

## Memorandum 76-82

Subject: Study 30.300 - Guardianship-Conservatorship

BACKGROUND

The Commission is authorized to study "whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised."<sup>1</sup>

This memorandum presents two policy issues relating to this broad topic:

(1) Should a priority be given to the study of the statutes relating to guardianship and conservatorship with a view to eliminating the overlap of the two statutes in the case of adults and revising the guardianship statute applicable to minors?

(2) What general approach should be taken in the revision of the guardianship and conservatorship statutes?

NEED FOR STUDY OF GUARDIANSHIP AND CONSERVATORSHIP STATUTES

One recommendation of the consultant on the child custody topic is that the standard for determining the person who should be given custody of a child should be the same whether the issue is raised in a marriage dissolution, adoption, guardianship, or other type of proceeding. It would be a useful first step to clean up the guardianship statute and (as recommended below) make it apply only to minors. Equally important,

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1. The Commission's consultant on this topic, Professor Brigitte M. Bodenheimer of the U.C. Davis Law School, has recommended that standards for custody of minors under the Family Law Act and under the guardianship provisions of the Probate Code be made uniform. See Bodenheimer, The Multiplicity of Child Custody Proceedings -- Problems of California Law, 23 Stan. L. Rev. 703, 731 (1971). Specifically, she has recommended that the order of preference for appointment of a guardian of the person of a minor (see Prob. Code §§ 1407, 1408) be eliminated and replaced by reference over to the child custody provisions of the Family Law Act (see Civil Code § 4600). Id.

the State Bar Committee on Probate and Trust Law has recommended that the guardianship and conservatorship provisions of the Probate Code be revised to eliminate the overlap between them.

Guardianship law is contained in Division 4 of the Probate Code, as it has been since the enactment of the code in 1931. Under Section 1405 of the Probate Code, a guardian may be appointed for the person, estate, or both, of minors and insane or incompetent persons. Experience under Division 4 has indicated a general reluctance to seek guardianships for noninsane adults because of the stigma associated with the required adjudication of incompetency. As a result, the State Bar proposed, and in 1957 the Legislature enacted, a conservatorship statute as Division 5 of the Probate Code. See W. Johnstone & G. Zilgitt, California Conservatorships § 1.2 at 3 (Cal. Cont. Ed. Bar 1968)[hereinafter cited as Johnstone]. A conservator may be appointed for the person, property, or both, of an adult "for whom a guardian could be appointed" or who for a variety of other reasons needs direction in the management of his affairs. See Prob. Code § 1751. Thus, although a conservator may not be appointed for a minor, a conservator may be appointed for an adult in any case in which a guardian could be appointed.

Much of the language of the conservatorship statute is identical to the guardianship provisions.<sup>2</sup> Several conservatorship sections incorporate guardianship law by reference.<sup>3</sup> Amendments to Divisions 4 and 5 since

2. Compare, for example, the following sections of Division 4 of the Probate Code with the corresponding sections of Division 5:

<u>Division 4</u> <u>(Guardian and Ward)</u>	<u>Division 5</u> <u>(Conservatorship)</u>
§ 1483.1	§ 1803
§ 1486	§ 1805
§ 1519	§ 1862
§ 1550	§ 1901
§ 1555	§ 1907
§ 1559	§ 1909
§ 1560	§ 1911
§ 1580	§ 1951
§ 1640	§ 2201
§ 1641	§ 2202
§ 1642	§ 2203
§ 1643	§ 2204
§ 1644	§ 2205
§ 1645	§ 2206
§ 1646	§ 2207

3. See, e.g., Prob. Code §§ 1702, 1751, 1852, 2151.

1957 have reduced the differences between the two, usually by conforming the guardianship provisions to the conservatorship provisions. See Johnstone, supra at xi.

When the conservatorship provisions were enacted, it was thought that eventually conservatorships would replace guardianships, but both proceedings were initially retained to permit the bar and the public to become familiar with the conservatorship proceeding. Johnstone, supra § 1.2, at 3.

Mr. Johnstone proposed to the May 18, 1974, meeting of the State Bar Committee on Probate and Trust Law that the law be revised to limit guardianships to minors and to limit conservatorships to adults. The committee unanimously approved Mr. Johnstone's suggestion and referred it to the Board of Governors of the State Bar with the recommendation that the matter be referred to the Law Revision Commission or C.E.B. "for study and revision of the statutes in line with the recommendation of the Committee."

THE STAFF RECOMMENDS: That a study of the statutes relating to guardianship and conservatorship be undertaken on a priority basis in cooperation with the State Bar Committee on Probate and Trust Law.

#### GENERAL APPROACH

##### The Johnstone Approach

The Johnstone approach, adopted unanimously by the State Bar Committee, would revise the law to limit guardianships to minors and to limit conservatorships to adults. One advantage of this approach is that it would retain the substance of the existing law concerning conservatorships. As far as the staff is aware, this law has worked well in practice and is generally regarded as a significant improvement over prior law. The law is under constant review and improvements are made each session. The effect of the Johnstone-recommended revision would be to eliminate a guardianship as an alternative to a conservatorship in the case of an adult.

Johnstone apparently did not contemplate any substantive revision in the law relating to guardianship of minors. His objective is to eliminate the overlap. However, if his approach is adopted, it would be

possible in drafting the law relating to guardianship of minors to make such changes in existing law as the Commission determines are necessary.

By way of summary, the Johnstone approach is conservatorship for property and person of adults; guardianship for person and property of minors. The staff recommends this approach.

#### The Uniform Probate Code Approach

The Uniform Probate Code takes a different approach, employing a guardianship for the protection of the person (whether an adult or a minor) and a conservatorship for the protection of property (whether the person is an adult or a minor). See Uniform Probate Code §§ 5-204, 5-303.

The Uniform Probate Code approach would require extensive revision of both Division 4 and Division 5. Division 4 would have to be revised to eliminate references to guardianship of property, and many provisions would have to be moved into Division 5 (see, e.g., Chapters 2, 2a, 8, 9, and 15). Division 5 would require extensive revision to include provisions relating to minors to parallel Division 4 and to eliminate references to conservatorship of the person. This approach might well meet with opposition in the Legislature, since Division 5 appears to have worked well in practice and the bar is now familiar with its provisions.

#### EMPLOYMENT OF CONSULTANT

The staff recommends that the Commission authorize the employment of Mr. Garrett Elmore as a consultant in connection with the revision of guardianship and conservatorship law, with Mr. Elmore's compensation to be negotiated. Mr. Elmore has previously done some preliminary drafting on this subject for the Bar Committee. The staff proposes to do the statutory drafting and to furnish Mr. Elmore with drafts as they are produced for his comment. Mr. Elmore would also be requested to attend Commission meetings when this subject is on the agenda for discussion.

Respectfully submitted,

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