#F-30.300 2/15/78

Memorandum 78-18

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Venue for Nonresidents)

At the last meeting, the Commission reviewed Section 2202 of the comprehensive statute, relating to venue for nonresidents. It was noted then that this section literally authorized the institution of a proceeding to establish a guardianship or conservatorship of the person of a nonresident not present in this state in the county where the proposed ward or proposed conservatee had property. It was further noted that a 1923 California Supreme Court case held, and existing court rules in a number of counties provide, that jurisdiction will not be exercised to establish a guardianship or conservatorship of the person of a nonresident not present in California.

The Commission requested that the staff research the basis for jurisdiction to award custody of children in other types of proceedings and to review Section 2202 in light of this research. Attached is a memorandum prepared by a law student research assistant. The memorandum indicates that the basis of jurisdiction and when it will be exercised in child custody cases is far from clear. The staff believes it would be a mistake to attempt to write into the statute rules as to when the court should or should not exercise jurisdiction in guardianships or conservatorships of the person of nonresidents. Instead, we suggest that Section 2202 be revised as set out in attached Exhibit 1.

If this section is approved, the proposed legislation will not attempt to specify the situations in which California will exercise its jurisdiction to establish a guardianship or conservatorship of the person. The revision divides the former draft provision into two subdivisions--subdivision (a) and subdivision (b)--and, by omitting the phrase "any county in which the proposed ward or proposed conservatee has property" from subdivision (a), avoids the implication that property alone is sufficient to permit establishment of a guardianship or conservatorship of a nonresident not present in California. The addition of the phrase "such other county as may be for the best interests of the proposed ward or proposed conservatee" to subdivision (a) (a phrase not

found in the existing statute) will provide a venue rule should the court find that it has jurisdiction that it wishes to exercise to establish a guardianship or conservatorship of the person of a nonresident not living in California.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

08360

§ 2202. Venue for nonresidents

2202. (a) The proper county for the institution of a proceeding for the guardianship or conservatorship of the person of a nonresident of this state is either of the following:

(1) The county in which the proposed ward or conservatee is temporarily living.

(2) Such other county as may be for the best interests of the proposed ward or proposed conservatee.

(b) The proper county for the institution of a proceeding for the guardianship or conservatorship of the estate for a nonresident of this state is any of the following:

(1) The county in which the proposed ward or proposed conservatee is temporarily living.

(2) Any county in which the proposed ward or proposed conservatee has property.

(3) Such other county as may be for the best interests of the proposed ward or proposed conservatee.

(c) If guardianship or conservatorship proceedings of a nonresident are instituted in more than one county, the guardianship or conservatorship first granted, including a temporary guardianship or conservatorship, extends to all of the property of the ward or conservatee within this state, and the court of no other county has jurisdiction.

Comment. Subdivisions (a) and (b) of Section 2202 continue and clarify the substance of portions of former Sections 1440(a) (guardian of minor), 1570 (guardian of minor or incompetent), and 2051 (conservatorship) but adds the provision that venue is proper in "such other county as may be for the best interests of the proposed ward or proposed conservatee." See the Comment to Section 2201.

Subdivision (c) continues the substance of the last sentence of former Section 1570 (guardianship), except that the reference to a temporary guardianship or conservatorship is new. There was no provision under prior conservatorship law comparable to subdivision (c).

MEMORANDUM

To: Bob Murphy
From: Carrie Carter
Date: 2/14/78
Re: Personal Jurisdiction over Nonresident Minors and Incompetents for the Purpose of Guardianship and Conservatorship Proceedings

STATEMENT OF THE PROBLEM

The Staff has been asked to consider jurisdiction and venue problems in appointing a guardian or conservator of the person of one absent from the state. The relevant jurisdictional provision has been in Probate Code § 1570, which allows the court to appoint a guardian of the person of a minor or incompetent who resides outside California if that person is actually present in the county, or if that person owns property within the county. This provision is generally considered to be limited by Grinbaum v. Superior Court, 192 Cal. 566, 221 P. 651 (1923), in which the California Supreme Court voided the appointment of a guardian of an incompetent then residing in an asylum in Switzerland, on the basis that there was no personal jurisdiction over the incompetent. See, e.g., A. Marshall, California Probate Handbook 274 (2d ed. 1968); 35 Cal. Jur 3d Guardianship and Conservatorship § 176 (1977).

(1) What is the holding in Grinbaum, and what is the continued vitality of Grinbaum, given the U.S. Supreme Court's evolving standards of due process in finding personal jurisdiction?

(2) What additional requirements need to be met in order to establish proper court jurisdiction in California child custody proceedings?

(3) What additional requirements should be met in order to establish proper court jurisdiction in California guardianship and conservatorship proceedings: Should the Commission recommend specific jurisdictional requirements or should the Commission rely on the general California long-arm provision?

(1)

At the time of the guardianship proceedings in Grinbaum, the incompetent was residing in an asylum in Switzerland, but she had lived in California for many years. She owned property in California, and her only living relative, the petitioner in the guardianship proceeding, lived in California. Yet the proceeding was found to be void because there was no personal jurisdiction over the incompetent. Even though the incompetent's long-time domicile had been in California, her absence from the state was found to constitute a bar to personal jurisdiction. The decision was based on, first, the standard of personal jurisdiction in Pennoyer v. Neff, 95 U.S. 714 (1877) and De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345 (1896), and, second, on the fact that there had been no notice to the incompetent.

What does Grinbaum stand for? The part of the holding that says that jurisdiction does not obtain without notice to affected parties retains vitality. Adequate notice is required to satisfy standards of due process. But the court's other basis for decision, the failure of Pennoyer personal jurisdiction may not be valid in light of subsequent Supreme Court decisions.

The principal Supreme Court case is International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). That case found that there is in personam jurisdiction over corporation where there are "minimum contacts" with the forum such that maintaining the proceedings in that forum is fair. What is important is the relationship between the party, the forum, and the action. The International Shoe standard applies to personal jurisdiction over individuals (see, e.g., Owens v. Superior Court, 52 Cal. 2d 822, 345 P. 2d 921 (1959)) and to in rem actions as well. Shaffer v. Heitner, 97 S. Ct. 2569 (1977). The Court in Shaffer went on to state that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Id. at 2584.

Under International Shoe, the incompetent in Grinbaum might have been within the personal jurisdiction of California courts (had there been sufficient notice, which was not given): The "minimum contacts" inquiry was not made. Sometimes Grinbaum is said to stand for the proposition that the location of the incompetent's property does not automatically give rise to jurisdiction over the person of the incompetent, that in personam jurisdiction must obtain. This proposition is correct under

International Shoe; certainly it is consonant with minimum contacts analysis. But an alternative proposition, that property alone may never give rise to personal jurisdiction over an absent party, does not hold under International Shoe. See, e.g., W. Johnstone & G. Zillgitt, California Conservatorships § 2.6 (C.E.B. 1968). Similarly, the interpretation that a minor or incompetent who resides out of state cannot ever have a guardian appointed in California unless he is actually within the state is too strong and does not accord with International Shoe. See, e.g., A. Marshall, California Probate Handbook 272 (1968).

The continuing validity of Grinbaum depends on what reading one gives the case. But it certainly seems that the decision is in any case superfluous, and that the International Shoe test provides the personal jurisdiction limit on present Section 1570. California Code of Civil Procedure § 410.10 incorporates this type of constitutional decision into our long-arm statute: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." See Garfinkle & Levine, Long Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure, 21 Hastings L.J. 1162 (1970).

Although jurisdiction in guardianship proceedings has traditionally been tied to the domicile and/or presence of the minor or incompetent (see 39 C.J.S. Guardian and Ward § 12 (1976); 35 Cal. Jur. 3d Guardianship and Conservatorship § 173 (1977); cf. Uniform Probate Code § 1-301), we have moved away from applying strict territorial limits to court jurisdiction. See The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970, 21 Hastings L.J. 1105 (1970). Instead, the controlling considerations are fairness, court convenience and efficiency in the proceedings, and, in this case, promoting the best interests of the potential ward. A. Marshall, California Probate Handbook 672 (1968). The same factors are important in child custody proceedings.

(2)

Given that the U.S. Constitution places an outer limit on in personam jurisdiction, there might be reasons for the state to put more stringent restrictions on the exercise of court jurisdiction. For example, the jurisdictional provisions of the Uniform Child Custody Jurisdiction Act, Civil Code §§ 5150 et seq., were drafted in response to some particular problems arising in child custody proceedings: The critical jurisdictional provision of this Act, Civil Code § 5152, was drafted to designate the one best forum for a child custody

proceeding, thereby eliminating the problem of concurrent jurisdiction, which was leading to a continual overturning of custody decrees and, worse, to child stealing to obtain a favorable forum. The one best forum was to be that which had the closest ties to the child's environment, such that decisions in the child's best interests could be made with the maximum access to pertinent information. Ratner, Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183, 185 (1965).

Given these goals of the Act, personal jurisdiction over the various parties is not per se important. So Section 5161 allows a binding custody decree to issue even when personal jurisdiction over some party is lacking. The Commissioners thus restricted May v. Anderson, 345 U.S. 528 (1953), an oft-criticized and severely limited opinion which required personal jurisdiction over the child or over the parent with whom the child was living. May contains some rather strange language about the possessory interest that a mother has in her children, and the case is especially unpopular because it seems to encourage child-stealing. The Commissioners of the Act chose not to follow May:

> "[T]he technical requirement of in personam jurisdiction conflicts with two major goals of the Act: validity of the initial custody decision and stability for the child. ...
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> "The best amelioration of the possible conflict between May v. Anderson and the Act is the enactment of long-arm jurisdiction statutes. ... This solution is not complete since it does not remove the constitutional restriction on personal jurisdiction that parties must have 'minimum contacts' with the state to be personally bound. ... However, the constitutional reach of a long-arm statute would probably be stretched very far to avoid the evils of child stealing, multiple litigation, and instability for the child."
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> Comment, The Uniform Child Custody Jurisdiction Act and the Continuing Importance of Ferreira v. Ferreira, 62 Cal. L. Rev. 365, 388-39 n.114 (1974). See attachment.

See also, Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 Vand. L. Rev. 1206, 1229 n. 85 (1969) (citing Comment, The Puzzle of Jurisdiction in Child Custody Actions, 38 U. Colo. L. Rev. 541, 542 (1966)).

Thus, overlaid on International Shoe and the California long-arm statute is the particular scheme of Sections 5152 and 5161, which promote traditional venue-type issues over the technical requirements of personal jurisdiction. The next question is whether such a scheme is desirable to protect the interests of minors and incompetents in guardianship and conservatorship proceedings.

(3)

Personal jurisdiction over the minor or incompetent will require notice and "minimum contacts" with the forum (or such other new standards as are established by the U.S. Supreme Court and incorporated into the long-arm statute). Should the Law Revision Commission propose provisions that specifically create other elements of proper jurisdiction, similar to the section 5152 provisions relating to child custody proceedings?

There are several factors that might distinguish guardianship and conservatorship proceedings from child custody proceedings. First, the critical jurisdictional issue is personal jurisdiction over the potential ward, not the hornet's nest of issues involved in a family breakup -- jurisdiction over children, mother, and father. Second, the problem of child- or incompetent-stealing may not be as big a concern in guardianship and conservatorship proceedings as it is in child custody proceedings. Therefore the problem of concurrent jurisdiction over the person of the potential ward may not have the same negative impacts on wards as they do on children in custody proceedings.

Still, there might be some value in minimizing concurrent jurisdiction just as a matter of court efficiency. If so, provisions like Civil Code Section 5152 might be desirable.

Depending on practical considerations like those listed above, I see basically four choices that the staff could make:

One. Adopt a mandatory provision similar to Civil Code Section 5152 to designate the one best forum.

Two. Use provisions similar to Civil Code Section 5152 as a permissive priority statute that a court would use in deciding whether or not to take jurisdiction over the proceedings.

Three. Rely on flexible change of venue provisions and consolidation provisions to allow courts to freely consult with one another about which court is the best forum for the proceedings. See, e.g., Uniform Probate Code §§ 5-313, 5-431. See attached

Four. Rely only on constitutional jurisdiction requirements, and leave it to the courts to defer to one another in determining which court provides the best forum in the proceedings.

My own notion is that a combination of Two and Three might be best. Thus the structure would be (1) that the court have International Shoe personal jurisdiction over the potential ward, (2) that the court consult with other courts concerning prior and pending proceedings to determine the best forum, and (3) that such determination is in line with Section 5152-type rules. This structure is rather ambitious, and my second choice would be choice Four.

effect given the decree, however, was wholly discretionary.[111] *Ferreira* affirmed this posture of sporadic comity—the court should enforce some foreign decrees "as a matter of comity" and re-examine others.[112] This formulation does give courts the flexibility to modify any decree which is believed no longer to be in the child's best interest. But if courts do not act with the "wisdom and sincerity" with which they are credited by Justice Traynor, the children's and the state's interests discussed above will suffer.

The Act makes a comprehensive attempt to accommodate all these state interests. It requires, for instance, that full faith and credit be given to foreign decrees if issued by states having jurisdiction in substantial conformance with the Act.[113] Decrees are binding on all parties given reasonable notice and the opportunity to be heard, even when there is no personal jurisdiction over the party.[114]

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111. *Id.*

112. 9 Cal. 3d at 833, 512 P.2d at 310, 109 Cal. Rptr. at 86.

113. The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this title or which was made under factual circumstances meeting the jurisdictional standards of the title, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this title.

CAL. CIV. CODE § 5162 (West Supp. 1974).

114. A custody decree rendered by a court of this state which had jurisdiction under Section 5152 binds all parties who have been served in this state or notified in accordance with Section 5154 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this title.

CAL. CIV. CODE § 5161 (West Supp. 1974).

The Act thus narrowly interprets May v. Anderson, 345 U.S. 528 (1953), the Supreme Court decision which required personal jurisdiction over the child or the parent with custody of the child in order for the state to issue a valid custody decree. In doing so the Commissioners concurred with the analysis by Professor Clark who calls *May* an anomaly and urges that it be "overruled at the earliest possible opportunity." CLARK, *supra* note 27, at 326.

Consequently, the Act makes no requirement of personal jurisdiction: "a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met." COMMISSIONERS' COMMENTS, *supra* note 57, at § 13. Professor Hazard and other commentators have criticized *May* chiefly because it guarantees child stealing, multiple litigation, and instability since the statutory and constitutional limits of personal jurisdiction often preclude binding all parties to an adoption or divorce custody decree even by the best forum. *See* Hazard, May v. Anderson, *Prelude to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

For further critical discussion and argument for a restrictive interpretation of *May v. Anderson*, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); H. GOODRICH, HANDBOOK ON CONFLICT OF LAWS 274 (4th ed. 1964); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 325 (3rd ed. 1963); and Comment, *The Puzzle of Jurisdiction in Child Custody Actions*, 38 U. COLO. L. REV. 541 (1966).

The Commissioners restricted *May v. Anderson* because the technical requirement

The Act's categorical rule of full faith and credit neglects to make an exception for emergency jurisdiction necessary to serve the state's interest in protecting an endangered child who is subject to proceedings pending in another state.[115] However, a child could still be protected from return to a dangerous environment by two methods. The Act does not end the parens patriae power[116] and jurisdiction of state courts to protect children from imminent danger.[117] Second, juvenile court jurisdiction to make temporary custody decisions for "depend-

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of in personam jurisdiction conflicts with two major goals of the Act: validity of the initial custody decision and stability for the child. These goals first require that all interested parties be informed of and included in the litigation. Next, the litigation must be maintained in a forum which has access to the evidence necessary for comprehensive evaluation of the child's interests. Finally, all notified parties must be bound by the decision, removing the possibility of relitigation. Full faith and credit would be of little consequence if a party could relitigate custody in his own state simply by avoiding personal jurisdiction in the more convenient forum.

The Act's interpretation of *May*, even if subsequently disapproved by the United States Supreme Court, does not create a problem in California because of its flexible and all-inclusive long-arm statute. CAL. CODE CIV. PRO. § 410.10 (West 1973). However, since some states do not have general long-arm statutes, the failure of the Act to create a long-arm statute which would acquire in personam jurisdiction over absent parties might prove an egregious error. If the Supreme Court later affirms the Act's narrow interpretation of *May*, then there is no problem. However, if the court later holds that *May* stands for the much broader proposition that in personam jurisdiction is necessary to bind parties to custody decrees, then the Act's attempt to bind all parties notified and served will be without effect.

The best amelioration of the possible conflict between *May v. Anderson* and the Act is the enactment of long-arm jurisdiction statutes. *See* Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 316 (1973). This solution is not complete since it does not remove the constitutional restriction on personal jurisdiction that parties must have sufficient "minimum contacts" with the state to be personally bound. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). A state long-arm statute might not constitutionally grant personal jurisdiction over parties such as Dr. Ferreira whose past contacts with the forum state have been very slight. (Dr. Ferreira was never a resident of Alabama or a party to a custody determination there and never violated an existing decree in Alabama.) However, the constitutional reach of a long-arm statute would probably be stretched very far to avoid the evils of child stealing, multiple litigation, and instability for the child. The decision of the Commissioners not to include a long-arm statute in the Act is unfortunate. One justification for the omission is that the long-arm statute doesn't circumvent the whole problem since some parties may be constitutionally beyond the reach of in personam jurisdiction, therefore, the long-arm provision should not be included at all. Bodenheimer, note 2 *supra*, at 1232-33. Needless to say, this reasoning is unconvincing. For further discussion of *May* and the Act's response to the *May* problem, Bodenheimer, *supra* note 2, at 1231-35.

115. In the *Ferreira* case, if a custody proceeding had been pending in Alabama, the home state of the children, when the California action was filed, Civil Code Section 5155 would have flatly prohibited the exercise of jurisdiction. There is no exception for "emergency" jurisdiction granted by Section 5152(1)(c). See notes 68-74 *supra* and accompanying text.

116. See note 71 *supra* and accompanying text.

117. For a discussion of the duty and inherent power of a court to protect endangered children regardless of the other jurisdictional or equitable doctrines, see Titcomb v. Superior Ct., 220 Cal. 34, 29 P.2d 206 (1934).

Section 5-211. [Proceedings Subsequent to Appointment; Venue.]

(a) The Court where the ward resides has concurrent jurisdiction with the Court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the Court located where the ward resides is not the Court in which acceptance of appointment is filed, the Court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other Court, in this or another state, and after consultation with that Court determine whether to retain jurisdiction or transfer the proceedings to the other Court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the Court in which acceptance of appointment is filed.

COMMENT

Under Section 1-302, the Court is designated as the proper court to handle matters relating to guardianship. The present section is intended to give jurisdiction to the forum where the ward resides as well as to the one where appointment initiated. This has primary importance where the ward's residence has been moved from the appointing state. Because the Court where acceptance of appointment is filed may as a practical matter be the only forum where jurisdiction over the person of the guardian may be obtained (by reason of Section 5-208), that Court is given concurrent jurisdiction.

UNIFORM PROBATE CODE

Section 5-313. [Proceedings Subsequent to Appointment; Venue.]

(a) The Court where the ward resides has concurrent jurisdiction with the Court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the Court located where the ward resides is not the Court in which acceptance of appointment is filed, the Court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other Court, in this or another state, and after consultation with that Court determine whether to retain jurisdiction or transfer the proceedings to the other Court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the Court in which acceptance of appointment is filed.

Section 5-481. [Payment of Debt and Delivery of Property to Foreign Conservator Without Local Proceedings.]

Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

COMMENT

Section 5-410(a) (1) gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.