Memorandum 86-22

Subject: Study L-700 - Guardianship-Conservatorship (Testamentary Capacity of Conservatee)

Attorney Harcourt Hervey has written the Commission to express concern about the provision of guardianship-conservatorship law that prevents the conservatorship court from taking away the conservatee's right to make a will. Prob. Code § 1871(c). Mr. Hervey points out that this may permit a third person to exert undue influence on the conservatee by persuading the conservatee to make or revise a will, and that because of the statute the conservator is powerless to prevent it. A copy of Mr. Hervey's letter is attached as Exhibit 1.

Conservatee's Legal Capacity Generally

California has a three-tiered scheme governing the conservatee's legal capacity:

First, there are powers that the conservatee lacks unless granted by the court: Unless the court grants the conservatee the power to make contracts, appointment of a conservator of the estate deprives the conservatee of that power. Prob. Code § 1872.

Second, there are powers that the conservatee keeps unless taken away by the court: Unless the court provides otherwise, the conservatee has the same power to consent to or refuse medical treatment (Prob. Code § 1880), to marry (Prob. Code § 1900), and to vote (Prob. Code § 1910) as he or she would have if there were no conservatorship.

Third, there are powers which the conservatee keeps and which the conservatorship court may not take away: Appointment of a conservator does not deprive the conservatee of the right to control a personal allowance, wages, or salary, to make a will, or to contract for necessaries. Prob. Code § 1871. The conservatee has the same power concerning these transactions as he or she would have if there were no conservatorship. Thus, in order to make a valid will, the conservatee must merely be "of sound mind" at the time the will is made. Prob. Code § 6100.

Conservatee's Testamentary Capacity

In providing that appointment of a conservator does not deprive the conservatee of the right to make a will, Section 1871 codified a long line of California case law. See, e.g., In re Estate of Johnson, 200 Cal. 299, 305, 252 P. 1049 (1927); In re Estate of Johnson, 57 Cal. 529, 531 (1881), Estate of Powers, 81 Cal. App.2d 480, 483, 184 P.2d 319 (1947). This rule is consistent with general U. S. law. See 79 Am. Jur.2d Wills § 58, at 319 (1975). Although in some states the appointment of a guardian or conservator for an adult creates a presumption of incapacity to make a will, no state renders the ward or conservatee completely without capacity to make a will. See id. There are two reasons for this:

(1) Appointment of a conservator is based on the conservatee's mental state when the appointment is made, while testamentary capacity is determined when the will is made. Estate of Nelson, 227 Cal. App.2d 42, 55, 38 Cal. Rptr. 459 (1964). The conservatee may lack testamentary capacity when the appointment is made, and yet have capacity when the will is made.

(2) The standard for appointing a conservator is different from the standard for testamentary capacity. A conservator may be appointed for one unable to manage his or her property or business, although he or she may have sufficient capacity to make a will. 7 B. Witkin, Summary of California Law Wills and Probate § 103, at 5618 (8th ed. 1974). "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity." Estate of Powers, supra.

Policy Question

Mr. Hervey would require notice to the conservator before the conservatee could make a will. The conservator could either consent to the will or seek court approval. The procedure for court approval could be drawn from the substituted judgment provisions (Prob. Code §§ 2580-2586) which permit the conservatorship court to review and approve various estate planning measures for the conservatee. If the conservator did not have notice of the conservatee's will, Mr. Hervey would permit the conservator, upon discovery, to petition to have it set aside.

Traditionally, the protection against undue influence of a conservatee has been the same as for testators generally: Undue influence is a basis for a will contest. The fact of conservatorship will likely invite scrutiny of the circumstances of the making of the will and may encourage a will contest. On the other hand, it would be administratively cleaner, and would tend to reduce litigation, if there were a procedure for the conservatorship court either to adjudicate the conservatee's lack of testamentary capacity, or to approve a proposed will, before death.

Does the need to protect the conservatee from possible undue influence override the historical policy in favor of preserving the conservatee's testamentary freedom to the maximum extent? Does the Commission want the staff to draft a proposal along the lines suggested by Mr. Hervey?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

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January 7, 1986

California Law Revision Commission
4000 Middlefield Road
Palo Alto, California 94303

Re: Probate Code Sections 1871, 1873 - Determination of Testamentary Capacity During Conservatorship.

Dear Commission members:

Recently, I was involved in a conservatorship in which the Conservatee's court-appointed attorney drafted a will for the conservatee and was prepared to have the conservatee execute it, without the prior knowledge of the Conservator. When the situation was inadvertently discovered, it was discussed with the opposing counsel involved. He took the position that Section 1871 gives the conservatee the absolute privilege to make a will and the attorney-client privilege prevents the attorney from making disclosure to the conservator and that the Probate Court is precluded from determining the testamentary capacity of a conservatee.

If this is so, does this mean that the Conservator is powerless to protect the conservatee from the over-reaching and undue influence of third parties in the area of estate planning?

Specifically, it seems that:

1. The Conservator should have the absolute right to advance notice of any attempted estate planning for the conservatee to permit the conservator to take any protective measures he deems necessary and

2. There should be three estate planning options available to a conservatee during the pendency of the conservatorship, as follows:

A. After notice and full disclosure to the Conservator, the conservator could consent in writing to the proposed estate planning, without court intervention; or

B. After notice and full disclosure to the Conservator, if the conservator was unsure of the appropriate action, the matter could be presented by petition to the Court for decision under a modified substituted judgment statute in the manner of a

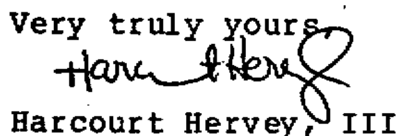
petition for instruction (The Conservator would be expected to make a recommendation); or

C. If estate planning is carried out without notice and disclosure, the Conservator would have the authority, again under a modified substituted judgment statute, to Petition the Court to vacate and set aside the estate plan, in favor of some other plan, approved by the Court. Such a plan, under the worst circumstances, might provide for distribution by intestate succession, rather than permit a distribution which would have resulted from duress or undue influence.

In summary, it seems the only tool a Conservator now has available is Probate Code section 2580 et seq. (substituted judgment proceedings) which seems at best a defensive tactic. Why shouldn't the Conservator be able to fully protect the conservatee's interests?

I urge you to look into this matter during your current work on the Probate Code.

Very truly yours,



Harcourt Hervey, III

HH:hs

cc: Honorable Julius A. Leetham
Valerie J. Merritt, Chair, LACBA Probate, Trust and Estate Planning Section.