIDENT MINORS SHOULD BE REVISED *

*A study Made by the Staff of the Law Revision Commission.

A STUDY TO DETERMINE WHETHER THE STATUTES RELATING TO PROCEDURES FOR APPOINTING GUARDIANS FOR NONRESIDENT INCOMPETENTS AND INSANE PERSONS AND NONRESIDENT MINORS SHOULD BE REVISED

The 1956 Session of the California Legislature authorized the Law Revision Commission to make a study of the procedures for appointing guardians for nonresident incompetents and nonresident incompetents and nonresident minors.[1] Two problems are involved: (a) Whether the provisions of Chapter 4 or the provision of Chapter 10 of Division 4 of the Probate Code control as to the appointment of guardians for nonresidents and (b) whether the procedures for the appointment of guardians for incompetent and insane persons should be uniform as between residents and nonresidents.[2]

WHAT STATUTES GOVERN THE APPOINTMENT OF GUARDIANS FOR NONRESIDENTS

Appointment of Guardian for Nonresident Insane or Incompetent Person

Division 4 of the Probate Code contains two chapters which provide for the appointment of guardians for insane or incompetent persons. Chapter 4, entitled Appointment of Guardians for Insane or Incompetent Persons, is not specifically limited to resident incompetents. Chapter 10, entitled Nonresident Wards, is clearly applicable only to nonresidents. As is shown below, the provisions

of the two chapters differ somewhat with respect to the procedure to be followed in appointing a guardian. Since Chapter 10 clearly applies to nonresidents and Chapter 4 could be construed also to apply to them, there is a surface conflict between them.

Sections 1460 and 1461 of Chapter 4 are apparently of general application. They provide:

> § 1460. Any superior court to which application is made as hereinafter provided may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person. As used in this division of this code, the phrase "incompetent person," "incompetent," or "mentally incompetent," shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.
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> § 1461. Any relative or friend may file a verified petition alleging that a person is insane or incompetent, and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing in this State; thereupon the clerk shall set the same for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him; said citation and a copy of the petition shall be personally served on the alleged insane or incompetent person in the same manner as provided by law for the service of summons, at least five days before the time of hearing; notice of the nature of the proceedings and of the time and place of the hearing, so set by the clerk shall be mailed at least five (5) days before such hearing date to each of such relatives of the alleged insane or incompetent person. Any relative or friend of the alleged insane or incompetent person may appear and oppose the petition.
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> Such person, if able to attend, must be produced at the hearing, and if not able to attend by reason of physical inability, such inability must be evidenced by the affidavit of a duly licensed physician or surgeon, or other duly licensed medical practitioner, unless such alleged insane or

incompetent person is a patient at a county or state hospital in this State in which case the affidavit of the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital, to the effect that such patient is unable to attend, shall be prima facie evidence of that fact.

Section 1570 of Chapter 10 clearly requires a different procedure when the alleged incompetent is a nonresident. This section provides:

> § 1570. The superior court may appoint a guardian of the person and estate, or person or estate, of a minor or insane or incompetent person who resides out of the State and who is within the county, or who has estate within the county, and who has no guardian within the State, upon petition of any friend of such person or of anyone interested in his estate, in expectancy or otherwise. If the nonresident ward is an insane or incompetent person, before making such appointment the court or judge must cause notice to be delivered personally to the alleged insane or incompetent person and to be given to such other person or persons as the court or judge deems proper in such manner as deemed reasonable. If the nonresident ward is a minor, notice shall be given to the persons and in the manner required by Section 1441 of this code. The guardianship which is first granted of a nonresident ward extends to all the estate of the ward within this State, and the court of no other county has jurisdiction.

These statutes obviously differ in many respects as is pointed out in detail in a later portion of this study.

It seems reasonable to suppose that a court faced with this conflict would hold that the provisions of Chapter 10 control with respect to the appointment of guardians for nonresidents, applying the well established rule of statutory construction that in case of a conflict between a statute of general application and a statute specifically directed to a particular matter the latter controls.[3] However, the following excerpt from a panel

discussion on probate practice and procedure at the 1954 State Bar Convention illustrates that there is some doubt on the matter, at least as respects what notice must be given when the appointment of a guardian for a nonresident is sought:

> Judge Herndon: I cannot stress too strongly the necessity of following the code in all matters relating to probate procedure and especially with respect to giving notice. Unless he has a prodigious memory, the probate lawyer must make constant reference to the code for the purpose of checking up on notices and other procedural requirements. No lawyer should ever present a petition in a probate proceeding without being prepared to cite to the court the section or sections of the code under which he proceeds.
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> Mr. Farrand: Judge Herndon, I recently observed a good illustration of your point in connection with a guardianship matter. In fact, the Los Angeles County Probate Department in its policy memoranda has covered it in Rule 702. This relates to the guardianship of nonresident wards. We had a situation where a resident of the state of Washington had been incompetent for many years and was confined in a Washington state mental institution. She owned a piece of real estate in Los Angeles County. In order to get a guardian appointed in Los Angeles County so that a sale could be made of the real property, it was necessary to bring about two separate and distinct services of process upon her. One was the service of notice required by Section 1570 of the Probate Code and the other was the personal service of citation upon her under Section 1461 of the Probate Code following an order for publication, the personal service being substituted for the actual publication.
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> Judge Herndon: Yes, I am familiar with those provisions. If you had not made that double service of process upon the lady in the Washington institution, I am afraid your sale would have run into difficulty with the title company. [4]

This confusion probably stems from the fact that prior to its 1949 amendment Probate Code Section 1570 did not provide for personal service. It then provided in relevant part:

> ....Before making such appointment, the court or judge must cause notice to be given to all persons interested, in such manner as deemed reasonable....

In Grinbaum v. Superior Court[5] this section was interpreted by the supreme court and the court stated:

> "...it is to be noted that under the express provision of Section 1793 of the Code of Civil Procedure [Probate Code Section 1570 was then Code of Civil Procedure Section 1793] ... whatever notice is to be given of the time and place of the hearing upon said application "to all persons interested" must be such notice as is ordered by the court as distinguished from such notices in certain similar proceedings as are expressly provided for by statute and as may be given without any special order of the court but by the clerk or other officer thereof pursuant to statutory direction."[6]

The court then read into Section 1973 a requirement that a citation be personally served on the alleged insane or incompetent person. The court referred to the fact that such service was specifically provided for in Probate Code Section 1461 and other statutes and went on to say:

> "The requirement of these sections of the Code of Civil Procedure that notice in some form and of some manner of service must be given to the individual alleged to be an insane or incompetent person before the courts can acquire jurisdiction to appoint guardians over their persons or estates does not depend for its sanction upon the express provisions of either section of the code. It rests upon the fundamental doctrine, as old as Magna Carta, that no person can be deprived of life, liberty, or property without due process of law; and it has accordingly been held in several of the states that even in the absence of express provisions in their laws relating to guardianship requiring notice to be given to insane or incompetent persons of impending guardianships over their persons or estates, such notice must be given or such proceedings shall be void. In the case of McKinstry v. Dewey, 192 Iowa 753 [23 A.L.R. 587, 185 N.W. 565], the decisions of these several jurisdictions are extensively reviewed and are shown to uniformly support the conclusion that even without express statutory requirements as to notice the personal liberty or property rights of a person alleged to be insane or incompetent cannot be invaded or impaired by the appointment of a guardianship over his person or estate without the giving to him of some form of notice sufficient to satisfy the constitutional requirement as to due process of law." [7]

It should be noted that the supreme court did not hold that Section 1461 is applicable to the appointment of a guardian for a nonresident. What it did say was that unless a requirement of personal service on the nonresident incompetent were read into Section 1570 the court would not have jurisdiction. It was compliance with the United States Constitution and not Probate Code Section 1461 that the court required. Nevertheless the excerpt quoted above from the 1954 proceedings of the State Bar Convention indicates that the Grinbaum case has been interpreted by some persons as making the provisions of both Chapter 4 and Chapter 10 applicable to the appointment of guardians for nonresidents.

Section 1570 was amended by the Legislature in 1949 to provide that notice must be delivered personally to the nonresident alleged incompetent or insane person.[8] As Section 1570 now stands, compliance with that section alone should satisfy all requirements of due process of law and compliance with the provisions of Section 1461 should not be necessary. In view of the confusion which apparently exists as to the effect of the Grinbaum decision, however, it would appear to be desirable to amend the title and the several provisions of Chapter 4 to make it clear that Chapter 4 applies only to the appointment of guardians for residents.

Appointment of a Guardian for a Nonresident Minor

Chapter 3 of Division 4 of the Probate Code, entitled "Appointment of Guardians for Minors," is in terms applicable to

to both resident and nonresident minors. Sections 1440 and 1441 of this Chapter provide:

> § 1440. When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. The court may issue letters of guardianship over the person or estate, or both, of more than one minor upon the same application, in its discretion. When there is an application for more than one minor, the court may permit a joint or separate bond in such multiple application.
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> § 1441. Before making the appointment, such notice as the court or a judge thereof deems reasonable must be given to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper. In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice cannot be given.

Section 1570 of Chapter 10, quoted above, is also applicable to nonresident minors. However there is little conflict between Sections 1440, 1441 and 1570. Section 1570 contains a cross-reference to Section 1441 with respect to notice, making it clear that a court order directing notification of interested persons must be obtained in all cases. The only problem arising from the duplicating provisions is with respect to whether a nonresident minor who is fourteen years old can himself petition for a guardian. Section 1440 specifically authorizes this, but Section 1570 is silent on the matter. The question has apparently never come before a court. It is suggested that this ambiguity be eliminated by amending Section 1570 to authorize a minor 14 years old or older

to petition for the appointment of a guardian.

WHETHER THE PROCEDURE FOR APPOINTING GUARDIANS FOR RESIDENT AND NONRESIDENT INSANE AND INCOMPETENT PERSONS SHOULD BE MADE UNIFORM

If the recommendations made above are accepted any existing ambiguity as to what statutes govern with respect to the appointment of a guardian for a nonresident minor or a nonresident insane or incompetent person will be eliminated. However, the provisions governing the appointment of a guardian for an insane or incompetent person will continue to be different as between residents and nonresidents in several respects. Should these differences be eliminated by amending either section or both? This question will be discussed in terms of the several existing differences between the sections:[9]

1. Section 1461 authorizes a petition for guardianship to be filed by "any relative or friend"; Section 1570 provides that it may be filed by "any friend...or any person interested in his estate in expectancy or otherwise." No reason for this difference appears to exist. It is recommended, therefore, that both sections be amended to permit a petition to be filed by "any relative, friend, or person interested in his estate in expectancy or otherwise."

2. Section 1461 requires the petitioner to set forth the names of all relatives known to him of the incompetent within

the second degree residing in the State and requires that these relatives be given five days notice by mail of the hearing of the petition. Section 1570 has no such requirement. No reason appears why, if there are relatives within the second degree living outside the State who are known to the petitioner of an alleged insane or incompetent person who is a resident of this State they should not be named in the petition and given notice of the hearing and it is recommended that Section 1461 be amended so to provide. Nor does any reason appear why, if a non-resident incompetent has such relatives within or without this State they should not be notified. It is recommended that Section 1570 be amended so to provide but that in this case 15 days notice be given so that the relatives may have adequate time to take such action as they may deem advisable.

3. Section 1461 provides that a citation shall be issued to the alleged incompetent or insane person setting forth the time and place of the hearing of the petition and that the citation and a copy of the petition shall be personally served on him at least five days before the hearing in the manner provided by law for the service of summons. Section 1570 provides that the judge shall "cause notice to be delivered personally to the alleged incompetent or insane person" but does not specify how long before the hearing the notice must be given or that it must state the time and place of the hearing of the petition. It would appear to be feasible to make these provisions for service in Sections 1461 and 1570 entirely uniform. The

provision for service upon a resident in the manner provided for service of summons seems desirable but would not be practicable in the case of nonresidents. However, the minimum time within which a nonresident is to be given notice should be specified in Section 1570; it is recommended that this be made 15 days because of the problem which a nonresident who receives such a notice will often have in arranging for adequate representation in the courts of this State. Section 1570 should also provide that the notice shall specify the time and place of the hearing of the petition.

4. Section 1570 requires the court to give notice of the proceeding "to such other person or persons as the court or judge deems proper in such manner as deemed reasonable." Section 1461 has no similar provision, providing only that relatives within the second degree residing in the State be given notice by mail. It would seem that cases might easily arise in which there would be no such relatives within the State but where notice could and should be given to relatives residing elsewhere or to other persons either within or without the State in the interest of having the incompetent or insane person's interests adequately represented. It is recommended, therefore, that Section 1461 be amended to incorporate a provision similar to that in Section 1570. It is also recommended, however, that this provision as it appears in both Section 1461 and Section 1570 should be so drafted as to make it clear that it is discretionary with the court whether such additional notice need be given and that it is not necessary to

have an order dispensing with such additional notice if the judge does not deem it necessary.

5. Section 1461 provides that any relative or friend of the alleged incompetent or insane person may appear and oppose the petition. Section 1570 does not have a similar provision. No sufficient reason for this dissimilarity appears and it is recommended that Section 1570 be amended to include such a provision.

6. Section 1461 provides that an alleged insane or incompetent person must be produced at the hearing if able to attend, with specific provisions for proof of physical inability to attend. Section 1570 contains no similar provision relating to nonresidents. While it obviously would not be practicable to require the attendance of the nonresident alleged incompetent or insane nonresident in every case, it would appear to be desirable to give the court discretion to require that he be produced in particular cases and it is recommended that Section 1570 be amended so to provide.

If all of the recommendations made herein were adopted the following changes would be made in the Probate Code:

CHAPTER 4

APPOINTMENT OF GUARDIANS FOR <u>RESIDENT</u> INSANE OR INCOMPETENT PERSONS

§ 1460. Any superior court to which application is made as hereinafter provided may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person <u>who is a resident of this State.</u> As

used in this division of this code, the phrase "incompetent person," "incompetent," or "mentally incompetent," shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.

§ 1461. Any relative~~,-or-friend~~, or person interested in his estate in expectancy or otherwise may file a verified petition alleging that a person who is a resident of this State is insane or incompetent, and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing ~~in~~ within or without this State; thereupon the clerk shall set the same for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him; said citation and a copy of the petition shall be personally served on the alleged insane or incompetent person in the same manner as provided by law for the service of summons, at least five days before the time of hearing; notice of the nature of the proceedings and of the time and place of the hearing, so set by the clerk

shall be mailed at least five ~~(5)~~ days before such hearing date to each of such relatives of the alleged insane or incompetent person. The court may order that similar notice be given to other persons in such manner as the court may direct. Any relative or friend of the alleged insane or incompetent person may appear and oppose the petition.

Such person, if able to attend, must be produced at the hearing, and if not able to attend by reason of physical inability, such inability must be evidenced by the affidavit of a duly licensed physician or surgeon, or other duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in this State in which case the affidavit of the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital, to the effect that such patient is unable to attend, shall be prima facie evidence of that fact.

CHAPTER 10

NONRESIDENT WARDS

§ 1570. The superior court may appoint a guardian of the person and estate, or person or estate, of a minor or insane or incompetent person who resides out of the State and who is within the county or who has estate within the county, and who has no guardian within the State, upon

petition of any relative or friend of such person or of anyone person interested in his estate, in expectancy or otherwise, or upon petition of the minor if fourteen years of age or older. ~~If the nonresident ward is an insane or incompetent person, before making such appointment the court or judge must cause notice to be delivered personally to the alleged insane or incompetent person and to be given to such other person or persons as the court or judge deems proper in such manner as deemed reasonable.~~

If the nonresident is an insane or incompetent person the petition shall set forth the names and residences, so far as they are known to the petitioner, of the relatives of the nonresident within the second degree residing within or without this State. The clerk shall set the petition for hearing by the court and issue a citation directed to the alleged insane or incompetent person setting forth the time and place of hearing. The citation and a copy of the of the petition shall be delivered personally to the alleged insane or incompetent person at least 15 days before the date of the hearing. Notice of the nature of the proceedings and of the time and place of the hearing shall be mailed at least 15 days before such hearing date to each relative of the nonresident named in the petition. The court may order that similar notice be given to other persons in such manner as the court may direct. Any relative or friend of the alleged insane or incompetent person may appear and oppose the petition.

If the court determines that the attendance of such insane or incompetent person at the hearing is necessary in the interest of justice the court may order him to be produced at the hearing. If such an order is made and it is contended that the alleged insane or incompetent is not able to attend by reason of physical inability, such inability must be evidenced by the affidavit of a duly licensed physician or surgeon, or other duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in which case the affidavit of the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital, to the effect that such patient is unable to attend, shall be prima facie evidence of that fact.

If the nonresident ward is a minor, notice shall be given to the persons and in the manner required by Section 1441 of this code. The guardianship which is first granted of a nonresident ward extends to all the estate of the ward within this State, and the court of no other county has jurisdiction.

FOOTNOTES

1. Cal. Stat. 1956, res. c. 42, p. 263.
2. See 1956 Rep. Cal. Law Revision Comm'n 21.
3. Cal. Civ. Code § 3534.
4. 5 Daily Journal Rep. 300 (1954).
5. 192 Cal. 528, 221 Pac. 635 (1923).
6. Ibid at 543.
7. Ibid at 540, 541.
8. Cal. Stat. 1949, c. 617 § 1. See also 23 So. Calif. L. Rev. 229 (1950).
9. It should be noted that the definition of an incompetent person is the same for both residents and nonresidents by virtue of the fact that the definition of the term in Section 1461 begins "as used in this division of this code"; Section 1570 as well as Section 1461 is in Division 4 of the code.