

## Memorandum 78-32

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Testamentary Guardians)

Background

At the May 1978 meeting, the Commission considered the staff proposal to continue existing Section 1484 (powers and duties of testamentary guardian may be "legally modified, enlarged or changed by the will by which he was appointed") with two changes. The changes suggested by staff (1) would have limited the application of the provision to testamentary guardians of the estate, and (2) would have permitted the powers to be modified by any signed writing by which a testamentary appointment could be made under the Commission's recommended legislation.

The Commission was of the view that the provision should not be expanded to permit modification in any signed writing, but that the provision should be restricted to a will as under present law. Commissioner Stanton favored retaining the provision with respect to a testamentary guardian of the person, but this issue was not resolved. The staff was directed to give the matter additional thought and to bring it back for further consideration by the Commission at a future meeting.

Testamentary Guardian of the Person

The staff continues to favor elimination of the provision for modification by will of the powers of a testamentary guardian of the person. There are two reasons for this view. First, since we are dealing with guardianship and not conservatorship, the provision affects custody of a minor. Under the Family Law Act as revised by the Commission's recommended legislation, the court will "consider and give due weight" to a testamentary appointment, but the appointment is not binding. If we make the modification of powers binding (except to the extent it may contravene public policy), the court may have to choose between a more desirable custodian having powers the court finds objectionable and a less desirable custodian who will have conventional powers. If, on the other hand, we permit the court to disregard the

will provision modifying the guardian's powers, then the provision is of little significance.

Second, because the basic grant of power to a guardian of the person is quite broadly stated (guardian has "care, custody, and control of, and is in charge of the education of, the ward") and the remaining provisions contain safeguards of the minor's individual rights (e.g., no compulsory surgery for minor over 12 except in extreme emergency), it would appear that modification of these powers by will would be either unnecessary or undesirable. The nine sections in the Commission's recommended legislation dealing with powers and duties of a guardian (or conservator) of the person are summarized as follows:

- § 2400. "Conservator" and "guardian" defined.
- § 2401. Guardian or conservator has "care, custody, and control of, and is in charge of the education of, the ward or conservatee."
- § 2402. Guardian or conservator may fix residence of ward or conservatee anywhere within California without permission of court, and anywhere outside California with court permission. Court must be notified of any change of residence.
- § 2403. Guardian has same right as custodial parent to require ward to receive medical treatment except that, if ward is 12 or over, then no surgery without consent or court order.
- § 2404. Conservator may require conservatee to receive medical treatment in extreme emergency, where court has authorized, or where conservatee has been determined permanently to lack capacity.
- § 2405. Involuntary civil mental health treatment for ward or conservatee may be obtained only under LPS Act.
- § 2406. Court order required for medical treatment not authorized under Section 2403 or Section 2404.

§ 2407. Additional conditions permitted in order of appointment with consent of guardian or conservator.

§ 2408. Court may authorize, instruct, approve, or confirm acts of guardian or conservator.

It would seem unnecessary to permit the testator to expand the basic power set forth in Section 2401 (care, custody, control, and education) which already appears quite comprehensive. It is conceivable that in some circumstances it would be desirable to permit the testator to restrict this broad power. However, if this is permitted, there is a danger that conditions may change and the court may be limited in its ability to act in the minor's best interest. The provisions which safeguard the minor's individual rights (see, e.g., Section 2403) have a due process flavor (see In re Roger S., 19 Cal.3d 921, 931, 569 P.2d 1286, 1292, 141 Cal. Rptr. 298, 304 (1977)) and ought not to be overridden by will.

#### Testamentary Guardian of the Estate

The main problem with existing Section 1484 as it relates to a testamentary guardian of the estate is its lack of specificity and the consequent hazard to a lawyer attempting to draft such a provision in a will. See Schlesinger, Testamentary Guardianships for Minors and Incompetents, in California Will Drafting § 10.48, at 329-30 (Cal. Cont. Ed. Bar 1965). The staff recommends that the statute be made specific, and thus useful, by permitting the testator by will to give a testamentary guardian of the estate any or all of the powers listed in the section on independent exercise of powers except to the extent the court may for good cause withdraw such powers.

#### Proposed Section

The staff proposes that the following section be added to Article 1 (appointment of testamentary guardian) of

Chapter 1 (appointment) of Part 2 (guardianship) of the recommended legislation:

1503. (a) Except as provided in subdivision (b), the powers and duties of a guardian appointed under this article are the same as those of a guardian appointed by the court.

(b) Except to the extent the court for good cause otherwise orders and subject to Sections 2593, 2594, and 2595, a testamentary guardian appointed by a will may, to the extent provided in the will, exercise any one or more of the powers listed in Section 2591 without notice, hearing, or court approval, confirmation, or instructions in the same manner as if such authority were granted by order of the court under Section 2590. As used in this subdivision, "testamentary guardian" means a guardian of the estate appointed by a will under Section 1500 or a guardian for property appointed by a will under Section 1501.

Comment. Section 1503 supersedes former Section 1484. The former provision which permitted a will to modify the powers of a testamentary guardian of the person is not continued. Under subdivision (a), a testamentary guardian of the person has the same powers and duties as any other guardian of the person.

With respect to a testamentary guardian of the estate, the ability of a testator to modify the guardian's powers is limited to broadening the power of the guardian to act without court approval as provided in Article 9 (commencing with Section 2590) of Chapter 6 of Part 4.

The provision of former Section 1484 requiring a testamentary guardian to "qualify" is superseded by Sections 1502(b) and 2300 (oath and, if required, bond).

Respectfully submitted,

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