

9/28/78

First Supplement to Memorandum 78-61

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

Attached (Exhibit 1--pink) is a letter from Mr. Price raising concerns about the aspects of the guardianship-conservatorship revision discussed below.

Capacity of Conservatee

Mr. Price raises a number of problems with Section 1872 (effect of conservatorship on capacity of conservatee), attached to Memorandum 78-61.

Mr. Price objects to use of the word "capacity", and would substitute the word "power." Capacity is used here not in its physical sense, as he suggests, but in its legal sense, which Webster defines as "legal qualification, competency, power, or fitness." The staff believes that "capacity" is the superior term, but if it in fact is causing confusion, we could use the phrase "legal capacity."

Mr. Price points out the difficulties of granting the conservatee legal capacity to bind or obligate the conservatorship estate at the same time there is a conservator whose powers and duties include overseeing the conservatorship estate. We have argued this point at length at several meetings now, and have always come to the same conclusion that a conservatee should not be deemed incompetent without an additional court finding. This is also existing law, and the staff suggests that we not become embroiled in this discussion yet again.

Mr. Price questions whether the "reasonably" prudent person standard was intentionally substituted for the "reasonable" prudent person standard. The "reasonably" prudent person standard is taken from existing Probate Code Section 1858, which requires that the conservator pay debts incurred by the conservatee "if they appear to be such as a reasonably prudent person might incur." Perhaps the "reasonable" prudent person would be a better standard here since it would restrict the ability of the conservatee to affect the conservatorship estate to those transactions which are both reasonable and prudent, as opposed to those which are only reasonably prudent.

Mr. Price suggests it would be gramatically preferable to refer to transactions "into which" a reasonably prudent person might enter, as opposed to transactions which a reasonably prudent person might "enter into." The staff is not opposed to making the suggested change.

Fiduciary Duty in Managing and Controlling Community Property

Mr. Price objects to the provision imposing a fiduciary duty on the competent spouse in managing and controlling community property where the competent spouse is conservator. This provision appears in Section 3057 (protection of rights of spouse who lacks legal capacity), attached to Memorandum 78-62. Mr. Price rightly points out that a conservator is already subject to a fiduciary duty imposed by statute. However, the community property is not necessarily part of the conservatorship estate, and Section 3057 imposes a fiduciary duty on the spouse in managing that property.

Mr. Price also points out that the Commission decided to impose a fiduciary duty on the competent spouse where there is no conservator. This is true. The staff argues against imposing such a duty, however, in Memorandum 78-62.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



1st Supp. to Memorandum 78-61

F-30.300

EXHIBIT 1
UNITED CALIFORNIA BANK

TRUST DIVISION • 405 MONTGOMERY STREET • SAN FRANCISCO, CALIFORNIA
MAILING ADDRESS: BOX 39009 • SAN FRANCISCO, CALIFORNIA 94139

September 27, 1978

California Law Revision Commission
School of Law
Stanford, California 94305

Attn: Mr. John H. DeMouly,
Executive Secretary

RE: Guardianship-Conservatorship Revision

Gentlemen:

The following comments are offered in response to the material recently mailed in preparation for the meeting of October 6 and 7:

1. Minutes page 8 Section 3051-Community Property

The third sentence of this minute item reads as follows: "However, where the competent spouse is conservator, the competent spouse has a fiduciary duty similar to that imposed on the husband prior to enactment of equal management and control." It was my understanding from the discussion which was held on this point that the fiduciary duty referred to herein was to be imposed upon the competent spouse with respect to community property where no conservator of the estate exists. The fiduciary duty of a conservator is expressly provided for elsewhere in the draft. The point advanced at the meeting was that where a spouse, by virtue of his or her being the only competent member of the community, is possessed of de facto unilateral control of the community property, the status of management in reality reverts to the pre joint control provisions of the Civil Code. Thus the spouses are in unequal positions with respect to management and by virtue of this inequality a degree of fiduciary duty should be imposed upon the competent spouse.

2. Memorandum 78-61, page 2 Section 1872-Effect of Conservatorship on Capacity of Conservatee

The word "capacity" appearing in the second line of section 1872 is inappropriate. Capacity is an aggregation of physical, mental and/or emotional abilities which is compared by the court to the theoretical quantum of these faculties necessary to meet a given standard in functioning within the existing societal framework. It is a state of being which either does or does not exist with respect to a proposed conservatee. In the case of conservatorship of the estate, this standard relates to the ability of the proposed conservatee "to manage his (sic) own financial resources". The concepts of capacity and ability are inseparable. Again, the former is an aggregation of the degrees of the latter which exist with respect to basic human faculties.

Capacity can no more be affected by a statute or court ruling than can the speed with which an automobile was travelling immediately prior to impact. The statute can only set a standard to be met in determining whether incapacity exists and make provision for restrictions to be placed upon the powers of those whose abilities do not meet the standard.

It is here that the anomaly arises. The imposition of a conservatorship upon the estate carries with it a determination of lack of capacity (substantial inability) to manage, etc. After the establishment of this sine qua non, it then becomes the function of the code to define what steps are to be taken in order to remedy the deficiency which has been perceived to exist. One of these steps is to limit the powers of the conservatee to subject the assets of his or her estate to liabilities.

California Law Revision Commission
September 27, 1978
Page Three

I hasten to assure you that the foregoing diatribe is not, of course, for the sole purpose of urging substitution of the word "powers" for "capacity" in draft section 1872. It is simply to address once again the paradox which is created by the dual control concept of the proposed code revision.

A transaction may be, irrefutably, one into which a "reasonably prudent person" might enter. A reasonably prudent person is however in control, within the strictures of general law, of the continuing disposition of all of that persons assets. A reasonable transaction entered into by the conservatee may conflict with a reasonable course of action being pursued by the conservator in discharge of the conservator's duty in managing the totality of the conservatee's assets for the benefit of the conservatee. To force the conservator to pursue only those courses of action which cannot be adversely affected by independant acts of the conservatee over which the conservator has severely limited control is to reduce substantially the beneficial nature of conservatorship.

At the risk of being pedantic, I would further submit that the concept of the "reasonable prudent man" (person) has its origin in tort law as the standard of care to be exercised toward others. The Massachusetts prudent man rule is embodied in Civil Code section 2261 has no reference to reasonable-ness. In any event, the adjective "reasonable" qualifies the noun "man" in the existing rule as opposed to the use of the adverb "reasonably" to modify the adjective "prudent" in the draft section. Is this an intentional departure?

California Law Revision Commission
September 27, 1978
Page Four

In the same vein and for the sake of syntax, perhaps
the last clause of subsection (a) could read
"...transactions into which a reasonably prudent
person might enter".

Respectfully submitted,



G. Sinclair Price
Vice President
Regional Trust Counsel

GSP:dan3/1