

Memorandum 78-40

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Conforming Revisions)

Attached to this memorandum as Exhibit 1 is the narrative discussion of the conforming revisions to be inserted in the preliminary part of the recommendation, and attached as Exhibit 2 are the six sections from the proposed conforming revisions which present significant policy questions for the Commission's consideration. Exhibit 3 contains the text of existing Civil Code Section 25.8 (authorization of medical treatment of minor) which the staff has concluded ought not to be amended.

The remaining sections in the staff draft of conforming revisions (approximately 174 in number) are technical and do not present significant policy questions. The staff proposes to distribute all of the conforming revisions to the Commissioners before they are sent to the printer, but we do not plan to schedule them for discussion at a Commission meeting.

The six policy sections, plus Civil Code Section 25.8, are discussed below. We have also received some comments from the State Department of Health Services which are discussed at the end of this memorandum.

Conforming Revisions Presenting Policy Issues

Civil Code § 4510. Dissolution of marriage for incurable insanity

Civil Code Section 4510 provides that the petition for dissolution of marriage on the grounds of incurable insanity shall be served on the general guardian or guardian of the person (if any) of the insane spouse, and that such guardian shall defend and protect the interests of the insane spouse. The section could be read to suggest that a guardian of the person shall defend with respect to the property issues which seem more appropriately within the purview of the guardian (or conservator) of the estate. Hence, the staff has revised Section 4510 to provide simply that the "guardian or conservator" shall defend, and the Comment notes that the guardian or conservator of the person is interested in the issues relating to dissolution of the marital relationship, while the guardian or conservator of the estate is interested in the property issues.

Civil Code § 4600. Order for child custody

Civil Code Section 4600 is revised as decided by the Commission at the September 1977 meeting.

Code of Civil Procedure § 153. Documents to which court seal must be affixed

Code of Civil Procedure Section 153 requires that the court seal be affixed to a "certificate . . . of the appointment" of a guardian but not of a conservator. The proposed amendment would extend this requirement to a conservator. Is this desirable?

Code of Civil Procedure § 304. Bonds to which chapter applies

Code of Civil Procedure Section 304 provides that the chapter in which the section appears applies to bonds of guardians. Bonds of conservators are not mentioned. Section 304.1 provides that bonds "where it is not otherwise provided, shall be in the name of and payable to the State of California . . ." See also Health & Saf. Code § 416.12 (bond of Director of Developmental Services "shall inure to the joint benefit of the several guardianship or conservatorship estates and the State of California").

However, existing Probate Code Section 1480 provides that the guardian "must furnish a bond to the ward . . ." And existing Probate Code Section 1805 provides that a conservator's bond "may be sued upon for the use and benefit of the conservatee, or of any person interested in the estate." It has been said that conservator's bonds "run to" the benefit of the conservatee or of any person interested in the estate. W. Johnstone & G. Zillgitt, California Conservatorships § 3.54, at 96 (Cal. Cont. Ed. Bar 1968). These provisions have been generally continued in proposed Section 2320 of the Commission's recommended legislation, which provides that "[e]very guardian and conservator shall furnish a bond . . . to protect the ward or conservatee and all persons interested in the guardianship or conservatorship estate." This provision appears to be inconsistent with Section 304 of the Code of Civil Procedure. Hence, the staff recommends that the reference to guardians be deleted from Section 304.

Probate Code § 202. Administration of community property

Probate Code § 650. Petition concerning community property

Under Sections 202 and 650 of the Probate Code, upon the death of a married person, a guardian or conservator of the estate of the surviving spouse may elect to have community property administered as part of the

estate of the deceased spouse (Prob. Code § 202), or may petition for a determination that such property not be administered as part of the estate of the deceased spouse (Prob. Code § 650). At the suggestion of Mr. Arne Lindgren, Chairman of the State Bar Subcommittee on Guardianship-Conservatorship Revision, the staff has added a provision to Sections 202 and 650, respectively, that the guardian or conservator may make the election or file the petition without approval of the guardianship or conservatorship court.

Section Not to Be Revised

Civil Code § 25.8. Authorization of medical treatment of minor

Civil Code Section 25.8 permits a minor's parent or guardian to "authorize in writing any adult person into whose care the minor has been entrusted to consent" to medical or dental care for the minor. The section makes no mention of compulsory care over the minor's objection. The Commission's recommended legislation requires court approval in most instances for a guardian or conservator to require a minor over 12 to receive medical treatment over the minor's objection. The staff initially considered revising Section 25.8 to say that a guardian or conservator of a minor could consent to medical treatment only as provided in the guardianship-conservatorship law (that is, normally with court approval), but ultimately concluded not to make that revision since the section appears generally not to contemplate the compulsory treatment situation, and since a guardian presumably cannot delegate to another any greater power than the guardian has under the guardianship-conservatorship law.

Comments Received From State Department of Health Services

Some of the comments we have received from the State Department of Health Services (Exhibit 1 to Memorandum 78-39) pertain to conforming revisions. Our attention is invited to four sets of statutory provisions for possible revision. First mentioned are Sections 7284-7287 of the Welfare and Institutions Code. These have been revised by the staff to refer to a conservator of the estate as well as a guardian of the estate as suggested in the letter.

Second, we are referred to Sections 416-416.23 of the Health and Safety Code which allow the Director of Developmental Services to be appointed guardian or conservator of a developmentally disabled person,

with no apparent qualification as to whether the person is an adult or a minor. However, Section 416.1 makes the guardianship and conservatorship provisions of the Probate Code applicable unless otherwise expressly provided. This section would appear to incorporate the new scheme of conservatorships for adults and guardianships for unmarried minors. The department also questions whether Health and Safety Code Section 416.10 (director may not be appointed as joint guardian or conservator with a private guardian or conservator) should be conformed to proposed Section 2105 (court may appoint joint guardians or conservators); this is a policy question which should be resolved by the Commission. The department questions whether Health and Safety Code Section 416.9 (in appointing director as guardian or conservator, the order of preference under the Probate Code for appointment of a conservator shall not apply) should be made subject to the order of preference in the Probate Code (see proposed Section 1812).

Third, our attention is invited to Welfare and Institutions Code Sections 5350-5371, which provide for LPS conservatorships for gravely disabled persons, whether adults or minors. The LPS Act also provides that appointment of an LPS conservator is subject to the list of priorities for appointment of a conservator under the Probate Code unless the court investigator recommends otherwise. The staff sees no problem with having these provisions coexist with the somewhat different Probate Code provisions.

Fourth, our attention is invited to the Interstate Compact on the Placement of Children (Civil Code §§ 264-274). The staff sees no inconsistency between the requirement of the proposed guardianship-conservatorship law that the guardian or conservator may fix the residence of the ward or conservatee outside of California with court permission, and the requirement of the Interstate Compact that, if the change of residence is for placement of the child in foster care or as preliminary to a possible adoption, the appropriate public authorities in the receiving state must approve (Civil Code § 265). Hence, the staff proposes no revision of Civil Code Sections 264-274 or of the guardianship-conservatorship provisions concerning the minor's place of residence.

Respectfully submitted,

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Staff Counsel

EXHIBIT 1

TO BE INSERTED IN PRELIMINARY PORTION OF
TENTATIVE RECOMMENDATION

CONFORMING REVISIONS

Numerous sections throughout the codes are amended to reflect the elimination of guardianships for incompetent adults,¹ to insert references to conservatorship where appropriate,² to correct cross-references to revised and recodified provisions of guardianship-conservatorship law, and to eliminate other inconsistencies.

Although most of the conforming revisions are technical, in a few cases substantive revisions are made. The child custody provision of the Family Law Act³ is revised so that, when a deceased parent has designated a testamentary guardian of the person of a child, that designation will be given some weight in any proceeding in which the child's custody is in issue.⁴ The requirement that a certificate of appointment of a guardian bear the court's seal⁵ is broadened to apply to conservatorship. The requirement in the Code of Civil Procedure that a guardian's bond be in the name of and payable to the State of California⁶ is

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1. Existing references to a guardian of an adult incompetent have been retained in those instances where it appears that the reference was intended to include a foreign guardian. See, e.g., Code Civ. Proc. § 416.70.
 2. Numerous sections of the California codes refer to guardians or guardianship in a context where it is apparent that the section should also refer to conservators or conservatorship. When the conservatorship law was added to the Probate Code in 1957 (1957 Cal. Stats., Ch. 1902), the other codes were not conformed to add these parallel references. About two-thirds of the conforming revisions being recommended by the Commission are to add the appropriate parallel references to conservators or conservatorship.
 3. Civil Code § 4600.
 4. See discussion under "Testamentary Guardian" supra.
 5. Code Civ. Proc. § 153.
 6. Code Civ. Proc. §§ 304, 304.1.

deleted in view of the inconsistent provision of the recommended guardianship-conservatorship law that the guardian's bond is to protect the ward.⁷ Finally, the Probate Code provisions which authorize a guardian or conservator of the estate of a surviving spouse to elect to have community property administered in the estate of the deceased spouse,⁸ or to petition for a determination that the community property not be so administered,⁹ should be revised to make clear that approval of the guardianship or conservatorship court is not required for such action.

7. See proposed Section 2320 (based in part on existing Section 1480: guardian "must furnish a bond to the ward"). See also existing Section 1805 (conservator's bond "may be sued upon for the use and benefit of the conservatee").

8. Prob. Code § 202.

9. Prob. Code § 650.

EXHIBIT 2

34266

Civil Code § 4510 (amended). Dissolution of marriage for incurable insanity

SEC. ____ . Section 4510 of the Civil Code is amended to read:

4510. (a) A marriage may be dissolved on the grounds of incurable insanity only upon proof, including competent medical or psychiatric testimony, that the insane spouse was at the time the petition was filed, and remains, incurably insane.

(b) No decree granted on this ground shall relieve a spouse from any obligation imposed by law as a result of the marriage for the support of the spouse who is incurably insane, and the court may make such order for support, or require a bond therefor, as the circumstances require.

(c) If the insane spouse has a ~~general~~ guardian or guardian of his person conservator , other than the spouse bringing the action, the petition and summons shall be served upon the insane spouse and ~~such~~ the guardian and he or conservator. The guardian or conservator shall defend and protect the interests of the insane spouse. If the insane spouse has no ~~general~~ guardian or guardian of his person conservator , or if the spouse bringing the action is the ~~general~~ guardian or guardian of his person conservator , the court shall appoint a guardian ad litem, who may be the district attorney or the county counsel, if any, to defend and protect the interests of the insane spouse. If a district attorney or county counsel is appointed guardian ad litem pursuant to this ~~paragraph; his~~ subdivision, the successor in the office of district attorney or county counsel, as the case may be, succeeds ~~him~~ as guardian ad litem, without further action by the court or parties.

Comment. Section 4510 is amended to substitute the references to a guardian or conservator of an insane spouse for the former references to a general guardian or a guardian of the person of the insane spouse. A guardian or conservator of the person is interested in the issues relating to dissolution of the marital relationship, while a guardian or conservator of the estate is interested in the property issues. See, e.g., 24 Am. Jur.2d Divorce and Separation § 274 (1966).

Civil Code § 4600 (amended). Order for child custody

SEC. __. Section 4600 of the Civil Code is amended to read:

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

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

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

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

~~(c)~~ (3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Comment. Section 4600 is amended to add the last sentence to subdivision (a) and to make a few nonsubstantive changes. It was not clear under prior law whether Section 4600 superseded the Probate Code provisions for a parent's testamentary appointment of a guardian of the person of a minor child. The addition of the last sentence to subdivision (a) makes clear that such an appointment is to be considered and given due weight, regardless of the nature of the custody proceeding.

Code of Civil Procedure § 153 (amended). Documents to which court seal must be affixed

SEC. ____ . Section 153 of the Code of Civil Procedure is amended to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except:

1. To a writ;
2. To a summons;
3. To a warrant of arrest;
4. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian , or conservator .

Comment. Section 153 is amended to add the certificate of appointment of a conservator to the exceptions stated in subdivision 4.

Note. This would impose a new requirement.

Code of Civil Procedure § 304 (amended). Bonds to which chapter applies

SEC. ____ . Section 304 of the Code of Civil Procedure is amended to read:

304. The provisions of this chapter apply to the bonds of receivers, executors, and administrators ; and guardians .

Comment. Section 304 is amended to delete the reference to guardians. Bonds to which this chapter applies are in the name of and payable to the State of California where it is not otherwise provided. Code Civ. Proc. § 304.1. However, the bond of a guardian is in favor of the ward. See Prob. Code § 2320.

Probate Code § 202 (amended). Administration of community property

SEC. ____ . Section 202 of the Probate Code is amended to read:

202. (a) Except as provided in Section 204, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her interest in the community property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 203 and 205, and no administration thereon shall be necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate,

or conservator of the property estate of the surviving spouse, the interest of the deceased spouse in the community property or both the interest of the deceased spouse and the surviving spouse in the community property may be administered under Division 3 (commencing with Section 300). The election must be made within four months after the issuance of letters testamentary or of administration by a writing filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the property estate of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property transferred by the surviving spouse to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

(d) The election and agreement referred to in subdivisions (b) and (c) may be made by the guardian or conservator without approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 202 is amended to add subdivision (d), and to change the reference to conservator of the "property" to conservator of the "estate." A guardian or conservator contemplating action under this section may seek instructions from the guardianship or conservatorship court. See Section 2403.

34271

Probate Code § 650 (amended). Petition concerning community property

SEC. __. Section 650 of the Probate Code is amended to read:

650. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the property estate of the surviving spouse may file a petition in the superior court in the county in which the estate of the deceased spouse may be administered alleging that administration of all or a part of the estate is not necessary for

the reason that all or a part of the estate is community property passing or belonging to the surviving spouse. The petition shall be verified and shall set forth the following information:

(1) The facts necessary to determine the county in which the estate of the deceased spouse may be administered if proceedings for the administration of the estate are not pending.

(2) The names, ages, and addresses of the heirs, devisees, and legatees of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as executors of the will or administrators of the estate of the deceased spouse, which are known to the petitioner.

(3) A description of the property of the deceased spouse which the petitioner alleges is community property passing to the surviving spouse, including the trade or business name of any community property business which the deceased spouse was operating or managing at the time of death.

(4) The facts upon which the petitioner bases the allegation that all or part of the estate of the deceased spouse is community property passing to the surviving spouse.

(5) A description of any interest in the community property which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section 201.

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is community property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

(c) To the extent of the election, this section shall not apply if the petitioner has elected to have the interest of the deceased spouse in the community property or both the interest of the deceased spouse and the surviving spouse in the community property administered under this division pursuant to subdivision (b) of Section 202.

(d) The action authorized by this section may be taken by a guardian or conservator without approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 650 is amended to add subdivision (d), to letter the remaining paragraphs as subdivisions, and to change the reference to a conservator of the "property" to a conservator of the "estate." A guardian or conservator contemplating action under this section may seek instructions from the guardianship or conservatorship court. See Section 2403.

EXHIBIT 3

Civil Code § 25.8. Authorization of medical treatment of minor

25.8. Either parent if both parents have legal custody, or the parent or person having legal custody or the legal guardian, of a minor may authorize in writing any adult person into whose care the minor has been entrusted to consent to any X-ray examination, anesthetic, medical or surgical diagnosis or treatment and hospital care to be rendered to said minor under the general or special supervision and upon the advice of a physician and surgeon licensed under the provisions of the Medicine Practice Act or to consent to an X-ray examination, anesthetic, dental or surgical diagnosis or treatment and hospital care to be rendered to said minor by a dentist licensed under the provisions of the Dental Practice Act.