

Memorandum 78-61

Subject: Study F-30.300 - Guardianship-Conservatorship Revision  
(Capacity of Conservatee)

The staff has revised the provisions relating to the legal capacity of the conservatee in accordance with the Commission's decisions at the September 1978 meeting. See Exhibit 1 (pink). New language not previously reviewed by the Commission appears in Sections 1872 (and Comment) and 1876 (and Comment).

The staff has deleted the reference to property "over which the conservatee has a power or in which the conservatee has an expectant interest." Upon further consideration, it appears that such property may or may not be part of the conservatorship estate. As to that which is part of the estate, no special provisions are necessary. As to that which is not part of the estate, we have adopted the general approach not to deal with such property in the present recommendation, but to leave governed by general law.

The staff has also drafted the major necessary conforming provisions for this statutory scheme. See Exhibit 2 (green). Other minor conforming changes are necessary in such provisions as the contents of the petition for conservatorship, the citation to the proposed conservatee, and the information given to the proposed conservatee.

The staff believes the provisions as thus revised can be approved for inclusion in the comprehensive statute.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

## EXHIBIT 1

CHAPTER 4. LEGAL CAPACITY OF CONSERVATEEArticle 1. Capacity to Bind or Obligate Conservatorship Estate§ 1870. Transaction defined

1870. As used in this article, unless the context otherwise requires "transaction" includes, but is not limited to, making a contract, sale, transfer, or conveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right.

Comment. Section 1870 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 1871(c).

27/936

§ 1871. Rights not affected by limitations of this article

1871. 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 1871 lists certain rights of the conservatee that are not affected either by the basic limitations of Section 1872 or by the authority of the court to impose further limitations pursuant to Sections 1873 and 1874. See also the last paragraph of the Comment to Section 1872 and the second paragraph of the Comment to Section 1874.

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").

27/932

§ 1872. Effect of conservatorship on capacity of conservatee

1872. (a) 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 is limited to transactions that a reasonably prudent person might enter into.

(b) Nothing in this section shall be construed to limit the powers and duties of the conservator under this division.

Comment. Section 1872 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 1872 does, however, limit the capacity of the conservatee in accordance with the rule of former Section 1858 that the conservator must pay debts incurred by the conservatee if they appear to be such as a reasonably prudent person might incur. Section 1872 governs any type of transaction including, but not limited to, debts, gifts, sales, encumbrances, conveyances, delegating powers, and waiving rights. See Section 1870 (defining "transaction"). Making a will is separately treated and is not covered by Section 1872. See Section 1871(c). As to contracts and debts incurred for necessaries, see Section 1871(d).

The rule stated in Section 1872 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 1872 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. See Section 1876 and Comment thereto.

Section 1872 does not apply if the court has made an order under Section 1873 or 1874. 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 1873, the court may make an order giving the conservatee greater capacity to enter into transactions than is provided in Section 1872. Under Section 1873, the court may also make an order further restricting the limited capacity of the conservatee under Section 1872. If the conservatee is adjudged to be seriously incapacitated under Section 1874, the conservatee lacks the power to enter into any transaction that binds or obligates the conservatorship estate.

The rights of the conservatee under this section do not affect the powers and duties of the conservator, other than the duty to satisfy a transaction validly executed by the conservatee. See, e.g., Section 2430; see also Section 2404 (court order for payment of debt, expense, or charge lawfully due and payable). The conservator has the management and control of the conservatorship estate, including the duty to marshal, take possession of, and inventory the conservatee's assets. See Section 2401 and Comment thereto. A person seeking to enforce a transaction under Section 1872 will ordinarily seek compliance by the conservator, who decides in the first instance whether the transaction satisfies the requirements of this section. The conservator, conservatee, or third person may obtain a court determination and instructions to the conservator if necessary in a particular case. Section 2403.

In determining whether a transaction is one "that a reasonably prudent person might enter into" under Section 1872, 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).

Section 1872 does not address other possible effects of appointment of a conservator, whether of the person or estate, on the capacity of the conservatee, nor is Section 1872 intended to impliedly repeal any specific statute expressly granting exercise of a power to the conservator to the exclusion 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.

27/934

§ 1873. Court order affecting capacity of conservatee

1873. (a) The court may by order modify the capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into such transactions or types of

transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

(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 one that a reasonably prudent person might enter into.

Comment. Section 1873 gives the court authority to broaden or restrict the capacity of the conservatee to affect the conservatorship estate over that specified in Section 1872. See the Comment to Section 1872. The court might, for example, limit the ability of the conservatee to enter into specified types of transactions (such as real property transactions) or transactions not exceeding specified amounts (such as contracts in excess of \$500). Cf. Welfare and Institutions Code Section 5357 (similar court authority in Lanterman-Petris-Short Act conservatorships).

The authority of the court to broaden the powers of the conservatee under Section 1873 will be infrequently used in light of the fact that the conservatee has been determined to be substantially unable to manage his or her own financial resources or resist fraud or undue influence. Section 1801. A broadening order may nonetheless be appropriate in some cases. For example, it may be desirable to permit a conservatee with a religious background to continue to tithe, notwithstanding the limitations of Section 1872.

For authority of the court to withdraw all capacity of the conservatee to affect the conservatorship estate, see Section 1874.

27/935

§ 1874. Conservatee adjudged to be seriously incapacitated

1874. (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.

(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 particular purpose.

Comment. Section 1874 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 an 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 1874 affects only 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 §§ 1382.1 (capacity required to create power of appointment), 1384.1 (capacity required to exercise power of appointment), 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 1871 (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 of a determination that the conservatee has legal capacity. See Section 1876 and Comment thereto.

27/937

§ 1875. Good faith purchaser or encumbrancer of real property

1875. A transaction that affects real property of the conservatorship estate entered into by a purchaser or encumbrancer, in good faith and 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 the county in which the property is located.

Comment. Section 1875 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 1875 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. See Section 1876 and Comment thereto. The sole effect of Section 1875 is to make the limitations on the conservatee's capacity that exist under Section 1872 or under an order made under Section 1873 or 1874 inapplicable to the transaction if the notice of establishment of conservatorship has not been recorded.

31/530

§ 1876. Applicability of other governing law

1876. The provisions of this article relating to the capacity of a conservatee to bind or obligate the conservatorship estate, or an order of the court broadening or limiting such capacity, do not displace but are supplemented by general principles of law and equity relating to transactions including, but not limited to, capacity to contract, estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating cause.

Comment. Section 1876 is included to assure that the provisions of this article relating to the power of the conservatee to affect the conservatorship estate are not construed as the exclusive rules by which the validity of any transaction entered into by the conservatee is measured. For a comparable provision, see Commercial Code Section 1103 (supplementary general principles of law applicable). The ability of the conservatee to obligate the estate for transactions a reasonably prudent person might enter into, for example, is subject to the limitation that such a transaction may be void or voidable due to the lack of contractual capacity of the conservatee under Civil Code Sections 38 and 39. The failure of the court to limit or withdraw the capacity of the conservatee under this article cannot be taken as an adjudication that the conservatee has capacity. See Section 1874(c). Likewise, a court order broadening or restricting the capacity of the conservatee for particular purposes relates only to the ability to obligate the conservatorship estate and not to general contractual capacity since such an order can speak only as of the moment it is issued and cannot determine the subsequent status of the conservatee.

27/938

Article 2. Other Legal Capacity of the Conservatee

§ 1880. Capacity to give informed consent to medical treatment

1880. If the court determines that there is no form of medical treatment for which the conservatee has the capacity to give an informed consent, 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 1880 is new. See Section 2355 and Comment thereto. Section 1880 applies only where the court determines that the conservatee does not have the capacity to give an informed consent to any form of medical treatment.

If the conservatee has the capacity to give an informed consent to some forms of medical treatment but lacks the capacity to give informed consent to other forms of medical treatment, an order under Section 1880 is not appropriate. In such case, if medical treatment is required and the conservatee lacks capacity to give informed consent, a court order must be obtained under Section 2357 authorizing the treatment.

27/939

§ 1881. Capacity to vote

1881. 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 1881 continues the substance of a portion of former Section 1462.

Note. This section is contingent upon enactment of AB 372 (1973 Antonovich).

27/940

Article 3. Procedural Provisions

§ 1890. Time of making an order limiting capacity of conservatee

1890. An order of the court under this chapter may be included in the order of appointment of the conservator if the order was requested in the petition for the appointment of the conservator or may be made subsequently upon a petition made, noticed, and heard by the court in the manner provided in this article.

Comment. Section 1890 permits orders under this chapter to be made at the time the conservatorship is established or at a subsequent time. The section applies to all orders under this chapter 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. See Section 1452.



§ 1891. Petition for order affecting capacity of conservatee

1891. (a) A petition may be filed under this article requesting that the court make an order under this chapter or that the court modify or revoke an order made under this chapter. The petition shall state facts showing that the order requested is appropriate.

(b) The petition may be filed by any of the following:

- (1) The conservator.
- (2) The conservatee.
- (3) The spouse or any relative or friend of the conservatee.

(c) The petition shall 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.

Comment. Sections 1891 to 1896 adapt 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. Sections 1891 to 1896 do not, however, grant the right to a jury trial on the issue.

§ 1892. Notice

1892. Notice of the hearing on the petition shall be as follows:

(a) 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.

(b) If the conservator is not the petitioner and has not joined in the petition, the conservator shall be served with a copy of the petition and a notice of the time and place of the hearing at least 15 days prior to the hearing.

(c) If the conservatee is not the petitioner and has not joined in the petition, the conservatee shall be served with a copy of the petition and a notice of the time and place of hearing at least 15 days prior to the hearing.

(d) Service under subdivisions (a) and (b) 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.

Comment. See Comment to Section 1891.

31/528

§ 1893. Attendance of conservatee at hearing

1893. The conservatee shall be produced at the hearing except in the following cases:

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

(b) Where the conservatee is unable to attend the hearing by reason of medical inability established (1) by the affidavit or certificate of a licensed medical practitioner or (2) 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.

(c) Where the court investigator has reported to the court that the conservatee has expressly communicated that the conservatee (1) is not willing to attend the hearing and (2) does not wish to contest the petition, and the court makes an order that the conservatee need not attend the hearing.

Comment. See Comment to Section 1891.

31/532

§ 1894. Court investigator

1894. 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:

(a) Interview the conservatee personally.

(b) 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.

(c) 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.

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

(e) 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.

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

(g) 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.

(h) 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 (1) representation by legal counsel and (2) willingness to attend the hearing.

Comment. See Comment to Section 1891.

31/529

§ 1895. Hearing

1895. (a) 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.

(b) Except where the conservatee is absent from the hearing and is not required to attend the hearing under the provisions of Section 1893 and any showing required by Section 1893 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.

(c) After the court informs the conservatee of the matters listed in subdivision (b) 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.

Comment. See Comment to Section 1891.

31/533

§ 1896. Order

1896. (a) If the court determines that the order requested in the petition is proper, the court shall make the order.

(b) The court, in its discretion, may provide in the order 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.

Comment. See Comment to Section 1891.

31/525

§ 1897. Duration of order

1897. An order of the court under this chapter 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 1897 is new. For duration of an order limited by its terms, see Section 1896. For revocation or modification of the order, see Section 1898. For termination of the conservatorship, see Chapter 3 (commencing with Section 1860). Modification or termination of an order alters the special limitations on the conservatee's ability to affect the conservatorship estate as provided in the order. Termination or modification is not an adjudication of capacity for any purpose, however. See Section 1876 and Comment thereto.

§ 1898. Modification or revocation of orders

1898. An order of the court under this chapter may be modified or revoked upon a petition made, noticed, and heard by the court in the manner provided in this article.

Comment. Section 1898 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 1872, unless broadened by court order made pursuant to Section 1873.

## EXHIBIT 2

31/165

## CONFORMING REVISIONS

Management and Control By Conservator§ 2401. Duty to manage estate using ordinary care and diligence

2401. (a) The guardian or conservator has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The guardian or conservator:

(1) Shall exercise a power when ordinary care and diligence requires that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

Comment. Section 2401 supplements the provision of Section 2101 that the relationship of guardian and ward and conservator and conservatee is subject to the law relating to trusts. The standard stated in subdivision (a) of Section 2401 is consistent with trust principles but recognizes specifically that what is ordinary care and diligence varies with the circumstances of each case. Compare Civil Code § 2259 (duty of trustee to use at least ordinary care and diligence in the execution of the trust). In determining what constitutes ordinary care and diligence a professional guardian or conservator (such as a trust company or the trust department of a bank) will be held to a greater standard of care based on its presumed expertise than a lay guardian or conservator. Cf. Estate of Beach, 15 Cal.3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975). Section 2401 applies to all powers and duties of the guardian or conservator, whether or not prior court authorization is required. But see Section 2103 (effect of court authorization or approval).

Subdivision (b) of Section 2401 makes clear that ordinary care and diligence may require that the guardian or conservator exercise a power. For example, the guardian or conservator may fail to exercise ordinary care and diligence under the circumstances of the particular estate if the guardian or conservator fails to secure insurance to cover the risk of loss of property of the estate. At the same time, subdivision (b) also makes clear that the extent to which a power should be exercised is limited to what is required by the exercise of ordinary care and diligence under all the circumstances. Thus, for example, in purchasing insurance covering the estate property, the guardian or conservator should not purchase an amount in excess of the amount that would be purchased using ordinary care and diligence in the management and control of the estate. See also the discussion in the Comment to Section 2451 (collection of debts).

Section 2401 supersedes the portion of the first sentence of former Section 1502 which required every guardian of an estate to manage it frugally and without waste.

The duty of management and control stated in subdivision (a) requires that the conservator act diligently in marshaling, taking possession of, and making an inventory of the conservatee's assets. This obligation is imposed on the conservator notwithstanding the ability of a conservatee to enter into transactions that bind or obligate the conservatorship estate. See Section 1872 and Comment thereto.

#### CROSS-REFERENCES

##### Definitions

Conservator, § 2400

Guardian, § 2400

Guardian nominated in will, § 2108

Liability of guardian or conservator not limited to amount of bond, § 554

Nature of surety's liability, § 554

Nonresident ward or conservatee, § 2107

Petition for instructions or confirmation, § 2403

Removal of guardian or conservator for

Continued failure to perform duties, § 2650(c)

Failure to use ordinary care and diligence, § 2650(a)

Gross immorality or conviction of felony, § 2650(c)

Incapacity to perform duties, § 2650(d)

Insolvency or bankruptcy, § 2650(h)

Review of sales, purchases, and other transactions upon accounting, § 2625

32/716

#### Payment of Debts and Expenses

##### § 2430. Payment of debts and expenses generally

2430. (a) Subject to subdivisions (b) and (c), the guardian or conservator shall pay the following from any principal and income of the estate:

(1) The just debts incurred by the ward or conservatee before creation of the guardianship or conservatorship, giving priority to the debts described in Section 2431 to the extent required by that section.

(2) The just debts incurred by the ward or conservatee during the guardianship or conservatorship for the necessities of life to the extent reasonable. The guardian or conservator may deduct the amount of any payments for such debts from any allowance otherwise payable to the ward or conservatee.

(3) In the case of a conservatorship, any other debt incurred by the conservatee during the conservatorship only if the debt satisfies the requirements of Chapter 4 (commencing with Section 1870) of Part 3, or any order made thereunder.

(4) The reasonable expenses incurred in the collection, care, and administration of the estate, but court authorization is required for payment of compensation to any of the following:

(1) The guardian or conservator of the person or estate or both.

(ii) An attorney for the guardian or conservator of the person or estate or both.

(iii) An attorney for the ward or conservatee.

(iv) An attorney for the estate.

(b) The payments provided for by paragraphs (1) and (3) of subdivision (a) are not required to be made to the extent such payments would impair the ability to provide necessities of life to the ward or conservatee and the spouse and minor children of the ward or conservatee.

(c) The guardian or conservator may petition the court under Section 2403 for instructions when there is doubt whether a debt should be paid under this section.

Comment. Section 2430 is adapted from portions of former Sections 1501, 1501a, and 1858.

The priorities given under paragraphs (1) and (2) of subdivision (a) to debts incurred before creation of the guardianship or conservatorship and to debts for necessities incurred after such creation are derived from former Section 1858. The requirement that such debts be "just" is derived from former Section 1501 and requires that the debts be legally enforceable debts. Cf. Estate of Cross, 51 Cal. App.3d 80, 86, 123 Cal. Rptr. 825, \_\_\_ (1975) (construing the words "justly due" in Probate Code Section 929). The requirement that debts incurred for necessities incurred after creation be paid "to the extent reasonable" is new. Thus, the guardian or conservator may refuse to pay a debt for necessities to the extent the debt is unreasonable in amount.

Paragraph (3) is based on the third sentence of former Section 1858 but recognizes that the court may withdraw or restrict the conservatee's power to contract. See Sections 1873 and 1874. Where the court has not withdrawn or limited the conservatee's power to contract, the conservator nonetheless may disaffirm debts of the conservatee (other than for necessities to the extent reasonable) if the debt is not one that a reasonably prudent person might incur. See Section 1872; Board of Regents State Univs. 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).

Paragraph (4) supersedes the last portion of the second sentence of former Section 1858. This provision is generalized to apply to guardianships as well as to conservatorships. The requirement of court authorization for payment of compensation is new and is consistent with former Sections 1556 and 1556.1. See Sections 2640-2643 (order fixing compensation for guardian, conservator, or attorney). See also Section 2644 (order authorizing periodic payments of compensation to guardian, conservator, or attorney).



Subdivision (b) is based on the last portion of the first sentence of former Section 1858 and the last sentence of former Section 1501a.

Subdivision (c) continues the substance of a provision of former Section 1858 (conservatorship) and extends this provision to guardianships as well as conservatorships.

As to the compensation of the guardian or conservator and the attorney when court instructions are sought, see the Comment to Section 2640.

#### CROSS-REFERENCES

Allowance for ward or conservatee, § 2421  
Compensation and expenses of guardian or conservator or attorney,  
§ 2623  
Conveyance of property claimed to belong to another, §§ 2520-2528  
Death or ward or conservatee, expenses of last illness and funeral,  
§ 2631  
Definitions  
  Conservator, § 2400  
  Court, § 1418  
  Guardian, § 2400  
Effect of court authorization or approval, § 2103  
Independent exercise of powers, § 2591(p), (q)  
Order compelling payment of debts, § 2404  
Request for special notice, § 2700  
Review on settlement of accounts, § 2625  
Submitting matters to  
  Arbitration, § 2406  
  Summary determination, § 2405  
Support, maintenance, and education of ward, conservatee, and depend-  
  ents, § 2420

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#### Transition Provisions

##### § 1485. Effect on guardianships of adults and married minors

1485. (a) A guardianship of an adult, or a guardianship of the person of a married minor, in existence under this code on the operative date shall be deemed to be a conservatorship and is governed by the provisions of law applicable to conservatorships without petition or order, whether or not the letters of guardianship or the title of the proceeding are amended as provided in this chapter.

(b) A conservatee subject to a conservatorship described in subdivision (a) shall be deemed to have been adjudged to be seriously incapacitated as provided in Section 1874 unless otherwise ordered by the court.

(c) The validity of transactions and acts of a guardian or conservator shall not be affected by a misdescription of the office, nor shall any judgment, decree, or order of the court be invalidated by any such misdescription.

Comment. Section 1485 continues in effect as conservatorships all guardianships for adults and all guardianships of the person of married minors established under prior law. It preserves the effect of the creation of such guardianships under prior law. See *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 604-05, 275 P. 794, 799-800 (1929) (guardianship rendered the ward incapable of making a valid contract). However, such a person is not deemed to lack capacity to give informed consent for medical treatment unless the court so orders. See Section 2354. See also Section 1880.

Unless the court makes a different order, Section 1487 requires that the court make an order that the conservatee described in subdivision (a) be adjudged to be seriously incapacitated. However, Section 1487 and subdivision (b) of Section 1485 authorize the court to make a different order. Thus, the court may make an order under Section 1873 broadening or restricting the capacity of the conservatee.

#### CROSS-REFERENCES

Allowance for ward or conservatee, § 2421  
Definitions  
    Court, § 1418  
    Operative date, § 1480  
Order reflecting capacity, § 1487  
Wages of ward or conservatee, § 2601

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#### § 1486. Effect on conservatorship of person for whom guardian could have been appointed

1486. If a conservator was appointed under prior law on the ground that the conservatee was a person for whom a guardian could have been appointed, the conservatee shall be deemed to have been adjudged to be seriously incapacitated as provided in Section 1874 unless otherwise ordered by the court.

Comment. Section 1486 preserves the effect of a conservatorship established under prior law on the ground provided in former Section 1751 that the proposed conservatee was a person "for whom a guardian could be appointed under Division 4 of this code . . . ." Such a determination by the court making the appointment constituted an adjudication that the conservatee was incompetent. See *Board of Regents State Univs. 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). However, such a person is not deemed to lack capacity to give informed consent for medical treatment unless the court so orders. See Section 2354. See also Section 1880 and the Comment to Section 1485.

#### CROSS-REFERENCES

Allowance for conservatee, § 2421  
Definitions  
    Court, § 1418  
    Prior law, § 1480  
Order reflecting capacity, § 1487  
Wages of conservatee, § 2601

§ 1487. Order to reflect lack of legal capacity of existing wards and conservatees

1487. (a) At or before the time of the court's first biennial review after the operative date under Section 1850:

(1) With respect to guardianships described in Section 1485, the court shall make an order that the conservatee is seriously incapacitated unless the court makes a different order.

(2) With respect to conservatorships described in Section 1486, the court shall make an order that the conservatee is seriously incapacitated unless the court makes a different order.

(b) Noncompliance with this section does not alter the effect of Section 1485 or 1486, which shall continue to apply until the court makes an order as required by this section, and gives rise to no penalty.

Comment. Section 1487 implements Sections 1485 and 1486. Section 1487 requires that the court make an order that the conservatee is seriously incapacitated unless the court makes some other order such as, for example, an order broadening or restricting the conservatee's power to enter into specified transactions. See Section 1873.

CROSS-REFERENCES

Definitions

Court, § 1418

Operative date, § 1480

Rules of Judicial Council, § 1491