

Memorandum 78-25

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Testamentary Guardians)

At present, there is no provision in the draft guardianship-conservatorship statute comparable to existing Probate Code Section 1484 which provides:

1484. Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged or changed by the will by which he was appointed.

The first portion of this section appears to state the obvious. The "except" clause has substantive importance, but it has never been construed in a reported appellate decision. One commentator has discussed this clause as follows:

The courts have not spelled out how or to what extent a will may "legally" modify, enlarge, or change the statutory provisions. Consequently, draftsmen attempting to do so are embarking on uncharted seas.

This is not true in trusts; will provisions expanding or limiting the powers and duties of trustees are widely used and regularly upheld unless they violate public policy. . . . It is therefore almost always preferable to create a trust instead of a guardianship if the client desires important extensions or limitations of the fiduciary's powers.

In the rare situation in which the draftsman must use a guardianship of the estate and must make changes in the statutory pattern of powers, he may be able to do so within the as yet undefined limits of Prob. C. § 1484. [Schlesinger, Testamentary Guardianships for Minors and Incompetents, in California Will Drafting § 10.48, at 329-30 (Cal. Cont. Ed. Bar 1965).]

The staff recommends that the substance of existing Section 1484 be continued with respect to a testamentary guardian of the estate. This will allow the testator to do through a testamentary guardianship of the estate what might be done through a trust. The testator might, for example, give the testamentary guardian authority for the independent exercise of powers similar to that which may be granted by the court under proposed Sections 2590-2595.

The provision that the testator may "legally" modify the guardian's powers appears to give the court the power to disregard the will provision when public policy would otherwise be violated. Although the meaning of the word "legally" has not been construed in this context, the staff has not attempted to substitute different language. Some discussion is included in the Comment, however (see below).

With respect to a testamentary guardian of the person, there is a stronger argument against allowing the wishes of a deceased parent to prevail over the court's judgment as to what is in the best interests of the minor according to then-existing circumstances. The Commission has previously decided, for example, that greater weight should be given to the written preference of a deceased parent in confirming the appointment of a testamentary guardian of the estate than of a testamentary guardian of the person. See proposed Section 1514. The staff, therefore, recommends that the provision of existing Section 1484 for the testator to modify the powers of a testamentary guardian of the person not be continued.

The final question is whether the modification of the guardian's powers should be permitted in any signed writing by which a testamentary appointment may be made (see proposed Sections 1500, 1501), or whether it should be restricted to a will. The staff recommends the former approach.

The staff, therefore, recommends the addition of the following section to Article 1 (appointment of testamentary guardian) of Chapter 1 (appointment) of Part 2 (guardianship) of the staff draft:

1503. The powers and duties of a testamentary guardian of the estate are the same as those of a guardian appointed by the court except to the extent that those powers and duties are legally modified, enlarged, or changed by the writing appointing the guardian.

Comment. Section 1503 supersedes former Section 1484. Unlike former Section 1484, Section 1503 is limited to a testamentary guardian of the estate. The authority for modification of the powers of a testamentary guardian of the person in the instrument by which the appointment is made is not continued. Thus, a testamentary guardian of the person will have the same powers and duties as any other guardian of the person. See Sections 2400-2408.

The requirement of Section 1503 that the powers and duties must be "legally" modified continues language found in former

Section 1484 and appears to give the court the power to disregard a purported modification of the guardian's powers when it violates public policy.

Since a testamentary guardian may now be appointed by a will or by a signed writing (Sections 1500, 1501), the provision of former Section 1484 for modification of the guardian's powers by will has been broadened to include any writing appointing the guardian. The provision of former Section 1484 that a testamentary guardian must "qualify" is superseded by Sections 1502(b) and 2300 (oath and, if required, bond).

CROSS-REFERENCES

Definitions:

Guardian of the estate, § 1424

Guardian of the person, § 1427

Bond by testamentary guardian, § 2324

Respectfully submitted,

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