

Date of Meeting: September 5-6, 1958
Date of Memo: September 2, 1958

Memorandum No. 10

Subject: Study No. 20 - Guardians for Nonresidents

The staff study on this subject discloses that Division 4 of the Probate Code, entitled Guardian and Ward, contains, inter alia, Chapter 3 (§§ 1440-1443) entitled Appointment of Guardians for Minors, Chapter 4 (§§ 1460-1462) entitled Appointment of Guardians for Insane and Incompetent Persons, and Chapter 15 (§§ 1570-1574) entitled Nonresident Wards. The study also discloses that there is some overlap between Chapter 15 and Chapters 3 and 4 with respect to nonresident wards and that this overlap has created some problems.

At the July meeting the Commission tentatively decided to clarify the law applicable to nonresident wards by (1) making Chapter 4 expressly applicable to resident insane and incompetent persons only, (2) making the provisions of Section 1461 and Section 1570 of the code, dealing respectively with the appointment of guardians for resident and nonresident insane and incompetent persons, substantially identical and (3) making a minor change in Section 1570 to conform it to Sections 1440 and 1441, thus eliminating the only substantial problem which exists with respect to the appointment of guardians for nonresident minors. The staff was then requested to study and report on whether, if the law respecting the appointment of guardians for resident and nonresident wards were thus made substantially

identical there was any further need for Chapter 15.

Our conclusion is that Chapter 15 should be retained. It contains five sections. Section 1570 provides for the appointment of guardians for nonresidents. The other four sections are as follows:

§ 1571. Every guardian of a nonresident ward has the same powers and duties, with respect to the estate of the ward within this state, and with respect to the person of the ward while living therein, as are prescribed by this code with respect to any other guardian. Such guardian must give bond to the ward as hereinbefore provided for other guardians, but his responsibility with regard to inventory, accounting and disposal of the estate is confined to such estate as comes into his hands in this state.

§ 1572. When the guardian and ward are both nonresidents, and the ward owns property in this state which may be removed to another state without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state of the ward's residence upon the application of the guardian to the superior court of the county in which the estate of the ward, or the principal part thereof, is situated.

§ 1573. Such application must be made upon ten days' notice to the resident guardian or executor or administrator, if there be such. The nonresident guardian must produce and file a certificate, under the hand of the clerk and seal of the court from which his appointment was derived, showing: (1) a transcript of the record of his appointment; (2) that he has entered upon the discharge of his duties; and (3) that he is entitled, by the laws of the state of his appointment, to the possession of the estate of the ward; or must produce and file a certificate, under the hand of the clerk and seal of the court having jurisdiction, in the state of his residence, of the estates of persons under guardianship, or of the highest court of such state, attested, in the case of a foreign country, by a minister, consul or vice consul of the United States, resident in state, that, by the laws of such state, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court.

§ 1574. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to remove the property of his ward to the state of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward. Such order is a discharge of the local

guardian or executor, administrator or other person in whose possession the property may be at the time the order is made, on filing with the clerk of the court the nonresident guardian's receipt therefor and transmitting a duplicate receipt, or a certified copy of such receipt, to the court from which such nonresident guardian received his appointment.

It seems clear that Sections 1572, 1573 and 1574 must be retained in substance in any organization of the Probate Code. Section 1571 also seems to be desirable even though it states what in its absence would probably be assumed to be the case. It should be noted, however, that Section 1571 raises an interesting problem which, while it is related to the problem under study, is considerably broader in its implications. Section 1571 states that the guardian of a nonresident ward has the same "powers and duties....as are prescribed by this code with respect to any other guardian." Does this mean, by negative implication, that the provisions of Division 4 of the Probate Code other than those dealing with powers and duties of guardians do not apply to nonresident minors and insane and incompetent persons? There are a large number of such provisions, all of which speak in language broad enough to be applicable in terms whether the persons affected are residents or nonresidents. It would appear that most if not all of them should be as applicable to nonresidents as to those who reside in the state. Do they so apply? What relevance does Section 1571 have to this question? The staff recommends that the Commission consider these questions as possibly constituting a topic for future study. The problem which they present would seem clearly to be beyond the scope of the present study, however, and the staff recommends that no attempt be made to answer it at this time.

If Sections 1571, 1572, 1573 and 1574 are to be retained it seems to make sense to have them collected, as they are, in a single chapter under the title Nonresident Wards. If this organization is continued the chapter should appropriately contain a section relating to the appointment of guardians for nonresidents. The staff recommends, however, that while Section 1570 should be retained for this purpose it should not itself specify the procedure to be followed but should simply incorporate by reference the general provisions of the code relating to the appointment of guardians. This will not only assure that the law relating to appointment procedure will be made uniform as of 1959 but that it will not later again become different for residents than for nonresidents as a result of amending only one of the sections. Section 1570 already takes this form insofar as the appointment of guardians for minors is concerned, incorporating the notice provisions of Section 1441 of the code. The staff recommends that the same be done with respect to insane and incompetent persons by deleting from 1570 its substantive provisions relating thereto and substituting a cross reference to Section 1461 of the code.

Attached is a proposed Recommendation of the Commission which reflects the staff recommendation made above. It departs to some degree from the action tentatively taken at the July meeting.

Respectfully submitted,

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Executive Secretary

September 2, 1958

RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION

Relating to Procedure for Appointing Guardians

Appointment of Guardian for Insane or Incompetent Person. Section 1461 of the Probate Code specifies the procedure to be followed in having a guardian appointed for an insane or incompetent person. The section is by its terms one of general application and, considered alone, would appear to apply in the case of nonresident as well as resident insane and incompetent persons. Section 1570 of the Probate Code provides expressly for the procedure to be followed in appointing a guardian for a nonresident insane or incompetent person. Since the provisions of Section 1570 are different in several respects from those of Section 1461, there arises the question of which statute controls with respect to nonresidents. Such an ambiguity would normally be resolved by applying the well-established rule of statutory interpretation that a statute expressly directed to a particular matter -- here Section 1570 -- controls over a statute of general application which is also broad enough to encompass the same subject. The ambiguity has not been so resolved in the case of the conflict between Section 1570 and Section 1461, however; rather, the courts have held that the procedures specified in both statutes must be complied with to make an effective appointment of a guardian for a nonresident insane or incompetent person. This construction of these statutes imposes more procedural requirements than would appear to be justifiable and is a

potential source of confusion or oversight, or both, by court and counsel.

This problem could be eliminated by revising Section 1461 to make it clear that it applies only to the appointment of guardians for resident insane and incompetent persons. The Commission recommends, however, that the problem be eliminated by deleting the provisions respecting appointment procedure from Section 1570 and inserting, in lieu thereof, a cross-reference in that section to Section 1461. This will make the same procedure applicable to both residents and nonresidents and will assure that this will continue to be the case.

In the course of making this study the Commission became aware of the need or at least the desirability of making certain substantive changes in Section 1461. Certain other changes should be made therein if this section is made applicable to the appointment of guardians for nonresidents.

Finally, certain changes should be made in both Section 1461 and Section 1570 to eliminate differences between them with respect to who may petition to have a guardian appointed. Accordingly, the Commission recommends that Sections 1461 and 1570 of the Probate Code be revised in the following respects:

1. Section 1461 authorizes a petition for guardianship to be filed by "any relative or friend." Section 1570 provides that a petition may be filed by "any friend....or any person interested in his estate in expectancy or otherwise." Both to avoid any difference in the law applicable to residents and nonresidents and to broaden the category of persons authorized to petition in the case of both it is recommended that both Section 1461 and Section 1570 be amended to permit a petition to be filed by "any relative, friend, or person interested in his estate in expectancy

or otherwise."

2. Section 1461 requires the petitioner to set forth the names of all relatives of the incompetent within the second degree residing in the State who are known to the petitioner and requires that these relatives be given five days notice by mail of the hearing of the petition. No reason appears why, if there are relatives within the second degree of an alleged insane or incompetent person living outside the State who are known to the petitioner they should not be named in the petition and given notice of the hearing and it is recommended that Section 1461 be amended so to provide. The Commission also recommends that at least 10 days notice of the hearing be required to be given to relatives named in the petition unless the court shortens the time for good cause shown. The longer period is particularly desirable when nonresident relatives are involved, as would be the case under the amendment of Section 1461 proposed by the Commission, because of the greater difficulty they will often have in arranging to be present or to have the alleged incompetent's interests adequately represented.

3. Section 1461 provides that a citation shall be issued to the alleged incompetent or insane person setting forth the time and place of the hearing of the petition and that the citation and a copy of the petition shall be personally served on him at least five days before the hearing in the manner provided by law for the service of summons. This provision should be limited in application to resident incompetent and insane persons. With respect to nonresidents the statute should require simply that the citation and a copy of the petition be delivered personally to the alleged insane or incompetent person not less than 15 days before the hearing unless

the court shortens the time for good cause shown. The longer period of notice appears to be necessary because of the greater difficulty which a nonresident may have in arranging for effective representation of his interests.

4. Section 1570 requires the court to give notice of the proceeding "to such other person or persons as the court or judge deems proper in such manner as deemed reasonable." Section 1461 has no similar provision, providing only that relatives within the second degree named in the petition be given notice by mail. It would seem that cases might easily arise in which there would be no such relatives but where notice could and should be given to more remote relatives or to friends of the alleged incompetent or insane person, either within or without the State, in the interest of having his interests adequately represented. It is recommended, therefore, that Section 1461 be amended to incorporate a provision authorizing the court to require that such notice be given.

5. Section 1461 provides that an alleged insane or incompetent person must be produced at the hearing if able to attend, with specific provisions for proof of physical inability to attend. Section 1570 contains no similar provision relating to nonresidents. While it obviously would not be practicable to require the attendance of the nonresident alleged incompetent or insane nonresident in every case, it would appear to be desirable to give the court discretion to require that he be produced in particular cases and it is recommended that Section 1461 be amended so to provide.

Appointment of Guardian for Nonresident Minor. Section 1440 of the Probate Code authorizes the appointment of guardians for resident and non-

resident minors; Section 1441 specifies the procedure to be followed in such cases. Section 1570 of the Probate Code also authorizes the appointment of a guardian for a nonresident minor. There is, however, no conflict or ambiguity among these sections as to the procedure to be followed in appointing a guardian such as there is between Section 1570 and Section 1461 in respect of guardians for nonresident insane and incompetent persons. This is because Section 1570 expressly incorporates by reference the notice provisions of Section 1441. There is, however, one inconsistency between Section 1440 and Section 1570, in that the former authorizes a minor 14 years of age or older to petition for the appointment of a guardian while the latter does not. The Commission recommends that this difference be eliminated by amending Section 1570 to authorize a nonresident minor 14 years of age or older to petition for the appointment of a guardian.

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 1461 and 1570 of the Probate Code, relating to the appointment of guardians for minors and for insane and incompetent persons.

The people of the State of California do enact as follows:

SECTION 1. Section 1461 of the Probate Code is amended to read:

1461. Any relative, ~~or~~ friend, or person interested in his estate in expectancy or otherwise may file a verified petition alleging that a

person is insane or incompetent, and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing in within or without this State. ~~+-thereupon-the~~ The clerk shall set the same petition for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him, ~~+-said~~

If the alleged insane or incompetent person is within the State the citation and a copy of the petition shall be personally served on the-alleged insane-or-incompetent-person him in the same manner as provided by law for the service of summons,. If the alleged insane or incompetent person is not within the State the citation and a copy of the petition shall be delivered to him, personally. In all cases service shall be made on the alleged insane or incompetent person at least five ten days before the time of hearing,+-notice unless the time be shortened by the court for good cause shown.

Notice of the nature of the proceedings and of the time and place of the hearing,+-se-set-by-the-clerk shall be mailed at-least-five-(5)-days before-such-hearing-date to each of such the relatives of the alleged insane or incompetent person named in the petition at least 15 days before the time of hearing unless the time be shortened by the court for good cause shown. The court may order that similar notice be given to other persons in such manner as the court may direct. Any relative or friend of the alleged insane or incompetent person may appear and oppose the petition.

Such-persons,+-if If the alleged insane or incompetent person is within the State and is able to attend, he must be produced at the hearing, and if he is not able to attend by reason of physical inability, such inability

must be evidenced by the affidavit of a duly licensed physician or surgeon, or other duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in this State in which case the affidavit of the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital, to the effect that such patient is unable to attend, shall be prima facie evidence of that fact.

If the alleged insane or incompetent person is not within the State and if the court determines that his attendance at the hearing is necessary in the interest of justice the court may order him to be produced at the hearing upon penalty of dismissing the petition if he is not produced. If such an order is made and it is contended that the alleged insane or incompetent is not able to attend by reason of physical inability, such inability must be evidenced by the affidavit of a duly licensed physician or surgeon, or other duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in which case the affidavit of the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital, to the effect that such patient is unable to attend, shall be prima facie evidence of that fact.

SEC. 2. Section 1570 of the Probate Code is amended to read:

1570. The superior court may appoint a guardian of the person and estate, or person or estate, of a minor or insane or incompetent person who resides out of the State and who is within the county, or who has estate within the county, and who has no guardian within the State, upon petition

of any relative or friend of such person or of anyone person interested in his estate, in expectancy or otherwise. A minor may, if he is fourteen years of age or older, petition to have a guardian appointed for himself.

If the nonresident ward is an insane or incompetent person, before ~~making-such-appointment-the-court-or-judge-must-cause-notice-to-be-delivered personally-to-the-alleged-insane-or-incompetent-person-and-to-be-given-to such-other-person-or-persons-as-the-court-or-judge-deems-proper-in-such manner-as-deemed-reasonable.~~ the appointment shall be made in compliance with Section 1461 of this code. If the nonresident ward is a minor, ~~notice shall-be-given-to-the-persons-and-in-the-manner-required-by~~ the appointment shall be made in compliance with Section 1441 of this code.

The guardianship which is first granted of a nonresident ward extends to all the estate of the ward within this State, and the court of no other county has jurisdiction.