

#30.300

11/21/77

Memorandum 77-82

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Powers
of Guardians and Conservators)

Our consultant, Garrett Elmore, has given additional thought to the powers of guardians and conservators. He has prepared a rough draft which has been slightly revised by the staff and is presented herewith (attached) for discussion purposes only. This draft takes the approach of attempting to describe those powers that may be exercised without court approval or confirmation. The staff favors the general approach of the attached draft.

If the Commission approves the attached draft (with or without revisions), we will incorporate its substance into the new comprehensive statute. This draft assumes that we will abandon an attempt to draft a special statute for "small" estates.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Article 1. Ordinary Management

§ 2520. Powers of ordinary management generally

2520. Except as limited by court order, a guardian or conservator is authorized, without court approval, confirmation, or instructions, to exercise as provided in this article powers of ordinary management of the estate of the ward or conservatee in the same manner as the ward or conservatee would or could do if possessed of legal capacity.

§ 2521. What constitutes ordinary management generally

2521. For the purposes of this article, what constitutes "ordinary management" is to be determined, in part, by the circumstances of the particular estate, the manner in which the estate was previously managed by the conservatee as owner, and the written instructions of the conservatee, if having legal capacity, expressed to the conservator.

§ 2522. Matters constituting ordinary management

2522. For the purposes of this article, "ordinary management" includes, but is not limited to, all of the following:

(a) Maintaining in good condition and repair the home or other dwelling of:

(1) The ward or conservatee; and

(2) The persons legally entitled to support from the ward or conservatee.

(b) Insuring property of the estate against loss or damage, and insuring the ward or conservatee, the guardian or conservator, the estate, and others against liability to third persons.

(c) Paying, contesting, and compromising taxes and assessments upon property of the estate or income or other taxes payable or claimed to be payable by the ward or conservatee, the guardian or conservator, or the estate; making tax returns for such persons or the estate.

(d) Instituting civil actions or proceedings on behalf of the ward or conservatee for the collection of debts due the ward or conservatee or for injury to or wrongful death of the ward or conservatee or for damage to, or recovery or protection of, real or personal property of the estate or for enforcement of any other right or cause of action of the ward or conservatee or estate; defending actions or proceedings against the ward or conservatee, guardian or conservator, or the estate;

compromising any action or proceeding. This subdivision does not apply (1) where another is appointed for the purpose, (2) to the compromise of a claim for injury to or wrongful death of the ward or conservatee where approval of a court pursuant to statute is not obtained, (3) where other provisions of this division or another statute expressly refer to the type of action or proceeding and require court approval, (4) where counsel is employed for the action or proceeding under a contract, (5) where the action or proceeding is to be instituted or defended by the guardian or conservator under a contract or other special arrangement, and (6) where the action or proceeding, in relation to past experience or the amount involved, or both, is extraordinary.

(e) Compromising claims by or against the estate or any of the persons named in subdivision (d), subject to the limitations stated in that subdivision.

(f) Continuing life insurance, disability insurance, and annuity policies of the ward or conservatee, memberships in hospital, medical, and other health plans of the ward or conservatee, and memberships in pension, retirement, and other welfare plans of the ward or conservatee; obtaining hospital, medical, or other health plans for the ward or conservatee and those persons legally entitled to support from the ward or conservatee; making changes in such policies or plans, including termination of or changes in coverage under such policies or plans.

(g) Prosecuting and compromising claims under the federal Social Security Act (_____), and under public assistance laws, state or federal.

(h) Paying reasonable expenses incurred in the collection, care, and administration of the estate; but this subdivision does not apply to compensation of the guardian or conservator or of an attorney for such person or for the ward or conservatee or the estate.

(i) Selling, exchanging, or otherwise disposing of tangible personal property of the estate, other than:

(1) Furniture and furnishings or personal effects of the ward or conservatee, unless the conservatee, having legal capacity, consents thereto; and

(2) Tangible personal property, other than that described in paragraph (1), which constitutes a principal asset of the estate.

(j) Acquiring tangible personal property by purchase, exchange, or other means for the use of the ward or conservatee or of the estate when there is reasonable need therefor and the cost is reasonable for the circumstances of the estate.

(k) Selling or otherwise disposing of tangible personal property which has become worthless or the cost of whose custody and care is uneconomic in relation to value.

(l) Leasing real or personal property where the term is not in excess of _____ years and the amount of rental computed on a monthly basis does not exceed \$ _____, or, regardless of rental, on a month-to-month basis.

(m) Taking or granting options for the purchase of tangible personal property where the transaction is reasonable for the circumstances of the estate.

(n) Depositing, redepositing, investing, reinvesting surplus funds in interest-bearing accounts or certificates of banks, trust companies, savings and loan associations, and credit unions, and making deposits without interest in a bank or banks other than for investment, when such deposits or certificates are insured under a federal law, now or hereafter in existence (including deposits and investments in a bank or trust company operated by the guardian or conservator).

(o) Investing surplus funds in direct obligations of the United States or of this state having a then maturity of not more than _____ years.

(p) Investing and reinvesting surplus funds in stocks, bonds, or other securities listed on a national securities exchange when such investment or reinvestment (1) is in accordance with the "prudent man" investment rule or is consented to in writing by a conservatee having legal capacity, or (2) carries out an investment policy of a prudent nature previously followed by the conservatee or, in case of a ward, by a predecessor guardian, but in making such investments or reinvestments, the guardian or conservator shall also take into consideration the then circumstances of the estate, indicated cash needs, and whether or not the proceeding will probably terminate in the near future.

(q) Renewing or extending obligations secured by encumbrance or security interest on real or personal property of the estate or obligations so secured which are part of the assets of the estate.

(r) Entering into contracts, other than secured obligations, to be performed within two years.

(s) Selling stock subscription rights or conversion rights; exercising stock or conversion rights where the amount does not exceed \$1,000 or five per cent of the then value of the personal property of the estate other than tangible personal property, whichever is the greater amount.

(t) Borrowing money on a temporary basis to provide immediate funds.

(u) Voting a security, in person or by general or limited proxy; paying calls, assessments, and any other sums chargeable or accruing against or on account of securities; participating in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers and liquidations and, in connection therewith to deposit securities with and transfer title and delegate discretions to any protective or other committee.

(v) Holding a security in the name or a nominee or other form without disclosure of the guardianship or conservatorship, so that the security may pass by delivery, but the guardian or conservator shall be liable for any act of the nominee in connection with the security so held.

(w) Doing any act incidental to any of the foregoing.

§ 2523. Matters not constituting ordinary management

2523. For the purposes of this article, "ordinary management" does not include, among other matters, any of the following:

(a) Selling, exchanging, or buying real property or an interest therein; creating, relinquishing, modifying, or otherwise affecting an interest in real property, except as provided by subdivisions (1) and (q) of Section 2522.

(b) Entering into any lease for, or agreement respecting, exploration for removal of gas, oil or other minerals.

(c) Making extraordinary repairs, improvements, or alterations.

(d) Placing an encumbrance or security interest on any property of the estate, but this limitation does not apply to either of the following:

(1) The acquisition or retention of property subject to an encumbrance or security interest created by another provided such encumbrance or security interest is not assumed.

(2) The purchase of tangible personal property in which title is retained by the seller as a security interest.

(e) Completing a contract entered into by the ward or conservatee to convey real or personal property.

(f) Determining third-party claims to real and personal property in the possession of, or title to which is held by, the ward or conservatee; determining the claim of the ward or conservatee to real or personal property title to, or possession of which, is held by another.

(g) Entering into a contract, other than a lease as provided by subdivision (1) of Section 2522.

(h) Continuing or participating in a business or other enterprise in which the ward or conservatee was engaged or had an ownership interest for a period of more than 60 days; effecting incorporation, dissolution, or other change in the form of organization of the business or enterprise.

(i) Doing any other act, not expressly permitted by Section 2522 or other statute, which, in the circumstances of the estate, is reasonably to be considered as an act outside the scope of ordinary management.

§ 2524. Powers exercisable with approval of court

2524. (a) With the approval of the court, the guardian or conservator may:

(1) Purchase real estate in this state (i) as a home for the ward or conservatee or as a home for a person or persons who are legally entitled to support or (ii) to protect the interest of the ward or conservatee.

(2) Agree with coowners of the ward or conservatee for a partition in kind or by sale, purchase from a coowner the undivided interest of such coowner, and bid on and purchase the property at a partition sale.

(b) With the approval of the court, the guardian or conservator may exercise specific powers of management whether or not enumerated in Section 2522, 2523, or 2524 appropriate to the circumstances of the estate. In such event, the letters shall have endorsed on them a notation in substantially the following form: "Special powers granted by order of (date)."

(c) An application for approval of the court pursuant to this section shall be made by petition upon the following notice (fill in).

§ 2525. Instructions or approval

2525. Notwithstanding the provisions of Section 2522, the guardian or conservator may submit any proposed matter or transaction to the court for approval or instructions.

§ 2526. Validity of actions of guardian or conservator

2526. Except with respect to real property and interests therein, the limitations expressed in this article do not affect the validity of the action taken by the guardian or conservator, or the title to any property conveyed or transferred, as to bona fide purchasers and encumbrancers and third persons dealing in good faith with the guardian or conservator and who have changed their position on the action, conveyance, or transfer without actual notice of the failure of the guardian or conservator to obtain court approval, instructions, or confirmation.

§ 2527. Other provisions not limited

2527. This article does not limit other provisions of this division which authorize the guardian or conservator to act without court approval.

§ 2528. Order limiting powers under this article

2528. Upon petition of a spouse, a relative, or other person interested in the estate, or upon written request of a conservatee having legal capacity or of a ward, if 14 or over, the court may (1) limit or deny the authority of the guardian or conservator to act without court approval as to any or all of the matters specified in Section 2522 or (2) direct that the guardian or conservator give to the person designated written advice of proposed action as to a described transaction or class of transactions. If such advice is directed to be given, the provisions of the Independent Administration of Estates Act shall apply, as nearly as may be. Notice of the hearing on such petition or request shall be given as the court directs.

Comment. This article is new. Its purpose is four-fold. First, by incorporating in the statute commonly used powers that are implied in the statutory provisions vesting the fiduciary with power to manage the estate (Section 2501) and by other specific provisions, it adds certainty to the statutory provisions. Second, by enlarging the matters for which court approval is not required, particularly in respect of power to buy and sell most tangible personal property and in respect of investment and reinvestment authority, it provides an incentive for dispensing with many formal court proceedings. At the same time, limitations are expressed to deter the use of the granted powers for purposes not in

keeping with the particular estate. The intent is to adopt a middle course between an absolute grant of power to act without court supervision, with accountability only upon settlement of accounts or through an equity proceeding brought by the ward or conservatee, and the traditional concept in this state that the administration of the estate is almost wholly had under court supervision. Generally, because of the sui generis nature of matters involving interests in real property, court supervision is retained for transactions involving real property. However, the court is authorized to shape an order granting special powers to meet the requirements of a particular estate. Third, protection is given third persons who have dealings with the guardian or conservator in transactions other than those involving real property (except for leases and renewals or extensions of encumbrances) when such third persons have no actual notice that a required court approval has not been obtained. Fourth, the court upon application may order that advice of proposed action be given to specified persons as to particular transactions or classes of transactions. The procedure is similar to, but not identical with that provided in the Independent Administration of Estates Act.

For provisions in former law expressly authorizing acts by the guardian or conservator without court approval, see _____. For provisions of former law relating to purchase of a home for the ward or conservatee and authority to act with reference to partition matters, see former Section 1661.5 and Sections 1506-1508.