

2/15/78

Memorandum 78-16

Subject: Study F-30.300 - Guardianship-Conservatorship Revision
(Appointment of Guardian Ad Litem)

At the January 1978 meeting, the Commission requested the staff to consider whether the provisions relating to a guardian ad litem (Code Civ. Proc. §§ 372-373.5) should be revised to require notice to an existing guardian or conservator of the estate, if any, before appointment of a guardian ad litem. In response to this, the staff has drafted proposed Section 373.2 to be added to the Code of Civil Procedure (Exhibit 1 to this memorandum) for Commission consideration. The section would be included in the conforming revisions bill.

The staff has some reservations about codifying such a section. It seems somewhat afield from the guardianship-conservatorship revision, and deals with a matter that is perhaps better dealt with by court rule than by statute.

Witkin describes the existing practice as follows:

The application does not require notice to anyone, and no form is prescribed. But the accepted practice is to present a written petition or application . . . setting forth . . . that the appointment is necessary because there is no general guardian, or the latter fails to act [3 B. Witkin, California Procedure Pleading § 58, at 1738 (2d ed. 1971).]

Does the Commission wish to include proposed Section 373.2 of the Code of Civil Procedure in the recommended legislation?

Respectfully submitted,

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EXHIBIT 1

STAFF DRAFT

Code Civ. Proc. § 373.2. Appointment of guardian ad litem where guardian or conservator of estate (added)

SEC. . Section 373.2 is added to the Code of Civil Procedure, to read:

373.2. (a) The application for appointment of a guardian ad litem shall disclose, if known to the applicant, the existence of any guardianship or conservatorship of the estate of the minor or insane or incompetent person for whom the guardian ad litem is sought.

(b) Unless the court otherwise orders, when the minor or insane or incompetent person has a guardian or conservator of the estate and such guardian or conservator is not the person seeking appointment as guardian ad litem:

(1) If the appointment of a guardian ad litem is sought by application to the court, a copy of the application shall be mailed to the guardian or conservator of the estate not less than 10 days prior to the presentation of the application to the court.

(2) If the appointment is made by the court on its own motion, the guardian ad litem promptly after appointment shall mail a copy of the order of appointment to the guardian or conservator of the estate.

(c) Failure to comply with this section does not affect the validity of the order appointing a guardian ad litem.

Comment. Section 373.2 is new. The requirement in subdivision (a) that an application for appointment of a guardian ad litem shall disclose the existence of a guardianship or conservatorship of the estate is consistent with existing practice. See 3 B. Witkin, California Procedure Pleading § 58, at 1738 (2d ed. 1971). The requirement in subdivision (b) that notice be given to the guardian or conservator of the estate will afford an opportunity for the guardian or conservator to seek appointment as guardian ad litem in place of the person applying or being considered by the court.