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September 1, 1977

<u>Time</u>	<u>Place</u>
Sept. 8 - 7:00 p.m. - 10:00 p.m.	Howard Johnson Motor Lodge
Sept. 9 - 9:00 a.m. - 5:00 p.m.	5990 Green Valley Circle
Sept. 10 - 9:00 a.m. - 3:30 p.m.	Culver City, CA 90230

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

September 8-10, 1977

1. Minutes of July 7 and 8, 1977, Meeting (sent 7/26/77)
2. Administrative Matters
 - Report on 1977 Legislative Program Generally
 - Oral Report at Meeting
 - Proposed Budget for 1978-79
 - Memorandum 77-49 (sent 8/24/77)
3. Study 36.800 - Review of Resolution of Necessity by Writ of Mandate
 - Approval of Recommendation for Printing
 - Memorandum 77-50 (sent 7/26/77)
 - Recommendation (attached to Memorandum)
4. Study 39.160 - Attachment (Performance of Judicial Duties by Court Commissioners)
 - Review of Comments on Tentative Recommendation
 - Memorandum 77-51 (sent 8/2/77)
 - Tentative Recommendation (attached to Memorandum)
5. Study 63.70 - Evidence (Evidence of Market Value of Property)
 - Review of Comments on Tentative Recommendation
 - Memorandum 77-52 (sent 7/26/77)
 - Tentative Recommendation (attached to Memorandum)
 - First Supplement to Memorandum 77-52 (sent 8/26/77)
6. Study 30.300 - Conservatorship-Guardianship Revisions [Special order of business at 9:00 a.m. on September 9]
 - Approval of Tentative Recommendation for Distribution for Comment
 - Memorandum 77-54 (sent 8/24/77)
 - Tentative Recommendation (attached to Memorandum)
 - First Supplement to Memorandum 77-54 (enclosed)

7. Study 39.160 - Attachment (Property Subject to Security Interest)
 - Memorandum 77-53 (enclosed)
 - Pamphlet entitled "The Attachment Law" (previously distributed)
 - Tentative Recommendation Relating to Attachment of Property Subject to Security Interest (enclosed)
8. Study 39.160 - Attachment (Section 481.050)
 - Memorandum 77-48 (sent 7/14/77)
9. Study 39.200 - Enforcement of Judgments
 - Redemption From Execution Sales
 - Memorandum 77-40 (sent 7/14/77)
 - Draft Statute (attached to Memorandum)
 - First Supplement to Memorandum 77-40 and Memorandum 77-55 (enclosed)
 - Exemptions
 - Memorandum 77-55 (sent 8/2/77)
 - Draft Statute (attached to Memorandum)
 - First Supplement to Memorandum 77-40 and Memorandum 77-55 (enclosed)
 - Levy Procedure
 - Memorandum 77-56 (sent 8/8/77)
 - Draft Statute (attached to Memorandum)
 - Miscellaneous Policy Problems
 - Memorandum 77-57 (sent 8/24/77)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 8, 9, AND 10, 1977

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on September 8, 9, and 10, 1977.

Present: John N. McLaurin, Chairman, September 9 and 10
Howard R. Williams, Vice Chairman
Beatrice P. Lawson
Jean C. Love, September 8 and 9
John D. Miller
Thomas E. Stanton, Jr.
Laurence N. Walker

Absent: George Deukmejian, Member of Senate
Alister McAlister, Member of Assembly
Bion M. Gregory, Ex Officio

Members of Staff Present:

John H. DeMouilly	Nathaniel Sterling
Stan G. Ulrich	Robert J. Murphy III

Consultants Present:

Thomas M. Dankert, Condemnation Law and Procedure,
September 8
Garrett H. Elmore, Child Custody, September 8, 9, and 10

Present as observers on September 8:

Jerrold Fadem, State Bar Condemnation Committee, Santa
Monica
Anthony J. Ruffolo, CALTRANS, Los Angeles.

ADMINISTRATIVE MATTERS

Minutes of July Meeting Approved as Corrected

The Minutes of the July 7 and 8, 1977, Meeting, were corrected by revising the first three lines of Section 1452 on page 11 to read:

1452. (a) Upon petition as provided in this chapter, the court ~~(a) shall~~ shall confirm the appointment of a special guardian.

As thus corrected, the Minutes were approved as submitted by the staff.

Report on 1977 Legislative Program

The Commission received the following report on the 1977 Legislative Program from the Executive Secretary.

Adopted or Enacted

- Res. Ch. 17, Statutes of 1977 - Continues authority to study topics previously authorized for study; authorizes Commission to drop two topics from agenda of topics.
- Ch. 49, Statutes of 1977 (AB 13) - Damages in unlawful detainer actions
- Ch. 155, Statutes of 1977 (AB 1007) - Use of keepers on writs of execution
- Ch. 198, Statutes of 1977 (AB 570) - Liquidated damages
- Ch. 232, Statutes of 1977 (AB 85) - Enforcement of sister state money judgments
- Ch. 499, Statutes of 1977 (SB 221) - Effect on attachment of bankruptcy or general assignment for benefit of creditors

Referred to Conference Committee

AB 393 - Wage Garnishment (Bill has passed both houses but Assembly did not concur in Senate amendments.)

No Action to Be Taken in 1977

- SB 623 - Nonprofit Corporations (conforming revisions)
- SB 624 - Nonprofit Corporations (comprehensive statute)

Proposed Budget for 1978-79

The Commission reviewed Memorandum 77-49 and the attached staff draft of a revised budget for 1977-78 and a proposed budget for 1978-79.

The first portion of the fourth paragraph of the preliminary descriptive material was revised to read:

Minutes
September 8, 9, and 10, 1977

At the 1977 session, one resolution and eight bills were recommended by the Commission. The resolution was adopted, and five of the bills were enacted. One bill was in conference committee when the Legislature recessed in September. Hearings on two bills (relating to nonprofit corporations) were deferred in 1977 to give an Assembly Select Committee time to study the subject matter of the bills.

With this revision, the revised budget for 1977-78 and the proposed budget for 1978-79 were approved with the understanding that the Department of Finance will be making various technical revisions in the budgets.

Compensation for Commissioners

The Commission requested that the Executive Secretary take the necessary actions in order to increase the per diem compensation of members of the Law Revision Commission appointed by the Governor from \$20 per day to \$100 per day.

Research Contracts

The Commission approved the following research contracts.

Contract With Professor Kanner. The Commission authorized and directed the Executive Secretary to execute on behalf of the Commission a contract with Professor Gideon Kanner to provide expert advice to the Law Revision Commission in connection with the study of eminent domain and inverse condemnation law. The compensation is to be \$20 per day for attending meetings of the Law Revision Commission or legislative hearings plus travel expenses at the rate for members of boards and commissions appointed by the Governor. The total amount payable under the contract is not to exceed \$500.

Contract With Mr. Dankert. The Commission authorized and directed the Executive Secretary to execute on behalf of the Commission a contract with Thomas M. Dankert to provide expert advice to the Law Revision Commission in connection with the study of eminent domain and inverse condemnation law. The compensation is to be \$20 per day for attending meetings of the Law Revision Commission or legislative hearings plus travel expenses at the rate for members of boards and commissions appointed by the Governor. The total amount payable under the contract is not to exceed \$500.

Minutes
September 8, 9, and 10, 1977

STUDY 30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 77-54, the First Supplement to Memorandum 77-54, and the attached staff draft of a proposed new Division 4 of the Probate Code. The new division as drafted would replace existing Divisions 4 and 5 of the Probate Code and would substantially consolidate guardianship and conservatorship law as directed by the Commission at its July 1977 meeting. The Commission reviewed the staff draft section by section through and including proposed Section 2596. The balance of the draft was deferred for review by the Commission at the October 1977 meeting.

The Commission approved the staff suggestion that the staff draft be sent to the members of the State Bar Subcommittee on Guardianship and Conservatorship, together with the Minutes of the September meeting to indicate the revisions made by the Commission and the preliminary part of the recommendation when revised. This will permit the subcommittee to commence its review of the staff draft as soon as possible. It should be made clear to the subcommittee in the letter of transmittal that the draft is merely a working draft and that substantial portions of it have not yet been discussed by the Commission. The Commission deferred the question of whether to attempt to have legislation ready for introduction at the 1978 session of the Legislature until some feedback has been obtained from the State Bar subcommittee.

The Commission authorized the staff to send to the members of the subcommittee copies of all materials prepared for the Commission on the subject of guardianship and conservatorship. The Commission further approved this practice as a matter of general policy for all studies whenever the appropriate standing committee or subcommittee of the State Bar expresses an interest in receiving such materials. Staff drafts which have not yet been reviewed or approved by the Commission should be so identified.

The Commission made the following decisions with respect to the portions of the staff draft which it reviewed:

Gifts of Principal by the Guardian or Conservator

The Commission directed the staff to develop a proposal for codification of the "doctrine of substituted judgment" by which the court may

authorize a guardian or conservator to make gifts of principal under appropriate circumstances as set forth in cases such as Estate of Christensen, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967), and Conservatorship of Weyss, 20 Cal. App.3d 877, 98 Cal. Rptr. 85 (1971).

Power of Attorney Which Will Survive Principal's Incompetency

The Commission directed the staff to develop for further Commission consideration a provision similar to Section 5-501 of the Uniform Probate Code, authorizing a principal to provide in a written power of attorney that it shall continue in effect notwithstanding the incompetency of the principal or that it shall become effective upon the incompetency of the principal.

Civil Code § 4600

The Commission requested the staff to redraft the proposal to amend Section 4600 of the Civil Code (Family Law Act) so that the section would read substantially as follows:

4600. (a) In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such the child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his the child's wishes in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to a testamentary appointment of a guardian of the person of the child under Section 1500 of the Probate Code.

(b) Custody should be awarded in the following order of preference:

(a) (1) To either parent according to the best interests of the child.

(b) (2) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) (3) 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.

(d) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than

a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

The Commission also requested that the Comment to Section 4600 make some reference to the rules for resolving the jurisdictional conflicts which may arise between the many types of proceedings in which child custody may be determined.

The following section numbers refer to the proposed sections of revised Division 4 of the Probate Code.

§§ 1400-1406 (Rules of construction)

Proposed Section 1401 should be deleted in view of a substantively identical provision in Section 4 of the Probate Code. The remaining rules of construction should be generalized and relocated at the beginning of the Probate Code.

§ 1450. Law governing

The second paragraph of the Comment to proposed Section 1450 (referring to rules of practice and right to jury trial) should be deleted.

§ 1460. Notice of hearing generally

Proposed Section 1460 should be revised substantially as follows:

1460. (a) Subject to Section 1461, if notice of hearing is required under this division but the applicable provision does not fix the manner of giving notice of hearing, the notice of the time and place of the hearing, in substantially the form prescribed in Section 1462, shall be given at least 10 days before the day of the hearing as provided in this section.

(b) Subject to Section 1461, the clerk of the court shall cause the notice of the hearing to be posted at the courthouse of the county where the proceedings are pending.

(c) Subject to Section 1461, the petitioner (which includes for the purposes of this section a person filing an account, report, or other paper) shall cause the notice of hearing to be mailed or personally delivered to each of the following persons (other than the petitioner or persons joining in the petition):

(1) The guardian or conservator.

(2) The ward if over the age of 14 or the conservatee.

(3) The spouse of the ward or conservatee, if the ward or conservatee has a spouse.

(4) Except as provided in subdivision (b) of Section 1512, the adult relatives of the ward or conservatee within the second degree named in the petition for appointment of a guardian or conservator and the parents of the ward or conservatee.

(d) Proof of the giving of notice shall be made at or before the hearing as provided in Section 1465.

The Comment to proposed Section 1460 should note that the provision in Section 1200 of the Probate Code for mailing of notice to the county seat of the county where the proceedings are pending when a proper mailing address is not known is not carried over into proposed Section 1460. In such a case, the person giving notice may request the court to dispense with such notice under proposed Section 1461. The Comment should also note that the section does not deal with the effect of notice.

The staff was requested to examine the recent case of Estate of Obiols, 69 Cal. App.3d 514, 138 Cal. Rptr. 220 (1977) (hearing denied by Cal. Sup. Ct., opinion ordered not to be published), for its possible impact on the provisions for notice.

§ 1461. Court may vary or dispense with notice

The Commission had reservations about the provisions in proposed Section 1461 (derived from existing Section 2001) authorizing the court to dispense with any notice required under revised Division 4. Also, the exception of subdivision (b) (court may not vary notice required to be given by personal service) may not be broad enough. For example, under proposed Section 1825, when a petition for conservatorship is filed, a citation and copy of the petition must be served on the proposed conservatee by personal delivery, by mail, or in such manner as may be authorized by the court, and this probably should not be dispensed with. Proposed Section 1461 was therefore referred back to staff for further consideration in light of the foregoing.

§ 1462. Form of notice

The Commission's consultant, Garrett Elmore, suggested that the form of notice prescribed in proposed Section 1462 (modeled after Probate Code Section 1200.1) might be partially obsolete. The Commission referred this section to staff for further study. The staff should consider whether the form of notice might more appropriately be

prescribed by Judicial Council rule rather than by statutory codification. If the form of notice is to be codified, the notice should indicate where the recipient of the notice can get access to a copy of the petition, account, or report upon which the hearing is to be held.

§ 1463. Publication of notice required in certain instances

The Commission decided to eliminate the requirement of publication of notice. Section 1463 should so provide in some succinct fashion, either by the language suggested by staff ("Section 1201 does not apply to proceedings under this division") or otherwise.

§ 1465. Proof of giving notice

Subdivision (a) of proposed Section 1465 should be revised substantially as follows:

1465. (a) Proof of the giving of notice shall be made at or before the hearing by ~~testimonial evidence presented at the hearing or~~ by the following means, as applicable:

(1) Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

(2) Proof of notice by personal delivery may be made by the affidavit of the person making such delivery showing the time, place, and manner of delivery, and the name of the person to whom delivery was made.

~~(2)~~ (3) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

~~(3)~~ (4) Proof of posting may be made by the affidavit of the person who posted the notice.

~~(4)~~ (5) Proof of publication may be made by the affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication.

. . . .

The staff should give further consideration to the second sentence of subdivision (b) ("When the order becomes final, it is conclusive on all persons"). Should there be an exception for persons under legal disability? Cf. Prob. Code § 931; Estate of Obiols, 69 Cal. App.3d 514, 138 Cal. Rptr. 220 (1977). Should the sentence be deleted altogether?

The penultimate sentence of the Comment (proof of notice "should be made by affidavit or declaration filed in the proceeding in those cases where notice is jurisdictional") appears unduly to discourage proof of notice by testimonial evidence. Since the basis for the statement is

that documentary proof will be part of the judgment roll while testimonial evidence will not, the staff should consider how testimonial proof might be given similar effect.

§ 1500. Appointment of testamentary guardian by parent

Proposed Section 1500 should be revised substantially as follows:

1500. (a) Either parent of a minor child, living or likely to be born, may appoint a guardian of the person of the child, or a guardian of the estate of the child, or both, to take effect upon the death of the appointing parent.

(b) An appointment under this section shall be made by ~~will~~, by deed, will or by a signed writing.

(c) Unless the other parent is dead or incapable of consent, the written consent of the other parent is required for an appointment under this section if that parent's consent would be required for an adoption of the child.

The Comment should indicate that "signed writing" includes a deed.

§ 1501. Appointment of special testamentary guardian

Proposed Section 1501 should be revised substantially as follows:

1501. (a) A parent may appoint a guardian by will or by deed a signed writing for the property of any minor child, living or likely to be born, which the child may take from the parent by the will or by succession.

(b) Any person may appoint a guardian by will for any property of a minor, living or likely to be born, which the minor may take from such person by the will.

The first sentence of the second paragraph of the Comment (special testamentary guardianship may coexist with general guardianship with former controlling property referred to in Section 1501 and latter controlling balance of the estate) should be codified either in Section 1501 or possibly in Section 2153 (several guardians or conservators). The Comment to Section 1501 should indicate that "signed writing" includes a deed.

§ 1510. Petition for appointment or confirmation

Proposed Section 1510 should be revised substantially as follows:

1510. (a) A relative or other person on behalf of the minor, or the minor if 14 years of age or older, may file a ~~verified~~ petition for the appointment or confirmation of a guardian of the minor. The petition shall allege that the appointment of a guardian of the person and estate of the minor, or of the person or estate of the minor, is necessary or convenient and shall set forth,

so far as known to the petitioner, the names and ~~residences~~ addresses of (1) the parents of the minor and (2) the relatives of the minor within the second degree ~~who reside in this state~~ degree.

(b) If the proposed ward is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Health and that fact is known to the petitioner, the petitioner shall name the institution in the petition.

(c) The petition shall state whether or not the proposed ward is receiving or entitled to receive benefits from the Veterans Administration.

The word "verified" is deleted in view of the proposed general provision requiring all petitions filed under this division to be verified (Section 1451), and the Comment should make reference to this requirement.

The term "address" should be included in the defined terms to mean mailing address.

§ 1511. Setting petition for hearing

Proposed Section 1511 should be deleted in view of the general provision requiring the clerk to set petitions for hearing (Section 1452).

§ 1512. Notice to person having custody, relatives, and parents

Proposed Section 1512 should be revised substantially as follows:

1512. (a) Except as provided in subdivision ~~(b)~~; (d), before the appointment or confirmation of the guardian, notice of the hearing on the proposed appointment or confirmation shall be given in such manner as the court or a judge thereof determines is reasonable to all of the following: to the persons and in the manner prescribed in subdivisions (b) and (c).

(b) Notice shall be given in the manner provided in Section 415.10 of the Code of Civil Procedure or in such manner as may be authorized by the court to all of the following:

(1) The proposed ward if 14 years of age or older.

(2) The parents of the proposed ward.

~~(2)~~ (3) The person having the care of the proposed ward.

(c) Notice shall be given by mail or in such manner as may be authorized by the court to all of the following:

(1) The proposed ward if under the age of 14 years.

~~(2)~~ (2) Such The relatives of the proposed ward residing in this state as the court or judge determines should be given notice, named in the petition at their addresses stated in the petition.

(3) If the proposed ward is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Health and that fact is known to the petitioner, to the Director of Health at the director's office in Sacramento.

(4) If the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration, to the office of the Veterans Administration referred to in Section 2908.

~~(b)~~ (d) Notice shall Unless the court orders otherwise, notice need not be given to any of the following:

(1) The parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency.

(2) The parents of a proposed ward who has been declared free from their custody and control.

~~(e)~~ (e) Proof shall be made to the court before the appointment is made or confirmed that notice has been given as required by this section or that the whereabouts of the persons entitled to notice is unknown or for other good cause such notice cannot be given.

The headline and the Comment to Section 1512 should be revised accordingly.

§ 1515. Appointment or confirmation of guardian

The references in proposed Section 1515 to a guardian of the person and estate or of the person or estate are awkward. This problem recurs throughout the draft statute. It should be sufficient to refer throughout the statute to a guardian of the person or a guardian of the estate and to draft a general provision to the effect that the guardian of the person and the guardian of the estate may be the same person. Such a general provision would render obsolete the definitions of "conservator" and "guardian" currently provided in proposed Sections 2400 and 2500.

§ 1516. No guardian of person for married minor

Proposed Section 1516 should be revised substantially as follows:

1516. (a) Notwithstanding any other provision of this part, no guardian of the person shall be appointed or confirmed for a minor who is ~~or has been married~~ married or whose marriage has been dissolved.

(b) Subdivision (a) does not apply in the case of a minor whose marriage has been adjudged a nullity.

There should be mention, either in the Comment to Section 1516 or in the preliminary part to the recommendation, that the scheme whereby

an incompetent married minor may have a conservator of the person but a guardian of the estate is recommended as a practical solution to the problem created by emancipation by marriage.

§ 1540. Application of article

The introductory clause to proposed Section 1540 should be revised to read: "This article does not apply in any of the following cases+ case in which:".

§§ 1541-1544 (nonrelative guardianships)

In proposed Sections 1541-1544, delete the introductory clause of each section which reads: "Except as provided in Section 1540:". Since Section 1540 by its own terms specifies the situations in which this article does not apply, the Comments to Sections 1541-1544 should refer to the provisions of Section 1540.

§ 1600. Majority, death, or marriage of ward

The same awkwardness in the use of the phrase "guardianship of the person and estate or person or estate" was noted in proposed Section 1600 as was noted in the discussion of proposed Section 1515. The solution suggested in the discussion of Section 1515 will also rectify the problem here.

In reviewing the last sentence of the Comment to Section 1600 (marriage of guardian does not affect guardian's authority, citing proposed Section 2156), the Commission decided to delete proposed Section 2156 and, therefore, the last sentence of the Comment to Section 1600.

The Comment to Section 1600 should also make a cross-reference to Section 1516 (no guardian of person for married minor).

§ 1601. Termination by court order

Proposed Section 1601 should be revised substantially as follows:

1601. Upon petition of the guardian or ward and after such notice to the other as the court may require, the court may make an order terminating the guardianship if the court determines that the guardianship is no longer necessary or convenient. it is in the ward's best interest to do so.

§ 1602. Settlement of accounts, release, and discharge of guardian

The substance of proposed Section 1602 should be moved into Article 3 (commencing with Section 2620) of Chapter 7 (inventory and accounts). The Commission was also concerned about the practical effect of subdivision (a) of proposed Section 1602 (ward who has reached majority may settle accounts with guardian and give guardian a release). The staff should consider whether the Comment should indicate that such a release does not excuse the guardian from filing a final account and obtaining a discharge from the court. Cupp, McCarroll, & McClanahan, Guardianship of Minors, in 1 California Family Lawyer § 16.75, at 661 (Cal. Cont. Ed. Bar 1962); see proposed Section 1641. Moreover, a release given to a former guardian by the former ward is presumed to have been made without sufficient consideration and under undue influence, and the former guardian has the burden of showing that the release was just and fair. Smith v. Fidelity & Deposit Co., 130 Cal. App. 45, 56-57, 19 P.2d 1018, ____ (1933); 35 Cal. Jur.3d Guardianship and Conservatorship § 156, at 731 (1977).

§ 1800. Conservatorships for adults or married minors

Subdivision (a) of proposed Section 1800 should be revised to avoid the awkward language "person and estate, or person or estate." See the discussion under Sections 1515 and 1600 above.

Subdivision (b) should be revised substantially as follows:

1800. If the other requirements of this chapter are satisfied, the court may appoint:

(a)

(b) A conservator of the person of a minor who is ~~or~~ has been married, married or whose marriage has been dissolved.

§ 1801. Need for appointment

Subdivision (a) of proposed Section 1801 should be revised substantially as follows:

1801. Subject to Section 1800, a conservator may be appointed for a person who:

(a) In the case of a conservatorship of the person, is unable properly to provide for ~~his or her~~ the personal needs of such person for physical health, food, clothing, or shelter.

. . . .

Use of the terms "his or her" should be avoided in drafting whenever possible.

§ 1810. Nomination by proposed conservatee

The Commission approved the continuation of the substance of existing Section 1752 (conservatorship), allowing the proposed conservatee to nominate a conservator in a written instrument not having the formalities of a witnessed will, in preference to the analogous provision in existing Section 1463 (guardianship) which does not require the formalities of a witnessed will. The Comment to proposed Section 1810 should note this difference, and language substantially as follows should also be added to the Comment: "The only formal requirements for the nomination are that the nomination be in writing and be signed by the proposed conservatee. The nomination may be made by written instrument made long before the conservatorship proceedings are commenced, but, whenever made, the proposed conservatee must have had at the time the writing was executed sufficient capacity to form an intelligent preference."

There should be a transition provision providing that a nomination of a guardian made by an adult under prior law shall be deemed to be a nomination of a conservator.

§ 1811. Order of preference for appointment as conservator

Subdivision (b) of proposed Section 1811 should be revised to provide that the spouse or a parent of the proposed conservatee may nominate a conservator either while living or posthumously by a signed writing as in the case of the appointment of a testamentary guardian. The staff should consider whether one or more additional sections may be required to provide for the manner of such a nomination.

§ 1820. Filing of petition

Subdivision (a) of proposed Section 1820 should be revised substantially as follows:

1820. (a) A petition for the appointment of a conservator may be filed by ~~the proposed conservatee or by any relative or friend, other than a creditor, of the proposed conservatee,~~ any of the following:

- (1) The proposed conservatee.

(2) Any friend, other than a creditor, of the proposed conservatee.

(3) A relative of the proposed conservatee.

(b)

This change will allow a relative of the proposed conservatee to file the petition even though the relative may also be a creditor of the proposed conservatee.

The last sentence of the Comment (where existing guardian is appointed conservator on incompetent minor's reaching majority, appointment may be made before settlement of guardian's accounts) should be codified either in Section 1820 or in Article 3 (commencing with Section 2620) of Chapter 7 (inventory and accounts). Cf. Comment to Section 2660 (resignation of guardian or conservator).

§ 1821. Verification and contents of petition

Proposed Section 1821 should be revised substantially as follows:

1821. (a) The petition ~~shall~~ be verified and shall allege that the appointment of a conservator is required and the reasons for appointment.

(b) The petition shall set forth, so far as they are known to the petitioner, the names and ~~residence~~ addresses of the spouse, if any, and of the relatives of the proposed conservatee within the second degree.

(c) If the petition is filed by one other than the proposed conservatee, the petition shall state whether or not the petitioner is a creditor of the proposed conservatee.

(d) If the proposed conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Health and that fact is known to the petitioner, the petitioner shall name the institution in the petition.

~~(d)~~ (e) The petition shall state whether or not the proposed conservatee is receiving or entitled to receive benefits from the Veterans Administration.

~~(e)~~ (f) The petition may include a further allegation that either of the following is necessary for the protection of the proposed conservatee or the estate of the proposed conservatee:

(1) That the proposed conservatee be adjudged under Section 1832 to lack legal capacity to the extent provided in Section 40 of the Civil Code.

(2) That the power of the proposed conservatee to enter into specified types of transactions or any transaction in excess of a specified money amount be withdrawn.

The elimination of the verification requirement in subdivision (a) is made possible by the general provision in proposed Section 1451 requiring that all petitions filed under new Division 4 be verified except as otherwise specifically provided.

As indicated in the discussion under proposed Section 1510 above, the term "address" should be included in the defined terms to mean mailing address. This will supersede the reference in subdivision (b) to "residence addresses" which is shortened to "addresses."

§ 1822. Setting petition for hearing

Proposed Section 1822 (clerk shall set petition for appointment of conservator for hearing within 30 days of filing) should be deleted in view of the general provision in proposed Section 1452 requiring the clerk to set all petitions for hearing. The requirement that the petition be heard within 30 days of the filing was drawn from existing Section 1851(a), but that latter provision is limited to petitions "filed under this chapter" (i.e., Chapter 4, powers and duties). The intent of existing Section 1851(a) is preserved in proposed Sections 2406 and 2503. The 30-day provision should not be extended to include situations not now covered under existing law.

§ 1823. Notice of hearing

Proposed Section 1823 (notice of hearing on petition for conservatorship) parallels proposed Section 1512 (notice of hearing on petition for guardianship). Section 1823 requires notice to the spouse, if any, of the proposed conservatee, but there is no requirement in Section 1512 for notice to the spouse, if any, of a married minor in the case of a petition for guardianship of the estate. Also, Section 1823 requires that "a copy of the petition and of the notice of the time and place of hearing" be mailed, but Section 1512 (as revised above) merely requires that "notice of the hearing" be given. The staff should give further consideration to whether these inconsistencies are sound or whether they should be eliminated.

§ 1824. Citation to proposed conservatee

Paragraphs (5) and (6) of subdivision (b) of proposed Section 1824 should be revised as follows:

(5) The proposed conservatee has the right to legal counsel of ~~his or her~~ the proposed conservatee's own choosing, including and the right to have legal counsel appointed by the court if ~~he or she~~ the proposed conservatee is unable to retain one.

(6) The proposed conservatee has the right to a jury trial if ~~he or she~~ the proposed conservatee so desires.

(See discussion under proposed Section 1801 above.)

§ 1827. Appointment and duties of court investigator

Paragraph (1) of subdivision (b) of proposed Section 1827 should be revised as follows:

(b) The court investigator shall do all of the following:

(1) ~~Personally interview~~ Interview the proposed conservatee. ~~conservatee personally.~~

There was Commission sentiment to make confidential the court investigator's report to the court pursuant to paragraph (7) of subdivision (b) of Section 1827 and pursuant to subdivision (b) of Section 1851. However, the Commission decided not to undertake any substantive revision of the provisions enacted in 1976 by the legislation authored by Assemblyman Lanterman. 1976 Cal. Stats., Ch. 1357. This should be stated in the preliminary part to the recommendation with specific reference to the proposed sections which embody that legislation.

§ 1829. Information to proposed conservatee by court

In paragraph (2) of subdivision (a) of proposed Section 1829, the words "his or her" should be deleted in the two places where they occur, and the words "the conservatee's" should be substituted in those two places.

In subdivision (b), the words "his or her" should be deleted, and the words "the proposed conservatee's" should be substituted. (See discussion under proposed Section 1801 above.)

§ 1832. Adjudication of conservatee's lack of legal capacity, withdrawing power to enter specified transactions

Subdivision (b) of proposed Section 1832 should be revised as follows:

(b) The order referred to in subdivision (a) may be included in the order of appointment of the conservator or may be ~~included~~ in a subsequent order made subsequently upon a ~~verified~~ petition

made, filed, noticed, and heard in the same manner as a petition for appointment of a conservator. The terms of the order shall be included in the letters of conservatorship.

§ 1840. Definitions

The Commission was of the view that proposed Section 1840, which merely makes a statutory cross-reference to definitions provided in the general provisions (Sections 1414 and 1426), is unnecessary and should be deleted.

§ 1851. Visitation and findings by court investigator

The second sentence of subdivision (a) of proposed Section 1851 should be revised as follows:

1851. (a) . . . The court investigator shall personally inform personally the conservatee that ~~he or she~~ the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. . . .

§ 1852. Notification of counsel; representation of conservatee at hearing

Proposed Section 1852 should be revised substantially as follows:

1852. If the conservatee wishes to petition the court for termination of the proceeding or for removal of the existing conservator, or if based on information contained in the court investigator's report or obtained from any other source the court determines that a hearing for such termination or removal is in the best interests of the conservatee, the court shall notify the attorney of record for the conservatee, if any, or shall appoint the public defender or other attorney to file the petition and represent the conservatee at the hearing or trial.

The staff should consider whether it should be made clearer that Section 1852 is related to the biennial review procedure and does not limit Chapter 3 (termination) of Part 3 (conservatorship).

§ 1862. Setting petition for hearing

Proposed Section 1862 (clerk shall set petition for hearing) should be deleted in view of the general provision in proposed Section 1452 requiring the clerk to set all petitions for hearing.

§ 1864. Hearing and judgment

Subdivision (c) of proposed Section 1864 should be revised as follows:

(c) ~~The conservator may at~~ At the hearing, or thereafter on further notice and hearing, the conservator may be discharged and bond given by the conservator be exonerated upon the settlement and approval of the conservator's final account by the court.

§ 1865. Termination of conservatorship of "absentee"

Subdivision (a) of proposed Section 1865 purports to continue the first sentence of existing Section 1755.5 which provides that a petition to terminate the conservatorship of an "absentee" may also be filed by any party eligible under Section 1754 to oppose or be made a party to the petition for conservatorship. This appears to be intended to include those referred to in the last sentence of existing Section 1754, namely, any officer or agency of this state or of the United States or an authorized delegate. The staff should consider whether this should be explicitly stated in proposed Section 1865.

§ 2100. "Court" defined

Proposed Section 2100 (defining "court") should be deleted in view of an identical provision in Section 1420 (definitions applicable to all of new Division 4).

§ 2153. Several guardians or conservators

Proposed Section 2153 should be revised substantially as follows:

2153. (a) The court, in its discretion, may appoint or confirm more than one guardian or conservator for the same ward or conservatee. In such a case, the guardians or conservators shall act as a unit by a majority.

The Commission considered subdivision (b) of Section 2153 which provides: "When two or more guardians or conservators are appointed, each shall qualify and is liable as if a sole guardian or conservator." The Commission gave consideration to a proposal to replace the words "is liable" with the words "be responsible for the performance of the duties of the office." However, in view of the decision to make express provision for joint guardians or conservators to act by majority, the staff should consider the advisability of adopting a rule that a guardian or conservator who does not join the majority in taking an action is not liable for the consequences of the action. This is the rule with respect to joint trustees (Civil Code § 2239; 76 Am. Jur.2d Trusts § 306 (1975)) and joint executors or administrators (Prob. Code § 920). See

also Uniform Probate Code § 5-429(b) (conservator is individually liable for obligations arising from ownership or control of estate only if "personally at fault").

§ 2154. One guardian or conservator for several wards or conservatees

The Comment to proposed Section 2154 should make clear that the court may appoint one guardian or conservator for several wards or conservatees either in the initial order of appointment or at any subsequent time.

§ 2156. Marriage of guardian or conservator

Proposed Section 2156 (marriage of guardian or conservator does not affect authority of guardian or conservator), which continues existing Section 1410, should be deleted as anachronistic and too obvious to require codification.

§ 2201. Venue for residents

The Commission tentatively made the following changes in proposed Section 2201:

2201. Guardianship or conservatorship proceedings for a resident of this state shall be instituted in the county in which the proposed ward or proposed conservatee resides or is temporarily domiciled or in such other county as may be ~~in the interest of justice~~ for the best interests of the proposed ward or proposed conservatee.

The Commission viewed the concept of "temporary" domicile as self-contradictory since domicile involves presence plus intent to remain. See 12 Cal. Jur.3d Conflict of Laws § 25, at 507 (1974). The Commission directed the staff to research the California cases to see if this terminology has been given any special meaning which should be preserved and to report back to the Commission.

The Commission also discussed the advisability of codifying the rule of *Grinbaum v. Superior Court*, 192 Cal. 566, 221 P. 651 (1923), to the effect that the court lacks jurisdiction to appoint a guardian (or conservator) of the person of one who is not present in the state. The Commission had serious reservations about doing so but directed the staff to research the question further and to report back to the Commission.

§ 2202. Venue for nonresidents

Subdivision (a) of proposed Section 2202 should be revised as follows:

2202. (a) Guardianship or conservatorship proceedings for a nonresident of this state shall be instituted in the county in which the proposed ward or proposed conservatee is temporarily living or, if there is no such county, in any county in which the proposed ward or proposed conservatee has property or in such other county as may be in the interests of justice, for the best interests of the proposed ward or proposed conservatee.

With respect to subdivision (b) (in event of multiple proceedings for nonresident, court first granting guardianship or conservatorship has exclusive jurisdiction), the Commission directed the staff to consider whether exclusive jurisdiction should be based on first filing, first service, or first granting, and to consider whether first granting may refer to appointment of a temporary guardian or conservator. The staff should also consider whether a similar rule should be codified for multiple proceedings involving a resident of this state.

§ 2211. Who may petition for transfer

Proposed Section 2211 should be revised as follows:

2211. The petition for transfer ~~shall~~ may be filed only by the guardian or conservator, the ward or conservatee, or any relative or friend of the ward or conservatee, or any person interested in the estate of the ward or conservatee.

§ 2212. Contents of petition

Proposed Section 2212 should be revised as follows:

2212. The petition for transfer ~~shall be verified and shall set forth all of the following:~~

- (a) The county to which the proceeding is to be transferred.
- (b) The ~~residence~~ address of the ward or conservatee.
- (c) A brief description of the character, value, and location of the property of the ward or conservatee.
- (d) The reasons for the transfer.
- (e) The names and ~~residence~~ addresses, so far as they are known to the petitioner, of the spouse and relatives of the ward or conservatee within the second degree.
- (f) The name and ~~residence~~ addresses of the guardian or conservator if the guardian or conservator is not the petitioner.

The requirement of verification is deleted because it is superseded by a general provision to the same effect. See proposed Section 1451. The term "residence" is deleted because of the Commission's decision to define "address" to mean mailing address. See discussion under proposed Section 1510 above.

§ 2213. Setting for hearing; notice of hearing

Proposed Section 2213 should be revised as follows:

2213. ~~(a) Upon the filing of the petition to transfer, the clerk shall set the petition for hearing.~~

(b) Notice of the hearing shall be given for the period and in the manner prescribed by ~~Section 1200~~. Chapter 3 (commencing with Section 1460) of Part 1. In addition, the petitioner shall cause written notice of the hearing and a copy of the petition to be mailed to all persons required to be listed in the petition at least 10 days before the date set for the hearing.

Subdivision (a) is deleted because it is superseded by a general provision to the same effect. See proposed Section 1452. The reference to Chapter 3 (notice of hearing) of Part 1 replaces the former references to existing Section 1200 throughout the staff draft.

The staff should give further consideration to whether notice by mail is sufficient on a petition to transfer the proceedings because of its potentially drastic effect.

Petitions for transfer of the proceedings should be added to the matters listed in proposed Section 2700 of which special notice may be requested.

§ 2250. Appointment (of temporary guardian or conservator)

Proposed Section 2250 should be revised substantially as follows:

2250. (a) On or after the filing of a petition for appointment of a guardian or conservator, any person entitled to petition for appointment of the guardian or conservator may file a petition for appointment of a temporary guardian or temporary conservator. The petition ~~shall be verified and~~ shall establish good cause for appointment of the temporary guardian or temporary conservator.

(b) The court, upon such petition or other showing as it may require, may appoint a temporary guardian of the person and estate or person or estate or a temporary conservator of the person and estate or person or estate to serve pending the final determination of the court upon the petition for the appointment of the guardian or conservator.

(c) Unless the court for good cause dispenses with notice, notice shall be given to the proposed ward if 14 years of age or older or to the proposed conservatee before appointment of a temporary guardian or temporary conservator. The appointment of the temporary guardian or temporary conservator may be made with or without ~~notice~~, notice to other persons, as the court may require.

The deletion from subdivision (a) of the verification requirement is made because of a general provision to the same effect. See proposed Section 1451.

The language added to new subdivision (c) is based on a policy determination by the Commission that ordinarily notice should be given to the proposed ward or conservatee before appointment of a temporary guardian or conservator. The requirement of notice to the ward only if 14 years of age or older is to make Section 2250 consistent with paragraph (1) of subdivision (b) of proposed Section 1512 (as revised) above.

§ 2312. Notice to conservatee

Proposed Section 2312 should be revised substantially as follows:

2312. Before letters of guardianship or conservatorship may be issued, a copy of the order appointing the guardian or conservator shall be mailed to the ward if 14 years of age or older or to the conservatee at the conservatee's last known address, address of the ward or conservatee.

§ 2320. General requirement of bond; amount

Paragraph (2) of subdivision (a) of proposed Section 2320 should be revised to make clear that the amount of the bond of a guardian or conservator shall be exactly the minimum amount prescribed in existing Section 541 unless the court for good cause orders otherwise.

§ 2321. Waiver of bond by conservatee

The Comment to proposed Section 2321 should emphasize that this section applies only to conservatorships and not to guardianships. There should also be a cross-reference to Section 2321 in a Comment to one or more sections in Part 3 (conservatorship).

§ 2332. Deposit in place of surety bond

The Commission was of the view that subdivision (b) of proposed Section 2332 (cash security returnable to guardian or conservator on termination of service) is not sufficiently inclusive in listing the

occasions upon which cash security is returnable to the guardian or conservator. Perhaps it should also provide for return of the security upon substitution of a surety bond or other adequate security. The staff was directed to give further consideration to subdivision (b).

§ 2334. Suit against sureties on bond; limitation period

Proposed Section 2334 should be revised substantially as follows:

2334. (a) In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate.

(b) No Except as provided in subdivision (c), no action may be maintained against the sureties on the bond unless commenced within three years from the discharge or removal of the guardian or conservator or from the date the order surcharging the guardian or conservator becomes final, whichever is later.

(c) If at the time of the discharge or removal of the guardian or conservator or when the order of surcharge becomes final any person entitled to bring the action is under any legal disability to sue, such person may commence the action within three years after the disability is removed.

§ 2400. Definitions

The definitions of "guardian" and "conservator" in proposed Section 2400 should be revised or deleted in view of the new general provision to be drafted. See discussion under proposed Section 1515 above. The definition of "court" is superseded by the general provision in proposed Section 1420.

§ 2403. Involuntary civil mental health treatment

The Commission considered proposed Section 2403 at length. The section is based on language in existing Sections 1500 and 1851 ("No person for whom a . . . [guardian or conservator] of the person has been appointed shall be placed in a mental health treatment facility against his will") which was added by 1976 legislation carried by Assemblyman Lanterman. 1976 Cal. Stats., Ch. 1357. It was the Commission's view that the substance of the 1976 Lanterman legislation should be kept intact in view of Assemblyman Lanterman's keen interest and the hard-fought political compromises which were reached in connection with its enactment. See discussion under proposed Section 1827 above. However, although the pertinent language of Sections 1500 and 1851 literally

applies to any person, adult or minor, it appears that the intent of the 1976 legislation was to safeguard the procedural rights of adults. Therefore, the staff proposal to make Section 2403 apply to persons "over the age of 14" would appear to be an extension of the prohibitions of the Lanterman legislation. On that basis, the Commission approved the staff draft of Section 2403 except that the words "over the age of 14" should be revised to read "who is 14 years of age or older."

The Commission directed the staff to rewrite the Comment to indicate that Section 2403 appears to be an extension of the prohibitory language of Sections 1500 and 1851 notwithstanding the literal language of those sections and to note that nothing in Section 2403 is intended to determine the existence or nonexistence of procedural rights of minors under the age of 14, citing In re Roger S., 19 Cal.3d 655, 665, 566 P.2d 997, 1003, 139 Cal. Rptr. 861, 867 (1977).

§ 2405. Instructions from or approval by court

The first sentence of subdivision (b) of proposed Section 2405 should be revised as follows:

(b) Notice of the hearing on the petition shall be given for the period and in the manner required by ~~Section 1200-~~ Chapter 3 (commencing with Section 1460) of Part 1. . . .

§ 2500. Definitions

The definitions of "guardian" and "conservator" in proposed Section 2500 should be revised or deleted in view of the new general provision to be drafted. See discussion under proposed Section 1515 above. The definition of "court" is superseded by the general provision in proposed Section 1420.

§ 2502. Additional conditions in order of appointment

The Commission directed the staff to determine whether any appellate decisions shed light on the meaning or effect of the provision in proposed Section 2502 (drawn from existing Section 1512) that "the court may, with the consent of the guardian or conservator, insert in the order of appointment conditions not otherwise obligatory"

§ 2504. Instructions from or approval by court

The first sentence of subdivision (b) of proposed Section 2504 should be revised as follows:

(b) Notice of the hearing on such petition shall be given for the period and in the manner required by ~~Section 1200~~ Chapter 3 (commencing with Section 1460) of Part 1.

The staff should also give further consideration to the possibility that a petition for instructions brought under Section 2504 might be used as a device for circumventing broader notice required if the action were undertaken pursuant to some other applicable section. If this is a problem, Section 2504 should be revised accordingly.

§ 2510. Support, maintenance, and education

Subdivision (b) of proposed Section 2510 should be revised substantially as follows:

(b) If the income from the estate is insufficient for the purpose described in subdivision (a), the guardian or conservator may sell or give a ~~chattel mortgage~~ security interest in or other lien on any personal property of the estate, or sell or mortgage or give a deed of trust on any real property of the estate, as provided in this part.

§ 2511. Allowance for ward or conservatee

The Comment to proposed Section 2511 should note that, notwithstanding an adjudication under proposed Section 1832 that a conservatee lacks legal capacity, the conservatee retains the power to spend or obligate a personal allowance authorized and paid to the conservatee as provided in Section 2511.

§ 2512. Payment of wage claims

The Commission had serious reservations about the advisability from a policy standpoint of the first sentence of subdivision (a) of proposed Section 2512 (wage claims shall be paid only after provision has been made for comfortable and suitable support of ward or conservatee and those entitled to support from ward or conservatee). A similar problem arises under the first sentence of subdivision (a) of proposed Section 2527. The staff was directed to give further consideration to these provisions and to present a revised draft for Commission consideration.

§ 2520. Representation in actions or proceedings; collection of debts

The staff was directed to research the question of whether a conservator has the authority to maintain a bankruptcy proceeding on behalf of the conservatee.

§ 2526. Compromise of claims and actions: extension, renewal, or modification of obligations

Subdivision (b) of proposed Section 2526 should be revised as follows:

(b) To obtain the approval of the court, the guardian or conservator shall file a ~~verified~~ petition showing the advantage of the compromise, composition, settlement, extension, renewal, or modification. ~~The clerk shall set the petition for hearing by the court and notice thereof~~ Notice of the hearing shall be given for the period and in the manner required by ~~Section 1200-~~ Chapter 3 (commencing with Section 1460) of Part 1.

Deletion of the requirement of verification is made possible by the general requirement of verification contained in proposed Section 1451. Deletion of the requirement that the clerk shall set the petition for hearing is made possible by a similar general requirement in proposed Section 1452. The reference to Chapter 3 (notice of hearing) of Part 1 replaces the references to existing Section 1200 throughout the staff draft. See discussion under proposed Section 2213 above.

§ 2527. Payment of debts

The Commission had serious reservations about the advisability from a policy standpoint of that portion of the first sentence of subdivision (a) of proposed Section 2527 which refers to proposed Section 2510 and has the effect of subordinating payment of debts to payments made for the comfortable and suitable support of the ward or conservatee and those legally entitled to support from the ward or conservatee. A similar problem arises under the first sentence of subdivision (a) of proposed Section 2512. The staff was directed to give further consideration to these provisions and to present a revised draft for Commission consideration.

§ 2528. Order compelling guardian or conservator to pay support or debts

Proposed Section 2528 should be revised substantially as follows:

2528. (a) If the guardian or conservator fails, neglects, or refuses to furnish comfortable and suitable support, maintenance, or education for the ward or ~~conservatee~~, conservatee as required by this division, or to pay a debt, expense, or charge lawfully due and payable by the ward, the conservatee, or the ~~estate~~, estate as provided in this division, the court ~~may, shall~~, upon petition or upon its own motion, order the guardian or conservator to do so from the estate.

(b) The petition may be filed by the ward or conservatee or by the creditor or any person interested in the estate. Notice of hearing on the petition shall be given for the time and in the manner provided in ~~Section 1200~~ Chapter 3 (comencing with Section 1460) of Part 1.

§ 2590. Definitions

The definitions of "guardian" and "conservator" in proposed Section 2590 should be revised or deleted in view of the new general provision to be drafted. See discussion under proposed Section 1515 above. The definition of "court" is superseded by the general provision in proposed Section 1420.

§ 2592. Powers that may be granted

The word "loan" in paragraph (11) of proposed Section 2592 should be changed to "lend."

Powers and Duties Generally

The Commission noted the many uncertainties in existing law with respect to the powers and duties of a conservator of the estate and the extent of court supervision required or permitted. First, it is unclear whether the inclusion of a power which the court may grant as an "additional" power under existing Section 1853 takes precedence over the general powers given to a conservator by existing Section 1852 with the result that the conservator cannot exercise such a power without specific court authorization. Compare *Olson v. United States*, 437 F.2d 981, 985 (Ct. Cl. 1971), with *Place v. Trent*, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, ___ (1972). Second, if court approval is required in advance of the action by the applicable general powers section, it is not clear whether the conservator's failure to obtain advance approval may be cured under the section authorizing confirmation of past acts (existing Section 1860). See *Place v. Trent*, supra. Third, it is not clear whether the court may attach restrictions or conditions that it believes appropriate to any grant of power. See *W. Johnstone & G. Zillgitt, California Conservatorships* § 5.75, at 218 (Cal. Cont. Ed. Bar 1968). Fourth, the degree of necessity required to be shown for the conservator to obtain a grant of additional powers under existing Section 1853 varies from county to county. See *Id.* § 5.77, at 219. These uncertainties have been carried forward into the staff draft of Chapter 6 (powers and duties of guardians or conservators of the estate).

Minutes
September 8, 9, and 10, 1977

The Commission expressed a preference for a statutory scheme that would make clear which powers may be exercised without court approval; which, if any, may be exercised only with advance court approval; which may be ratified after the fact; and when the court may attach restrictions or conditions to the exercise of a power.

There was some support on the Commission for giving the guardian or conservator a broad grant of power, akin to that possessed by a trustee, to act on behalf of the ward or conservatee without specific court approval and to list in the statute those specific exceptions where court approval would be required. Some sentiment was also expressed for a scheme which would exempt the guardian or conservator from having to obtain specific court approval when the value of the property affected by the transaction was small either in terms of its percentage of the total value of the estate or in terms of its absolute dollar amount. The Commission's consultant, Garrett Elmore, suggested the possibility of requiring the guardian or conservator to give notice of an intended action without the necessity of petitioning the court. A certain time period could be allowed within which anyone wishing to challenge the proposed action could file a petition to do so.

The Commission directed the staff to prepare a memorandum outlining these various policy options for further Commission consideration. The memorandum should also discuss the approach and possible application of the Independent Administration of Estates Act (Prob. Code §§ 591-591.7).

Minutes
September 8, 9, and 10, 1977

STUDY 36.800 - CONDEMNATION LAW AND PROCEDURE
(REVIEW OF RESOLUTION OF NECESSITY BY
WRIT OF MANDATE)

The Commission considered Memorandum 77-50 and the attached staff draft of the recommendation relating to review of resolution of necessity by writ of mandate. The Commission approved the recommendation to print subject to editorial changes submitted to the staff by the Commissioners and subject to the staff ascertaining whether "ordinary mandamus" is the properly descriptive term. Commissioner Miller dissented from approval of the recommendation.

STUDY 39.160 - ATTACHMENT (USE OF COURT COMMISSIONERS)

The Commission considered Memorandum 77-51 and the comments on the tentative recommendation relating to use of court commissioners in attachment. The Commission approved the recommendation in substance, with the following revisions:

- (1) The phrase "Unless otherwise stipulated by the parties in writing" was deleted from subdivision (b).
- (2) The phrase "to hear and determine a matter arising under this title" was deleted from subdivision (c).
- (3) The paragraph in the Comment relating to stipulation of the parties was deleted, and the paragraph describing the effect of subdivision (c) was revised to note that appointment of a temporary judge is pursuant to stipulation of the parties.

The staff will revise the preliminary part of the recommendation and submit the revised recommendation to the Commission for editorial revisions at the October Commission meeting.

STUDY 63.70 - EVIDENCE OF MARKET VALUE OF PROPERTY

The Commission considered Memorandum 77-52 and the First Supplement thereto along with the attached tentative recommendation relating to evidence of market value of property. The Commission directed the staff to solicit further comment from practitioners in other areas of law whose practice would be affected by the recommendation, including a renewed request to the State Bar family law section. The Commission also made the following decisions concerning the tentative recommendation:

§ 810. Application of Evidence Code provisions

This section should be amended so that the article applies to valuation of property "other than ad valorem property tax assessment or equalization." The Comment should note:

Property tax assessment and equalization proceedings, whether judicial or administrative, are not subject to this article. See, e.g., Rev. & Tax. Code §§ 1609, 1636-1641 (equalization proceedings); Cal. Admin. Code, Tit. 18 (public revenues regulations). Nothing in this section is intended to require a hearing to ascertain the value of property where a hearing is not required by statute. See, e.g., Rev. & Tax. Code §§ 14501-14505 (Inheritance Tax Referee permitted but not required to conduct hearing to ascertain value of property).

§ 811. "Value of property"

The staff should make sure that the amendment of this section does not alter the law relating to determination of damages and benefits in a severance damage case.

§ 812. "Market value" or its equivalent

The words "or its equivalent" were replaced by "whether denominated 'fair market value,' 'market price,' 'actual value,' or otherwise."

§ 813. Opinion testimony by nonexperts

The change proposed in subdivision (a)(2) to permit the owner of an interest in property to testify to the whole was deleted and the original language restored. In place of the change, the Commission determined to amend Section 1260.220 of the Code of Civil Procedure as follows:

1260.220. (a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.

(b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, ~~his~~ the property or the defendant's interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by ~~his~~ the failure to exercise ~~his~~ the right to present evidence during the first stage of the proceeding.

Comment. Subdivision (b) of Section 1260.220 is amended to make clear the right of a defendant, whether or not a fee owner, to present evidence of the value of the whole property in order to assure an adequate award for purposes of apportionment.

The staff should consider whether a personal representative or a guardian or conservator is an "owner" for purposes of subdivision (a)(2).

Subdivision (a)(3), which permits testimony by a designee of a nonnatural owner of property, was revised to read as follows:

(3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

§ 815. Sale of subject property

This section was approved without change as set out in the tentative recommendation.

§ 816. Comparable sales

The proposed subdivision (c) that would mandate liberal admissibility of comparable sales was deleted.

§ 817. Leases of subject property

The prohibition on use of a lease entered into after filing of lis pendens should be limited to determination of the value of property. The Comment should make clear that such a lease could be used to show

damages, such as those authorized by *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). The Comment should also note the definition of "value of property" in Section 811.

§ 819. Capitalization of income

The proposed amendment to permit capitalization of hypothetical improvements was deleted.

§ 822. Matter upon which an opinion may not be based

Subdivision (b). The prohibition on admissibility of offers should be modified to permit admission of offers to buy the subject property with restrictions to assure the bona fides of such offers. The staff is to indicate in a memorandum what restrictions would be appropriate.

Subdivision (d). The Comment to subdivision (d) was deleted. The staff was directed to review the cases to determine whether the citation of *Merced Irrigation District v. Woolstenhulme*, 4 Cal.3d 478, 501-03, 483 P.2d 1, 16-17, 93 Cal. Rptr. 833, 848-49 (1971), would be appropriate. The staff should also investigate the case of *San Bernardino County Flood Control District v. Sweet*, 255 Cal. App.2d 889, 63 Cal. Rptr. 640 (1967).

Subdivision (g). Proposed subdivision (g), which would make inadmissible trades and exchanges of property, was deleted along with the Comment thereto.

APPROVED

Date

Chairman

Executive Secretary