#F-30.300 2/22/78

Memorandum 78-14

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Right of Guardian or Conservator to Require Medical Treatment)

An important issue, not previously considered by the Commission, is the right of a guardian or conservator to make necessary medical decisions for the ward or conservatee. For background on this problem, please read at this point the attached Opinion of the Attorney General.

The staff believes that the issue is one that can and should be resolved in the proposed legislation. Attached are portions of the proposed legislation that set forth the staff suggested solution.

In the case of a conservatorship, the staff suggests that the order appointing the conservator or a subsequent order be permitted, but not required, to include an adjudication of either or both of the following:

(1) The conservatee lacks the capacity to make necessary medical decisions.

(2) The conservatee lacks the capacity to make decisions concerning the need for surgery.

Attached is revised version of Part 3 (conservatorship). The adjudication referred to is provided in paragraphs (3) and (4) of subdivision (a) of Section 1831. Related sections that have been adjusted to reflect this change are: Sections 1821 (contents of petition), 1823 (citation to proposed conservatee), 1828 (information to proposed conservatee by court).

The key provisions to implement the staff proposal are contained in attached revised Chapter 5 (powers and duties of guardian or conservator of the person). See Sections 2404-2406.

We also present at this time for approval: revised Chapter 5 attached and revised Part 3 attached.

Respectfully submitted,

John H. DeMoully
Executive Secretary

OFFICE OF THE ATTORNEY GENERAL
State of California

EVELLE J. YOUNGER
Attorney General

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OPINION	:	
of	:	No. CV 76/248
EVELLE J. YOUNGER Attorney General	:	DECEMBER 9, 1977
WINIFRED L. YOUNGE Deputy Attorney General	:	

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THE HONORABLE WALTER I. COLBY, COUNTY COUNSEL OF YUBA COUNTY, has requested an opinion on the following question:

What type of finding, if any, is needed before a conservator for an adult conservatee has the power to make necessary medical decisions for the conservatee?

The conclusion is:

With respect to conservatorships for the "gravely disabled" pursuant to the Lanterman-Petris-Short Act, the specific and detailed procedures set forth in Welfare and Institutions Code sections 5357, 5358 and 5358.2 constitute the exclusive means by which the conservator is given the power to make necessary medical decisions for the conservatee. With respect to probate conservatorships and guardianships, the situation is unclear. Recent amendments to the Probate Code make it uncertain as to when, if ever, the appointment of a conservator or guardian, without more, transfers to the conservator or guardian the power to make necessary medical decisions for the adult conservatee or ward. Accordingly, until such time as there is legislative or judicial clarification, conservators and guardians who feel compelled to make necessary medical decisions for their adult conservatees and wards should obtain express judicial authority to do so.

ANALYSIS

I

INTRODUCTION

This opinion request raises extremely significant issues with respect to an important fundamental right, namely, the right of an adult to make his or her own decisions with respect to medical treatment. Specifically, the question is related to conservatorships of adult conservatees and asks what sort of finding, if any, is necessary to give a conservator the power to make necessary medical decisions for the conservatee.

There are essentially two major conservatorship provisions authorized by the California statutes -- conservatorships for the "gravely disabled" under the Lanterman-Petris-Short Act and so-called "probate" conservatorships. Because the statutory provisions vary considerably, they must be described separately. On the other hand, because the probate conservatorship provisions are so related to the guardianship statutes, it is necessary to discuss the guardianship provisions as a part of the analysis dealing with probate conservatorships. There are, however, some comments that relate to both types of conservatorships and guardianships alike.

First, we are necessarily dealing here with conservatorships or guardianships "of the person" or "person and estate" of the conservatee or ward. Conservators or guardians of only the "estate" or "property" of the conservatee or ward can be created. (Welf. & Inst. Code § 5350, Prob. Code §§ 1460, 1751.) However, none of the powers granted to the conservator or guardian of only the "estate" or "property" of the conservator or ward, which powers are financial in nature, could possibly be construed to give the conservator or guardian the power to make necessary medical decisions for the conservatee or ward.

Second, the right of an adult to make his or her decisions with respect to medical treatment is a fundamental right which is constitutionally protected. (58 Ops.Cal.Atty.Gen. 849 (1975) and 59 Ops.Cal.Atty.Gen. 402 (1976)). Suffice it to say, without repeating all the analysis and authorities set forth in those prior opinions, that the conclusion that an adult has lost the right to make his or her own medical decisions is not a conclusion that should be lightly reached or based upon any presumed finding under an ambiguous statute.

II

CONSERVATORSHIPS FOR THE "GRAVELY DISABLED" UNDER THE LANTERMANMAN-PETRIS-SHORT ACT

Under what is commonly referred to as the Lanterman-Petris-Short Act, a "conservator of the person, . . . may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism". (Welf. & Inst. Code § 5350.) [illegible]

"procedure for establishing, administering and terminating" the conservatorship is the same as for probate conservatorships. (Welf. & Inst. Code § 5350.) [Emphasis added.] Although the Lanterman-Petris-Short Act conservatorship statutes incorporate the "procedure" relating to probate conservatorships, the substantive provisions vary.

In 1975, this office was asked to render an opinion on whether a Lanterman-Petris-Short Act conservator could consent to medical treatment for the conservatee. Based on an analysis of conservatorship law in general and the decision of the California Supreme Court in Board of Regents v. Davis (1975) 14 Cal.3d 33, it was concluded that the mere fact that a person was a conservatee did not mean that he or she lacked the capacity to make necessary medical decisions with respect to his or her own body. (58 Ops.Cal.Atty.Gen. 849 1975)).

It was inferred, however, based on a footnote in Board of Regents v. Davis, supra, that the result would be different if the conservatee was determined to be "incompetent" by way of a finding that the conservatee was a person "for whom a guardian could be appointed." (58 Ops.Cal.Atty.Gen., supra, at 852; Board of Regents v. Davis, supra, at 38, fn. 6.) The validity of that inference has never been tested for the reason that, following the issuance of our opinion, the Legislature enacted amendments to the Lanterman-Petris-Short Act conservatorship statutes to deal with the situation. Welfare and Institutions Code section 5357 was amended to provide that the report by the officer providing conservatorship investigation should recommend whether the conservatee should retain the power (1) "to refuse or consent to treatment related specifically to the conservatee's being gravely disabled" and (2) "to refuse or consent to other medical treatment unrelated to remedying or preventing recurrence of the conservatee's being gravely disabled which is necessary for the treatment of an existing or continuing medical condition." The following was added to Welfare and Institutions Code section 5358:

> "A conservator shall also have the right, if he specified in the court order, to require his conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee's being gravely disabled, or to require his conservatee to receive other medical treatment unrelated to remedying or preventing the recurrence of the conservatee's being gravely disabled which is necessary for the treatment of an existing or continuing medical condition. Except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery shall be performed upon the conservatee without the conservatee's prior consent or a court order specifically authorizing such surgery obtained pursuant to Section 5358.2."

Section 5358.2 of the same code provides:

> "If a conservatee requires medical treatment which has not been specifically authorized by the court, the conservator shall, after notice to the conservatee, obtain a court order for such medical treatment, except in emergency cases in which the conservatee faces loss of life or serious bodily injury. The conservatee, if he chooses to contest the request for a court order, may petition the court for hearing which shall be held prior to granting the order."

Thus, the Legislature has laid down specific procedures for Lanterman-Petris-Short Act conservatorships as they relate to the power of the conservator to make medical decisions for the conservatee. The essential thrust of the provisions being that the conservatee is not divested of the right to make his or her own medical decisions absent a specific determination by the court that the conservatee cannot make those decisions. In view of the fundamental nature of the right affected, the court should not make such a determination unless it finds that the conservatee lacks the mental capacity to rationally understand the nature of the medical problem, the proposed treatment and the attendant risks.

It has been suggested that the procedures outlined above can be avoided if, in the original appointment proceeding, it is concluded that the conservatee is "incompetent" because he or she is a "person for whom a guardian could be appointed". As indicated previously, such an inference could be drawn from our opinion at 58 Ops.Cal.Atty.Gen. 849 (1975). However, there are at least two reasons why any such conclusion must be rejected.

First and foremost, our opinion preceded the previously discussed amendments to the Lanterman-Petris-Short Act, which amendments deal specifically with the subject of when a conservatee is divested of the right to make his or her own medical decisions. The legislation by its terms applies to all Lanterman-Petris-Short Act conservatees. We cannot conclude that the Legislature intended that the specific and detailed procedures, designed to protect a fundamental right, could be avoided by a general finding of "incompetence" at the inception of the proceedings.

Secondly, as discussed in the following section of this opinion, the recent amendments to the guardianship statutes make it unclear as to whether a "person for whom a guardian could be appointed" need be a person who, in a real sense, cannot rationally understand the various aspects of questions relating to medical decisions.

In summary, it is concluded that with respect to Lanterman-Petris-Short Act conservatorships, the statutory procedures set forth in the act constitute the exclusive means by which the power to make necessary medical decisions for the conservatee is transferred to the conservator.

II

PROBATE CONSERVATORSHIPS
AND GUARDIANSHIPS

Although the extent to which probate conservators and guardians could make necessary medical decisions for their conservatees and wards has never been entirely clear, there was at least, some general understanding of the scope of conservatorships as compared to guardianships.

Guardianships were originally established for "insane or incompetent" persons. The concept of "incompetency" was intended to include persons with some "derangements of the mind" which "presupposes a lack of mental capacity to understand the nature and effect of a contract". (Hellman Commercial T & S. Bk. v. Alden (1929) 206 Cal. 592, 604-605.) The operative statutory provision is Probate Code section 1460 which until July 1, 1977, read as follows:

> "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, who is a resident of this State. 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." (Stats. 1959, ch. 500, §1, p. 2441.)

Conservatorships, on the other hand, covered a much broader group of persons. Until July 1, 1977, Probate Code section 1751 read as follows:

> "Upon petition as provided in this chapter, the superior court, if satisfied by sufficient evidence of the need therefor, shall appoint a conservator of the person and property or person or property of any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed under Division 4 of this code, or who voluntarily requests the same and to the satisfaction of the court

establishes good cause therefor, or who is an absentee as defined in Section 1751.5. The court, in its discretion, may appoint one or more conservators." (Stats. 1972, ch. 988, §3, pp. 1799-1800.)

The distinctions are discussed by the California Supreme Court in Board of Regents v. Davis, supra, in which the court noted, at page 39, that "the Legislature designed the conservatorship statute to cover a much more extensive category of eligible persons than the more limited guardianship law." The court concluded that a person for whom a probate conservator had been appointed did not, by that fact alone, lose the right to contract. The court implied, however, that a different result might be reached if the conservatee was found to be a "person for whom a guardian could be appointed", citing Hellman Commercial T & S Bk. v. Alden, supra,1/ Id. at 40.

Had Probate Code sections 1460 and 1751 remained unchanged, some straight forward conclusions could have been drawn. It might have been concluded that guardians had the right to make necessary medical decisions for their wards for the reason that the adjudication of incompetency presupposes a lack of mental capacity to understand the nature of the medical decision. Conservators, on the other hand, would not have such powers unless it had been found that the conservatee was "a person for whom a guardian could be appointed."

Unfortunately, effective July 1, 1977, Probate Code sections 1460 and 1751 were amended to such an extent that the scope of the two programs is unclear.

Probate Code section 1460, which deals with guardianships, now reads:

> "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 incompetent person, who is a resident of this state. As used in this division and Division 5 of this code, the phrase 'incompetent person,' 'incompetent,' or 'conservatee' shall mean a legal, not a medical disability and shall be measured by functional inabilities. It shall be construed to mean or refer to any adult person who, in the case of a guardianship of the person, is unable properly to provide for his own personal needs for physical health, food, clothing or shelter, and, in the case of a guardianship of the estate, is substantially

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1. It must be noted that Board of Regents v. Davis, supra at 36, dealt with a conservatorship of the estate, not the person.

unable to manage his own financial resources. 'Substantial inability' shall not be evidenced solely by isolated incidents of negligence or improvidence." [Emphasis added.]

It should be noted that Probate Code section 1460 not only defines "incompetent" and "conservatee" for purposes of the guardianship statutes, but for "Division 5 of this code" as well. Division 5 is the portion of the code dealing with conservatorships.

Probate Code section 1751, which is in Division 5 and which deals with conservatorships, now reads, in relevant part:

"Upon petition as provided in this chapter, the superior court, if satisfied by sufficient evidence of the need therefor, shall appoint a conservator of the person and property or person or property of any adult person who, in the case of a conservatorship of the person, is unable properly to provide for his personal needs for physical health, food, clothing or shelter, and in the case of a conservatorship of the property, is substantially unable to manage his own financial resources, or resist fraud or undue influence, or for whom a guardian could be appointed under Division 4 of this code, or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor, or who is an absentee as defined in Section 1751.5. 'Substantial inability' shall not be evidenced solely by isolated incidents of negligence or improvidence. The court, in its discretion, may appoint one or more conservators." [Emphasis added.]

It is readily apparent that the Legislature by using over-lapping definitions, has made it unclear as to whether, in the case of involuntary conservatees or wards, there is any distinction between the two programs. For example, a guardianship "of the person" can be established for any person who "is unable properly to provide for his own personal needs for physical health, food, clothing or shelter". (Prob. Code § 1460.) A conservatorship "of the person" can be established for any person who "is unable properly to provide for his personal needs for physical health, food, clothing or shelter." (Prob. Code § 1751.) In addition, a conservator can be appointed for any person "for whom a guardian could be apointed under Division 4 of this code". Ibid. Since the definition of "incompetent" contained in Probate Code section 1460 also defines "conservatee" and since the operative words of Probate Code sections 1460 and 1751 are virtually

identical, 2/ the addition of the phrase "or for whom a guardian could be appointed" appears redundant and unnecessary.

Also adding to the uncertainty is the language just referred to which provides for the appointment of a guardian or conservator for any person who "is unable properly to provide for his [own] personal needs for physical health, food, clothing or shelter." (Prob. Code § 1751.) The use of the disjunctive makes it doubtful that an adjudication of "incompetency" within the meaning of those statutes necessarily presupposes a finding that the person is unable to understand the nature and effect of medical decisions. It is conceivable that a person might not be able to provide for his or her needs for physical health, food, clothing and shelter but still be able to understand the nature and effect of medical decisions.

Because of this uncertainty caused by the recent amendments to the Probate Code and because of the importance of the right to make one's own medical decisions, we are reluctant to conclude that a conservator, even one for a conservatee "for whom a guardian could be appointed", has the power, by virtue of his appointment alone, to make necessary medical decisions for the conservatee.

Until the situation is clarified by either legislative action or judicial decision, the most prudent course of action for probate conservators or guardians to follow would be to obtain express judicial authority to make necessary medical decisions for the conservatee or ward. If in the proceeding to establish the conservatorship or guardianship it is pleaded and proved that the person lacked the capacity to understand the nature and effect of medical decisions, the order appointing the conservator or guardian could give the conservator or guardian the power to make such decisions. While they are not expressly made applicable to probate conservatorships or guardianships by statutes, the statutory procedures with respect to medical decisions contained in the Lanterman-Petris-Short Act could be used as guidelines. 3/

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2. Section 1460 refers to "his own personal needs" whereas section 1751 refers to "his personal needs." Since both refer to the conservator or ward, the extra word "own" adds nothing to the meaning of the sentence.

3. It appears that this is not the only area in which the recent Probate Code amendments need legislative clarification. See the concurring opinion of Justice Kane in Conservatorship of Chambers (1977) 71 Cal.App.3d 277, 288-289, which discusses the notice of requirements of Probate Code section 1754.1.

29192

PART 3. CONSERVATORSHIP

CHAPTER 1. APPOINTMENT

Article 1. Persons for Whom Conservator May Be Appointed

Tentatively Approved - Sept. 1977

§ 1800. Conservatorships for adults or married minors

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

(a) A conservator of the person or estate of an adult, or both.

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

Comment. Section 1800 is new and makes clear that conservatorships are authorized only for adults and for minors who are married or whose marriage has been dissolved. In the case of a minor who is married or whose marriage has been dissolved, a conservator of the person may be appointed if the requirements of this chapter are satisfied; a guardian of the estate of the minor may be appointed where necessary or convenient. See Sections 1514, 1515. In the case of a minor whose marriage has been adjudged a nullity, guardianship and not conservatorship is the appropriate protective proceeding of the person. See Section 1515.

Definitions

Court, § 1418

29193

Tentatively Approved - Sept. 1977

§ 1801. Showing required for appointment generally

1801. Subject to Section 1800:

(a) A conservator of the person may be appointed for a person who is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter.

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence. "Substantial inability" may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

Comment. Section 1801 continues the substance of a portion of former Section 1751. The portion of former Section 1751 that authorized the appointment of a conservator for an adult for whom a guardian could be appointed is superseded by subdivision (f) of Section 1821 and Section 1831.

29194

Tentatively Approved - Sept. 1977

§ 1802. Appointment upon request of proposed conservatee

1802. Subject to Section 1800, a conservator of the person or estate, or both, may be appointed for a person who voluntarily requests the appointment and who, to the satisfaction of the court, establishes good cause for the appointment.

Comment. Section 1802 continues the substance of a portion of former Section 1751. If the proposed conservatee is the petitioner, he or she may waive bond and, in such case, the court may in its discretion dispense with bond. Section 2321.

Definitions

Court, § 1418

29195

Tentatively Approved - Sept. 1977

§ 1803. Proposed conservatee an "absentee"

1803. A conservator of the estate may be appointed for a person who is an absentee as defined in Section 1403.

Comment. Section 1803 continues a portion of former Section 1751. For special provisions applicable where the proposed conservatee is an absentee, see Article 4 (commencing with Section 1840).

Definitions

Absentee, § 1403

29198

Article 2. Order of Preference for Appointment of Conservator

Tentatively Approved - Sept. 1977

§ 1810. Nomination by proposed conservatee

1810. The proposed conservatee may nominate a conservator in the petition or in a written instrument executed either before or after the petition is filed if, at the time of signing the petition or written

instrument, the proposed conservatee has sufficient capacity to form an intelligent preference. The court shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.

Comment. Section 1810 continues the substance of the second sentence of former Section 1752. Like former Section 1752, but unlike former Section 1463 (guardianship), Section 1810 does not require that the instrument containing the nomination be executed in the same manner as a witnessed will. The only formal requirements for a nomination under Section 1810 are that the nomination be in writing and be signed by the proposed conservatee. The nomination may be made in a written instrument made long before the conservatorship proceedings are commenced, but, whenever made, the proposed convervatee must have had at the time the writing was executed sufficient capacity to form an intelligent preference. A nomination of a guardian made by an adult under prior law is deemed to be a nomination of a conservator. See Section 1478.

If the proposed conservatee is the petitioner, he or she may waive bond and, in such a case, the court may in its discretion dispense with bond. Section 2321.

Definitions

Court, § 1418

30/939

Tentatively Approved - Sept. 1977

§ 1811. Nomination by certain relatives of proposed conservatee

1811. (a) A spouse, adult child, parent, brother, or sister of the proposed conservatee may nominate a conservator in the petition or at the hearing on the petition.

(b) The spouse or a parent of the proposed conservatee may nominate a conservator in a written instrument executed either before or after the petition is filed and such nomination shall remain effective notwithstanding the death or incapacity of the spouse or parent, except that a nomination by the spouse shall become void upon dissolution or an adjudication of nullity of their marriage.

Comment. Section 1811 is new. Subdivision (a) specifies the manner in which the nomination contemplated by former Section 1753 (continued in Section 1812) shall be made. Subdivision (b) goes beyond prior law, and gives a written nomination made by a spouse or parent posthumous effect analogous to a testamentary guardianship. Unlike the appointment of a testamentary guardian of the estate which the court must confirm unless the appointee is "unsuitable" (Section 1514), or a

nomination made by the proposed conservatee pursuant to Section 1810 which nominee the court must appoint unless it is not in the best interests of the proposed conservatee, a nomination made under Section 1811 merely entitles the nominee to some preference for appointment. See Section 1812.

29199

Tentatively Approved - Sept. 1977

§ 1812. Order of preference for appointment as conservator

1812. (a) The selection of a conservator of the person or estate, or both, is solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be for the best interests of the proposed conservatee.

(b) Subject to Sections 1810 and 1813, of persons equally qualified in the opinion of the court to appointment as conservator of the person or estate or both of another, preference is to be given in the following order:

(1) The spouse of the proposed conservatee or the person nominated by the spouse pursuant to Section 1811.

(2) An adult child of the proposed conservatee or the person nominated by the child pursuant to Section 1811.

(3) A parent of the proposed conservatee or the person nominated by the parent pursuant to Section 1811.

(4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister pursuant to Section 1811.

(5) Any other person or entity eligible for appointment as a conservator under this code or, if there is no such person or entity willing to act as a conservator, under the Welfare and Institutions Code.

(c) The preference for any nominee for appointment under paragraphs (2), (3), and (4) of subdivision (b) is subordinate to the preference for any other parent, child, brother, or sister in such class.

Comment. Section 1812 continues the substance of former Section 1753 and the first sentence of former Section 1752. The last sentence of former Section 1752 is omitted as unnecessary in view of the addition of the introductory clause to subdivision (b) of Section 1812 and the more detailed and inconsistent provisions of former Section 1753 which are continued in Section 1812. The last paragraph of former Section 1753 has been omitted as unnecessary. The reference to guardian of an incompetent person has been omitted since guardians are no longer appointed for incompetent persons.

Certain nonprofit charitable corporations may be appointed as conservators of the person or estate or both. See Section 2104. A corporation or association authorized to conduct the business of a trust company in this state may be appointed as a conservator of the estate but not as a conservator of the person. Section 480. Other public offices or entities are also authorized to serve as a conservator. See Health & Saf. Code § 416 (Director of Developmental Services); Mil. & Vet. Code § 1046 (Veterans' Home of California); Welf. & Inst. Code § 8006 (public guardian). See also Sections 2105 (several conservators for one conservatee), 2106 (one conservator for several conservatees). As to appointments to fill vacancies, see Section 2107.

Definitions

Court, § 1418

29200

Tentatively Approved - Sept. 1977

§ 1813. Condition for appointment of absentee's spouse

1813. The spouse of an absentee as defined in Section 1403 may not be appointed as conservator of the estate of the absentee unless the spouse alleges in the petition for appointment as conservator, and the court finds, that the spouse has not commenced any action or proceeding against the absentee for judicial or legal separation, divorce or dissolution of marriage, annulment, or adjudication of nullity of their marriage.

Comment. Section 1813 continues the substance of the second sentence of former Section 1754.5.

Definitions

Absentee, § 1403
Court, § 1418

4449

Article 3. Procedure for Appointment

Tentatively Approved - Sept. 1977

§ 1820. Filing of petition

1820. (a) A petition for the appointment of a conservator may be filed by any of the following:

(1) The proposed conservatee.

(2) A relative of the proposed conservatee.

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

(b) If the proposed conservatee is a minor, the petition may be filed during his or her minority so that the appointment of a conservator may be made effective immediately upon the minor's becoming eligible therefor as provided in Section 1800. An existing guardian of the minor may be appointed as conservator under this part upon the minor's becoming eligible therefor, whether or not the guardian's accounts have been settled.

Comment. Subdivision (a) of Section 1820 continues the substance of a portion of the first sentence of former Section 1754 except that a relative of the proposed conservatee may now petition, whether or not the relative is also a creditor. The requirement that the petition be verified is continued in Section 1450.

The first sentence of subdivision (b) is new and will permit the uninterrupted continuation of protective proceedings for an incompetent minor under guardianship who is approaching majority. The second sentence of subdivision (b) is based on a portion of the first sentence of former Section 1704. Under subdivision (b), however, the power of the court to appoint an existing guardian as conservator upon the minor's reaching majority is not conditioned upon settlement of the guardian's accounts. Such settlement may take place after the guardian's appointment as conservator. See Section 2641.

When the petition is filed by the proposed conservatee, the proposed conservatee may waive bond. Section 2321.

For provisions for notice to the Director of Mental Health or the Director of Developmental Services in certain cases, see Section 1461.

4450

Tentatively Approved in Substance - Sept. 1977
Staff Revision - March 1978

§ 1821. Contents of petition

1821. (a) The petition shall request that a conservator be appointed for the person or estate, or both, shall specify the proposed conservator, and shall state the reasons why the appointment is required.

(b) The petition shall set forth, so far as they are known to the petitioner, the names and residence addresses of the spouse 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 Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition shall state that fact and name the institution.

(e) The petition shall state, so far as is known to the petitioner, whether or not the proposed conservatee is receiving or is entitled to receive benefits from the Veterans Administration.

(f) The petition may include a further statement that any one or more 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 to lack legal capacity.

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

(3) That the proposed conservatee be adjudged to lack the capacity to make necessary medical decisions.

(4) That the proposed conservatee be adjudged to lack the capacity to make decisions concerning the need for surgery.

Comment. Subdivision (a) of Section 1821 continues the substance of a portion of the first sentence of former Section 1754 but adds the requirement that the petition "specify the proposed conservator" and state the "reasons for appointment." This addition is consistent with existing practice. See Petition for Appointment of Conservator (Form Approved by Judicial Council of California, effective July 1, 1977). The petition must be verified. See Section 1450.

Subdivision (b) is the same in substance as the second sentence of former Section 1754. Subdivision (c) is new and conforms to the change in former law made in Section 1820 (creditor-relative permitted to file petition).

Subdivision (d) continues the substance of a portion of former Section 1461.3 (guardianship) which appears to have been made applicable to conservatorships by the penultimate sentence of former Section 1754. See Petition for Appointment of Conservator (Form Approved by the Judicial Council of California, effective July 1, 1977).

Subdivision (e) is based on the penultimate sentence of former Section 1754 and is consistent with former practice. See Petition for Appointment of Conservator (Form Approved by the Judicial Council of California, effective July 1, 1977). In connection with subdivision (e), see the Uniform Veterans' Guardianship Act, Part 5 (commencing with Section 2900). For additional requirements if the proposed conservatee is an "absentee," see Sections 1813 and 1841. See also Section 2104 (nonprofit charitable corporation as conservator).

Subdivision (f) replaces the portion of former Section 1751 that permitted a conservator to be appointed if the proposed conservatee was a person for whom a guardian could be appointed. For provisions giving the court authority to remove or restrict the conservatee's capacity, see Section 1831.

4452

Tentatively Approved - Sept. 1977

§ 1822. Notice of hearing

1822. (a) At least 15 days before the hearing on the petition for appointment of a conservator, notice of the time and place of hearing, accompanied by a copy of the petition, shall be mailed to the following persons:

(1) The spouse, if any, of the proposed conservatee at the address stated in the petition.

(2) The relatives named in the petition at their addresses stated in the petition.

(b) If notice is required by Section 1461 to be given to the Director of Mental Health or the Director of Developmental Services, notice of the time and place of the hearing and a copy of the petition shall be mailed or delivered as required by that section.

(c) If the petition states that the proposed conservatee is receiving or is entitled to receive benefits from the Veterans Administration, notice of the time and place of the hearing and a copy of the petition shall be mailed or delivered at least 15 days before the hearing to the office of the Veterans Administration referred to in Section 2908.

Comment. Subdivision (a) of Section 1822, which requires that notice be mailed at least 15 days before the hearing, is drawn from former Section 1754. The requirement of former Section 1754 that the notice be of the "nature of the proceedings" is replaced by a requirement that a copy of the petition be mailed with the notice of the time and place of the hearing. Paragraphs (1) and (2) of subdivision (a) continue the substance of a portion of the fifth sentence of former Section 1754 but add the provision that the mailing is to be sent to the addresses stated in the petition. See Section 1821(b). Subdivisions (b) and (c) are based on the penultimate sentence of former Section 1754, which appears to have adopted a portion of former Section 1461.3 (guardianship) and provisions of the Uniform Veterans' Guardianship Act. The provision for shortening the time for the notice which was found in former Section 1461.3 is not continued here. If time is of the essence, a temporary conservatorship may be used. See Sections 2250-2256. For

additional notice requirements where the proposed conservatee is an "absentee," see Section 1842. See also Section 1829 (right of state and federal officers and agencies to appear at hearing and support or oppose petition).

4454

Tentatively Approved in Substance - Sept. 1977
Staff Revision - March 1978

§ 1823. Citation to proposed conservatee

1823. (a) If the petition is filed by a person other than the proposed conservatee, the clerk shall issue a citation directed to the proposed conservatee setting forth the time and place of hearing.

(b) The citation shall include a specific delineation of the legal standards by which the need for a conservatorship is adjudged as stated in Section 1801 and shall state the substance of all of the following:

(1) The proposed conservatee may be adjudged unable to provide for personal needs or to manage financial resources and, by reason thereof, a conservator may be appointed for the person or estate or both.

(2) Such adjudication may transfer to the appointed conservator the proposed conservatee's right to contract, to manage and control property, to determine the need for medical treatment, including surgery, and to fix a residence.

(3) The court or a court investigator will explain the nature, purpose, and effect of the proceeding to the proposed conservatee and will answer questions concerning the explanation.

(4) The proposed conservatee has the right to appear at the hearing and oppose the petition.

(5) The proposed conservatee has the right to choose and be represented by legal counsel and the right to have legal counsel appointed by the court if the proposed conservatee is unable to retain one.

(6) The proposed conservatee has the right to a jury trial if desired.

Comment. Section 1823 continues the substance of the second paragraph of former Section 1754 but adds the reference to medical treatment. A citation is not required if the proposed conservatee is an "absentee." Section 1843.

§ 1824. Service on proposed conservatee of citation and petition

1824. The citation and a copy of the petition shall be served on the proposed conservatee at least 10 days before the hearing. Service shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court. If the conservatee is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure.

Comment. The first two sentences of Section 1824 are the same in substance as the first sentence of the third paragraph of former Section 1754. The third sentence of Section 1824 is new.

No citation is required if the proposed conservatee is the petitioner. See Section 1823(a). If the proposed conservatee is an "absentee," no citation is required. Section 1843.

Definitions

Court, § 1418

§ 1825. Attendance of proposed conservatee at hearing

1825. (a) The proposed conservatee shall be produced at the hearing except in either of the following cases:

(1) Where the proposed conservatee is out of the state when served and is not the petitioner.

(2) Where the proposed conservatee is unable to attend the hearing.

(b) If the proposed conservatee is unable to attend the hearing because of medical inability, such inability shall be established (1) by the affidavit or certificate of a licensed medical practitioner or (2) if the proposed conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an accredited practitioner of that religion, by the affidavit of the practitioner. The affidavit or certificate is evidence only of the proposed conservatee's inability to attend the hearing and shall not be considered in determining the issue of need for the appointment of a conservator.

(c) Emotional or psychological instability is not good cause for the absence from the hearing of the proposed conservatee unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the proposed conservatee.

Comment. Section 1825 continues the substance of the first four sentences of the fourth paragraph of former Section 1754. An "absentee," as defined in Section 1403, need not be produced at the hearing. See Section 1843.

4460

Tentatively Approved - Sept. 1977

§ 1826. Appointment and duties of court investigator

1826. (a) Upon receipt of an affidavit or certificate attesting to the medical inability of the proposed conservatee to attend the hearing, the court shall appoint as court investigator a person trained in law who is an officer or special appointee of the court and has no personal or other beneficial interest in the proceedings.

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

(1) Interview the proposed conservatee personally.

(2) Inform the proposed conservatee of the contents of the citation, of the nature, purpose, and effect of the proceeding, and of the right of the proposed conservatee to oppose the proceeding, attend the hearing, have the matter tried by jury, and be represented by counsel.

(3) Determine whether it appears that the proposed conservatee is unable to attend the hearing.

(4) Determine whether the proposed conservatee wishes to contest the establishment of the conservatorship.

(5) Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

(6) Determine whether the proposed conservatee wishes to be represented by counsel and, if so, whether the proposed conservatee has retained counsel and, if not, the name of an attorney the proposed conservatee wishes to retain.

(7) Report to the court in writing concerning all of the foregoing, including the proposed conservatee's express statement concerning representation by counsel, at least five days before the hearing.

Comment. Section 1826 continues the substance of the fifth, sixth, and seventh paragraphs of former Section 1754 [as amended by 1977 Cal. Stats., Ch. 453]. "Medical inability" has been substituted for "inability" in subdivision (a) to avoid the requirement that a court investigator be appointed in a case, for example, where the proposed conservatee is an "absentee." See Section 1844(b).

Definitions

Court, § 1418

4461

Tentatively Approved - Sept. 1977

§ 1827. Law and procedure applicable to hearing

1827. The court shall hear and determine the matter according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded.

Comment. Section 1827 continues the substance of the third sentence of former Section 1606.5 (guardianship of incompetent adult) and the third sentence of former Section 2006 (conservatorship). See also Section 1863 (law and procedure applicable termination of conservatorship).

The proposed conservatee has a right to counsel at the hearing. See Sections 1870 and 1871. See also Section 1829 (persons who may support or oppose petition).

Definitions

Court, § 1418

4462

Tentatively Approved - Sept. 1977

§ 1828. Information to proposed conservatee by court

1828. (a) Except as provided in subdivision (c), prior to the appointment of a conservator of the person or estate, or both, the court shall inform the proposed conservatee of all of the following:

(1) The nature and purpose of the proceeding.

(2) The appointment of a conservator is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or to manage the conservatee's own financial resources or of the conservatee's incapacity to make a conveyance or contract or of the conservatee's capacity to make decisions concerning medical treatment,

including surgery, and the effect of such an adjudication on the conservatee's basic rights.

(3) The identity of the person who has been nominated as the conservator.

(4) The conservatee has the right to oppose the proceeding, to have the matter tried by jury, and to be represented by legal counsel if the conservatee chooses.

(b) After the court so informs the proposed conservatee and prior to the appointment of a conservator, the court shall consult the proposed conservatee to determine the proposed conservatee's opinion concerning the appointment.

(c) This section does not apply in either of the following cases:

(1) The proposed conservatee is the petitioner.

(2) The proposed conservatee is absent from the hearing, is not required to attend the hearing under the provisions of Section 1825, and any showing required by Section 1825 has been made.

Comment. Subdivisions (a) and (b) of Section 1828 continue the substance of the first paragraph of former Section 1754.1. Subdivision (c) expands the second sentence of former Section 1754.1 which made the section inapplicable only if the proposed conservatee's inability to attend the hearing was "medically" certified. Subdivision (c) makes this section inapplicable in the case of any legitimate absence of the proposed conservatee.

Definitions

Court, § 1418

09598

Tentatively Approved - Sept. 1977

§ 1829. Persons who may support or oppose petition

1829. Any officer or agency of this state or of the United States or the authorized delegate thereof, or any relative or friend of the proposed conservatee, or the proposed conservatee, may appear at the hearing to support or oppose the petition.

Comment. Section 1829 continues the substance of the last sentence of former Section 1754 except that the words "to support or" have been added.

09597

Tentatively Approved - Sept. 1977

§ 1830. Order appointing conservator

1830. The order appointing the conservator shall contain the names, addresses, and telephone numbers of:

(a) The conservator.

(b) The conservatee's attorney, if any.

(c) The court investigator, if any.

Comment. Section 1830 continues the substance of the last sentence of former Section 1801.

4464

Staff Draft

§ 1831. Adjudication of conservatee's lack of legal capacity and lack of capacity to make medical decisions; withdrawing power to enter specified transactions

1831. (a) If the court determines that it is necessary for the protection of the conservatee or the conservatee's estate, the court may by order do either any one or more of the following:

(1) Determine that the conservatee lacks legal capacity.

(2) Withdraw the power of the conservatee to enter into (i) specified types of transactions or (ii) any transaction in excess of a specified amount or (iii) any transaction other than specified types of transactions.

(3) Determine that the conservatee lacks capacity to make necessary medical decisions.

(4) Determine that the conservatee lacks capacity to make decisions concerning the need for surgery.

(b) The order referred to in subdivision (a) may be included in the order of appointment of the conservator or may be made subsequently upon a petition filed, noticed, and heard in the same manner as a petition for appointment of a conservator. The terms of the order and any modification thereof shall be included in the letters of conservatorship.

(c) The order referred to in subdivision (a) may be modified or revoked upon a verified petition made, noticed, and heard in the same manner as a petition for termination of a conservatorship under Chapter 3 (commencing with Section 1860).

Comment. Section 1831 is new and is added to preserve the effect under former Section 1751 of appointing a conservator on the ground that the conservatee was a person for whom a guardian could have been appointed. The appointment of a guardian for an adult under former Division 4 constituted a judicial determination of incapacity under Section 40 of the Civil Code and made void any contract entered into by the ward after such determination. Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 604-05, 275 P. 794, ___ (1929). An order appointing a conservator on the ground that the conservatee was a person for whom a guardian could have been appointed rendered the conservatee incapable of contracting. Board of Regents State Univs. v. Davis, 14 Cal.3d 33, 38 n.6, 43, 533 P.2d 1047, ____ n.6, ____, 120 Cal. Rptr. 407, ___ n.6, ___ (1975).

Section 1831 permits the court to determine that the conservatee lacks legal capacity or to constrict the conservatee's power to contract. If the court determines that the conservatee lacks legal capacity, the conservatee will thereby be rendered incapable of making any conveyance or contract, or of delegating any power or waiving any right, until restored to capacity. See Civil Code § 40.

The provision authorizing the court to withdraw the power of the conservatee to enter into specified types of transactions or any transaction in excess of a specified amount is drawn from Section 5357 of the Welfare and Institutions Code. As to the legal capacity of an adult for whom a guardian had been appointed under prior law, see Section 1476. For the consequences of the determinations concerning capacity to make decisions concerning medical treatment, including surgery, see Section 2405.

Definitions

Court, § 1418

4467

Tentatively Approved - Sept. 1977

Article 4. Special Provisions Applicable Where Proposed Conservatee Is An Absentee

§ 1840. Procedure for appointment of conservator for absentee

1840. Except as otherwise provided in this article, a conservator for an absentee shall be appointed as provided in Article 3 (commencing with Section 1820).

Comment. Section 1840 retains the substance of the prior statute which applied to the appointment of a conservator for an absentee but included some special provisions applicable where the proposed conservatee is an absentee. Because of the limited use of conservatorships for absentees, these special provisions have been relocated from the general provisions relating to appointment of conservators and have been collected in this article. See also Sections 1803 (conservator of estate

may be appointed for absentee), 1813 (condition on appointment of spouse of absentee as conservator), 1864 (termination of conservatorship for absentee).

Definitions

Absentee, § 1403

4468

Tentatively Approved - Sept. 1977

§ 1841. Additional contents of petition

1841. In addition to the other required contents of the petition, if the proposed conservatee is an absentee:

(a) The petition and any notice required by any other law shall set forth the last known military rank or grade and the social security account number of the proposed conservatee.

(b) The petition shall state whether the absentee's spouse has commenced any action or proceeding against the absentee for judicial or legal separation, divorce or dissolution of marriage, annulment, or adjudication of nullity of their marriage.

Comment. Section 1841 continues that portion of the first and second sentences of former Section 1754.5 that related to the information required to be contained in the petition or in the notice except that, under Section 1841, the information concerning military rank and social security number is required to be included in the petition rather than in the notice. See also Section 1813 (condition on appointment of spouse of absentee as conservator).

Definitions

Absentee, § 1403

4469

Tentatively Approved - Sept. 1977

§ 1842. Notice of hearing

1842. In addition to the persons and entities to whom notice of hearing is required under Section 1822, if the proposed conservatee is an absentee, a copy of the petition and notice of the time and place of the hearing shall be mailed at least 15 days before the hearing to the secretary concerned or to the head of the United States department or agency concerned, as the case may be. In such case, notice shall also

be published pursuant to Section 6061 of the Government Code in a newspaper of general circulation in the county in which the hearing will be held.

Comment. Section 1842 continues the substance of a portion of the fourth sentence and all of the fifth sentence of former Section 1754. The inconsistent requirement of former Section 1754.5 that the copy of the petition and notice be "delivered only by a method which would be sufficient for service of a summons in a civil action" is not continued. See also Section 1829 (right of officer or agency of United States or authorized delegate thereof to appear at hearing and support or oppose petition).

Definitions

Absentee, § 1403
Secretary concerned, § 1430

4470

Tentatively Approved - Sept. 1977

§ 1843. Citation to proposed conservatee not required

1843. No citation is required under Section 1823 to the proposed conservatee if the proposed conservatee is an absentee.

Comment. Section 1843 continues the substance of the second sentence of the third paragraph of former Section 1754.

Definitions

Absentee, § 1403

4471

Tentatively Approved - Sept. 1977

§ 1844. Proof of status of proposed conservatee; attendance at hearing not required

1844. (a) An official written report or record complying with Section 1283 of the Evidence Code that a proposed conservatee is an absentee shall be received as evidence of that fact and the court shall not determine the status of the proposed conservatee inconsistent with the status determined as shown by the written report or record.

(b) The inability of the proposed conservatee to attend the hearing is established by the official written report or record referred to in subdivision (a).

Comment. Subdivision (a) of Section 1844 continues the substance of the last sentence of former Section 1754.5. Subdivision (b) continues the substance of the last sentence of the fourth paragraph of former Section 1754.

Definitions

Absentee, § 1403
Court, § 1418

CHAPTER 2. BIENNIAL REVIEW OF CONSERVATORSHIP

Note: The Commission solicits comments on the advisability of extending the provisions of this chapter to guardianships of minors.

Staff Suggestion: Staff suggests above note be omitted.

§ 1850. Court review of conservatorship

1850. (a) Each conservatorship initiated pursuant to this part shall be reviewed by the court one year after the appointment of the conservator and biennially thereafter.

(b) For each conservatorship established prior to July 1, 1977, court review shall commence at the time of the next financial accounting but, in all cases, no later than July 1, 1980.

Comment. Subdivision (a) of Section 1850 continues the substance of the first sentence of former Section 1851.1. Subdivision (b) continues the substance of former Section 1851.2.

Definitions

Court, § 1418

§ 1851. Visitation and findings by court investigator

1851. (a) When court review is required, the court investigator shall visit the conservatee. The court investigator shall inform the conservatee personally that the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. The investigator shall determine whether the conservatee wishes to petition the court for termination of the conservatorship, whether the conservatee is still in need of the conservatorship, and whether the present conservator is acting in the best interests of the conservatee.

(b) The findings of the court investigator, including the facts upon which such findings are based, shall be certified in writing to the court within 15 days of the date of review.

Comment. Section 1851 continues the substance of the second, third, and fourth sentences of former Section 1851.1.

Definitions

Court, § 1418

4474

Tentatively Approved - Sept. 1977

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

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 trial or 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 trial or hearing.

Comment. Section 1852 continues the substance of the fifth and sixth sentences of former Section 1851.1, with the addition of the language authorizing the court to act on information from whatever source it may be received.

Definitions

Court, § 1418

4626

Tentatively Approved - Jan. 1978

§ 1853. Failure to locate conservatee; termination of conservatorship on failure to produce conservatee

1853. (a) If the court investigator is unable to locate the conservatee, the court shall order the court investigator to serve notice upon the conservator, in the manner provided in Section 415.10 of the Code of Civil Procedure or in such other manner as is ordered by the court, to make the conservatee available for the purposes of Section 1851 to the court investigator within 15 days of the receipt of such notice or to show cause why the conservatorship should not be terminated.

(b) If the conservatee is not made available within the time prescribed and no good cause is shown for not doing so, the court shall terminate the conservatorship. If the conservatorship is of the estate, the court shall order the conservator to file an accounting.

Comment. Section 1853 continues the substance of the last two sentences of former Section 1851.1 but Section 1853 provides for the manner of service and provides that the conservatee is to be made available to the court investigator for the purposes of Section 1851.

Definitions

Court, § 1418

4627

Tentatively Approved - Sept. 1977

CHAPTER 3. TERMINATION

§ 1860. When conservatorship terminates

1860. A conservatorship continues until terminated by the death of the conservatee or by order of court.

Comment. Section 1860 continues a portion of the first sentence of former Section 1755. The provision of former Section 1755 for termination of the conservatorship on the death of the conservator is not continued; death of the conservator merely terminates the relationship of conservator and conservatee but does not terminate the conservatorship proceeding. See Section 2641. Cf. Estate of Mims, 202 Cal. App.2d 332, 20 Cal. Rptr. 667 (1962) (guardianship). As to the duty of the conservator to deliver the conservatee's estate to the conservatee's personal representative upon death of the conservatee, see Section 2537. See also Section 1853 (termination of conservatorship on failure to locate or produce conservatee).

Definitions

Court, § 1418

4630

Tentatively Approved - Sept. 1977

§ 1861. Petition for termination of conservatorship

1861. The conservator, conservatee, or any relative or friend of the conservatee may petition the court to have the conservatorship terminated. The petition shall state facts showing that the conservatorship is no longer required.

Comment. Section 1861 continues the second and third sentences of former Section 1755. The petition must be verified. See Section 1450. For provisions for notice to the Director of Mental Health or the Director of Developmental Services in certain cases, see Section 1461.

Definitions

Court, § 1418

4637

Tentatively Approved - Jan. 1978

§ 1862. Notice of hearing

1862. (a) At least 15 days before the hearing, a copy of the petition and of the notice of the time and place of the hearing shall be mailed to the persons specified in Section 1822.

(b) If the conservator is not the petitioner and has not joined in the petition, the conservator shall be served with a copy of the petition and a notice of the time and place of the hearing at least 10 days prior to the hearing.

(c) If the conservatee is not the petitioner and has not joined in the petition, the conservatee shall be served with a copy of the petition and a notice of the time and place of hearing at least 10 days prior to the hearing.

(d) Service under subdivisions (b) and (c) shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure. If the conservator or conservatee cannot with reasonable diligence be served with a copy of the petition and notice of hearing, the court may dispense with such service.

Comment. Subdivision (a) of Section 1862 continues the substance of a portion of the fourth sentence of former Section 1755, which provided that notice of the hearing shall be given to the persons and in the manner provided for the appointment of a conservator.

Subdivision (b) continues the substance of the fifth, sixth, and seventh sentences of former Section 1755 except that subdivision (b) requires 10 days' notice rather than five days as was the case under former Section 1755. This change makes subdivision (b) consistent with Section 1824.

It was not clear under the former law whether issuance and personal service of a citation on the conservatee was required when the hearing is on the termination of the conservatorship. See W. Johnstone & G. Zillgitt, California Conservatorships § 7.10, at 266 (Cal. Cont. Ed. Bar 1968). Subdivision (c) merely requires that the conservatee be served with a copy of the petition and notice of hearing if issuance and service of a citation is not required.

For provisions for notice to the Director of Mental Health or the Director of Developmental Services in certain cases, see Section 1461.

Definitions

Court, § 1418

§ 1863. Hearing and judgment

1863. (a) The court shall hear and determine the matter according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded. The conservator, the conservatee, or any relative or friend of the conservatee may appear and support or oppose the petition.

(b) If the court determines that the grounds for appointment of a conservator of the person or estate, or both, no longer exist, the court shall make such a finding and shall enter judgment terminating the conservatorship accordingly.

(c) 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.

(d) Termination of conservatorship does not preclude institution of new proceedings for appointment of a conservator on the same or other grounds.

Comment. Section 1863 supersedes the last five sentences of former Section 1755. Under subdivision (a), the authority to support the petition is added and the list of those who may appear and support or oppose the petition is broadened to include the conservatee. Subdivision (d) supersedes the last sentence of former Section 1755.5 but broadens its application to all cases and not merely those where the conservatee was an absentee as defined in Section 1403.

The conservatee has a right to counsel at the hearing. See Sections 1870 and 1871.

Definitions

Court, § 1418

§ 1864. Termination of conservatorship of "absentee"

1864. (a) In the case of the conservatorship of an "absentee" as defined in Section 1403, the petition to terminate the conservatorship may also be filed by any officer or agency of this state or of the United States or the authorized delegate thereof.

(b) If the petition states and the court finds that the absentee has returned to the controllable jurisdiction of the military department or civilian department or agency concerned, or is deceased, as determined under 37 United States Code, Section 556, or 5 United States Code, Section 5566, as the case may be, the court shall order the conservatorship terminated. An official written report or record of such military department or civilian department or agency that the absentee has returned to such controllable jurisdiction or is deceased shall be received as evidence of such fact.

Comment. Section 1864 continues the substance of the first paragraph of former Section 1755.5.

Definitions

Absentee, § 1403
Court, § 1418

CHAPTER 4. RIGHT TO COUNSEL

Tentatively Approved in Substance - Sept. 1977

§ 1870. Right to counsel

1870. (a) In any proceeding under this part for the appointment of a conservator or for the termination of a conservatorship, the proposed conservatee or conservatee shall be represented by legal counsel at the hearing if he or she so chooses, irrespective of whether he or she appears to have the capacity to make such a choice.

(b) If the proposed conservatee or conservatee so chooses but is unable to retain legal counsel, the court shall, at the time of the hearing, appoint the public defender or other attorney to represent the proposed conservatee or conservatee.

(c) A county without a public defender is authorized to compensate the attorney appointed by the court for a proposed conservatee or conservator entitled to be represented by counsel in proceedings under this part.

Comment. Subdivisions (a) and (b) of Section 1870 continue the substance of the first paragraph of former Section 2006. Subdivision (c) continues the substance of former Section 2007 (enacted in 1977).

Definitions

Court, § 1418

4641

Tentatively Approved - Sept. 1977

§ 1871. Compensation of court-appointed counsel

1871. (a) If the proposed conservatee or conservatee is furnished legal counsel under this chapter, either through the public defender or private counsel appointed by the court, upon the conclusion of the hearing, the court shall make a determination of the present ability of the proposed conservatee or conservatee to pay all or a portion of the costs of such counsel.

(b) If the court determines that the proposed conservatee or conservatee has the present ability to pay all or a portion of the costs of such counsel, the court shall order the conservator of the estate or, if

none, the proposed conservatee or conservatee to pay the amount so determined:

(1) In the case of the public defender or a court-appointed attorney referred to in subdivision (c) of Section 1870, to the county.

(2) In the case of other court-appointed private counsel, to such counsel.

(c) The court shall order the amount determined under subdivision (b) to be paid in such installments and manner the court determines to be reasonable and compatible with the financial ability of the proposed conservatee or conservatee.

(d) If a conservator is not appointed for the proposed conservatee, execution may be issued on the order in the same manner as on a judgment in a civil action.

Comment. Section 1871 continues the substance of the last paragraph of former Section 2006 (amended in 1977).

Definitions

Court, § 1418

CHAPTER 5. POWERS AND DUTIES OF GUARDIAN OR CONSERVATOR OF THE PERSON

Tentatively Approved - Jan. 1978

§ 2400. Definitions

2400. As used in this chapter:

(a) "Conservator" means a conservator of the person as defined in Section 1415.

(b) "Guardian" means a guardian of the person as defined in Section 1427.

Comment. Section 2400 is new. The section is needed to avoid needless repetition in the various sections in this chapter. As a result of the definitions of "conservator" and "guardian" in Section 2400, if one person is appointed as the conservator of the person and estate or as the guardian of the person and estate, the powers and duties conferred by this chapter will apply.

969/027

Tentatively Approved - Sept. 1977

§ 2401. Care, custody, control, and education

2401. The guardian or conservator has the care, custody, and control of, and is in charge of the education of, the ward or conservatee.

Comment. The provision of Section 2401 for care, custody, and control continues provisions found in the first sentence of former Sections 1500 (guardianship) and 1851 (conservatorship), respectively. The words "and control" were contained in former Section 1851 but not in former Section 1500. The generalization of these words to apply to guardianships as well as to conservatorships makes no substantive change. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.3, at 152-53 (Cal. Cont. Ed. Bar 1968).

The provision of Section 2401 concerning the education of the ward or conservatee extends to conservators the provision of the second sentence of former Section 1500 which applied only to guardians. This extension authorizes a conservator of the person to provide for the education of a married minor subject to conservatorship as well as of a conservatee over the age of 18.

Definitions

Conservator, § 2400
Guardian, § 2400

Tentatively Approved - Sept. 1977
Technical Revision - March 1978

§ 2402. Residence of ward or conservatee

2402. (a) The guardian or conservator may fix the residence of the ward or conservatee at:

(1) Any place within this state without the permission of the court.

(2) A place not within this state if permission of the court is first obtained.

(b) The guardian or conservator shall give prompt written notice to the court of all changes in the residence of the ward or conservatee.

Comment. Subdivision (a) of Section 2402 continues the substance of the third sentence of former Section 1500 and the last portion of the first sentence of former Section 1851. Subdivision (b) continues the substance of subdivision (c) of former Section 1500 and subdivision (b) of former Section 1851 except that notice is to be given to the court in which the proceedings are then pending rather than the court which issued letters.

Definitions

Conservator, § 2400
Court, § 1418
Guardian, § 2400

405/853

Tentatively Approved - Sept. 1977

§ 2403. Involuntary civil mental health treatment

2403. No person 14 years of age or older for whom a guardian or conservator has been appointed shall be placed in a mental health treatment facility under the provisions of this division against the person's will. Involuntary civil mental health treatment for such a ward or conservatee shall be obtained only pursuant to the provisions of Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

Comment. Section 2403 continues the substance of the second paragraph of former Sections 1500 and 1851, respectively, except that the words "14 years of age or older" have been added. The former provision appears to have been intended to apply to adult incompetents, and the

new language thus extends its protection to minors over the age of 14. Section 2403 recognizes that minors over the age of 14 have an independent right to assert the protections of the due process clause of the United States and California Constitutions. In re Roger S., 19 Cal.3d 921, 931, 569 P.2d 1286, 1292, 141 Cal. Rptr. 298, 304 (1977). Nothing in Section 2403 is intended to determine the existence or nonexistence of procedural rights of minors under the age of 14.

Definitions

Conservator, § 2400
Guardian, § 2400

405/340

Staff Draft - March 1978

§ 2404. Medical treatment of ward

2404. (a) Subject to Section 2403 and to subdivision (b), the guardian has the same right as a parent having custody of a child to require the ward to receive medical treatment.

(b) If the ward is 14 years of age or older, except in an emergency case in which the ward faces loss of life or serious bodily injury, no surgery shall be performed upon the ward without the ward's prior consent or a court order specifically authorizing such surgery obtained pursuant to Section 2406.

Comment. Section 2404 is new and is designed to provide clear guidelines as to the authority of the guardian to require the ward to receive medical treatment. Subdivision (b) is drawn from a similar provision found in Section 5358 of the Welfare and Institutions Code (Lanterman-Petris-Short Act).

Definitions

Guardian, § 2400

405/341

Staff Draft - March 1978

§ 2405. Medical treatment of conservatee

2405. Subject to Section 2403 and to Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code, the conservator has the right to require the conservatee to receive necessary medical treatment in any of the following cases:

(a) Where the case is an emergency case in which the conservatee faces loss of life or serious bodily injury.

(b) Where a court order specifically authorizing such medical treatment has been obtained pursuant to Section 2406 of this code or Section 5358.2 of the Welfare and Institutions Code.

(c) Where the medical treatment does not involve surgery and a court order has specifically determined that the conservatee lacks the capacity to make necessary medical decisions.

(d) Where the medical treatment involves surgery, and a court order has specifically determined that the conservatee lacks the capacity to make decisions concerning the need for surgery.

Comment. Section 2405 is new and is designed to provide clear guidelines as to the authority of the conservator to require the conservatee to receive necessary medical treatment where the conservatee refuses to receive such medical treatment. If the conservatee consents to the medical treatment, including surgery, there is no restriction on providing the medical treatment to the conservatee unless an order of the court has determined that the conservatee lacks capacity to make the decision. In the latter case, the conservator also would have to consent to the medical treatment. The orders referred to in subdivisions (c) and (d) may be included in the order of appointment of the conservator or may be made upon a subsequently filed petition. See Section 1831. Section 2405 is drawn from Section 5358 of the Welfare and Institutions Code (Lanterman-Petris-Short Act). It will help to eliminate the uncertainty that existed under prior law. See Opns. Cal. Atty. Gen. No. CV 76/248 (Dec. 9, 1977). The reference in Section 2405 to the provisions of the Health and Safety Code is to the "Natural Death Act," and is included to make clear that the conservatees valid directive under that act is effective to the extent therein provided.

Definitions

Conservator, § 2400

405/949

Staff Draft - March 1978

§ 2406. Court ordered medical treatment

2406. If the ward or conservatee requires medical treatment which is not authorized under Section 2404 or 2405, the guardian or conservator shall, after notice to the ward or conservatee, obtain a court order for such medical treatment. The ward or conservatee, if the ward or conservatee choses to contest the request for a court order, may petition the court for hearing which shall be held prior to the granting of the order.

Comment. Section 2406 is based on Section 5358.2 of the Welfare and Institutions Code (Lanterman-Petris-Short Act).

Definitions

Conservator, § 2400
Court, § 1418
Guardian, § 2400

404/678

Tentatively Approved - Sept. 1977

§ 2407. Additional conditions in order of appointment

2407. When a guardian or conservator is appointed, the court may, with the consent of the guardian or conservator, insert in the order of appointment conditions not otherwise obligatory providing for the care, treatment, education, and welfare of the ward or conservatee. The performance of such conditions is a part of the duties of the guardian or conservator, for the faithful performance of which the guardian or conservator and the sureties on the bond, if any, are responsible.

Comment. Section 2407 continues the portion of former Section 1512 which applied to a guardian of the person of a minor and broadens its application to include a conservator of the person. In the case of a guardian or conservator of the person, the requirement of a bond is discretionary with the court. See Section 2322.

Definitions

Conservator, § 2400
Court, § 1418
Guardian, § 2400

999/343

Tentatively Approved - Sept. 1977

§ 2408. Instructions from or approval by court

2408. (a) Upon petition of the guardian or conservator or ward or conservatee or other interested party, the court may, after hearing, authorize and instruct the guardian or conservator or approve and confirm the acts of the guardian or conservator, with respect to the powers and duties prescribed in this chapter.

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

Comment. Section 2408 is based on the portion of former Section 1860 (instructions to or approval of acts of conservator) insofar as that section related to the care and protection of the conservatee. See also former Section 1516, which was limited to instructing the guardian

of the estate. Section 2408 makes clear that the court may instruct and approve with respect to supervision of the person as well as with respect to management of the estate (see Section 2503). Section 2408 also extends to guardians of the person the former conservatorship provision of Section 1860 which authorized the court not only to instruct in advance but also to confirm actions already taken. For provisions for notice to the Director of Mental Health or the Director of Developmental Services in certain cases, see Section 1461. The petition must be verified. See Section 1450. The clerk sets the petition for hearing. See Section 1451.

Definitions

Conservator, § 2400
Court, § 1418
Guardian, § 2400