#F-30.300

8/23/78

Memorandum 78-56

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Effect of Appointment of Conservator or Determination of Incompetence)

A central issue of guardianship and conservatorship law is the extent to which the civil rights of the conservatee are affected by imposition of the conservatorship--does the conservatee retain contractual capacity, the right to vote, the right to marry? In most jurisdictions the law on this important point is not clear, and California is no exception.

The attached staff study indicates that a conservatee suffers some disabilities by virtue of creation of the conservatorship, and suffers greater disabilities if the court finds in the conservatorship proceeding that the conservatee is incompetent. However, the effect of appointment of a conservator or a determination of incompetence on most of the important civil rights of a conservatee is not clear.

Section 1835 of the draft statute permits the conservatorship court to adjudge that the conservatee "lacks legal capacity". The staff's study has now persuaded us that this provision does nothing to solve the existing problems in the law, and in fact may add confusion since "lacks legal capacity" is a new term without any case-law connotation. Section 1836 provides that such an adjudication is an adjudication that the conservatee is "an incompetent person". This brings us back to more familiar footing, but again does nothing to solve the problems.

The staff is convinced that the most desirable approach to this area of the law is to develop meaningful tests for capacity for different purposes and adequate procedures for determining capacity, either before or after a particular action occurs. However, this approach would be a very substantial undertaking involving significant questions of social policy and substantial civil rights and liberties problems. The staff recommends that we not get involved in such a project in connection with this study, but that we request independent authority to work on the problems. This would be a substantial contribution to clarity in the law.

The staff suggests that we limit our endeavors in the present study to the effect of the conservatorship and the conservatee's capacity on

the conservatorship estate. This is the area of most immediate and direct concern to us, and it is the area where most of the real problems occur--to what extent can the conservatee bind the estate, how does the existence of conservatorship affect third parties who deal with the conservatee, etc.

The staff, in consultation with our consultant Mr. Elmore, has developed the following statutory scheme, which we recommend.

(1) Appointment of a conservator should not in and of itself constitute a determination of incompetence. This codifies existing law.

(2) Appointment of a conservator should in and of itself constitute a limitation on the ability of the conservatee to obligate the conservatorship estate. The estate should be liable only for necessaries of life and for reasonably prudent transactions by the conservatee. This concept is based on an existing provision relating to debts.

(3) The court should have authority to expand or limit the basic capacity of the conservatee outlined above, in light of the particular circumstances. The court may withdraw all capacity to affect the conservatorship estate by finding that the conservatee is "seriously incapacitated", a euphemism for "incompetent". The finding that the conservatee is seriously incapacitated would affect only the conservatorship estate, and would not relate to other capacities of the conservatee (such as the right to marry, have custody of children, etc.), which must be determined under appropriate standards on an ad hoc basis as each case arises, just as under existing law.

(4) The right to make a will is not affected by either appointment of a conservator or a finding that the conservatee is "seriously incapacitated", even though a will directly affects the conservatorship estate. Under existing law, an incompetent conservatee does not necessarily lack testamentary capacity. A prior determination in the conservatorship proceeding that the conservatee lacks testamentary capacity, while useful for the conservator, may not be fully and adequately investigated in the context of a conservatorship proceeding, and may deny interested parties an opportunity to be heard.

(5) Bona fide purchasers of real property are protected if notice of the conservatorship is not recorded in the county in which the property is located. This provision is derived from comparable provisions in other jurisdictions.

The staff's draft of this scheme is attached as Exhibit 1 (pink). If this scheme is adopted, the staff will make necessary conforming changes in the contents of the petition, duties of the court investigator, transitional provisions, and the like.

Respectfully submitted,

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Assistant Executive Secretary

Exhibit 1

Article 4. Legal Capacity of Conservatee

§ 1831. Transaction defined

1831. As used in this article, unless the context otherwise requires, "transaction" includes, but is not limited to, making a contract, sale, transfer, or convayance, incurring a debt or encumbering property, making a gift, delegating a power, or waiving a right.

Comment. Section 1831 makes clear that as used in this article "transaction" includes any type of transaction. The right to make a will may not be limited under this article. See Section 1835(c).

§ 1832. Effect of conservatorship on capacity of conservatee

1832. Except as otherwise provided in this article, upon appointment of a conservator of the estate, the capacity of the conservatee to bind or obligate the conservatorship estate or affect property not vested in possession of the conservatorship estate is limited to transactions that are such as a reasonably prudent person might enter into.

Comment. Section 1832 clarifies the effect of appointment of a conservator on the capacity of the conservatee to affect the conservatorship estate. It codifies the concept that a conservatee is not rendered incompetent by the mere fact of appointment of a conservator. See Board of Regents v. Davis, 14 Cal.3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975); Shuck v. Myers, 233 Cal. App.2d 151, 43 Cal. Rptr. 215 (1965). Section 1832 does, however, limit the capacity of the conservatee in accordance with the rule of former Section 1858 (continued in Section 2430) that the conservator must pay debts incurred by the conservatee if they appear to be such as a reasonably prudent person might incur. Section 1832 includes any type of transaction including, but not limited to, debts, gifts, sales, encumbrances, conveyances, delegating powers, and waiving rights. See Section 1831 (defining "transaction"). Making a will is separately treated (Section 1835) and is not covered by Section 1832. As to contracts and debts incurred for necessaries, see Section 1835(d).

Section 1832 limits the capacity of the conservatee to enter into transactions that "affect property not vested in possession of the conservatorship estate." This limitation relates to (but is not limited to) such matters as contingent or expectant interests in property (including marital property rights or a right of survivorship incident to joint tenancy or tenancy by the entirety), powers as a donee of a special power of appointment, the right to elect to take under or against a will, the right to renounce or disclaim an interest acquired by testate or intestate succession or by inter vivos transfer (including the right to surrender the right to revoke a revocable trust), and the right to revoke a revocable trust. With respect to these types of transactions,

Section 1832 limits the capacity of the conservatee, absent a court order determining capacity, to those transactions that are such as a reasonably prudent person might enter into.

The rule stated in Section 1832 merely limits the capacity of the conservatee. The section does not grant to the conservatee capacity to engage in a particular transaction if the conservatee lacks capacity for that transaction. For example, even though the conservatee enters into a transaction that a reasonably prudent person might enter into, Section 1832 does not validate a transaction that is invalid under Section 38 of the Civil Code nor does it prevent rescission of a transaction if the conservatee is so lacking in capacity for the transaction that it can be rescinded under Section 39 of the Civil Code.

Section 1832 does not apply if the court has made an order under Section 1833 or 1834. Those sections give the court considerable flexibility in devising an order that authorizes the conservatee to enter into such transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. Under Section 1833, the court may make an order giving the conservatee greater capacity to enter into transactions than is provided in Section 1832. Under Section 1833, the court may also make an order restricting the limited capacity of the conservatee under Section 1832. If the conservatee is adjudged to be seriously incapacitated under Section 1834, the conservatee will lack the power to enter into any transaction that binds or obligates the conservatorship estate or that affects property not vested in possession of the conservatorship estate.

In determining whether a transaction is one "such as a reasonably prudent person might enter into" under Section 1831, the conservator and the court should take into consideration all the circumstances of the particular conservatee and the conservatorship estate. One important circumstance to be taken into consideration is the extent to which the transaction might impair the ability to provide for the support, maintenance, and education of the conservatee and the support, maintenance, and education of the persons the conservatee is legally obligated to support, maintain, or educate. See subdivision (b) of Section 2430 (payment of debts). See also Section 2404 (court order for payment of debt, expense, or charge "lawfully due and payable").

Section 1832 does not address other possible effects of appointment of a conservator, whether of the person or estate, on the capacity of the conservatee. Other consequences of appointing a conservator are that court proceedings must be conducted through the conservator or a guardian ad litem (Code Civ. Proc. §§ 372, 416.70), the office of trustee held by a conservatee is vacated (Civil Code § 2281(1)(2)), and many rights may be exercised by the conservator rather than conservatee (e.g., right to vote shares of stock (Corp. Code § 702), right to disclaim testamentary and other interests (Prob. Code § 190.2)). This listing is intended as illustrative and not exclusive.

§ 1833. Court order affecting capacity of conservatee

1833. (a) The court may by order broaden or limit the capacity a conservatee would otherwise have under Section 1832 by authorizing the conservatee to enter into such transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate including, but not limited to, the following:

(1) Transactions of specified types.

(2) Transactions other than specified types.

(3) Transactions not exceeding specified amounts.

(b) In an order made under this section, the court may include such limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate including, but not limited to, the following:

(1) A requirement that for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

(2) A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not such as a reasonably prudent person might enter into.

Comment. Section 1833 gives the court authority to broaden or limit the capacity of the conservatee to affect the conservatorship estate over that specified in Section 1832. See the Comment to Section 1832. Section 1833 is derived from Welfare and Institutions Code Section 5357 (Lanterman-Petris-Short Act conservatorships). For authority of the court to withdraw all capacity of the conservatee to obligate the conservatorship estate, see Section 1834.

§ 1834. Conservatee adjudged to be seriously incapacitated

1834. (a) If it is shown that it is necessary in the circumstances of the particular conservatee and conservatorship estate, the court shall by order adjudge the conservatee to be seriously incapacitated.

(b) A conservatee adjudged to be seriously incapacitated lacks the capacity to make a contract, sale, transfer, or conveyance, incur a debt or encumber property, make a gift, delegate a power or waive a right, or enter into any other transaction that binds or obligates the conservatorship estate or that affects property not vested in possession of the conservatorship estate.

(c) The failure or refusal of the court to adjudge a conservatee to be seriously incapacitated is not a determination that the conservatee has legal capacity for any purpose.

Comment. Section 1834 supersedes the provision of former Section 1751 for appointment of a conservator on the ground that the conservatee

is a person "for whom a guardian could be appointed". Under former Section 1460, a guardian could be appointed for a person who is "incompetent". Appointment of a guardian for an adult under former law constituted a judicial adjudication 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, 799-800 (1929). An order appointing a conservator on the ground that the conservatee was a person for whom a guardian could be appointed was an adjudication of incompetence and rendered the conservatee incapable of contracting. Board of Regents v. Davis, 14 Cal.3d 33, 38 n.6, 43, 533 P.2d 1047, 1051 n.6, 1054, 120 Cal. Rptr. 407, 411 n.6, 414 (1975).

Adjudging a conservatee to be seriously incapacitated under Section 1834 is equivalent to an adjudication of incompetence only for the purposes of affecting the conservatorship estate. Other legal rights of a conservatee have their own standards, which may require differing degrees of capacity. See, e.g., Civil Code §§ 2355-2356 (agency terminated by incapacity to act or contract); Code Civ. Proc. § 352(a)(2) (toll of statute of limitations on insanity); Prob. Code §§ 20-21 (person of sound mind may make a will), 401 (executor may not be a person adjudged incompetent by reason of want of understanding), 423 (administrator must be competent). See also Section 1835 (power to make will not affected). Subdivision (c) makes clear that, a failure or refusal to adjudge the conservatee to be seriously incapacitated is not the equivalent to a determination that the conservatee has legal capacity. See the Comment to Section 1832.

§ 1835. Rights not affected by limitations of this article

1835. Nothing in this article shall be construed to deny a conservatee, whether or not adjudged to be seriously incapacitated, any of the following:

(a) The right to control an allowance provided under Section 2421.

(b) The right to control wages or salary to the extent provided in Section 2601.

(c) The right to make a will subject to the limitations of Chapter 1 (commencing with Section 20) of Division 1.

(d) The right to enter into transactions to the extent reasonable to provide the necessaries of life to the conservatee and the spouse and minor children of the conservatee.

Comment. Section 1835 lists rights of the conservatee to affect the conservatorship estate that are not affected either by the basic limitations of Section 1832 or the authority of the court to impose further limitations pursuant to Sections 1833 and 1834.

Subdivision (a) recognizes that the conservatee has the sole control of the allowance paid to the conservatee under Section 2421. See Section 2421(c).

Subdivision (b) recognizes that wages or salary of the conservatee are subject to the conservatee's control unless the court otherwise orders. See Section 2601.

Subdivision (c) codifies the rule of Estate of Powers, 81 Cal. App.2d 480, 184 P.2d 319 (1947). Appointment of a conservator or an adjudication that the conservatee is seriously incapacitated is not in itself a basis for revocation of testamentary capacity, which depends upon soundness of mind. Sections 20 and 21.

Subdivision (d) makes clear that an order under this article does not limit the right of the conservatee to obtain for reasonable value necessaries of life for the conservatee and the conservatee's dependents. The subdivision is consistent with the requirement that the conservator pay debts incurred by the conservatee during the conservatorship to provide the necessaries of life to the conservatee and the spouse and minor children of the conservatee to the extent the debt is reasonable. See Section 2430(a)(2). See also Civil Code Section 38 ("person entirely without understanding" is liable for "the reasonable value of things furnished to him necessary for his support and the support of his family").

§ 1836. Good faith purchaser or encumbrancer of real property

1836. A transaction that affects real property of the conservatorship estate entered into by the conservatee with a good faith purchaser or encumbrancer for a valuable consideration is not affected by any provision of this article or any order made under this article unless a notice of the establishment of the conservatorship has been recorded prior to the transaction in each county in which the property is located.

Comment. Section 1836 is designed to protect innocent third parties who do not have notice of the incapacity of the conservatee. It is drawn from statutes in a number of other jurisdictions. See, e.g., Mass. Ann. Laws c.201 § 10. Nothing in Section 1836 validates a transaction that is invalid under Section 38 of the Civil Code or prevents rescission of a transaction under Section 39 of the Civil Code if the conservatee would lack capacity for the transaction absent the establishment of the conservatorship. The sole effect of Section 1836 is to make the limitations on the conservatee's capacity that exist under Section 1832 or under an order made under Section 1833 or 1834 not applicable to the transaction if the notice of establishment of conservatorship has not been recorded.

§ 1837. Capacity to give informed consent to medical treatment

1837. If the court determines that the conservatee does not have the capacity to give informed consent for any and all forms of medical treatment, the court shall (1) adjudge that the conservatee lacks the capacity to give informed consent for medical treatment and (2) by order

give the conservator of the person the powers specified in Section 2355. If an order is made under this section, the letters of conservatorship shall include a statement that the conservator has the powers specified in Section 2355.

Comment. Section 1837 is new. See Section 2355 and Comment thereto.

§ 1838. Capacity to vote

1838. If it appears to the court that the conservatee is not capable of completing an affidavit of voter registration in accordance with Section 500 of the Elections Code, the court shall by order disqualify the person from voting pursuant to Section 707.5 or 707.6 of the Elections Code.

Comment. Section 1838 continues the substance of a portion of former Section 1462.

Note. This section is contingent upon enactment of AB 372 (1978 Antonovich).

§ 1839. Time of making an order limiting capacity of conservatee

1839. An order of the court under this article affecting the legal capacity of the conservatee may be:

(a) Included in the order of appointment of the conservator if the order was requested in the petition for the appointment of the conservator.

(b) Made subsequently upon a petition made, noticed, and heard by the court in the manner provided in Section 1842.

Comment. Section 1839 permits orders under this article to be made at the time the conservatorship is established or at a subsequent time. The section applies to all orders under this article relating to the legal capacity of the conservatee for various purposes. There is no right to a jury trial in connection with an order relating to the legal capacity of the conservatee.

§ 1840. Duration of order affecting capacity of conservatee

1840. (a) The court, in its discretion, may provide in an order under this article affecting the legal capacity of the conservatee that, unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order.

(b) An order of the court under this article affecting the legal capacity of the conservatee continues in effect until the earliest of the following times:

(1) The time specified in the order, if any.

(2) The time the order is modified or revoked.

(3) The time the conservatorship is terminated.

Comment. Section 1840 is new. For revocation or modification of the order, see Section 1842. For termination of the conservatorship, see Chapter 3 (commencing with Section 1860).

§ 1841. Modification or revocation of orders

1841. An order of the court under this article affecting the legal capacity of the conservatee may be modified or revoked upon a petition made, noticed, and heard by the court in the manner provided in Section 1842.

Comment. Section 1841 makes clear that the court may modify or revoke an order relating to legal capacity of the conservatee. Revocation of an order limiting the legal capacity of the conservatee does not affect the basic restraints on the capacity of the conservatee under Section 1832, unless broadened by court order made pursuant to Section 1833.

§ 1842. Procedure on petition for order affecting capacity of conservatee

1842. (a) A petition for a court order under this article affecting the legal capacity of the conservatee, if not included in the order of appointment of the conservator, or for modification or revocation of such an order may be made by any of the following persons:

(1) The conservator.

(2) The conservatee.

(3) The spouse or any relative or friend of the conservatee.

(b) The petition shall:

(1) State facts showing that the order or modification or revocation of the order is appropriate.

(2) Set forth, so far as they are known to the petitioner, the names and addresses of the spouse and of the relatives of the conservatee within the second degree.

(c) Notice of the hearing on the petition shall be as follows:

(1) At least 15 days before the hearing, a copy of the petition and a notice of the time and place of the hearing shall be mailed to the

spouse and relatives of the conservatee named in the petition (other than the petitioner or persons joining in the petition) at their addresses stated in the petition.

(2) 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 15 days prior to the hearing.

(3) 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 15 days prior to the hearing.

(4) Service under paragraphs (2) and (3) shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other 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.

(d) The conservatee shall be produced at the hearing except in the following cases:

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

(2) Where the conservatee is unable to attend the hearing by reason of medical inability established (i) by the affidavit or certificate or a licensed medical practitioner or (ii) if the 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 conservatee's inability to attend the hearing and shall not be considered in determining the issue of the legal capacity of the conservatee. Emotional or psychological instability is not good cause for the absence of the conservatee from the hearing unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the conservatee.

(3) Where the court investigator has reported to the court that the conservatee has expressly communicated that the conservatee (i) is not

willing to attend the hearing and (ii) does not wish to contest the petition, and the court makes an order that the conservatee need not attend the hearing.

(e) If the petition alleges that the conservatee is not willing to attend the hearing or upon receipt of an affidavit or certificate attesting to the medical inability of the conservatee to attend the hearing, the court investigator shall do all of the following:

(1) Interview the conservatee personally.

(2) Inform the conservatee of the contents of the petition, of the nature, purpose, and effect of the proceeding, and of the right of the conservatee to oppose the petition, attend the hearing, and be represented by legal counsel.

(3) Determine whether it appears that the conservatee is unable to attend the hearing, and if able to attend, whether the conservatee is willing to attend the hearing.

(4) Determine whether the conservatee wishes to contest the petition.

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

(6) If the conservatee opposes the petition and has not retained counsel, determine whether the conservatee desires the court to appoint legal counsel.

(7) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee in any case where the conservatee does not oppose the petition and has not retained legal counsel and does not plan to retain legal counsel.

(8) Report to the court in writing, at least five days before the hearing, concerning all of the foregoing, including the conservatee's express communications concerning both (i) representation by legal counsel and (ii) willingness to attend the hearing.

(f) The conservatee, any relative or friend of the conservatee, the conservator, or any other interested person may appear at the hearing to support or oppose the petition.

(g) Except where the conservatee is absent from the hearing and is not required to attend the hearing under the provisions of subdivision (d) and any showing required by subdivision (d) has been made, the court shall, prior to granting the petition, inform the conservatee of all of the following so far as relevant to the allegations made and the order requested in the petition:

(1) The nature and purpose of the proceeding.

(2) The nature and effect on the conservatee's basic rights of the order requested.

(3) The conservatee has the right to oppose the petition and to be represented by legal counsel if the conservatee so chooses.

(h) After the court informs the conservatee of the matters listed in subdivision (g) and prior to granting the petition, the court shall consult the conservatee to determine the conservatee's opinion concerning the order requested in the petition.

(i) If the court determines that an order under this article affecting the legal capacity of the conservatee or modification or revocation of such an order as requested in the petition is proper, the court shall make the order.

Comment. Section 1842 adapts the procedure for appointment of a conservator for the situation where an order affecting the legal capacity of the conservatee is sought apart from the appointment of a conservator. Section 1842 does not, however, grant the right to a jury trial on the issue.

STAFF STUDY

EFFECT OF APPOINTMENT OF CONSERVATOR OR DETERMINATION OF INCOMPETENCE

Introduction

Under existing Probate Code Section 1751, a conservator may be appointed for a person who "is unable properly to provide for his personal needs for physical health, food, clothing or shelter" or for the property of a person who "is substantially unable to manage his own financial resources, or resist fraud or undue influence." In addition, a conservator may be appointed for a person for whom a guardian could be appointed. A guardian may be appointed for an "incompetent person" under Probate Code Section 1460.

The consequence of this statutory scheme is that there are two types of conservatees--conservatees who have been found to be incompetent and conservatees who have not been found to be incompetent. The mere fact that a conservator is appointed is not a determination that the conservatee is in any way "incompetent." Shuck v. Myers, 233 Cal. App.2d 151, 43 Cal. Rptr. 215 (1965). It is safe to say that a conservatee who has been found to be incompetent is under greater disabilities than the conservatee who has not, but just what those disabilities are is not always easy to specify.

Disabilities Imposed By Appointment of Conservator

In some cases, appointment of a conservator alone, without a finding of incompetence, is sufficient to deprive the conservatee of legal capacity. For example, a person for whom a conservator has been appointed may appear in court proceedings only through a conservator of the estate or a guardian ad litem. Code Civ. Proc. § 372; In re Marriage of Higgason, 10 Cal.3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973). Service of process must be made on the conservator and the court can dispense with service on the conservatee. Code Civ. Proc. § 416.70. The office of a trustee is vacated by appointment of a conservator for the trustee. Civil Code § 2281(1)(c). An attorney for whom a conservator is appointed is enrolled as an inactive member. Bus. & Prof. Code § 6007(a). There are numerous other provisions that give the exercise of a right to the conservator rather than the conservatee.

See, e.g., Corp. Code § 702 (conservator may vote shares held by conservator without a transfer of shares into the holder's name); Prob. Code § 190.2 (disclaimer of testamentary and other interests by conservator).

Disabilities Imposed By Finding of Imcompetence

A finding of incompetence imposes greater disabilities on the conservatee. The conservatee may not contract or, presumably, make a gift. Board of Regents v. Davis, 14 Cal.3d 33, 120 Cal. Rptr. 407, 533 P.2d 1047 (1975). The conservatee may not convey property. Gibson v. Westoby, 115 Cal. App.2d 273, 251 P.2d 1003 (1953) (guardianship). The conservatee no longer has capacity to exercise an inter vivos power of appointment. Estate of Wood, 32 Cal. App.3d 862, 108 Cal. Rptr. 522 (1973). Incompetence terminates an agency relationship. Civil Code §§ 2355-2356; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343 (1926). Statutes of limitation are tolled. Code Civ. Proc. § 352(a)(2); Gottesman v. Simon, 169 Cal. App.2d 494, 337 P.2d 906 (1959) (guardianship).

Disabilities Requiring a Greater or Different Finding Than Incompetence

Whether the finding of incompetence affects the right to vote or hold public office, engage in a licensed profession, operate a motor vehicle, serve as a juror, testify as a witness, marry, have custody of children, or make a will is more problematic.

Vote or hold public office. The California Constitution, Article II, § 3, provides that the Legislature must provide for the disqualification of electors "while mentally incompetent." The Legislature has not yet done so, although AB 372 (Antonovich) presently moving through the Legislature would require the county clerk to cancel the registration of a person for whom a conservator is appointed upon demonstration in court that the person does not have the mental capacity to complete an affidavit of registration. The right to hold public office is dependent on the right to vote. Govt. Code § 275. However, a vacancy in office may be declared in quo warranto proceedings, in which the standard is "mentally incapacitated." Govt. Code § 1770(b).

Engage in a licensed profession. Until 1967 California had an elaborate regulatory scheme that required revocation of professional licenses by the appropriate board upon adjudication of incompetence.

Concurrent with the enactment of the Lanterman-Petris-Short Act in 1967, these provisions of the Business and Professions Code were repealed. Since then, different standards have been reenacted on a piecemeal basis for particular professions. For attorneys, appointment of a conservator alone, without a finding of incompetence, requires the attorney to be placed on the inactive roll. Bus. & Prof. Code § 6007. A doctor's license must be suspended if the doctor becomes "mentally ill." Bus. & Prof. Code § 2417. An interesting sidelight is that a doctor who is "incompetent" is guilty of unprofessional conduct. Bus. & Prof. Code § 2361. Here the term "incompetent" is clearly being used in a different sense.

Operate a motor vehicle. The Vehicle Code does not tie the privilege of operating a motor vehicle to "incompetence" as such. Vehicle Code Section 12806 states:

> Any physical or mental defect of the applicant which in the opinion of the department does not affect the applicant's ability to exercise reasonable and ordinary control in operating a motor vehicle upon the highway shall not prevent the issuance of a license to the applicant.

In addition to being able to control the vehicle, the person must understand the traffic signs or signals and the rules of the road, and be able to operate the vehicle safely. Veh. Code § 12805(d), (e). The court in establishing a Lanterman-Petris-Short Act conservatorship may determine that the conservatee may not operate a motor vehicle, but the license of the conservatee may not be revoked except upon grounds and by procedures provided in the Vehicle Code. Welf. & Inst. Code § 5357; 58 Ops. Cal. Atty. Gen. 502 (___).

Serve as a juror. A person is competent to act as a juror if "In possession of his natural faculties and of ordinary intelligence and not decrepit, provided that no person shall be deemed incompetent solely because of the loss of sight in any degree." Code Civ. Proc. § 198. This standard has been construed to mean that the juror must be "mentally competent." Church v. Capitol Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956). Whether a finding of incompetence in a guardianship proceeding satisfies this standard has not been determined.

Testify as a witness. The ability of a person found to be incompetent to testify as a witness depends upon the circumstances of the

particular case. Evidence Code Section 701 disqualifies a person who is "Incapable of understanding the duty of a witness to tell the truth." The Law Revision Commission's Comment to this provision states:

> Although Section 701 modifies the existing law with respect to determining the competency of witnesses, it seems unlikely that the change will have much practical significance. Theoretically, Section 701 may permit children and persons suffering from mental impairment to testify in some instances where they are now disqualified from testifying; in practice, however, the California courts have permitted children of very tender years and persons with mental impairment to testify. [citations]

Despite the narrowness of the standard stated in Section 701, the courts have stated that in determining the mental competency of a witness, the question is whether the mental derangement or defect is such that the person was deprived of the ability to perceive the events about which he is to testify or is deprived of the ability to recollect and communicate with reference thereto; the trial court may exercise discretion in determining the effect of a prior adjudication of incompetency on the capacity to testify as a witness. People v. Jackson, 273 Cal. App2d. 248, 78 Cal. Rptr. 20 (1969).

Marry. Marriage is a personal relation arising out of a civil contract to which the consent of the parties "capable of making that contract" is necessary. Civil Code § 4100. While it has been determined that a conservatee who is incompetent loses contractual capacity, it has not been determined that the conservatee loses capacity for the marriage "contract." However, the marriage may be annulled if at the time of marriage the conservatee was of "unsound mind," and the marriage may be dissolved on the basis of "incurable insanity." Civil Code §§ 4425(c), 4506(2). It has not been held that a finding of incompetence constitutes a determination of unsoundness of mind or insanity for purposes of marriage. It should be noted, however, that the basis of contractual capacity is also soundness of mind and a conservatee found to be incompetent does lose contractual capacity. See Civil Code §§ 38-40, 1556-1557.

Custody of children. It appears that a finding of incompetence does not deprive the conservatee of custody of the conservatee's children. A person may be made a ward of the juvenile court if there is no

parent or guardian "capable of exercising" proper and effective parental care or control. Welf. & Inst. Code § 600(a). Likewise, an action may be brought for the purpose of declaring a minor free from the custody and control of a parent if the parent is and will remain incapable of supporting or controlling the child in a proper manner because of "mental deficiency or mental illness;" such a finding must be supported by adequate medical testimony. Civil Code § 232(a)(6).

A related question is whether a person found to be incompetent is capable of giving consent to adoption of that person's child. Civil Code §§ 224, 224m. As a general rule, capacity to consent to anything depends upon the person's understanding of the nature and consequences of the thing consented to. Consent to adoption, which waives important statutory rights, such as the rights of natural parents to raise their children, must be voluntary and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. San Diego County Dept. of Pub. Welfare v. Superior Court, 7 Cal.3d 1, 10, 496 P.2d 453, ___, 101 Cal. Rptr. 541, ___ (1972). Note that a finding of incompetence does render a person of unsound mind incapable of waiving "any right." Civil Code § 40.

Make a will. In order to make a will, a conservatee must be of "sound mind." Prob. Code §§ 20-21. While the basis of contractual capacity is also soundness of mind, it has not been held that an incompetent conservatee lacks testamentary capacity. In fact at least one California case has held that an adjudication of incompetence in a guardianship proceeding is not equivalent to a determination that a testator is incapable of testamentary disposition. Estate of Powers, 81 Cal. App.2d 480, 184 P.2d 319 (1947).

Other disabilities. The law is replete with provisions that impose disabilities on incapacitated persons. The standards for determining incapacity are varied. In addition to "incompetence" and "unsoundness of mind," disabilities may be imposed on persons who are "insane," "incapacitated," "disabled," or who lack "contractual capacity." Whether a conservatee who has been found to be incompetent satisfies any of these standards in most cases has never been determined. Standards that appear similar have different meanings in the context in which they apply:

> The law governing insane and incompetent persons in the State of California is primarily statutory. An examination of the statutes involved and the cases relevant thereto will serve to indicate the definitive variants of the term "insanity" and the possibility of its use in different situations. Among others can be noted: (1) insanity or incompetency with relation to capacity to contract (Civ. Code, §§ 38-40); (2) insanity or incompetency with relation to capacity to make testamentary disposition (Prob. Code § 20 [citations]); (3) insanity with relation to capacity to commit crime (Pen. Code, § 26); (4) insanity as "mental illness" which warrants confinement under provisions of Welfare and Institutions Code, division 6; and (5) insanity and incompetency pursuant to which, under Probate Code, section 1460, letters of guardianship are issued. "Insanity" may and does mean a variety of different things. Depending on the pertinent statute, a variety of issues of fact can be the subject of litigation. And, depending on which statute is invoked, the parties to the litigation are different and the results obtained are to different ends. In re Zanetti, 34 Cal.2d 136, 141, 208 P.2d 657, ___ (1949).

General Statutory Scheme

From the preceding review of some of the more important civil rights, it can be seen that appointment of a conservator imposes some disabilites on the conservatee; a finding of incompetence imposes further, though indeterminate, disabilities; and in general the law is very uncertain in this area. Part of the uncertainty is due to the fact that many California statutes are apparently drafted on the erroneous assumption that appointment of a conservator, or a finding of incompetence, renders the conservatee incapacitated for purposes of those stautes. In fact, even a finding of incompetence in the conservatorship proceeding does not necessarily accomplish this result, and the issue of incapacity must be litigated by applying the language of the statute to the facts in a particular case.

The California statutory "scheme" is not atypical. Research of the law of all jurisdictions in the United States reveals that the typical statute, among other defects:

1. fails to state whether a formal legal adjudication of mental disability is required before personal and property rights are restricted;

2. fails to indicate whether prohibition of rights applies to a person who is in fact incompetent but who has not been so adjudicated;

3. neglects to spell out administrative procedures enforcing the suspension of rights; and

4. fails to specify when or how reinstatement of any suspended rights occurs.

See American Bar Foundation, The Mentally Disabled and the Law 303-340 (rev. ed. 1971).

Early working drafts of the Uniform Probate Code attempted to cure this problem by specifying precisely what abilities or disabilities the conservatee has:

> After appointment of a conservator and until termination of the conservatorship, the protected person is incapable of incurring a debt, transferring or encumbering his property, except by will, or otherwise affecting his business affairs unless the contract or other transaction is authorized or confirmed by the court or by the conservator. The protected person lacks capacity to sue or be sued, to exercise, except by will, or release a power of appointment, to exercise powers as a trustee, conservator, personal representative, custodian for a minor or attorney in fact, modify or terminate a trust, without authorization or confirmation by the court. The existence of a conservatorship has no bearing on the capacity of the protected person to marry, to vote or exercise other civil rights.

This provision was ultimately not adopted by the Uniform Commissioners, however, and Section 5-408(5) simply provides that, "An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person." The reasons for this switch are not apparent; it does, however, leave issues of capacity open to future litigation, as in California. See Effland, Caring for the Elderly Under the Uniform Probate Code, 17 Ariz. L. Rev. 373, 398-402 (1975).

Perhaps one reason the original Uniform Probate Code draft was rejected is that it would have imposed on all conservatees the same disabilites regardless of differences in their conditions. In California under Lanterman-Petris-Short conservatorships, the court may tailor specific incapacities for the particular conservatee. Under Welfare and Institutions Code Section 5357, an officer providing conservatorship investigation makes a report to the court with recommendations concerning the legal disabilities to be imposed upon the conservatee:

> The report shall also recommend for or against the imposition of each of the following disabilities on the proposed conservatee:

(a) The privilege of possessing a license to operate a motor vehicle. If the report recommends against this right and if the court follows the recommendation, the agency providing conservatorship investigation shall, upon the appointment of the conservator, so notify the Department of Motor Vehicles.

(b) The right to enter into contracts. The officer may recommend against the person having the right to enter specified types of transactions or transactions in excess of specified money amounts.

(c) The right to refuse or consent to treatment related specifically to the conservatee's being gravely disabled. The conservatee shall retain all rights specified in Section 5325 [right to refuse convulsive treatment, psychosurgery, etc.].

(d) The right to refuse or consent to 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. The report shall include an evaluation of such condition and the current treatment for such condition, if any.

Conclusion

California law does not automatically impose all disabilities upon appointment of a conservator, and the standards for the different disabilities vary. However, the different standards are not well thought out, and it is not clear what effect appointment of a conservator or a determination of incompetence has on the particular civil rights.

The commentators have stated that, "It is desirable that competency determinations be more discriminating and that they specify those functions which the incompetent should not and may not perform while stating those rights and functions which he remains entitled to assert or perform." The Mentally Disabled and the Law, supra, at 264. This would avoid litigation, since the determination of competence for particular purposes will have been determined before, rather than after, an act is performed. Allen, Ferster, and Weihofen, Mental Impairment and Legal Incompetency, 252-53 (1968). California law does this to a limited extent. A determination of incompetence in a conservatorship proceeding does act as notice to the world of the conservatee's inability to make a valid contract, and the status of incompetency is fixed until such time as the conservatee is restored to capacity. See, e.g., Gibson v. Westoby, 115 Cal. App.2d 273, 251 P.2d 1003 (1953). And specific disabilities can be imposed in Lanterman-Petris-Short Act conservatorships.