

Second Supplement to Memorandum 85-7

Subject: Study L-1050 - Probate Code (Guardianship-Conservatorship)

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar has considered Memorandum 85-7 and sent the following communication to the Commission:

The State Bar Executive Committee strongly objects to the proposal by Atty. Bridgeman. There are many instances in which the relatives of the proposed conservatee within the second degree who are under the age of 18 years have parents or legal guardians that are very much interested in the process of the conservatorship. To limit notice to only people over the age of 18 substantially prejudices the rights of people interested in conservatorship proceedings who are not yet of age. Atty. Bridgeman seems to feel that sending such notice to persons under age of 18 is ridiculous. Our position would be that not sending notice to such persons would be serious violation of due process.

In the first Supplement to Memorandum 85-7, it is suggested that 14 rather than 18 be the age at which notice be dispensed with. The staff believes that this is a desirable modification of Arthur Bridgman's suggestion. One issue for Commission decision is whether notice in conservatorship proceedings should be required to be given to relatives of the second degree who have not attained the age of 14 years.

ELIMINATION OF NOTICE TO MINOR RELATIVES WOULD NOT VIOLATE DUE PROCESS

At the outset, the staff is of the view that this is a policy issue. We disagree with the statement of the State Bar Section that "not sending notice to [relatives of the second degree who have not attained the age of 18 years] would be serious violation of due process."

In the statutory provisions relating to court authorization of a transaction on behalf of a spouse lacking legal capacity, notice of the hearing on a petition for court approval of the transaction (in lieu of the otherwise required consent or joinder by the spouse lacking legal capacity) need be given only to the adult relatives within the second degree. See Probate Code §§ 3121, 3131. The other requirements for the hearing on court approval of the transaction are comparable to those required for establishment of a conservatorship, including appointment of legal counsel, presence of spouse lacking capacity at the hearing, and information to be given to the spouse lacking capacity by the court. See Prob. Code §§ 3140-3142.

The 14-year old standard suggested in the First Supplement to Memorandum 85-7 is consistent with provisions of the guardianship statute and the staff is unaware of any contention that the guardianship statute violates due process. Under the guardianship statute, the proposed ward is required to be served with a notice of hearing on the petition for appointment of a guardian only if the proposed ward is 14 years of age or older. (But notice also is required to be given to the person having the legal custody of the proposed ward and the parents of the proposed ward.) In addition, notice is required to be given by mail to the relatives of the proposed ward within the second degree (so far as is known to the petitioner) without regard to their ages. See Probate Code § 1511.

The general provision relating to notice of hearings after the guardianship is established (which applies to many different hearings) requires notice to the ward "if 14 years of age or older." See Section 1460. Other provisions of the guardianship law also use the 14-year standard. See e.g., Sections 1510 (minor if 14 years or older may petition for appointment of a guardian), 2545 (sale or exchange of personal effects or furniture or furnishings of ward's estate may be made if the ward is under the age of 14, or, if 14 or over, if the ward consents), 2642 (notice of hearing on removal of guardian to be served on ward if 14 or over), 2670 (notice of hearing on appointment of successor guardian to be served on ward if 14 or over), 2250 (notice of hearing for appointment of temporary guardian to be served on proposed ward if 14 or older), 2312 (copy of order appointing guardian to be mailed to ward if 14 or older), 2353 (if ward is 14 or older, no surgery shall be performed upon the ward unless have consent of the ward and guardian or have a court order).

The staff believes that the conservatorship law would satisfy due process requirements even if the 14-year old standard were used for notice to relatives of the proposed conservatee. In fact, the existing conservatorship statute is overburdened with protections for a proposed conservatee. The proposed conservatee must be produced at the court hearing unless (1) the conservatee is unable to attend the hearing by reason of medical inability (which must be certified to by a person authorized to practice medicine or a Christian Science Practitioner) or (2) the conservatee does not wish to attend the hearing and has no objection to the conservatorship or the proposed conservator. If the proposed conservatee is not going to be present at the hearing, a court

investigator (a qualified person appointed by the court) must interview and conservatee, inform the conservatee of his or her rights and of the nature of the proceeding, and determine whether the proposed conservatee desires to be represented by legal counsel. If the proposed conservatee does not plan to have legal counsel at the hearing, the court investigator must determine whether appointment of legal counsel is necessary to protect the interests of the proposed conservatee. At the hearing, the court is required to explain to the conservatee the nature of the proceeding and the rights of the conservatee. In addition, there is a periodic review by the court investigator of the need for continuing the conservatorship and whether the conservator is acting in the best interests of the conservatee. The net effect of all these requirements has been to reduce substantially the number of conservatorships that are established.

POLICY CONSIDERATIONS

The requirement that notice be given to all relatives of the proposed conservator within the second degree means that notice must be given to all of the following, so far as known to the petitioner:

- (1) Parents of the proposed conservatee.
- (2) Grandparents of the proposed conservatee.
- (3) Brothers and sisters of the proposed conservatee.
- (4) Children of the proposed conservatee.
- (5) Grandchildren of the proposed conservatee.

As a practical matter, only categories (4) and (5) above are likely to involve giving notice to relatives under the age of 14.

The State Bar Section favors existing law primarily because it believes that persons under 18 are likely to have parents or legal guardians who "are very much interested in the process of the conservatorship." The Section fears that failure to give notice of these relatives under the age of 18 will substantially prejudice their rights. Precisely what right a grandchild has in a conservatorship of a grandparent is not entirely clear. To be weighed against the possible benefit of the existing requirement is the cost to the estate of the proposed conservatee of mailing notice and a copy of the petition to minor children and grandchildren.

STAFF RECOMMENDATIONS

The staff believes that the view of the State Bar Section has some merit. We recommend that the existing provision requiring that notice of the hearing on establishment of a conservatorship be mailed to all relatives of the proposed conservatee within the second degree be retained.

We do not believe that the burden of mailing the notice to minor children and minor grandchildren of the proposed conservatee is that burdensome. But we further recommend that a number of existing provisions that require the mailing of notices of other hearings after the conservatorship is established be revised to adopt the general notice provision of Sections 1460-1469. This would mean that notice of proceedings after the establishment of a guardianship or conservatorship (with some exceptions) would be sent by mail to the following:

- (1) The guardian or conservator.
- (2) The ward if 14 years of age or older or the conservatee.
- (3) The spouse of the ward or conservatee, if the ward or conservatee has a spouse.
- (4) Any interested person who has appeared in the particular matter to which the hearing relates.
- (5) Any person who has requested special notice pursuant to the provisions permitting an interested person to request special notice.

In addition, where the court determines that the notice otherwise required is insufficient in the particular circumstances, the court may require that further or additional notice be given.

The staff recommended change is consistent with many provisions of the guardianship and conservatorship laws which adopt this scheme for hearings after the guardianship or conservatorship is established. See Exhibit 2 attached. If all relatives within the second degree (not just adult relatives) are given notice of the hearing to establish the guardianship or conservatorship, any interested person can request special notice of later hearings and proceedings if the person wants to follow the conservatorship.

At the time we review the guardianship-conservatorship provisions to determine what necessary conforming changes are required, we also will carefully review those provisions to determine what revisions would be required to adopt the above staff recommendation. A preliminary review identifying those sections that the staff recommends be retained without change and those that be changed to adopt the general notice provisions is set out as Exhibit 1 attached.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

STAFF RECOMMENDATIONS CONCERNING
GUARDIANSHIP-CONSERVATORSHIP LAW PROVISIONS
THAT REQUIRE NOTICE TO RELATIVES WITHIN THE SECOND DEGREE

PART 1. DEFINITIONS AND GENERAL PROVISIONS

§ 1461.7. Notice where conservator appointed for estate of absentee--
NO CHANGE

PART 2. GUARDIANSHIP

§ 1511. Notice of hearing on petition for appointment of guardian--
NO CHANGE

PART 3. CONSERVATORSHIP

§ 1822. Notice of hearing on establishment of conservatorship--NO
CHANGE

§ 1842. Notice of hearing on appointment of conservator for
absentee--NO CHANGE

§ 1847. Notice of hearing on appointment of conservator for missing
person--NO CHANGE

§ 1862. Notice of hearing on petition for termination of conservator-
ship--CHANGE

§ 1892. Notice of hearing on petition for order giving conservator
authority to make medical decisions for conservatee or for modifi-
cation or revocation of such an order--CHANGE

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP

§ 2214. Notice of hearing on petition to change venue of proceed--
CHANGE

§ 2351.5. Notice of hearing on petition to modify powers of limited
conservator--CHANGE

§ 2581. Notice of hearing on petition for substituted judgment--
CHANGE

§ 2614. Notice of hearing on objections to appraisals--CHANGE

§ 2652. Notice of hearing on petition to remove guardian or con-
servator--CHANGE

§ 2670. Notice of hearing on petition to appoint successor guardian--
CHANGE

§ 2683. Notice of hearing on petition to appoint successor con-
servator--CHANGE

§ 2804. Notice of hearing on petition to transfer assets out of
state--CHANGE

§ 2808. Copy of final account when all assets transferred out of
state--CHANGE

EXHIBIT 2

EXISTING PROVISIONS REQUIRING NOTICE TO BE GIVEN UNDER
GENERAL NOTICE PROVISIONS (SECTIONS 1460-1469)

PART 2. GUARDIANSHIP

§ 1601. Petition to terminate guardianship

PART 3. CONSERVATORSHIP

§ 1873. Petition for order authorizing conservatee to enter into particular transactions or types of transactions; petition to revoke or modify such an order

§ 1901. Petition for order determining whether conservatee has capacity to marry

PART 3. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP

§ 2351. Petition for order limiting powers and duties conservator otherwise would have or modifying or revoking such an order

§ 2357. Petition for order that guardian or conservator obtain or consent to specified medical treatment for ward or conservatee

§ 2359. Instructions from or confirmation by court of acts of guardian or conservator of the person

§ 2403. Instructions from or confirmation by court of acts of guardian or conservator of the estate

§ 2404. Petition for order compelling guardian or conservator to pay support or debts

§ 2421. Allowance for ward or conservatee

§ 2422. Order authorizing support notwithstanding third party liability

§ 2423. Payment of surplus income to relatives of conservatee

§ 2450. Order limiting authority of guardian or conservator of estate

§ 2500. Order limiting authority of guardian or conservator to compromise claims and actions or to extend, renew, or modify obligations

§ 2506. Petition for court approval of compromise of claim or action or extension, renewal, or modification of obligation

§ 2521. Petition for authorization of conveyance or transfer of property claimed to belong to ward or conservatee or other person

§ 2551. Petition for order to borrow money and give security

§ 2552. Petition for order authorizing refinancing, improving, or repairing property

§ 2553. Petition for approval of lease

- § 2556. Petition for order authorizing dedication or conveyance of real property or easement with or without consideration
- § 2570. Order authorizing investments and purchase of property
- § 2592. Petition for authority for independent exercise of powers
- § 2593. Petition for withdrawal or subsequent limitation of authority for independent exercise of powers
- § 2621. Notice of hearing on account of guardian or conservator
- § 2640. Petition by guardian or conservator of estate for compensation and for compensation of attorney
- § 2641. Petition for order allowing compensation to guardian or conservator of person
- § 2642. Petition by attorney for compensation
- § 2643. Petition for periodic payment of compensation
- § 2644. Petition for approval of contingent fee contract of attorney
- § 2660. Approval of resignation of guardian or conservator