#F-100 3/23/79

Memorandum 79-19

Subject: Study F-100 - Guardianship-Conservatorship Revision (Comments of California Bankers Association)

Attached is material provided by the legislative representative of the California Bankers Association outlining the major areas where the Association has problems with the proposed guardianship-conservatorship statute. All of the matters have been discussed at length by the Commission. You should read the attached material for an understanding of the areas of continuing concern.

The package of bills is set for hearing on March 28, and we expect to be able to report at the March 30-31 meeting what action the Assembly Judiciary Committee took with respect to the matters noted in the attached material.

Respectfully submitted,

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Executive Secretary

Sections 1870-1874

Legal Capacity of Conservatee

Unless adjudged to be "seriously incapacitated" or otherwise restricted by Court order or other general statutory provision, a conservatee would have the capacity to bind or obligate the conservatorship estate to any transaction. As defined in Section 1870, a transaction includes, but is not limited to, making a contract, sale, transfer, coveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right. The sole limitation imposed is that the transaction be such as would be entered into by a "reasonably prudent person".

What does "reasonably prudent person" mean? The reasonable prudent person rule in tort law is an objective standard applied to the conduct of alleged tortfeasors in determining whether such conduct meets the standard of care toward others required by society. If this safeguard is to have any relevance to the protection of a conservatee's assets, it must be wholly subjective and take into account all of the circumstances affecting the conservatee's estate, his or her needs, wants, obligations, lifestyle and myriad other personal considerations. A "reasonably prudent person" might purchase an automobile, but should the conservator, or court, take into consideration the fact that the conservatee does not like to drive, uses public transportation and has recently sold a car which he or she never drove? If these factors are not to be considered, the conservatorship affords little protection. If they are to be considered, the rule is a trap for the unwary, since no one knowing its true effect would wish to deal with a conservatee.

The concept is of no real benefit to the conservatee. The proposed statute provides, and the comment points out, that the conservator has management and control of the estate including the duty to marshal and take possession of the assets. Thus the third party must still deal with the conservator in order to enforce the transaction if it involves disbursement of funds or physical transfer of tangible articles. The rule merely avoids involvement of the conservator in early negotiations, at a time when any problems are easiest solved.

As to transactions which do not involve physical transfer such as exclusive listing and conveyance of real property, the result of the rule can be absurd. Title to real property remains in the conservatee who has a greater ability to convey than does the conservator. The conservator, after

exposing the property to the market and making a sale, must submit it to a probate court auction before the transaction is confirmed. The proposed statute is replete with well designed provisions controlling and limiting the powers of a conservator of the estate. None of these specific controls or limits applies to the conservatee. Proper management and control by the conservator is impossible when there is a concurrent unilaterally exercisable power of disposition in the conservatee.

There is a showing required before appointment of a conservator of the estate that the conservatee is substantially unable to manage his or her own financial resources or resist fraud or undue influence. This inability may not be proved by isolated incidents of negligence or improvidence. For those persons wishing only to delegate certain management related functions to others, there is a plethora of trust and agency relationships and commercially provided services available. It is not for these people that conservatorship proceedings are designed.

It was recognized, even suggested, by members of the Commission that proposed conservators of the estate, particularly corporate fiduciaries, will accept appointment only if the court expressly limits the transaction powers of the conservatee or makes a finding that he or she is "seriously incapacitated". This latter finding would, under Section 1874, remove the conservatee's capacity to enter into transactions. Apart from the fact that as a standard practice this would tend to make a mockery of the general rule, there are several other drawbacks to this approach:

1. The standard for determination of "serious incapacity" is non-existent. It is merely required that such a determination be "necessary under the circumstances". It is submitted that the quoted pre-requisites for imposition of a conservatorship create such necessity. The existence of this special designation, however, indicates that an undetermined quantum of undefined additional circumstances must exist before such necessity is found to exist. These undefined circumstances are then used to justify the elimination of powers which otherwise the Commission insists a conservatee should possess.

2. At the time when the proposed conservator files a consent to the appointment, he, she or it does not know whether the court will enter these findings or not. There is no way of knowing what rule will

govern the relationship. Subsequent resignation, as discussed later, is not the answer to this dilemma.

3. The stigma caused by the making of this finding and its endorsement on letters of authority is unwarranted and unnecessary. It was the avoidance of this type of brand which occasioned the shift from the old concept of adult guardianship in the first place.

If the idea of retention of powers was to allow execution of reasonably prudent transactions by the conservatee, why exclude those who are "seriously incapacitated"? The answer is that such retention is inconsistent with the purpose and aim of transferring management responsibility to a court supervised appointee.

In its Recommendation, at page 80, the Commission explains the requirement that the conservator of the estate of a conservatee spouse, and not the conservatee spouse himself, be the one to join with the other spouse in transactions involving community property. The Commission's statement that "This makes clear with whom the buyer must deal and gives needed certainty to affected transactions, particularly those involving real property." speakes eloquently to the general point.

In the interests of brevity, the following partial list of other considerations is presented.

1. "Joint" control raises serious problems of priority where two "prudent" transactions are pending or have been effected involving the same funds or property.

2. What and whose is the liability for breach of contract in the above described situation?

3. What is the time frame allowed for the conservator to make a determination of "reasonable prudence"?

4. How much time and expense to the court and to the parties, including discovery proceedings, will be involved in a determination of "reasonable prudence"?

It is emphasized that, in any event, the conservatee will and would retain the following powers:

a. The right to control an allowance.
b. The right to control his or her own wages or salary.
c. The right to make a Will.
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.
e. The right to vote.
f. The right to give informed consent to medical treatment.

The Solution - To provide that the imposition of a conservatorship upon the estate removes the transaction powers of the conservatee, except to the extent that the court on petition of conservator or conservatee grants to the conservatee any such powers with respect to specific property. This effect and procedure would, of course, be included in the mandatory information to be provided to the proposed conservatee by the court investigator.

Section 2430(b)

Payment of Debts

This subsection provides, in part, that debts of the ward or conservatee before creation of the guardian ship or conservatorship are not required to be paid "to the extent such payments would impair the ability to provide necessaries of life to the ward or conservatee and the spouse and minor children of the ward or conservatee". This provision is new. The statement in the Comment that it is based on portions of existing Section 1858 and 1501a is misleading. Punctuation clearly shows that a somewhat lesser limitation in Section 1858 applies only to debts incurred after creation of a conservatorship. The provision in Section 1501a applies only to guardianship, only to wages owed by the ward as an employer and expresses the limitation in terms of current needs.

In these days of rising costs it is possible to demonstrate that almost any disbursement would impair this ability at some point along the line, even in an estate of several hundred thousand dollars. To apply this limitation to pre-creation debts, is to foster unjust enrichment of conservatees and, much worse, to invite a "friendly" conservatorship proceeding for the sole purpose of gaining for the debtor a far larger exemption than that allowed by bankruptcy law. Deletion of this category of debt from the limitation of

2430(b) is strongly urged. There would remain the clear duty of the guardian or conservator to interpose all available defenses to the collection of any such debt, including the possible lack of contractual capacity of the debtor-now-conservatee under Civil Code Sections 38 & 39.

Section 2640

Compensation

The proposed law greatly expands the number and nature of acts which can be performed by the guardian or conservator of the estate without prior court authorization. Throughout its consideration of this area of the project, members of the Commission constantly referred to the availability of prior court authorization when the conservator for any reason, feels that such is appropriate. This was expressed in Section 2450 which recites that "Nothing in this subdivision precludes the guardian or conservator from seeking court authorization, instructions, approval, or confirmation ..."

The Commission comment to Section 2640, however, invites the court to consider whether compensation should be allowed to the conservator or attorney for petitions seeking instructions with respect to transactions falling into this category. To say that this has a chilling effect on the conservator is in no way an overstatement. Until very recently, the probate judge in a populous Northern California county took the position that no compensation would be allowed an executor or attorney for similar petitions concerning transactions covered by the Independent Administration of Estates act, which governs a comparatively narrow range of acts. Such a position, invited by the Commission's comment with respect to the optional unsupervised acts of conservators would be infair and unconscionable.

It is requested that the Committee express the intent of the Legislature to the effect that reasonable compensation for such petitions not be withheld absent a finding that the conservator's submissions to the court were in this case clearly unjustifiable.

Secton 2660

Resignation

There are, unfortunately, situations in which a guardian's or conservator's continuance in office becomes untenable. Common fairness requires that resignation be allowed in these circumstances. Balanced against this allowance is the

paramount reason for the relationship; the protection of the person and/or estate of the ward/conservatee. It is perceived that the proposed section 2660 makes resignation less available than a combination of existing Probate Code Sections 1125.1, 1582 and 1953 referred to in the Comment. It is urged that the Legislature consider, instead, a provision consistent with those sections which would incorporate the following elements drawn therefrom:

a) That the guardian or conservator may resign at any time.
b) That the court shall accept such resignation, making any order necessary for the protection of the ward or conservatee or his or her estate.
c) That the liability of such resigning guardian or conservator, if of the estate, or of the sureties on his or her bond shall not in any manner be discharged, released or affected by such resignation until the guardian's or conservator's account has been settled and the estate delivered to the person whom the court shall appoint to receive the same.

It is further urged that orders issued pursuant to this section be added to the 1st of those appealable in Section 2750.