#F-30.300 6/26/78

Memorandum 78-39

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Review of Comments on Exposure Draft)

BACKGROUND

We distributed a copy of the Exposure Draft of the Tentative Recommendation Relating to Guardianship-Conservatorship Law (May 1978) to members of the State Bar Subcommittee, to member of a special committee of the California Bankers Association, to members of a special committee of the California Land Title Association, to the office of the California Attorney General, to the State Department of Health Services, and others. This memorandum reviews the written comments we received. A number of persons who will be attending our July meeting will supplement their written comments with oral comments at the meeting or, if they did not provide written comments, will present their comments orally at the meeting.

Comments were received from the following persons and are attached hereto as exhibits:

Exhibit 1. State Department of Health Services (pink pages)

Exhibit 2. G. Sinclair Price (United California Bank) (yellow pages)

Exhibit 3. Almon B. McCallum (California Bankers Association) (green pages)

Exhibit 4. Garrett H. Elmore (Commission's consultant) (buff pages)

Exhibit 5. David C. Lee (Superior Court Probate Commissioner) (blue pages)

Exhibit 6. William S. Johnstone (Member State Bar Subcommittee) (gold pages)

Exhibit 7. Professor Brigitte M. Bodenheimer (Commission's consultant on child custody and adoption) (white pages)

SUGGESTED MEETING PROCEDURE

At the July meeting, the staff suggests that the Commission go through the Exposure Draft (May 1978) section by section. This memorandum indicates the comments received on the Exposure Draft in sequential

order. Persons who have oral comments or matters to bring up can bring them up as each section is reached in the Exposure Draft. This memorandum also indicates at appropriate places where material in the Supplemental Material (June 1978) can be taken up and discussed. We should have advised you when we sent you the Supplemental Material that it should be kept separate from the Exposure Draft.

GENERAL REACTION

Three commentators gave a general reaction to the Exposure Draft.

William S. Johnstone (Exhibit 6), a member of the State Bar Subcommittee, comments:

> Before concluding this letter, let me reiterate the comment which I made to your staff. As a general reaction to the draft, I am very favorably impressed with the work product, not only substantively, but from a drafting standpoint. Reviewing as much legislation as I do, and have done, for the State Bar, I am constantly depressed. In contrast, my feeling was one of exuberance in reviewing your draft. You and your staff should be commended for an outstanding job of drafting in the instance of this subject.

Ralph Colburn, Attorney, writing for the Department of Health Services (Exhibit 1), comments:

> We are pleased with the quality and coverage of your monumental work. We are gratified to see that you are preserving the existing protections that concern us. We are also gratified to see that you have solved many of the existing problems. For example, you have provided a procedure for receiving special notice of the filing of an inventory and appraisement which does not exist under present law.
>
> We suppose that you have allowed us to review the draft to raise questions about anything that does not appear to us to be quite solved, particularly in reference to concerns of the State Department of Health and its successor agencies. The balance of this letter will try to carry out that task. The nature of the task given to us is to list some negatives. We trust this will not be interpreted to detract from our opinion that you have an excellent draft.
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> * * * * *
>
> In closing this part of this letter we want to reiterate that you have produced an excellent draft. We also want it understood that although we have asked questions we are not requesting you to

answer them. They are purely to raise issues for your consideration.

* * * * *

In closing, we commend you for a draft that appears both scholarly and practical and express our appreciation for the opportunity to comment.

Professor Bodenheimer, (Exhibit 7), comments:

> Let me state to begin with that the proposed new scheme is a great improvement over the present law. Limiting guardianship to unmarried minors and consolidating many provisions common to guardianship and conservatorship makes a great deal of sense.

SECTION-BY-SECTION ANALYSIS

Preliminary Portion

Please turn in to the staff your copy of the preliminary portion of the recommendation on which you have noted any needed editorial or substantive corrections. We plan to prepare a revised preliminary portion and will distribute it to the Commission for review prior to sending it to the printer.

Bank in This State

The letter of transmittal noted that some provisions of existing law contain the word "bank" while others use the phrase "bank in this state" and that the Commission has not attempted to use uniform language in the proposed legislation. Mr. Price (Exhibit 2) notes that no problem is presented insofar as the term bank has reference to the exercise of fiduciary powers. See Probate Code Section 480. However, he makes no comment concerning the problem that caused concern to the Commission--whether deposits should be permitted in out-of-state banks not subject to the jurisdiction of California courts.

§ 1412. Conservator of the estate; conservatorship of the estate

This section is included to avoid the need in provisions referring to "conservator of the estate" to refer to "conservator of the estate or conservator of the person and estate, as the case may be." See the Comment to the section. Mr. Price (Exhibit 2) questions:

> Section 1412 Does the Commission feel there is any danger that this section could lead third parties to misunderstand the extent of

powers granted as evidenced by Letters? e.g. To assume that Letters evidencing appointment as conservator of the person would empower the holder to exercise the powers of a conservator of the estate.

It should be noted that the letters would have to appoint a person as "conservator of the person and estate" in order for the definition to become applicable. If a person is appointed merely as "conservator of the person," the person so appointed does not fall within the definition. Accordingly, in view of the need to avoid unnecessary repetition throughout the statute, the staff suggests that Section 1412 be retained without change.

§ 1418. Court

Our consultant, Mr. Elmore (Exhibit 4), suggests that Section 1418 be rephrased. The staff believes that the suggestion is a good one and suggests that Section 1418 be rephrased to read:

> 1418. "Court," when used in connection with matters in the guardianship or conservatorship proceeding, means the court in which such proceeding is pending.

§ 1450. Petitions, applications, and accounts to be verified

Mr. Elmore (Exhibit 4) suggests that this section be reworded to read:

> 1450. Except as otherwise specifically provided, a petition, report, or account filed pursuant to this division shall be verified.

The staff recommends this revision which deletes "application" from and adds "report" to the section as contained in the Exposure Draft. The reason for the suggestion is that an application for an extension of time, for example, is not always verified; likewise in the one instance where a motion for a new trial may be made.

If the above suggestion is adopted, the staff further suggests (as did Mr. Elmore) that a general definition be added to read:

> § 1428. Petition
>
> 1428. "Petition" includes an application in the nature of a petition.

We also suggest that the Comment to Section 1450 be revised along the lines suggested by Mr. Elmore in Exhibit 4 (these are technical revisions).

§ 1452. Trial by jury

Mr. Elmore (Exhibit 4) suggests a technical revision in the Comment. The staff plans to make this revision.

§ 1453. When motion for new trial allowed [new provision]

Mr. Elmore (Exhibit 4) suggests a new section be added to the proposed legislation. The following is extracted from his letter:

> [1453.] A motion for a new trial can [may] be made only in cases in which, under the provisions of this division, a right to jury trial is expressly granted, whether or not the case is so tried.
>
> Comment. Section [1453] is new. However, the principle is the same as that under former law, i.e., that in guardianship and conservatorship proceedings, the motion for new trial will lie only when there was a right to jury trial, even though the issues were not tried by a jury. See former Sections 1606 and 1708, incorporating the relevant parts of Prob. Code Section 1231.

Note: Since the new Act no longer relies upon the reference to probate procedure as to jury trials, the interrelated subject to when a motion for new trial may be made should be expressly included in the Act. The new section would also assist in making the procedure more clear. The timeliness of an appeal depends upon in this area may turn upon whether the procedure permits a motion for a new trial.

§ 1453. Guardian ad litem

This section will be renumbered to Section 1454 if the new section proposed above is added.

Mr. Johnstone notes that this section refers to an "incompetent" person. We have adopted the term "lacks legal capacity" in the guardianship-conservatorship revision. However, we have not attempted to rewrite the various statutes, including those relating to guardian ad litem in the Code of Civil Procedure, to delete references to "insane" persons, "person of unsound mind," "incompetent persons," and the like. Accordingly, we continue existing language in Section 1453 with the omission of the reference to "insane" persons which appears in the existing provision.

Chapter 3 (commencing with Section 1460). Notice of Hearing

Various provisions of the proposed legislation require or permit notice by mail. In some instances, a provision permits notice by mail

or by personal delivery. The staff recommends the inclusion of the following new provision in the proposed legislation to clarify various matters:

§ 1464. Manner of mailing notice; personal delivery

1464. (a) Unless otherwise expressly provided:

(1) If a notice or other paper is required or permitted to be mailed pursuant to this division, it shall be sent by first-class mail, postage prepaid.

(2) Mailing is complete under this division when the item is deposited in the mail, postage prepaid, addressed to the person to whom the item is mailed.

(b) If a notice or other paper is required or permitted to be mailed pursuant to this division, whether by first-class, certified, or registered mail, it may be delivered personally.

(c) If service is made by mail pursuant to this division in the manner authorized in Section 415.30 of the Code of Civil Procedure, the service is complete on the date a written acknowledgement of receipt is executed, if such acknowledgement is thereafter returned to the sender.

Comment. Section 1464 is new.

The inclusion of this section permits deletion of other reference to personal delivery.

The staff also recommends adding the following provision, which is based on Probate Code Section 1205, to the chapter on notices:

§ 1463. Postponement of hearings; notice

1463. The court may continue or postpone any hearing, from time to time, in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.

Comment. Section 1463 is the same as Section 1205.

If these sections are approved, the other sections in Chapter 3 will be renumbered.

§ 1460. Notice of hearing generally

Approval of the two sections proposed above permits deletion of the phrase "or personally delivered" in subdivision (c). Also approval of those sections takes care of the problem raised by Mr. Elmore (Exhibit 4) concerning whether Code of Civil Procedure Section 1013 (extension of time when document is served by mail) applies.

Mr. Elmore suggests that the words "or other paper" be deleted from subdivision (c) and the phrase "person filing a petition, report, or account" be substituted for "person filing an account, report, or other paper." In view of the proposed definition of "petition" to include an application in the nature of a petition, this change may be desirable.

Mr. Elmore questions whether two notices are required where a person is required to be given notice under Section 1460 and also has requested special notice pursuant to Chapter 9 of Part 4. See subdivision (d) of Section 1460. The staff sees no problem. One notice will satisfy the requirements of both sections. The time limits and methods of giving the notice are the same under both sections. We recommend no change in the section.

The reference to Section 1461 in the introductory portion of subdivision (a) should be to Section 1462.

One person orally suggested that the requirement of posting be eliminated except where a notice of sale is given. This would appear to be a desirable limitation on this requirement. The person making the suggestion stated that, in some cases, persons do examine the posted notices of sales to determine whether they might be interested in the property to be sold.

§ 1461. Notice to Director of Mental Health or Director of Developmental Services

The staff plans to revise this section so that it does not apply where the director is the petitioner.

Mr. Elmore (Exhibit 4) suggests that the phrase "petition, account, or other paper" that appears three times in subdivision (b) be replaced by the phrase "petition, report, or account." This appears to be a desirable change, consistent with the revisions to other sections previously suggested.

In paragraph (2) of subdivision (b), the numbering will be changed to conform to the new numbers given the sections referred to and a reference to Chapter 3 (commencing with Section 3100) of Part 6 added in place of the bracketed material.

Professor Bodenheimer (Exhibit 7) asks: "Should notice under this and various other provisions be given to directors of Regional Centers for the retarded and other developmentally disabled who have never been

in a state hospital? Or is this covered by the Health and Safety or other Code?" Section 1461 retains and somewhat expands the notice requirement of existing law. An examination of Health and Safety Code Sections 38200-38224 (Regional Centers for Persons with Developmental Disabilities) indicates that there are no provisions for notice to directors of regional centers. The staff suggests that the views of the State Department of Health Services be solicited on this point. We would not want to require a notice other than to one of the directors listed in Section 1461 even if the section were to be expanded to include persons served by regional centers for persons with developmental disabilities. Perhaps the proposed legislation should defer any decision on whether such a notice should be required and leave the decision on this matter to later legislation initiated by the State Department of Health Services or some other group.

§ 1462. Court may extend or shorten time for notice or require additional notice

The staff plans to delete the phrase "as the court requires" from subdivision (b) as suggested by Mr. Elmore (Exhibit 4).

§ 1463. Form of notice

The staff plans to add the word "or" after "chapter" in the second line of the text of this section.

§ 1471. Effect on existing guardianships and conservatorships generally

The staff plans to substitute "Section 1474" for "Sections 1474 and 1475" in the introductory phrase of this section.

§ 1472. Effect on bonds, security, and other obligations

As suggested by Mr. Elmore (Exhibit 4), the staff plans to revise this section to read:

> 1472. The bonds, security, and other obligations in effect immediately prior to the operative date shall continue to apply on and after the operative date ~~just~~ the same as if filed, issued, taken, or incurred under this division after the operative date.

§ 1473. Appointments or confirmations made under prior law

As suggested by Mr. Elmore (Exhibit 4), the staff plans to add "on or" before "after" in the last line of the text of this section.

§ 1474. Pending matters under prior law

Mr. Elmore (Exhibit 4) suggests that subdivision (a) of this section be revised to read as follows (with the addition of the reference to Section 1476 which is added by the staff):

> 1474. Subject to ~~Section~~ Sections 1475 and 1476 :
>
> (a) Any petition, ~~application, accounting, defense,~~ report, account, or other matter ~~instituted or maintained~~ filed or commenced before the operative date shall be continued under this division, so far as applicable, unless in the opinion of the court application of a particular provision would substantially interfere with the effective conduct of ~~a matter in progress~~ the matter or with the rights of the parties or other interested persons, in which case the particular provision does not apply and prior law applies.

In subdivision (b), as suggested by Mr. Elmore (Exhibit 4), the words "on or" should be inserted after "division."

The reference to "application" is unnecessary in view of the previously suggested definition of "petition." The reference to Section 1476 is added in view of the addition of the new section of this number. See Supplemental Material (June 1978).

§ 1475. Effect on guardianships of adults and married minors

The word "application" in the fourth line of the text of the section should be changed to "petition."

Mr. Elmore (Exhibit 4) suggests: "Suggest consideration of rewording subd. (a) to permit a guardianship to continue, without conversion to a conservatorship, if the relationship has terminated. Or perhaps a Comment could be added. The legal meaning is not sufficiently clear." The staff does not recommend this change. It would unduly complicate the provision and with little benefit.

The State Department of Health Services makes a comment concerning Section 1475 that does not call for revision of the section and deals with a problem created by other legislation. We would prefer not to attempt to deal with the problem. The following is the comment of the State Department of Health Services (Exhibit 1):

> 1475. This provision seems in order. However, it reminds us of a latent problem created by AB 1417 (1976). Wards and conservatees adjudicated incompetent before July 1, 1977 were so adjudicated under a definition that has been repealed and they are continued in a state of legal incompetency under definition under which they have never had a hearing.

§ 1476. Effect on conservatorship of person for whom guardian could have been appointed [Supplemental Material]

This is a new section that was not included in the Exposure Draft. The new section is found in the Supplemental Material (June 1978).

§ 1477. Amendment of letters of existing guardianships and conservatorships [Supplemental Material]

This section is found in the Supplemental Material (June 1978). It is a revised version of Section 1476 of the Exposure Draft.

The State Department of Health Services makes the following comment concerning this section:

> 1476. It is a good idea to have the letters of conservatorship show that the adult who was changed from a ward to a conservatee by operation of law, has been adjudicated incompetent. However, otherwise, is there any requirement that the details of the representative's power or the conservatee's disabilities be summarized in the letters? With the increase in variations in orders of appointments and provisions for modification of such orders there may be a need for a more informative form for letters. Some forms, even with a certification that they are still in full force and effect have very little information about what the conservator and conservatee may or may not be empowered to do.

There is merit to this observation. The existing Exposure Draft does not specify the content of the letters. See Section 2311 of Exposure Draft (page 119). Section 1831 requires that any limitations on power of conservatee (lacks legal capacity or has limited legal capacity; lacks capacity to make necessary medical decisions) be included in letters of conservatorship. The existing law and the Exposure Draft are far from clear on what a conservatee whose legal capacity has not been limited may do. You will recall the California Supreme Court held that a conservatee could make a binding pledge to donate a substantial sum of money to the Wisconsin State University. Under the Exposure Draft, the conservator need pay only such debts of the conservatee as are described in paragraphs (2) and (3) of subdivision (a) of Section 2515, and such payments are limited by subdivision (b) of that section.

The Commission could add to Section 2311 a requirement that a provision summarizing the effect of the provisions of Section 2515 noted above be included in the letters if the powers of the conservatee have not been limited under Section 1831. However, the suggestion that the

letters recite the powers of the conservator would be quite burdensome because of the scope and complexity of such powers. For example, the discussion of the conservator's powers and duties fills 77 pages in the Johnstone-Zillgitt book on California conservatorships.

§ 1478. References in statutes [to be renumbered § 1479]

Concerning this section, Mr. Price (Exhibit 2) comments:

> Section 1478 At the time that the age of majority was changed by statute in California, I recall that constitutional objections were raised to the amendment of existing sections by a blanket definitional change. The question is posed as to whether sub-section (a) of this section would be subject to similar objection.

The staff believes that subdivision (a) would be upheld as constitutional. The section merely implements Section 1475 which we believe creates no constitutional problems.

§ 1479. Rules of Judicial Council [to be renumbered § 1480]

Mr. Elmore correctly notes that the operative date section (Section 4 of the Act on page 241 of the Exposure Draft) will need to be revised to permit the Judicial Council to act under this section prior to the operative date. The staff plans to so revise the operative date section.

§§ 1500-1501. Appointment of testamentary guardian

Professor Bodenheimer (Exhibit 7) comments:

> As to guardianship, the idea of "appointment" by a parent or other person is retained. Subsequent sections clarify that court confirmation is required. The sections on conservatorship refer to "nomination" (§§ 1811-1812). Would it be preferable (and clearer to non-lawyers reading § 1500) if "nomination" were used in both cases?

§ 1500. Appointment of testamentary guardian by parent

The staff plans to delete the words "will or by" from subdivision (a) of this section as unnecessary.

In commenting on Section 2324, Commissioner Lee (Exhibit 5) comments:

> Should require that testamentary nomination specify appointment of guardian of estate. Too many such nominations are ambiguous as to whether is guardian of persons and/or estate.

The only way the staff can see to deal with this problem is to establish some kind of a presumption, such as a presumption that an appointment of a guardian by both parents in a signed writing is presumed to be the appointment of a guardian of the person and estate. A different presumption might be established. However, we would prefer not to provide such a presumption, thus leaving to the court the construction of the writing.

§ 1501. Appointment of testamentary guardian as to particular property

The staff plans to make the following technical revisions in this section:

(1) Delete "will or by" from subdivision (a).

(2) Substitute "such" for "the" before "parent" in subdivision (a).

(3) Substitute "guardian of the estate" for "other guardian" in subdivision (c).

The last two substitutions are in response to the comments of Mr. Price (Exhibit 2). Mr. Price raises another important substantive policy issue that merits serious Commission discussion:

> It is further suggested that the Commission consider a provision for special guardianships or conservatorships to be created other than by nomination in the ordinary course of guardianship or conservatorship proceedings. There are many instances where specific assets are more properly handled by a member of the family or friends of a conservatee whose estate otherwise requires management by an experienced financial institution. As an example, a relative living with the conservatee might be by far the most appropriate person to have custody and control of valuable jewelry, a coin or other valuation collections so as to allow the conservatee constant access. An adult son may very easily be the most appropriate person to control the family farm. The persons mentioned, however, may be entirely inappropriate candidates for management of the balance of the conservatee's estate. Agency and employment relationships in these situations are seldom satisfactory, giving rise to misunderstanding as to the extent to which each party is responsible for and authorized to act with regard to the assets.

§ 1510. Petition for appointment or confirmation

Professor Bodenheimer (Exhibit 7) makes the following comment concerning this section and Section 1511:

> The person having the "care" (de facto, physical, custody) of the proposed ward may be a neighbor or grandparent, whereas legal custody may have been awarded to another nonparent under Civil Code

§ 4600 or by the juvenile court. I think that both the legal custodian (if not a parent) and the actual caretaker should be listed.

The suggestion appears to be a desirable addition to the two sections.

§ 1511. Notice of hearing

See comment of Professor Bodenheimer (Exhibit 7) under Section 1510.

Mr. Johnstone suggests that the phrase in subdivision (f)(2) "has been declared free from their custody and control" be clarified. This phrase comes from existing Section 1441. A reference to Chapter 4 (commencing with Section 232) of Title 2 of Part 3 of Division 1 of the Civil Code could be added to the reference, but that would limit the exception to the notice requirement to the case where the proposed ward has been declared free from custody and control in a California proceeding. The staff would prefer to leave the provision in the form in which it is contained in the Exposure Draft.

Mr. Elmore (Exhibit 4) makes the following suggestion:

> The reference in subd. (b) to CCP 415.30 is troublesome. Literally applied, it conflicts with the 15 day provisions of (a). See Sec. 415.30 procedure. The writer would substitute wording for personal delivery to the following, with wording that a written admission of receipt of the notice and copy of the petition is equivalent to personal delivery.

The staff does not recommend the revision suggested by Mr. Elmore. The language used in the Exposure Draft is taken from various provisions of the existing guardianship and conservatorship statute (see existing Sections 1461 and 1754, both referring to Section 415.30). The general section that the staff proposes to add to the proposed legislation concerning the time when mailing is effective includes a provision that, when service is made in the manner provided for in Section 415.30, service is deemed complete on the date a written acknowledgment of receipt is executed, if such acknowledgment thereafter is returned to the sender. We believe that this provision is sufficient to clarify the section and eliminate any apparent conflict.

The State Department of Health Services (Exhibit 1) expresses the following concern about Section 1511:

1511. We wonder if the court should not have additional discretion to dispense with notice. We had an example in point. The Director of Health had petitioned to become guardian of a developmentally disabled child who had been a dependent child of the juvenile court. The child had not been relinquished to an adoption agency and had not been declared free of custody and control of his parents. It was probable that the mother could be notified. However, the child was born out of wedlock and was severely retarded and the mother has written letters begging that no one write to her about the child. Her last letter explained that she was happily married and the mother of subteen children and the she had never confided to her husband or other children about the existence of the developmentally disable child. Proposed 1511 seems to require that despite these circumstances the notice would have to be given to the mother.

§ 1512. Order for temporary custody

Professor Bodenheimer (Exhibit 7) makes the following comment concerning this section:

> This section divides § 1442 of the present law into two subdivisions. § 1512(a) is all right. Subdivision (b), however, is apt to be abused in today's climate of increasingly ferocious battles over children. Fathers or mothers who are separated, divorced, or unmarried, or nonparents seeking custody, may assert "that there is reason to believe that the minor will be carried out of the jurisdiction of the court." Thereupon the child may be arrested by a sheriff or the police and either handed over to the other party in the domestic feud or placed into custody, presumably in a neutral place which may be a police station. The arrest of young children by uniformed officers or other strangers is as harmful to children (or more so) as a childsnatching by a person whom the child knows. Subdivision (b) standing by itself does not require proof that the child suffers irreparable injury. The reenactment and reaffirmation by the legislature of this hitherto relatively obscure provision would surely be seized upon as a tool in today's family feuds - a tool that is extremely dangerous for children.
>
> The Titcomb case referred to in the comment warned that this "summary power should be exercised with extreme caution where the child is in the care of the other parent." 220 Cal. at 41 (1934). Judges today are under extreme pressures at times to use such extraordinary powers. For example, a parent may seek the arrest of a child under § 1512(b) when the other parent, who has legal custody, is in the process of moving. This subject is governed by Civil Code § 213. Restraining orders against the parent (not arrest of the child) are permitted only when the child's welfare is prejudiced. If § 1512(b) is enacted, the noncustodial parent may be able to argue successfully that that section, being the later enactment, supersedes or supplements § 213.

Perhaps the law should provide that a child may be seized and immediately returned to the parent who has custody when the other parent snatches the child and is in the process of leaving the state, if this is practically feasible. The use of criminal sanctions and police measures in such cases is presently being debated in the Congress and various state legislatures. The guardianship law is hardly the place for a piecemeal coverage of this subject which holds grave dangers for children. I urge the deletion of subdivision (b).

The staff recommends that Section 1512 be deleted entirely and provision made for a temporary guardian of the person. See discussion supra under Section 2250.

§ 1513. Investigation by probation officer of domestic relations investigator

Professor Bodenheimer (Exhibit 7) comments concerning subdivision (b): "The guardianship may be contested by a parent or by other petitioners for guardianship. The report would have to be made available to all parties." This is a good objection. The provision is taken from the Family Law Act (Civil Code Section 4602), the pertinent portion of which reads:

> The report may be considered by the court and shall be made available only to the parties or their attorneys at least 10 days before any hearing regarding the custody of a child. The report may be received in evidence upon stipulation of all interested parties.

We would rephrase Section 1513 to conform. Also, the 1977 Legislature added a provision to the comparable Civil Code Family Law Act provision providing for repayment to the county of the cost of the investigations and reports. The staff suggests a comparable provision be added to Section 1513. The revised section would read:

> § 1513. Investigation by probation officer or domestic relations investigator
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> 1513. (a) The probation officer or domestic relations investigator in the county in which the petition for appointment of a guardian is pending shall make an investigation of each case whenever requested by the court. If a petition for guardianship is filed for a minor of two years of age or under and the petition requests that a person be appointed as guardian who is not a relative of the minor, the court shall require the probation officer or domestic relations investigator to make an investigation.
>
> (b) The officer making the investigation shall file with the court a written confidential report. The report may be considered

by the court and shall be made available only to the parties or their attorneys at least 10 days before the hearing on the petition. The report may be received in evidence upon stipulation of all interested parties.

(c) When the probation officer or domestic relations investigator is directed by the court to make an investigation and report under this section, the court shall make an inquiry into the financial condition of (1) the parent, parents, or other person charged with the support and maintenance of the proposed ward and (2) the estate of the proposed ward. If the court finds such parent, parents, or other person or the proposed ward's estate able, in whole or in part, to pay the expense of the investigation and report, the court shall make an order requiring such parent, parents, or other person, or the guardian of the ward's estate when appointed, to repay to the county such part, or all, of such expenses of the investigation and report as, in the opinion of the court, is proper. The repayment shall be made to the county officer designated by the board of supervisors, who shall keep suitable accounts of such expenses and repayments and shall deposit the collections in the county treasury.

Comment. Subdivision (a) of Section 1513 continues the substance of former Section 1443 insofar as that section related to a guardian for a minor except that "domestic relations investigator" has been added to Section 1513 to conform to Civil Code Section 4602. Subdivisions (b) and (c) of Section 1513 are new and are based on the comparable provisions of Civil Code Section 4602.

CROSS-REFERENCES

Definition, court, § 1418
Report in case of certain nonrelative guardianships, § 1544

Suggested New Provision

Professor Bodenheimer (Exhibit 7), commenting with reference to Section 1870, states:

The draft does not include the appointment of counsel for a minor in a guardianship proceeding. Civil Code section 4606, effective in 1977, provides that the court may appoint counsel for the child. When there is a contest over custody (or guardianship), independent representation of the minor is desirable in certain cases.

Civil Code Section 4606 provides:

4606. In any proceeding under this part where there is in issue the custody of a minor child, the court may, if it finds it would be in the best interests of the minor child, appoint private counsel to represent the interests of the minor child. When the court appoints counsel to represent the minor, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the parents in such proportions as the court deems just.

The staff suggests that a new article be added to the chapter on appointment of guardians to read:

Article 4. Appointment of Counsel

§ 1520. Appointment of counsel to represent ward or proposed ward

1520. In any proceeding under this part for the appointment or confirmation of a guardian or the termination of a guardianship, the court may, if it finds it would be in the best interests of the proposed ward or ward, appoint private counsel to represent the interests of the proposed ward or ward. When the court appoints counsel under this section, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the parent, parents, or from the estate of the proposed ward or ward, in such proportions as the court deems just.

Comment. Section 1520 is drawn from Civil Code Section 4606 which provides comparable authority for appointment of counsel in proceedings under the Family Law Act where there is in issue the custody of a minor child. Section 1520, like Civil Code Section 4606, recognizes that independent representation of the minor whose custody is in issue may be desirable in certain cases.

§§ 1540-1544. Nonrelative guardianships

Professor Bodenheimer (Exhibit 7) raises a basic policy issue concerning Sections 1540-1544:

> I have difficulty seeing the need or desirability of these provisions. There are no such requirements under Civil Code section 4600. It makes no difference under section 4600 whether the nonparent is a relative or not. § 1544 is particularly objectionable. There is no reason why guardianship investigations should not all be made, like CC 4602 investigations, pursuant to § 1513. Guardianship proceedings are used at times when adoptions are not proceeding satisfactorily. See San Diego County Dept. of Welfare v. Superior Court, 7 Cal. 3d 1 (1972); Guardianship of Henwood, 49 Cal. 2d 639 (1958). Naturally, in such cases the investigation must be made by an agency which is not involved in the adoption.
>
> However, it would be desirable that the petition under § 1510 disclose whether the petitioner, or any other person known to the petitioner, has filed an adoption petition or a guardianship petition concerning the same child in the particular county or any other county of the state. The petition should also disclose whether any action has been taken under the Juvenile Court Act, whether a formal petition has been filed under that Act or not.

On the other hand, the State Department of Health Services (Exhibit 1) mentions the procedure under Sections 1540-1544 (which follow existing

law) and suggest only a technical change, which the staff will make in the proposed legislation if Professor Bodenheimer's suggestion is not adopted. The following is the comment of the State Department of Health Services:

> The quality of your draft is so good that we could find only one error. That is in Section 1543 of your draft. The notice and copy of the petition should be mailed or delivered to the Director of Social Services instead of the Director of Developmental Services. At present the notices given under Probate Code Section 1440(c) are received by the Adoption and Foster Care Section of the Children Social Services Branch of the Social Services Division of the Department of Health. Upon receiving the notices the Adoption and Foster Care Section, in turn, alerts the agency investigating the adoption or local agency handling foster care licensing, whichever is appropriate, to furnish a report to the court. In the reorganization of the Department of Health which is operative July 1, 1978, the Social Services Division will become part of the Department of Social Services. Probate Code Section 1440(c) notices, therefore, should, appropriately, be furnished to the director of that department.

§ 1601. Termination by court order

Professor Bodenheimer (Exhibit 7) suggests in substance that this section be revised to read:

> 1601. Upon petition of the guardian, a parent, or the ward and after such notice ~~to the other~~ as the court may require, the court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is otherwise in the ward's best interest to ~~do so~~ terminate the guardianship.

The staff believes that a parent should have a right to petition for termination of the guardianship. The other language added to Section 1601 comes from existing law (grounds for discharge of guardian) and perhaps should be added to the section for that reason. However, the addition appears unnecessary since, under the section as set out in the Exposure Draft, it would be "in the ward's best interest" to terminate the guardianship if the guardianship is no longer necessary. In connection with this matter, see the Comment to Section 2650.

§ 1812. Order of preference for appointment as conservator

Mr. Elmore (Exhibit 4) correctly points out that subdivision (a) of Section 1812 is inconsistent with the second sentence of Section 1810.

As he suggests, the conflict should be resolved by revising subdivision (a) of Section 1812 to read:

> (a) Subject to Section 1810, the selection of a conservator of the person or estate, or both, is solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be for the best interests of the proposed conservatee.

The State Department of Health Services (Exhibit 1) points out an inconsistency between priorities for guardians and conservators under provisions of the Welfare and Institutions Code and the proposed legislation:

> There appears to be a conflict between the preference section for a LPS conservator and the proposed Probate Code Section 1812(b)(5). The combination of Welfare and Institutions Code Sections 5350(b) and 5355 seem to give the highest priority to the person designated most suitable by the conservatorship investigator while proposed Probate Code Section 1812(b)(5) places anyone eligible under the Welfare and Institutions Code at the bottom of the preference list.
>
> * * * * *
>
> 1812(b)(5). There are at least three separate provisions for guardians or conservators under the Welfare and Institutions Code:
>
> 1. LPS conservators (W&I 5350)
> 2. Department of Mental Health (W&I 7284)
> 3. Public Guardian (W&I 8000 et seq.)
>
> Under 1812(b)(5) persons who qualify under the Welfare and Institutions Code are given the lowest preference but the order among themselves is not given. As mentioned earlier despite 1812(b)(2) the LPS law seems to give preference to the person designated by the conservatorship investigator. (See W&I 5350(b) and 5355.)

Section 5350 of the Welfare and Institutions Code provides in part:

> 5350. A conservator of the person, of the estate, or of the person and the estate may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism.
>
> The procedure for establishing, administering and terminating conservatorship under this chapter shall be the same as that provided in Division 5 (commencing with Section 1701) of the Probate Code, except as follows:
>
> (a) A conservator may be appointed for a gravely disabled minor.
>
> (b) Appointment of a conservator under this part shall be subject to the list of priorities in Section 1753 of the Probate Code unless the officer providing conservatorship investigation recommends otherwise to the superior court.

(c) When a gravely disabled person already has a guardian or conservator, the superior court may appoint him or another person as conservator under the provisions of this chapter.

* * * * *

Section 5355 of the Welfare and Institutions Code provides:

5355. If the conservatorship investigation results in a recommendation for conservatorship, the recommendation shall designate the most suitable person, corporation, state or local agency or county officer, or employee designated by the county to serve as conservator. No person, corporation, or agency shall be designated as conservator whose interests, activities, obligations or responsibilities are such as to compromise his or their ability to represent and safeguard the interests of the conservatee. Nothing in this section shall be construed to prevent the State Department of Mental Health from serving as guardian pursuant to Section 7284, or the function of the conservatorship investigator and conservator being exercised by the same public officer or employee.

When a public guardian is appointed conservator, his official bond and oath as public guardian are in lieu of the conservator's bond and oath on the grant of letters of conservatorship. No bond shall be required of any other public officer or employee appointed to serve as conservator.

The staff believes that the statutory scheme under the Welfare and Institutions Code is a desirable one for that code. We do not, however, recommend that the Probate Code conservatorship provisions be conformed; there is sufficient flexibility in the Probate Code provisions because the priorities apply only in the case of "persons equally qualified" (subdivision (b) of Section 1812) and the general priority scheme is subject to the overriding right of the conservatee to designate the conservator.

§ 1820. Filing of petition

Professor Bodenheimer (Exhibit 7) makes the following comment:

I wonder whether there is any way to have the changeover from guardianship to conservatorship take place automatically. Guardianship may lapse and there is no one who petitions for conservatorship in a case where there is severe retardation or mental disability. Perhaps the court on its own motion should continue a guardian as conservator when the need is clear.

The staff strongly objects to this suggestion. We believe that the proposed conservatee should have all the rights that any adult would have if a conservatorship were to be established. A guardianship is

established merely because the ward is a minor and needs a guardian of the person or estate or both. The same is not true of a conservatorship--a conservatorship can be established only upon a showing that the proposed conservatee is a person for whom a conservator can be appointed. In the case of severe retardation or mental disability, a "friend" of the proposed conservatee can petition for appointment. See Section 1820. Perhaps the section should be expanded to permit additional designated persons--Director of Mental Health, Director of Developmental Services, and other public officials--to petition.

§ 1821. Contents of petition

The State Department of Health Services comments:

> 1821(f)(1). If the proposed conservatee is adjudged to lack legal capacity what will he be legally incapable of doing? What does 1821(f)(1) add that is not covered by 1821(f)(2) or 1821(f)(3)? Can he no longer make a will during lucid intervals? Can the conservator interfere in the conservatee's marriage? Is 1821(f)(2) applicable only to conservatorship of the estate? Is 1821(f)(3) applicable only to conservatorship of the person?

The staff recommends no change in Section 1821. Subdivision (f) is designed to implement subdivisions (a) and (b) of Section 1831. Paragraph (1) of subdivision (f) is a request for a determination that the proposed conservatee is completely without legal capacity. Paragraph (2) permits the court to withdraw the ability of the conservatee to make certain contracts but, at the same time, the conservatee can make other contracts of a routine nature.

As to the capacity to make a will, the following is extracted from W. Johnstone & G. Zillgitt, California Conservatorships § 1.24, at 11-12 (Cal. Cont. Ed. Bar 1968):

> The fact that a person is a conservatee does not mean that he cannot make a valid will, since the test of testamentary capacity differs from the test that determines whether a person needs a conservator [citation omitted]. At least one California case has held that an adjudication of incompetency in a guardianship proceeding is not equivalent to a determination that a testator is incapable of testamentary disposition [citation omitted]. But see Comment, 45 Iowa L. Rev. 402, 403 (1960). If one who is adjudged incompetent (in a guardianship or conservatorship) is not necessarily incapable of making a will, the same result should certainly follow when a conservatee is not adjudged incompetent.

The proposed legislation could provide that, if the conservatee is adjudged to lack legal capacity, the conservatee is deemed to lack testamentary capacity. The staff, however, recommends against such a provision. The decision on whether the conservatee has testamentary capacity should probably be made in light of the facts of each case. It should be noted in this connection that the provisions relating to exercise of substituted judgment require that the court take into account the "wishes of the conservatee." See Section 2583.

Other provisions of the statute make clear that the medical decision provision applies to the conservator of the person only. See Sections 2403-2406 of the Exposure Draft. Later in this memorandum, we recommend a revision in Section 1831 to further clarify this matter.

§ 1822. Notice of hearing

Mr. Johnstone suggests a technical correction in this section. Before the colon in subdivision (a), the following should be inserted "(other than the petitioner or persons joining in the petition)."

The State Department of Health Services (Exhibit 1) comments:

> 1822. Under this section we raise the same question we raised in respect to Section 1511. Should not the Court be given discretion to dispense with notice to some persons within the second degree?

§ 1823. Citation to proposed conservatee

Mr. Price (Exhibit 2) comments:

> Section 1823(b)(2) Is it the intent of the Commission that the transfer of the rights enumerated can be made by the court either to the conservator of the estate or of the person or should that section identify the appropriate transferee?

We believe that the draft might be made more specific in Section 1831(b) in indicating that the conservator of the person has the right to make necessary medical decisions when this right is withdrawn from the conservatee. However, we do not believe that any revision of Section 1823 is desirable; Section 1823 is merely a notice to the conservatee provision. We might add a statement to the Comment to Section 1823 that briefly indicates that Section 1831 gives the court authority to determine that the conservatee lacks legal capacity, to withdraw his

right to make certain types of contracts, or to authorize the conservator of the person to require that the conservatee receive necessary medical treatment. The limits on the conservatee's capacity to contract affect the extent to which the conservator of the estate will pay debts or recognize obligations created by the conservatee. See Section 2515 of the Exposure Draft.

§ 1824. Service on proposed conservatee of citation and petition

Mr. Elmore (Exhibit 4) notes the reference to Code of Civil Procedure Section 415.30. This matter was discussed under Section 1511 and the same action taken under that section should be taken here.

§ 1825. Attendance of proposed conservatee at hearing

The State Department of Health Services (Exhibit 1) asks: "If the proposed conservatee is able to attend can he appear through his attorney without being physically present, himself, in Court?" The staff believes that the answer should be in the negative. The purpose of having the conservatee physically present is so that the court can advise the conservatee of his or her rights (Section 1828) and determine whether the person should be made a conservatee and, if so, whether the person's legal capacity should be limited or the person's right to make necessary medical decisions withdrawn.

§ 1828. Information to proposed conservatee by court

The State Department of Health Services (Exhibit 1) comments:

> 1828. Does this section require the court to inform the proposed conservatee about matters mentioned in 1828(a)(2) that are not relevant to the petition that is on file? For example, should the judge state "The appointment of a conservator is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or" if the petition is for conservatorship of only the estate? We believe this is misleading even though the word "or" is used and the statement might be literally accurate. Nonetheless, we have heard judges read all the inapplicable alternatives.
>
> Perhaps Section 1828 could be redrafted to make it clear that alternatives that are inapplicable are not to be included in the court's admonition.

There is merit to this comment. The information to the proposed conservatee should be relevant to the petition. Accordingly, the staff suggests that the introductory portion of subdivision (a) of Section 1828 be revised to read:

1828. (a) Except as provided in subdivision (c), prior to the appointment of a conservator of the person or estate, or both, the court shall inform the proposed conservatee of all of the following so far as relevant to the allegations and determinations requested in the petition :

§ 1830. Order appointing conservator

Mr. Johnstone suggests that the phrase ", among other things," be inserted after "shall" in the first line of the text of the section.

§ 1831. Adjudication of conservatee's lack of legal capacity and lack of capacity to make medical decisions; withdrawing power to enter into specified transactions

Mr. Price (Exhibit 2) comments:

> Section 1831 This section is viewed as a very positive step in an area which has created substantial problem. It is suggested that sub-section (a)(2), which is presently in the disjunctive, be reworded to allow a combination of (i) and (ii) or (ii) and (iii). The Commission may also wish to consider restricting the grant of the sub-section (b) power to the conservator of the person.

In response to this comment, the staff suggests that paragraph (2) of subdivision (a) be revised to read:

> (2) Withdraw the power of the conservatee to enter into any one or more of the following: (i) specified types of transactions ~~or~~ ; (ii) any transaction in excess of a specified amount ~~or~~ ; (iii) any transaction other than specified types of transactions.

We also suggest that subdivision (b) be revised to refer to the "conservator of the person."

§ 1853. Failure to locate conservatee; termination of conservatorship on failure to produce conservatee

The staff believes that the following revision, suggested by Mr. Price (Exhibit 2), is desirable:

> 1853. (a) If the court investigator is unable to locate the conservatee, the court shall order the court investigator to serve notice upon the conservator of the person, or if there is no conservator of the person upon the conservator of the estate, in the manner provided in Section 415.10 of the Code of Civil Procedure. . . .

The staff suggests that subdivision (b) be revised to read:

> (b) If the conservatee is not made available within the time prescribed, unless good cause is shown for not doing so, the court shall terminate the conservatorship ~~.~~ ~~If~~ and, if the conservatorship is of the estate, ~~the court~~ shall order the conservator to file an accounting.

The State Department of Health Services (Exhibit 1) asks the following question:

> 1853. If the conservatee has been adjudicated incompetent and the conservatorship is terminated because the conservatee has disappeared, is he left in a state of legal incapacity?

The answer to this question is not clear. What result does the Commission desire? The staff believes that it would be desirable to provide a clear statement whether the conservatee is left in a state of legal incapacity (if he was found to lack legal capacity) or is restored to legal capacity. It would appear the latter result would be in keeping with the purpose of requiring the biennial review and production of the conservatee for examination.

§ 1860. When conservatorship terminates

Mr. Price (Exhibit 2) comments:

> Section 1860 It is believed that coordination of the revised sections requires insertion of the words "annullment of the marriage of a minor conservatee" after the word conservatee presently appearing in the draft. This will avoid the possibility of a conservatorship for a minor who has never been legally married.

This appears to be a correct analysis and the staff believes the change is one that should be made. The change does illustrate the complexity of providing a different rule for a minor whose marriage is dissolved than the rule applied to a minor whose marriage is annulled.

§ 1862. Notice of hearing

Mr. Elmore (Exhibit 4) notes that this section contains another reference to Section 415.30 of the Code of Civil Procedure. This matter was previously considered.

§ 1870. Right to counsel

Mr. Elmore (Exhibit 4) suggests:

> Sec. 1870. Suggest check of entire division (if not already made) to make certain appointment or termination are the only cases where there is right to counsel. Part 6 (incompetent spouse) has its own provisions for appointment of counsel and compensation. Should the Comment refer to them?

The existing law (Probate Code Section 2006) gives a right to counsel only on appointment and termination. The staff is reluctant to extend

the right. We will include a reference in the Comment to the provision in Part 6 (management or disposition of community or homestead property where one or both spouses lacks legal capacity) that makes provision for appointment and compensation of counsel.

Mr. Johnstone questions why subdivision (c) is limited to a "county without a public defender." The answer is that this is a continuation of existing law, enacted in 1977. The limitation is sought to be removed by a bill introduced at the 1978 legislative session, and if that bill is enacted, the staff will conform Section 1870. The question of compensation by the county apparently is a political issue, but the section appears merely to authorize not to require compensation by the county.

§ 2100. Law governing guardianships and conservatorships

The staff plans to add to the Comment to this section the substance of the following suggested by Mr. Elmore (Exhibit 4):

> Suggest adding to Comment: "Since Section 1452 establishes a definite rule as to when the right to jury trial exists, Section 2100 does not incorporate those portions of Section 1230 which, arguably, provide for a broader right to jury trial." (Note: This should help avoid future litigation in this area where there are efforts to broaden the law- cf. Estate of Beach).

§ 2101. Relationship confidential and subject to law of trusts

Mr. Price (Exhibit 2) comments:

> Section 2101 This section together with Section 2501 and the various expanded powers of the sales and investment which follow raise a substantial issue similar to that recently addressed by the California Supreme Court, in the estate of Seth G. Beach, which dealt with the respective responsibilities of an executor and testamentary trustee in investing and re-investing assets subject to his or her control. Should the conservator regard his or her function as one of preserving the nature and character of the assets, making changes only when required to avoid substantial loss or to provide for the current cash needs of the conservatee, or should he or she regard the assets similarly to a trust estate, realigning their nature or character so that they will more closely resemble the typical trust investment program. This is a very difficult area to comment upon without writing volumes, but it is an area of great importance.

Note that the comment of Mr. Price also refers to Section 2501 of the Exposure Draft (duty to use ordinary prudence in the management of the

estate). The Commission has discussed the issue raised by Mr. Price and has decided not to attempt to deal with it in the statute.

§ 2103. Effect of court authorization, approval, or confirmation

Mr. Price (Exhibit 2) comments:

> Section 2103 Concern is expressed as to the elimination of the requirements noted in the Commission Comment. It is impossible to define accurately a "material fact". Misrepresentation may be and often is unintentional. Intentional misrepresentation is covered by use of the word "fraud". Faced with the lack of the requirement that the fact in question must be contained in the Petition or Order it will be very difficult for anyone to rely on the finality of a judgment, order or decree.

Compare proposed Section 2103 in the Exposure Draft with existing Section 2103:

> 2103. Any judgment, order or decree of court made pursuant to the provisions of this division, unless reversed on appeal taken under preceding Section 2101, shall be final and shall release the conservator and his sureties from all claims of the conservatee and of any persons affected thereby based upon any act directly authorized, approved or confirmed in the judgment, order or decree. This release shall not operate in favor of a conservator or a surety where the order was obtained by fraud, conspiracy or misrepresentation as to any material fact contained therein or in the petition for same.

Mr. Price's comment raises an important policy issue for Commission determination.

§ 2105. Several guardians or conservators

Mr. Price (Exhibit 2) correctly points out a technical defect in Section 2105 which the staff will correct by redrafting the section:

> Section 2105 A literal reading of the section would indicate that it is applicable to a situation where there is one guardian of the person and one guardian of the estate. Since this is apparently not the intention of the commission, perhaps some clarification is required.

Commissioner Lee (Exhibit 5) comments concerning subdivision (d) of this section:

> In keeping with right of ward/conter to be advised and object to who will serve and be advised of various exercise of powers, why allow w/out notice to contee/ward? Perhaps several appointed to "watch dog" one another as compromise. Suggest notice to contee and other contor.

Subdivision (d) continues existing law without change. It gives the court discretion to make the order with or without notice. The provision could be revised to require notice to the ward (if 12 or over) or conservatee and to the other guardians or conservators, unless the court for good cause dispenses with such notice. Whether this would be a desirable change in existing law is a policy issue for the Commission to decide.

§ 2107. Powers and duties of guardian or conservator of nonresident ward or conservatee

Commissioner Lee (Exhibit 5) comments:

> Seems no predicate for appointment over person as by definition "absentee" is a missing person, therefore, if is within state and susceptible to powers of contor is no longer "absentee". Suggest delete 2107(a).

Subdivision (a) covers the appointment of a guardian or conservator of the person of a nonresident and prescribes the powers of the guardian or conservator while the ward or conservatee is in this state. It covers, for example, the case where a guardian or conservator of the person is appointed for a person domiciled in another state in order to obtain necessary medical care while the person is temporarily in California. The subdivision is a continuation of a portion of the first sentence of existing Probate Code Section 1571. The staff recommends that subdivision (a) be retained. Subdivision (a) does not deal with an "absentee" since it is a conservator of the estate that is being appointed in the case of an "absentee."

§ 2108. Powers and duties of testamentary guardian [Supplemental Material]

This new section, not included in the Exposure Draft, is found in the Supplemental Material (June 1978) distributed for the July meeting. The section is noted for your consideration.

§§ 2201 and 2202. Venue

The State Department of Health Services comments concerning these two provisions:

> 2201 and 2202. The venue provisions do not allow for the convenience of the conservator. We suggest consideration of venue based on the convenience of the conservator when it is not contrary

to the best interest of the conservatee. Except for the hearing for appointment it is usually only the conservator and/or his attorney who go to court. In past years in our department guardianship program we filed most of the petitions in Los Angeles or Sacramento Counties. This over the years has saved the state tens of thousands of dollars in lawyer's time and travel expenses.

We think there may be many private conservators who would also benefit from having an action filed in the county where the conservator lives rather than where the conservatee lives.

As an alternative we suggest venue for any county subject to being moved for the best interest of the conservatee.

Health and Safety Code Section 416.6 provides that Director of Developmental Services petitions for appointment be filed in the superior court of the county where the main administrative office of the regional center serving such developmentally disabled person is located.

The point made has some appeal to the staff. Accordingly, we would redesignate subdivision (b) of Section 2201 as subdivision (c) and add a new subdivision (b) to read:

(b) The county in which the proposed guardian or proposed conservator resides.

We would also make a comparable addition to Section 2202.

Mr. Johnstone raises a question concerning Section 2201. He asks which court listed has the priority? Which controls? The first to act? This matter is dealt with in subdivision (c) of Section 2202 (nonresidents), but there is no comparable provision for residents. The Commission previously has discussed this question at some length and declined to deal with it. The staff believes that further consideration should be given to the question and some provision made to deal with it (based on subdivision (c) of Section 2202) if the broader venue provisions are retained. We recommend the deletion of subdivision (c) of Section 2202 and the addition of the following provision:

§ 2203. Court having priority where proceedings instituted in several counties

2203. (a) If proceedings for the guardianship or conservatorship of the estate are instituted in more than one county, the guardianship or conservatorship of the estate first granted, including a temporary guardianship or conservatorship of the estate, extends to all the property of the ward or conservatee within this state.

(b) If proceedings for the guardianship or conservatorship of the person are instituted in more than one county, the guardianship or conservatorship first granted, including a temporary [guardianship or] conservatorship, governs and the other proceeding shall be dismissed.

Comment. Subdivision (a) of Section 2203 continues the substance of the last sentence of former Section 1570 (guardianship) except that the provision has been extended to residents as well as nonresidents and the reference to a temporary guardianship or conservatorship is new. The language of the last sentence of former Section 1570 that the "court of no other county has jurisdiction" has been omitted as unnecessary. There was no provision under prior conservatorship law comparable to subdivision (a). Subdivision (b) is new and is adapted from subdivision (a).

Commissioner Lee (Exhibit 5) objects to the liberalization of the venue rules in Sections 2201 and 2202:

2201(b) Very bad, sets no standard as to "best interests", gives more than one 2202(a)(2) proper jurisdiction. Results in race to court houses by persons seeking (b)(2) appointment. Suggest delete and rely upon 2210 Venue for transfer if best interests to be furthered--after jurisdiction has been established.

§ 2210. Authority to transfer proceeding

Professor Bodenheimer (Exhibit 7) comments under this section:

This draft proposes to eliminate transfers of guardianship proceedings to other states. I consider the present § 1603 which authorizes such transfers to be a most desirable provision. Considering the mobility of the population, there will be many guardians who move elsewhere. When permission is given by the court to move with the minor, there should be no great difficulty about sending a court memorandum (with copy to the guardian) to the trial court of the new residence. Details can be worked out by Judicial Council rule. An interstate procedure would preserve the continuity of the guardianship and obviate the necessity for entirely new proceedings in the second state. The Uniform Child Custody Jurisdiction Act provides for various cooperative procedures between the states which are beginning to work.

The difficulty of "transferring the proceeding" can best be understood if some other state were attempting to "transfer the proceeding" in that state to California. If the proceeding is one involving the guardianship, conservatorship, or other fiduciary of the estate, it is necessary that there be an inventory of the property, a bond, the approval of the fiduciary in California, and a court file opened so that court approval can be sought where necessary for various acts in connection with the

estate. It is far simpler and cleaner to start a new proceeding in California and follow the procedure provided in the statute to do so than to attempt to transfer the proceeding from the other state to California.

Professor Bodenheimer is concerned, however, with a guardianship or conservatorship of the person. Here too there would be a necessity to have a proceeding in California so that there is a pending proceeding to obtain any needed court orders for medical treatment, change of residence, and the like. More important, the California law has provisions on who has priority for selection as a guardian, including giving strong effect to testamentary appointment of a guardian by a parent and nomination of a conservator by a proposed conservatee. An important decision is whether the proposed conservatee lacks capacity to make necessary medical decisions--a matter to be determined by the court in the California proceeding. In the case of a child, there needs to be a court to authorize surgery if the ward is over 12. The staff doubts that the California courts would be willing not to follow the ordinary procedure merely because a guardian or conservator had been appointed in another state if a guardianship or conservatorship of the person were sought to be established in California. If there is to be some type of transfer of guardianships or conservatorships of the person, a uniform act would be necessary, and we are not aware of any such act.

Accordingly, the staff recommends no change in the Exposure Draft provisions relating to this matter. It would be of interest in this connection if anyone can provide an example of how a transfer of the proceeding works in actual practice.

§ 2211. Who may petition for transfer [of venue]

Commissioner Lee (Exhibit 5) comments:

> 2211(c)(d) Wasteful to allow persons other than fiduciary or ward/contee to petition what interest could they have at this point. Perhaps expend to include spouse if not separated.

In connection with this comment, the following extract from W. Johnstone & G. Zillgitt, California Conservatorships § 2.21, at 40 is of interest:

> If Prob C §2052 is read literally, no one but the conservator may petition for a transfer. This is a considerable limitation if it means that the conservator can preclude relatives from attempting to have the proceedings moved. In Oliver, the conservatee's

grandchildren filed objections to a petition filed in Los Angeles by a son seeking his appointment as conservator; concurrently the grandchildren filed a petition in Fresno for appointment of themselves as conservators of the person. The Los Angeles court transferred the proceedings on the ground that Fresno was the conservatee's residence. Persons who want to transfer the proceedings over the objections of the conservator may have to try to remove the conservator under Prob C §1951.

The staff believes that there may be circumstances where a person listed in subdivision (c) or (d) should be permitted to have the proceedings transferred, and we recommend no change in the provision.

§ 2214. Hearing and order

Mr. Johnstone notes that the Commission has in various provisions added that persons may appear "to support" or oppose. The question here is whether the persons who can support the petition are to be limited to those listed in subdivision (a) and whether all the persons listed in subdivision (a) have a right to appear in support of the petition. This is the same issue presented in each case where the "to support" language has been added. The "to support" language does not appear in any of the provisions of existing law.

Commissioner Lee (Exhibit 5) suggests that subdivision (a) be expanded to add an additional paragraph:

> (4) The guardian or proposed guardian or the conservator or proposed conservator.

This paragraph is unnecessary because paragraph (1) includes "Any person required to be listed in the petition" which under Section 2212 includes the spouse and the relatives of the ward or conservatee within the second degree and the guardian or conservator if other than the petitioner.

§ 2250. Appointment

Commissioner Lee (Exhibit 5) suggests that provision be made for the temporary guardian of the person. Mr. Johnstone raises the same question. You will recall that, at one point, the Commission had this provision in the draft, but it was deleted because it covered the same situation as is covered by Section 1512. However, Professor Bodenheimer strongly objects to Section 1512 (subdivision (b) of the section) and

Section 1512 does not clearly provide that the person given temporary custody can, for example, consent to necessary medical treatment. The staff concludes that it would be best to delete Section 1512 and to provide for temporary guardians of the person. The Family Law Act contains a provision for temporary custody orders for proceedings under that act so Section 1512 is unnecessary for the purposes of that act. See Civil Code Section 4600.1 (temporary order pending determination of custody) (enacted in 1976).

§ 2251. Issuance of letters

Commissioner Lee (Exhibit 5) suggests that the letters should include the termination date of temporary appointment. There is no doubt but that this information should be included in the letters. The only question is whether the statute should require the information or the information should be required by a form adopted by the Judicial Council. We see no harm in imposing a statutory requirement that the information be included in the letters. It should be noted that it would not be sufficient to merely insert one date in the letters; it would be necessary to insert the substance of subdivision (a) of Section 2257, and new letters would need to be issued if the court extends the time for the termination of the powers of the temporary guardian or conservator under subdivision (b) of Section 2257.

§ 2252. Powers and duties

The State Department of Health Services (Exhibit 1) comments:

> 2252(a). Does the statement that the only duties are to preserve and protect the property prohibit the temporary representative from using the property to support the conservatee?
>
> 2252(b). Is our assumption correct that the conservator of the person selects care and living arrangements and the conservator of the estate provides for paying for care and living arrangements? If so, does not 2252(b) encroach on the duties of the temporary conservator of the estate? Does not providing maintenance and support include managing financial resources? In 2504 and 2510 providing maintenance and support seems to fall under the guardian or conservator of the estate.

The staff concludes that Section 2252 is poorly drafted. We believe the section should follow more closely the existing provision (Section 2203) which reads:

2203. A temporary conservator shall have only such power and authority and only such duties as are necessary to provide for the temporary care, maintenance and support of the conservatee and as may be necessary to conserve and protect the property of the conservatee from loss or injury; and such other powers and duties as may be ordered by the court in the order of appointment, or by subsequent order made with or without notice as the court or judge may require.

We suggest that Section 2252 be revised to read:

2252. (a) Except as otherwise provided in subdivision (b) and subject to Sections 2253 and 2254, a temporary guardian or temporary conservator has only the power and authority and only the duties that are necessary to provide for the temporary care, maintenance, and support of the [ward or] conservatee and that are necessary to conserve and protect the property of the ward or conservatee from loss or injury.

(b) The temporary guardian or temporary conservator has such additional powers and duties as may be ordered by the court (1) in the order of appointment or (2) by subsequent order made with or without notice as the court may require.

Commissioner Lee (Exhibit 5) suggests this section include the temporary guardian of the person of a ward. The staff recommends that the concept of temporary guardian of the person be adopted and that all necessary conforming changes be made to carry out the concept.

§ 2253. Change of conservatee's residence generally

Mr. Johnstone suggests there is no need for the language "by a preponderance of the evidence" in subdivision (c). The staff agrees. We propose to delete the language and note its deletion (as being unnecessary) in the Comment to the section.

Commissioner Lee (Exhibit 5) raises several questions concerning this section:

2253(b) Rather than have an unnecessary hearing provide for court investigator to ascertain if constee has objections. If none, relax standard. Should be may be not shall be represented by counsel.

(c) In many cases the specific place cannot be determined as there may be a placement problem.

These are good questions. However, the Commission previously decided not to recommend changes in the recently enacted provisions designed to protect the rights of conservatees. The provisions in question were

enacted in 1977. Mr. Johnstone points out there is a proposed amendment pending to the existing statute. We will pick it up and include it in our proposed legislation if it is enacted by the Legislature.

§ 2254. Removal of conservatee from residence in case of emergency or with conservatee's consent

Commissioner Lee (Exhibit 5) suggests:

> 2254(b) As usually a court hearing is calendared in near future, why not allow such a hearing to coincide with general appointment hearing unless hearing is more than reasonable time in future.

This suggestion again calls for the review and correction of possible defects in the recently enacted legislation designed to protect rights of conservatees--a task the Commission decided not to undertake for a number of reasons.

§ 2256. Accounts

Mr. Johnstone suggests that the phrases "the account" and "the first regular account" are unclear and the problem could be corrected by substituting "his or her" for "the" in both places, a change the staff plans to make absent any objections.

§ 2311. Form of letters

The State Department of Health Services (Exhibit 1) asks: "Should letters list the powers of the conservator and the disabilities of the conservatee? See the discussion above about proposed Section 1476."

See the previous discussion of this suggestion in this memorandum under Section 1477.

Commissioner Lee (Exhibit 5) comments: "As is general reference to letters should refer to proposed 2251 above re: time limit on special letters."

§ 2312. Notice to ward or conservatee

Commissioner Lee (Exhibit 5) comments:

> Confusion exists regarding this. Some attorneys in order to economize time will serve "proposed" order rather than endorsed filed order on contee. Notice should be more precisely prescribed.

§ 2321. Waiver of bond by conservatee

Commissioner Lee (Exhibit 5) commments:

> Why limit contee right to waive bond to cases where contee is petitioner? If an informed consent to waiver can be given, (even if

given to court investigator for non-attending contee) court should have latitude to waive.

Further if contor is spouse, could not the court be allowed to waive bonding of community?

These two suggestions appear to be desirable changes.

§ 2328. Deposit of money or other property subject to court control

As suggested in the comment by Mr. Elmore (Exhibit 4), we will include a reference in the Comment to Section 2328 to the new section on the right of a guardian or conservator to have a control account in the estate proceeding. See new Section 2456 as set out in the Supplemental Material (June 1978).

Commissioner Lee (Exhibit 5) comments:

I have been called upon to surcharge fiduciaries too many times to like the prospective impound of assets as a predicate for lessening bond. Now most bonding company pro-rate initial premium and therefore if petitioner can't use 2328(c) to receive receipt a bond would not be that prohibitive.

As the comment to Section 2328 indicates, the section basically continues existing law.

§ 2329. Estate not exceeding $10,000 consisting of deposited money

Commissioner Lee (Exhibit 5) comments:

This would cover most guardianships. Experience suggests that this is a poor idea. As well income (VA, Soc. Sec., Trusts and Pensions) often is very high even though corpus of estate is small. I strongly urge reconsideration.

This section might be modified to take into consideration the annual income. However, the section states existing law as drafted.

§ 2330. Reduction of amount of bond

Commissioner Lee (Exhibit 5) comments: "Should be amended to allow ex parte reduction upon subsequent impound of funds per 2328."

Subdivision (d) of Section 2330 provides that nothing in the section limits the authority of the court under Section 2328 to reduce the amount of the bond. Section 2328 applies in any proceeding to determine the amount of the bond "(whether at the time of appointment or subsequently)." The staff had assumed that the order under Section 2328

could be made ex parte since no notice of hearing is required. However, if this is not clear, it could be made clear by adding appropriate language. We recommend that language be added, for this purpose, to Section 2320, to read:

> (c) Except as otherwise specifically provided, determinations under this chapter may be made ex parte unless the court otherwise orders.

§ 2331. Additional bond on real property transactions

Commissioner Lee (Exhibit 5) comments: "Should be after transaction as may be over bids, etc." Section 2331 uses language of the existing statute which appears to use the after transaction price as the price that determines the amount of the bond.

§ 2334. Suit against sureties on bond; limitation period

The staff plans to make a technical change suggested by Mr. Johnstone. We plan to insert "within three years" after the word "or" at the end of the first line on page 128 of the Exposure Draft.

§ 2335. Insufficiency of sureties; order for further security or new bond

Commissioner Lee (Exhibit 5) comments: "Allow Guardian/Conservator to ex parte petition." We do not see the relevance of this comment to this section. This is a petition directed against the guardian or conservator.

§ 2401. Care, custody, control, and education

In response to a suggestion from Mr. Johnstone, the staff plans to substitute "has charge of" for "is in charge of" in this section.

§ 2402. Residence of ward or conservatee

Commissioner Lee (Exhibit 5) comments: "Is it intended that court be given actual knowledge or merely that court files be amended by a report of fact? If actual knowledge is intended, serve on court or court investigator?" This comment appears to be directed to subdivision (b), which appears to be intended to provide a correct address in the court files. The staff believes that this could be made clear by revising the subdivision to read:

> (b) The guardian or conservator shall promptly mail written notice to the court of all changes in the residence of the ward or conservatee.

§ 2403. Medical treatment of ward

Commissioner Lee (Exhibit 5) comments: "I don't understand why (b) is included." Mr. Johnstone points out that the section appears to make it possible for the minor to consent and questions the validity of the minor's consent. To preclude this construction, the staff suggests that subdivision (b) be revised to read:

> (b) If the ward is 12 years of age or older, except in an emergency case in which the ward faces loss of life or serious bodily injury, no surgery shall be performed upon the ward without either (1) the consent of both the ward and the guardian or (2) a court order specifically authorizing such surgery obtained pursuant to Section 2406.

§ 2404. Medical treatment of conservatee

Mr. Johnstone suggests that the section should be revised to contain the substance of what is found in the first three sentences of the Comment.

A less drastic revision would be to insert after "Safety Code" the following: "if the conservatee refuses to receive necessary medical treatment,".

§ 2406. Court ordered medical treatment

Mr. Johnstone asks whether there is a notice and hearing required under this section before the order is given. Commissioner Lee (Exhibit 5) comments: "Fails to establish form of notice how hearing is to be calendared. Cannot court investigator be utilized." The Commission will recall that these problems were discussed when the section was approved for inclusion in the Exposure Draft. At that time, it was noted that a hearing was held only if the ward or conservatee petitioned the court for a hearing and that the section is the same in substance as Section 5358.2 of the Welfare and Institutions Code (added in 1976). The Commission was not inclined to make it too easy to contest the attempt of the guardian or conservator to obtain the order for the medical treatment. Nevertheless, the section leaves many procedural questions unanswered and should be reconsidered by the Commission.

§§ 2407 and 2502. Additional conditions in order of appointment

Commissioner Lee (Exhibit 5) comments: "Such conditions, etc., should be included in letters under 1831." The staff agrees that such

conditions should be included in the letters, and we would add a provision, like the one in subdivision (c) of Section 1831, to Sections 2407 and 2502. Specifically, we would add the following sentence after the first sentence of Sections 2407 and 2502, respectively:

> The terms of the order shall be included in the letters of guardianship or conservatorship.

§ 2408. Instructions from or approval by the court

Mr. Johnstone suggests that the phrase "with respect to the powers and duties prescribed in this chapter" be deleted from subdivision (a). This phrase is not found in existing law and may undesirably limit the section. The staff proposes to delete the language quoted above.

§ 2513. Payment of surplus income to next of kin of conservatee

The State Department of Health Services (Exhibit 1) comments:

> Is "but for the existence of the conservatorship" the true reason why the conservatee cannot distribute surplus income? If that is the reason, why not just terminate the conservatorship and have the conservatee restored to capacity? We suspect that the true reason is a mental disability.

Section 2513 is drawn from existing Section 1856 which authorizes the court to direct the conservator to pay surplus income to the next of kin whom the conservatee would have aided "but for the existence of the conservatorship." The staff has no better language to suggest.

Mr. Johnstone suggests that the second sentence of the second paragraph of the Comment (court may attach conditions that conservatee would have imposed) be put in the statute.

Commissioner Lee (Exhibit 5) makes three suggestions:

First, the authority to pay surplus income to the next of kin should be broadened to apply to guardianship as well as conservatorship:

> Why not extend the power to petition to ward. Circumstances exist which could justify the court's granting use for ward's family as well.

This would broaden authority under existing law and presents the policy issue whether a minor's estate should be expended to support persons other than the minor.

Second, the list of persons who may petition for an order under this section (now limited to conservator and relatives of conservatee

within the second degree) should be expanded to include the conservatee (and ward if expanded). This appears to be a desirable change.

Third, the limitation that the surplus income be paid only to relatives should be eliminated:

> Why restrict use of surplus to relatives. Often actual objects of bounty are not next of kin. Indeed may be strangers to the blood.

The staff opposes this suggestion because the broader ability to make gifts is already provided for in the "exercise of substituted judgment" provisions of the proposed legislation, and those provisions contain necessary safeguards not found in Section 2513.

The remainder of the comments will be covered in the First Supplement to Memorandum 78-39. We are sending you this portion of the analysis of the comments so you can begin your study of them.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF HEALTH
714-744 P STREET
SACRAMENTO, CALIFORNIA 95814
(916) 322-9411

June 7, 1978

John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: California Law Revision Commission's Tentative Recommendation Relating to Guardianship-Conservatorship Law

Dear Mr.. DeMoully:

This is in response to your letter of May 10, 1978, to Dennis Eckhart with which you sent a copy of the above draft and generously offered us an opportunity to comment on the draft. This letter also responds to your letter to Harold Stein who sent his comments to us and asked us to include them in our reply. He was satisfied with the changes to the sections you cited in your covering letter. He did suggest that the draft be reviewed by the Patient Benefits and Accounts Section since that section receives and acts on the notices which are the subject of most of the code sections cited in your covering letters. That section did review the draft and a copy of a favorable memo of William F. Schneider of that section is enclosed.

We are pleased with the quality and coverage of your monumental work. We are gratified to see that you are preserving the existing protections that concern us. We are also gratified to see that you have solved many of the existing problems. For example, you have provided a procedure for receiving special notice of the filing of an inventory an appraisement which does not exist under present law.

We suppose that you have allowed us to review the draft to raise questions about anything that does not appear to us to be quite solved, particularly in reference to concerns of the State Department of Health and its successor agencies. The balance of this letter will try to carry out that task. The nature of the task given to us is to list some negatives. We trust this will not be interpreted to detract from our opinion

that you have an excellent draft. Our suggestions are divided into these categories:

A. Mistake (only one)
B. Conforming additions (which you have not drafted)
C. Queries about Proposed Draft
D. Additional areas for solution

A. Mistake

The quality of your draft is so good that we could find only one error. That is in Section 1543 of your draft. The notice and copy of the petition should be mailed or delivered to the Director of Social Services instead of the Director of Developmental Services. At present the notices given under Probate Code Section 1440(c) are received by the Adoption and Foster Care Section of the Children Social Services Branch of the Social Services Division of the Department of Health. Upon receiving the notices the Adoption and Foster Care Section, in turn, alerts the agency investigating the adoption or local agency handling foster care licensing, whichever is appropriate, to furnish a report to the court. In the reorganization of the Department of Health which is operative July 1, 1978, the Social Services Division will become part of the Department of Social Services. Probate Code Section 1440(c) notices, therefore, should, appropriately, be furnished to the director of that department.

B. Conforming Additions

You have explained that you have not yet drafted the changes that will be necessary to other codes in order to conform them to the changes in your revision of the Probate Code.

When you begin drafting changes for other codes, please consider conforming amendments to the following four programs which are of concern to the Department of Health.

1. Department of Mental Health guardianships under Welfare and Institutions Code Section 7284-7287. This program applies to only estates. It applies to all ages, and does not include conservatorships. It is not a complete system but relies on the law in the Probate Code. At the time of appointment of the guardian the ward must be in a state hospital. New wards must be mentally disordered but until July 1, 1971, developmentally disabled persons could become wards under these sections. This program differs from the proposed changes for the Probate Code in that guardianship of the estate is provided for adults (as well as minors) while under your revision of the Probate Code the Probate Code would have conservatorship for adults.

2. Director of Developmental Services guardianships and conservatorships under Health and Safety Code Sections 416-416.23. These allow the Director of Developmental Services to be appointed guardian or conservator of the person and estate, or person or estate of developmentally disabled persons. There is no age qualification. This differs from your proposed revision of the Probate Code which generally provides guardians for minors and conservators for adults. Health and Safety Code Section 416.10 prohibits the Director of Developmental Services from being a dual guardian and may need some revision to conform to Proposed Probate Code Section 1501(c). Health and Safety Code Section 416.9 should also be considered for revision in that it now provides that the preferences in Probate Code Section 1753 do not apply.

3. Lanterman-Petris-Short Act Conservatorships under Welfare and Institutions Code Sections 5350 et seq. Welfare and Institutions Code Section 5350(a) applies the act to minors while the proposed revision of the Probate Code would generally limit conservatorship to adults (as do the present conservatorship provisions).

There appears to be a conflict between the preference section for a LPS conservator and the proposed Probate Code Section 1812(b)(5). The combination of Welfare and Institutions Code Sections 5350(b) and 5355 seem to give the highest priority to the person designated most suitable by the conservatorship investigator while proposed Probate Code Section 1812(b)(5) places anyone eligible under the Welfare and Institutions Code at the bottom of the preference list.

4. The Interstate Compact on the Placement of Children under Civil Code Sections 264 through 274. While we have listed this as a statute that needsto be conformed to your proposed changes to the Probate Code, we suspect that the conforming, in this instance should be in the proposed section 2402(a)(2).

Under the Interstate Compact a guardian in this state placing a child in another state is probably a "sending agency" as defined in Article 2(b) (of Civil Code Section 265). Article 8(a) exempts from the Compact a guardian's placing a child in another state with certain close relatives or a non-agency guardian in another state. However, if the guardian places the child with someone in the other state who does not qualify as one of the named relatives or a non-agency guardian, the Compact applies. If the Compact applies, then the conditions for placement in Article 3 of the Compact apply including approval from the receiving state. It would appear the proposed Probate Code Section 2402(a)(2) should be subject to the Interstate Compact.

C. Queries About the Proposed Draft

Our discussion in A and B, above, are in areas in which the Department of Health has special concerns. However, under this section on queries there is less relationship to Department of

Health programs. Here we are merely listing thoughts that come to mind in reading through your draft. We have not done any research to support any of the queries. If any of the thoughts in this list seem to have value, please feel free to use them. On the other hand, feel equally free to dismiss any or all of them without comment. We are following a numerical order with the numbers referring to the section numbers in the proposed revision.

1475. This provision seems in order. However, it reminds us of a latent problem created by AB 1417 (1976). Wards and conservatees adjudicated incompetent before July 1, 1977 were so adjudicated under a definition that has been repealed and they are continued in a state of legal incompetency under definition under which they have never had a hearing.

1476. It is a good idea to have the letters of conservatorship show that the adult who was changed from a ward to a conservatee by operation of law, has been adjudicated incompetent. However, otherwise, is there any requirement that the details of the representative's power or the conservatee's disabilities be summarized in the letters? With the increase in variations in orders of appointments and provisions for modification of such orders there may be a need for a more informative form for letters. Some forms, even with a certification that they are still in full force and effect have very little information about what the conservator and conservatee may or may not be empowered to do.

1511. We wonder if the court should not have additional discretion to dispense with notice. We had an example in point. The Director of Health had petitioned to become guardian of a developmentally disabled child who had been a dependent child of the juvenile court. The child had not been relinquished to an adoption agency and had not been declared free of custody and control of his parents. It was probable that the mother could be notified. However, the child was born out of wedlock and was severely retarded and the mother had written letters begging that no one write to her about the child. Her last letter explained that she was happily married and the mother of subteen children and she had never confided to her husband or other children about the existence of the developmentally disabled child. Proposed 1511 seems to require that despite these circumstances the notice would have to be given to the mother.

1812(b)(5). There are at least three separate provisions for guardians or conservators under the Welfare and Institutions Code:

1. LPS conservators (W&I 5350)

2. Department of Mental Health (W&I 7284)
3. Public Guardian (W&I 8000 et seq.)

Under 1812(b)(5) persons who qualify under the Welfare and Institutions Code are given the lowest preference but the order among themselves is not given. As mentioned earlier despite 1812(b)(2) the LPS law seems to give preference to the person designated by the conservatorship investigator. (See W&I 5350 (b) and 5355.)

1821(f)(1). If the proposed conservatee is adjudged to lack legal capacity what will he be legally incapble of doing? What does 1821(f)(1) add that is not covered by 1821(f)(2) or 1821(f)(3)? Can he no longer make a will during lucid intervals? Can the conservator interfere in the conservatee's marriage? Is 1821(f)(2) applicable only to conservatorship of the estate? Is 1821(f)(3) applicable only to conservatorship of the person?

1822. Under this section we raise the same question we raised in respect to Section 1511. Should not the Court be given discretion to dispense with notice to some persons within the second degree?

1825. If the proposed conservatee is able to attend can he appear through his attorney without being physically present, himself, in Court?

1828. Does this section require the court to inform the proposed conservatee about matters mentioned in 1828(a)(2) that are not relevant to the petition that is on file? For example, should the judge state "The appointment of a conservator is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or" if the petition is for conservatorship of only the estate? We believe this is misleading even though the word "or" is used and the statement might be literally accurate. Nonetheless, we have heard judges read all the inapplicable alternatives.

Perhaps Section 1828 could be redrafted to make it clear that alternatives that are inapplicable are not to be included in the court's admonition.

1853. If the conservatee has been adjudicated incompetent and the conservatorship is terminated because the conservatee has disappeared, is he left in a state of legal incapacity?

2201 and 2202. The venue provisions do not allow for the convenience of the conservator. We suggest consideration of venue based on the convenience of the conservator when it is not contrary to the best interest of the conservatee. Except for the hearing for appointment it is usually only the conservator and, or his attorney who go to court. In past years in our department guardianship program we filed most of the petitions in Los Angeles or Sacramento Counties. This over the years has saved the state tens of thousands of dollars in lawyer's time and travel expenses.

We think there may be many private conservators who would also benefit from having an action filed in the county where the conservator lives rather than where the conservatee lives.

As an alternative we suggest venue for any county subject to being moved for the best interest of the conservatee.

Health and Safety Code Section 416.6 provides that Director of Developmental Services petitions for appointment be filed in the superior court of the county where the main administrative office of the regional center serving such developmentally disabled person is located.

2252(a). Does the statement that the only duties are to preserve and protect the property prohibit the temporary representative from using the property to support the conservatee?

2252(b). Is our assumption correct that the conservator of the person selects care and living arrangements and the conservator of the estate provides for paying for care and living arrangements? If so, does not 2252(b) encroach on the duties of the temporary conservator of the estate? Does not providing maintenance and support include managing financial resources? In 2504 and 2510 providing maintenance and support seems to fall under the guardian or conservator of the estate.

2311. Should letters list the powers of the conservator and disabilities of the conservatee? See the discussion above about proposed Section 1476.

2513. Is "but for the existence of the conservatorship" the true reason why the conservatee cannot distribute surplus income? If that is the reason, why not just terminate the conservatorship and have the conservatee restored to capacity? We suspect that the true reason is a mental disability.

2610. While we consider an inheritance tax referee an appropriate person to make appraisements for guardianships and conservatorships, we believe they should not be inflexibly bound to all the inheritance tax rules when the appraisement is not concerned with an inheritance tax. We had recent occasion to have a life estate appraised for purposes of a sale. Based on the life expectancy of a 73 year old person the inheritance tax referee come up with a figure that was about two-fifths (2/5) of the market value of the combined life estate and remainder. We could not find any prospective buyer who would pay 90% of this appraised value for the privilege of gambling on the longevity of the 73 year old person. We suggested to the referee that his guidelines did not compute a true market value for the circumstances but he said he was bound to follow the inheritance tax regulations.

In closing this part of this letter we want to reiterate that you have produced an excellent draft. We also want it understood that although we have asked questions we are not requesting you to answer them. They are purely to raise issues for your consideration.

D. Additional Areas for Solution

1. There may be a need for substituted consent without guardianship or conservatorship. We had an inquiry a year ago from an Assistant Attorney General for the State of Maryland who was doing a research project to develop such a substituted consent. It was for persons who lacked the capacity to give informed consent for medical treatment or surgery but who otherwise could function satisfactorily without a guardian or conservator. The model being considered provided that the substituted consent be given by a panel of medical experts rather than by a court. This may be something that would be useful in California. There are numerous residents in California state hospitals for the developmentally disabled who lack the capacity to give informed consent and have no guardian or conservator. Substituted consents are given for them under statutes that allow the hospital or regional center to consent on their behalf to medical, dental or surgical treatment. However, these statutes have some problems. If you wish to inquire further into the Maryland project, the person who wrote us was Ms. Judith K. Sykes, Assistant Attorney General, Department of Health and Mental Hygiene, 201 West Preston Street, Baltimore, Maryland 21201.

2. Another area needing a solution is consent for sterilization and other less drastic birth control measures. It has been held that neither the personal representative nor court can authorize sterilization. See Guardianship of Kemp (1974) 43 Cal.App. 3rd 758. Furthermore, the sterilization regulations for California health facilities provide that before elective sterilization is performed the patient shall be able to understand the content and nature of the informed consent process as defined therein and not have been judicially declared incompetent. See 22 C.A.C. 70707.5(a)(2). Consequently, sterilization is not available to persons who lack the ability to give informed consent. If there is such a thing as a right to sterilization these persons seem to have a right without a remedy. Compare Civil Code Section 3523. Beside persons actually adjudicated incompetent or clearly unable to give informed consent, those persons whose capacity is in doubt are similarly handicapped because of the reluctance of medical practitioners to take the risk that the person might be found to lack capacity.

In closing, we commend you for a draft that appears both scholarly and practical and express our appreciation for the opportunity to comment.

Sincerely,

RICHARD H. KOPPES
Deputy Director
Office of Legal Affairs

by Ralph Colburn
Ralph Colburn
Staff Attorney

cc: Harold Stein
William F. Schneider

UNITED CALIFORNIA BANK

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June 15, 1978

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attn: John H. DeMoully
Executive Secretary

Re: TENTATIVE RECOMMENDATION RELATING TO GUARDIANSHIP-CONSERVATORSHIP LAW (May, 1978)

Gentlemen:

In response to the letter of transmittal dated May 8, 1978 which accompanied the exposure draft of the above recommendation, the following comments are offered:

1. "Bank" vs. "Bank in this State" in so far as these terms have reference to in the exercise of fiduciary powers, the attention of the Commission in drawn to Section 1503 of the California Financial Code which governs the exercise of fiduciary powers by out-of-state corporations. In this specific area it would therefore not be necessary to distinguish between the two terms. No comment is offered as to the use of these terms in the commercial banking area, e. g. as a savings account depositary.

2. Section 1412 Does the Commission feel there is any danger that this section could lead third parties to misunderstand the extent of powers granted as evidenced by Letters? e.g. To assume that Letters evidencing appointment as conservator of the person would empower the holder to exercise the powers of a conservator of the estate.

3. Section 1478 At the time that the age of majority was changed by statute in California, I recall that constitutional objections were raised to the amendment of existing sections by a blanket definitional change. The question is posed as to whether sub-section (a) of this section would be subject to similar objection.

4. Section 1501(a) It is suggested that the words "the parent" appearing in the last clause of this sub-section be changed to read "that parent" or "such parent".

It is further suggested that the Commission consider a provision for special guardianships or conservatorships to be created other that by nomination in the ordinary course of guardianship or conservatorship proceedings. There are many instances where specific assets are more properly handled by a member of the family or friends of a conservatee whose estate otherwise requires management by an experienced financial institution. As an example, a relative living with the conservatee might be by far the most appropriate person to have custody and control of valuable jewelry, a coin or other valuation collections so as to allow the conservatee constant access. An adult son may very easily be the most appropriate person to control the family farm. The persons mentioned, however, may be entirely inappropriate candidates for management of the balance of the conservatee's estate. Agency and employment relationships in these situations are seldom satisfactory, giving rise to misunderstanding as to the extent to which each party is responsible for and authorized to act with regard to the assets.

Sub-Section (c) of this section contemplates one special guardian and one "general" guardian. Perhaps the rewording is indicated to cover the situation where more than one special guardianship has been created.

5. Section 1823 (a)(2) Is it the intent of the Commission that the transfer of the rights enumerated can be made by the court either to the conservator of the estate or of the person or should that section indentify the appropriate transferee?

6. Section 1831 This section is viewed as a very positive step in an area which has created substantial problem. It is suggested that sub-section (a)(2), which is presently in the disjunctive, be reworded to allow a combination of (i) and (ii) or (ii) and (iii). The Commission may also wish to consider restricting the grant of the sub-section (b) power to the conservator of the person.

7. Section 1853 (a) This section should provide that notice is to be served upon the conservator of the person or, if none, then upon the conservator of the Estate.

8. Section 1860 It is believed that coordination of the revised sections requires insertion of the words "annullment of the marriage of a minor conservatee" after the word conservatee presently appearing in the draft. This will avoid the possibility of a conservatorship for a minor who has never been legally married.

9.. Section 2101 This section together with Section 2501 and the various expanded powers of the sales and investment which follow raise a substantial issue similar to that recently addressed by the California Supreme Court, in the estate of Seth G. Beach, which dealt with the respective responsibilities of an executor and testamentary trustee in investing and re-investing assets subject to his or her control. Should the conservator regard his or her function as one of preserving the nature and character of the assets, making changes only when required to avoid substantial loss or to provide for the the current cash needs of the conservatee, or should he or she regard the assets similarly to a trust estate, realigning their nature or character so that they will more closely resemble the typical trust investment program. This is a very difficult area to comment upon without writing volumes, but it is an area of great importance.

10. Section 2103 Concern is expressed as to the elimination of the requirements noted in the Commission Comment. It is impossible to define accurately a "material fact". Misrepresentation may be and often is unintentional. Intentional misrepresentation is covered by use of the word "fraud". Faced with the lack of the requirement that the fact in question must be contained in the Petition or Order it will be very difficult for anyone to rely on the finality of a judgement, order or decree.

11. Section 2105 A literal reading of the section would indicate that it is applicable to a situation where there is one guardian of the person and one guardian of the estate. Since this is apparently not the intention of the commission, perhaps some clarification is required.

12. Section 2515 (a)(1) This section would indicate that a Conservator must refuse to pay debts incurred by the conservatee prior to imposition of the conservatorship when no abnormal restriction had been placed on his or her activity unless that debt is "reasonable". Thus a creditor who had contracted with a person under no legal disability might have to demonstrate the "reasonableness" of the transaction in order to obtain payment. The standards by which the transaction would be judged are uncertain. If the Conservator made a large purchase and, after imposition of a conservatorship, it were determined that the purchase was an irrational act, due to factor not known by the provider, would this be "reasonable" debt? If not, an individual might avoid the consequences of his own intentional improvidence with a "friendly" conservatorship.

13. Section 2523 (Commission note) While no specific suggestion is made as to the titling to Bank accounts, if prescription is to be made it should take into account the flexibility afforded by Section 1831 (a)(2).

14. Section 2528 It is suggested that mutual fund and other dividend reinvestment plans initiated by a conservatee prior to imposition of the conservatorship should be added to this list.

15. Section 2530 A natural addition to this section would be the exercise of elections, such as sub-chapter S corporation holdings, gain deferral options, etc.

16. Section 2536 It is suggested that the Commission address the question as to whether the guardian or conservator should be entitled to interest on advances, e.g., at the legal rate for judgements.

17. Section 2537 Addition of the following clause at the end of this section is suggested. ",and shall have such powers as are granted to a guardian or conservator herein as shall be necessary for the performance of said duty".

18. Section 2542(c) The last sentence of this sub-section may not be to the benefit of the estate. It is often the case that co-tenants have differing costs bases or other considerations which would make it advantageous for one to sell for cash and another on deferred terms. This is not possible under the current wording.

19. Section 2543(b) It is suggested that the Commission consider reference to Probate Code Section 757 for the procedure for sales, eliminating the requirements for "raising the power of sale" which are applicable where no power of sale is granted.

20. Section 2544 It is suggested that consideration be given to the inclusion of State, Federal and Municipal Securities including agencies thereof in the categories set forth in subsection (a) (1).

21. Section 2545 (b) It is suggested that the sum of $1,000.00 be raised to $5,000.00 in order to allow summary sales of items such as an automobile. The 5% limitation should be retained.

22. Section 2557 This section should include the power to consent as a lienholder to such conveyence or dedication by the owner of property subject to the lien.

23. Section 2575 Please see comment re Section 2101.

24. Section 2580 Subsection (a) (5) creates a power of which is, at least in one way, more extentsive than the power to make a Will on behalf of the Conservatee. A Will can be revoked or amended upon restoration of the conservatee's capacity. It is noted that the Commission has stopped short of granting testamentary power to the conservator, while the difference between these two powers appears to be inconsequential. In any event it would appear that, at least where there is no existing Will, the class of persons to whom notice should be given should be expanded to include heirs apparent of the conservatee.

The writer is Chairman of the State Governmental Affairs Committee of the California Bankers Association Trust Group. Comments made herein are, however, solely my own and although portions of the contents hereof have been discussed with representatives of other bank trust divisions and individuals within United California Bank, they do not necessarily reflect any position either of this bank or the California Bankers Association.

Respectfully submitted,

G. Sinclair Price
Vice President
Regional Trust Counsel
(415) 544-5641

GSP:ch5/1

cc: Lyston Jaco
Phillip P. Martin, Jr.
Blair Reynolds
Al McCallum

EXHIBIT 4

June, 1978

Study F-30.300

MEMO. TO MR. DEMOULLY

FROM: GARRETT H. ELMORE, Consultant

At your request I have gone over the Exposure Draft of May, 1978, to list comments that are not duplicative of points I have already made.

The following consists principally of editorial suggestions or technical points. Because of their length, I could not review the "Comments" in any detail at this time.

The list is in section sequence. Points believed to be major are marked "Substantive."

Sec. 1418. Suggest the following re-wording, although final text should await text of Part 6 (incompetent spouse). As will appear there, sometimes two conservatorships are involved and it seems desirable in the text to distinguish. E. g., "joinder" by conservator authorized by court "appointing"such conservator in a sale made in the conservatorship estate of the other spouse.

Sec. 1418. "Court", when used in connection with matters in the guardianship or conservatorship proceeding, means the court in which such proceeding is pending.

Sec. 1430. Suggest that inthis section and other sections

uniform wording be used (see below) that avoids "application" and that, as a general definition, or by Comment it be stated that "petition" includes an application in the nature of a petition. For example, an application for an extension of time or a continuance is not always verified; likewise, in the one instance where a motion for new trial may be made, a notice of intention to move for a new trial arguably is an "application" but of course is not verified.* Suggested re-draft:

1450. Except as otherwise specifically provided, a petition, report or account filed pursuant to this division shall be verified.

Suggested revision of Comment:

Comment: Section 1450 is new. It replaces references to verification in individual sections of the former guardianship and conservatorship statutes. Under existing practice petitions, reports and accounts are verified. (Cite Judicial Council forms or local rules). "Petition" is broad enough to include applications which are in the nature of petitions.

Sec. 1452. It is suggested that the third sentence of the Comment be revised, on the ground that "former law" as stated was not clearly established, particularly in the case of a "transfer" petition. Suggested:

---

* The same problem arises later on in the use of the indefinite phrase "or other papers."

(Third sentence): However, Section 1432 does not continue provisions of former law which apparently granted a right to jury trial on a petition for removal of the conservator (see former Section 1951; W. Johnson & G. Zilligitt, supra, § 7.8, at 104). It does not provide for such a right on a petition to transfer the proceeding to another county (for discussion of former law, see W. Johnson & G. Zilligitt, supra, § 2.26, at 44).

Sec. 1454 (proposed). SUBSTANTIVE. Suggested, new Section 1454 be added, as follows:

1454. When Motion For New Trial Allowed.

> 1454. A motion for new trial can be made only in cases in which, under the provisions of this division, a right to jury trial is expressly granted, whether or not the case is so tried.
>
> Comment. Section 1454 is new. However, the principle is the same as that under former law, i. e., that in guardianship and conservatorship proceedings, the motion for new trial will lie only when there was a right to jury trial, even though the issues were not tried by a jury. See former Sections 1606 and 1702, incorporating the relevant parts of Prob. Code Section 1231.

Note: Since the new Act no longer relies upon the reference to probate procedure as to jury trials, the interrelated subject to when a motion for new trial may be made should be expressly included in the Act. The new section would also assist in making the procedure more clear. The timeliness of an appeal depends upon

in this area may turn upon whether the procedure permits a motion for a new trial. Incidentally, the proposed section should be moved up one number. End of note.

Sec. 1900. In subd. (a) wording should be clarified to avoid problems as to possible application of CCP 1013 (extension of time when document is served by mail). Preferably the section should be re-structured to avoid the use of "given" and to make the 10 day period apply directly to the "act" to be done, i. e., delivery or mailing. If this cannot be done, the section should be changed, to insert after "given" the words: in the manner provided by this section, and to delete the last phrase. A further change should be the omission in subd. (c) of "or other paper." This terms is vague and is difficult to amplify by adding "initiating the matter." Suggested, that the wording should be changed to: (.....a person filing a petition, report or account). Then the Comment should refer to the broad meaning of "petition" as suggested above, p. 2.

(next page, please)

Subd. (d) leaves open the idea that notice of hearing must be sent to the same person under this section and also under Sec. 2700 et seq.,(request for special notice), a wasteful procedure. See fifth paragraph of Comment.

Sec. 1461. SUBSTANTIVE. In the writer's opinion, the requirements for sending copies of "any paper" are unduly burdensom and could lead to void or voidable orders if the requirement was not met through inadvertence. Also, "or other paper" is indefinite. Does it include objections and oppositions? As written, the section seems vague.

Sec. 1462. In subd. (b), delete: "as the court requires."

Sec. 1472, 1473. Suggest need for examining out, i. e., omit "just" , and change "issued" to "taken" in Sec. 1472; note absence of "on or after the operative date" in Sec. 1473.

Sec. 1474. Suggest the first clause in (a) read: Proceedings upon a petition, report, account or other matter filed or commenced before the operative date.... ; also strike "in progress" and change "a matter" to "the matter." In subd. (b) insert "on or" after "division."

Sec. 1475. SUBSTANTIVE Suggest consideration of re-wording subd. (a) to permit a guardianship to continue, without conversion to a conservatorship, if the relationship has terminated. Or perhaps a Comment could be added. The legal meaning is not sufficiently clear. Non-substantive: Change "application" to "petition" and in subd. (b) change

Sec. 1479. The Comment is technically inaccurate. To have the effect stated Sec. 4 of the Act (p.841) must be amended to permit this section to take effect before the operative date.

Sec. 1511.The reference in subd. (b) to CCP 415.30 is troublesome. Literally applied, it conflicts with the 15 day provisions of (a). See Sec. 415.30 procedure. The writer would substitute wording for personal delivery to the following, with wording that a written admission of receipt of the notice and copy of the petition is equivalent to personal delivery.

Sec. 1512. Should a check be made as to whether any recent legislation, i. e., the Uniform Child Custody Act, conflicts with this section.

Sec. 1812. Does not the first sentence (subd. (a)) conflict with the second sentence of Sec. 1810, relating to nomination of a conservator by the affected person (even long before). The second sentence (which follows former Sec. 1463 (guardian) states: The court shall appoint the nominee ...unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee. The conflict should be resolved in favor of Sec. 1810.

Sec. 1824. See above under Sec. 1511 as to use of Sec. 415.30.(This problem is probably one of the writer's making some years ago).

Sec. 1862. Note reference in subd. (d) to Sec. 415.30.

Sec. 1870. Suggest check of entire division (if not already made) to make certain appointment or termination are the only cases where there is right to counsel.* Part 6 (incompetent spouse) has its own provisions for appointment of counsel and compensation. Should the Comment refer to them?

Sec. 2100. SUBSTANTIVE. Suggest adding to Comment: Since Section 1452 establishes a definite rule as to when the right to jury trial exists, Section 2100 does not incorporate those portions of Section 1230 which, arguably, provide for a broader right to jury trial. (Note: This should help avoid future litigation in this area where there are efforts to broaden the law- cf. Estate of Beach).

Sec. 2328. Should the Comment be revised to reflect new sections on the right of a conservator to have a control account in the estate proceeding?

Sec. 2530. Is the power to compromise tax claims limited by Sec. 2502 (maximum liability incurred)?

Sec. 2575. A question has been raised as to "flower bonds" being able to be purchased without court order.

Sec. 2591. Suggested, that the Comment be more precise in relation to other sections permitting action without court order (drafted later), and to avoid use of "additional"

Sec. 2701. Suggested, the third sentence be clarified

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* See, e. g., Sec. 2253 (b)-representation by counsel upon change of residence proceeding.

Perishable and certain other property, under probate procedure, need not be sold pursuant to petition. A quick look at the third sentence (passing over "petition") led to the belief that notice was required for a sale of such property. Also, since under new sections, added to the draft Act, no court approval is needed in the case of securities and certain tangible personal property, the Comment should refer to this fact as well as to the sale of perishable property without petition.

Sec. 4 of Act. Operative Date. See point as to whether any section should have an earlier effective date (p. 6 above).

Memorandum 78-39

EXHIBIT 5

Study F-30.300

SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA
ADMINISTRATION BUILDING
1221 OAK STREET
OAKLAND, CALIFORNIA 94612
874-7742

June 21, 1978

DAVID C. LEE
PROBATE COMMISSIONER

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

RE: Law Revision Commission Project to Revise Guardianship-Conservatorship Law

Dear Mr. DeMoully:

Enclosed are comments on draft pertaining to Part 4, Chapters 1 through 6 which Arne Lindgren assigned to me for specific review.

I will be as well forwarding comments to you regarding several other portions of the draft but wished to get in your hands the major portion as soon as possible.

Sincerely,

David C. Lee
Probate Commissioner

DCL:mhn
Enclosures

cc: Arthur K. Marshall, Judge
Superior Court, Los Angeles

cc: William S. Johnstone, Jr.
Suite 900
301 East Colorado Blvd.
Pasadena, CA 91101

cc: Ann E. Stodden, Probate Comm.
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cc: Matthew S. Rae, Jr.
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cc: Arne Lindgren
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Attorneys at Law
Los Angeles, CA 90071

PROCEDURAL 1205 — In keeping with right of ward/conter to be advised and object to who will serve and be advised of various exercise of powers, why allow w/out notice to contee/ward? Perhaps several appointed to "watch dog" one another as compromise. Suggest notice to contee and other contor.

PROCEDURAL 2107 — Seems no predicate for appointment over person as by definition "absentee' is a missing person, therefore, if is within state and susceptible to powers of contor is no longer "absentee". Suggest delete 2107(a)

2201(b) 2202(a)(2) (b)(2) — Very bad,sets no standard as to "best interests", gives more than one proper jurisdiction. Results in race to court houses by persons seeking appointment. Suggest delete and rely upon 2210 Venue for transfer if best interests to be furthered - - after jurisdiction has been established

PROCEDURAL 2211 (c)(d) — Wasteful to allow persons other than fiduciary or ward/contee to petition what interest could they have at this point. Perhaps expend to include spouse if not separated.

PROCEDURAL 2214(a) — Add (4) to Allow Guardian/Contor (or prospective appointee) to object.

2250 (a)(b)(c) — Circumstances exist which would require temporary guardian of person for medical, custodial or status quo reasons. Suggest. Allow temporary guardian of person.

PROCEDURAL 2251 — Letters should include the termination date of temporary appointment.

PROCEDURAL 2252(b) — See 2250 above re: guardian of person.

PROCEDURAL 2253(b) — Rather than have an unnecessary hearing provide for court investigator to ascertain if constee has objections. If none,relax standard. Should be may be not shall be represented by counsel.

(c) — In many cases the specific place cannot be determined as there may be a placement problem.

PROCEDURAL 2254(b) — As usually a court hearing is calendared in near future, why not allow such a hearing to coincide with general appointment hearing unless hearing is more than reasonable time in future.

PROCEDURAL 2311 — As is general reference to letters should refer to propose 2251 amendment above re: time limit on special letters.

PROCEDURAL 2312 — Confusion eixts regarding this. Some attorneys in order to economize time will serve "proposed" order rather than endorsed filed order on contee. Notice should be more precisely prescribed.

PARTLY PROCEDURAL 2321 — Why limit contee right to waive bond to cases where contee is petitioner? If an informed consent to waiver can be given. (even if given to court investigator for non-attending contee) court should have latitude to waive.

Further if contor is spouse, could not the court be allowed to waive bonding of community?

PROCEDURAL 2324 — Should require that testamentary nomination specify appointment of guardia of estate, Too many such nominations are ambiguous as to whether is

guardian of persons and/or estate.

PROCEDURAL 2328 I have been called upon to surcharge fiduciaries too many times to like the prospective impound of assets as a predicate for lessening bond. Now most bonding company pro-rate initial premium and therefore if petitioner can't use 2328(c) to receive receipt a bond would not be that prohibitive.

2329 This would cover most guardianships. Experience suggests that this is a poor idea. As well income (VA, Soc. Sec., Trusts and Pensions) often is very high even though corpus of estate is small. I strongly urge reconsideration.

PROCEDURAL 2330 Should be amended to allow exparte reduction upon subsequent impound of funds per 2328.

PROCEDURAL 2331 Should be after transaction as may be over bids, etc.

PROCEDURAL 2335 Allow Guardian/Contor to exparte petition.

PROCEDURAL 2402 Is it intended that court be given actual knowledge or merely that court files be amended by a report of fact? If actual knowledge is intended, serve on court or court investigator?

2403 (b) I don't understand why (b) is included!

PROCEDURAL 2406 Fails to establish form of notice how hearing is to be calendared. Cannot court investigator be utilized?

PROCEDURAL 2407 Such conditions, etc. should be included in letters under 1831.

PROCEDURAL 2502 Same as comment on 2407 above.

2505 Reserve comments depending upon Section 3000 et seq.

PARTLY PROCEDURAL 2513 Why not extend the power to petition to ward. Circumstances exist which could justif the court's granting use for ward's family as well.

Why restrict use of surplus to relatives. Often actual objects of bounty are not next of kin. Indeed may be strangers to the blood.

Why not allow contee/ward to petition as well.

" 2516 (d) Last word, second sentence "is" should be changed to may allowing shift of burden to claimant in doubtful cases where fiduciary can't actually conclude claim to be invalid.

(e) Provide for notice. Add (f) to allow for PC 718 summary determination of validity of disputed claim.

2523 Add to last sentence the clause", unless deposited pursuant to Section 2328." for clarification.

2525 Does this mean may be held in street name? If so, is it wise, particularly if institutional fiduciary?

2530 Should be shall not may.

ROCEDURAL 2531 Most courts have contingent fee limits for litigation on behalf of minors (some for 2533 contee as well) As the court generally fixes fee any way shouldn't fees be included (a) (1) in 2533(b)

PROCEDURAL 2535 When is determination made? I prefer such abandonment to be ordered. Is commonly as part of account current.

2544 Why this change? Frequently such sales are determined to be not in best interest of ward/contee after capital gains or other considerations are discussed.

2545 (b) The $1000 limit is on proceeds received not Fair Market Value of items sold.

(c) (1) If a 12 year old can disapprove surgery, why have 14 age limit here.

2255 What consideration causes $750/mo. rather than $250 as per administrator whose duties are limited in duration to the closing of estate?

2575 See comments to 2544 as to change. The difference between a trustee and guardian/contor is that for sure a guardian/contor is fiduciary for one under an incapacity. Beneficiaries of trusts usually are unincapacitated and therefore able to monitor the conduct of the fiduciary.

2585 As a policy matter I disapprove of such exculpatory language. Omission can be a predicate for liability under general fiduciary law. The trend is surely moving toward increasing such liability. Should the Guardianship/Contorship law be an express statutory exception? Particularly as corporate fiduciary performance seems to be less artful than it once was.

EXHIBIT C

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CABLE ADDRESS
HAHNLAW

Study F-30.300

June 15, 1978

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Law Revision Commission Project to revise Guardianship-Conservatorship Law

Dear Mr. DeMoully:

As I advised your staff, my professional schedule, including being out of the office for several weeks, has prevented me from responding to you sooner and in a more complete fashion, all with respect to the above-referenced matter. However, as was suggested, I have photocopied pages of your exposure draft on which I have made notes. A photocopy of such pages is enclosed herewith for your staff's attention. Some of my comments are self-explanatory, some of them may prove cryptic; however, I felt it best to get to you what I could as soon as possible. It will at least provide a reference for discussion purposes at the forthcoming meeting.

Before concluding this letter, let me reiterate the comment which I made to your staff. As a general reaction to the draft, I am very favorably impressed with the work product, not only substantively, but from a drafting standpoint. Reviewing as much legislation as I do, and have done, for the State Bar, I am constantly depressed. In contrast, my feeling was one of exuberance in reviewing your draft. You and your staff should be commended for an outstanding job of drafting in the instance of this subject.

I will look forward to meeting with you and others at your forthcoming meeting commencing July 6, 1978.

Very truly yours,

William S. Johnstone, Jr.
of HAHN & HAHN

WSJ/kks
Enclosures

cc w/ enclosures: David C. Lee
Judge Arthur K. Marshall
Ann E. Stodden
Matthew S. Rae, Jr.
Arne S. Lindgren

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF LAW DAVIS, CALIFORNIA 95616

June 23, 1978

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoully:

Thank you for sending me the Commission's First Exposure Draft of a Guardianship-Conservatorship Law.

I have not given the draft an in-depth reading, but do have some comments and questions.

Let me state to begin with that the proposed new scheme is a great improvement over the present law. Limiting guardianship to unmarried minors and consolidating many provisions common to guardianship and conservatorship makes a great deal of sense.

Turning to specifics, I shall follow the sections of the draft in numerical order.

§ 1461.

Should notice under this and various other provisions be given to directors of Regional Centers for the retarded and other developmentally disabled who have never been in a state hospital? Or is this covered in the Health & Safety or other Code?

§§ 1500-1501.

As to guardianship, the idea of "appointment" by a parent or other person is retained. Subsequent sections clarify that court confirmation is required. The sections on conservatorship refer to "nomination" (§§ 1811-1812). Would it be preferable (and clearer to non-lawyers reading § 1500) if "nomination" were used in both cases?

§ 1510(c)(2) and § 1511(b)(2).

The person having the "care" (de facto, physical, custody) of the proposed ward may be a neighbor or grandparent, whereas legal custody may have been awarded to another nonparent under Civil Code § 4600 or by the juvenile court. I think that both the legal custodian (if not a parent) and the actual caretaker should be listed.

§ 1512.

This section divides § 1442 of the present law into two subdivisions. §1512(a) is all right. Subdivision (b), however, is apt to be abused in today's climate of increasingly ferocious battles over children. Fathers or mothers who are separated, divorced, or unmarried, or nonparents seeking custody,may assert "that there is reason to believe that the minor will be carried out of the jurisdiction of the court." Thereupon the child may be arrested by a sheriff or the police and either handed over to the other party in the domestic feud or placed into custody, presumably in a neutral place which may be a police station. The arrest of young children by uniformed officers or other strangers is as harmful to children (or more so) as a child-snatching by a person whom the child knows. Subdivision (b) standing by itself does not require proof that the child suffers irreparable injury. The reenactment and reaffirmation by the legislature of this hitherto relatively obscure provision would surely be seized upon as a tool in today's family feuds - a tool that is extremely dangerous for children.

The Titcomb case referred to in the comment warned that this "summary power should be exercised with extreme caution where the child is in the care of the other parent." 220 Cal. at 41 (1934). Judges today are under extreme pressures at times to use such extraordinary powers. For example, a parent may seek the arrest of a child under § 1512(b) when the other parent, who has legal custody, is in the process of moving. This subject is governed by Civil Code § 213. Restraining orders against the parent (not arrest of the child) are permitted only when the child's welfare is prejudiced. If § 1512(b) is enacted, the noncustodial parent may be able to argue successfully that that section, being the later enactment, supersedes or supplements § 213.

Perhaps the law should provide that a child may be seized and immediately returned to the parent who has custody when the other parent snatches the child and is in the process of leaving the state, if this is practically feasible. The use of criminal sanctions and police measures in such cases is presently being debated in the Congress and various state legislatures. The guardianship law is hardly the place for a piecemeal coverage of this subject which holds grave dangers for children. I urge the deletion of subdivision(b).

§ 1513(b).

The guardianship may be contested by a parent or by other petitioners for guardianship. The report would have to be made available to all parties.

§§ 1540-1544.

I have difficulty seeing the need or desirability of these provisions. There are no such requirements under Civil Code section 4600. It makes no difference under section 4600 whether the nonparent is a relative or not. § 1544 is particularly objectionable. There is no reason why guardianship investigations should not all be made, like CC 4602 investigations, pursuant to § 1513. Guardianship proceedings are used at times when adoptions are not proceeding satisfactorily. See San Diego County Dept. of Welfare v. Superior Court, 7 Cal. 3d 1 (1972); Guardianship of Henwood, 49 Cal. 2d 639 (1958).

Naturally, in such cases the investigation must be made by an agency which is not involved in the adoption.

However, it would be desirable that the petition under § 1510 disclose whether the petitioner, or any other person known to the petitioner, has filed an adoption petition or a guardianship petition concerning the same child in the particular county or any other county of the state. The petition should also disclose whether any action has been taken under the Juvenile Court Act, whether a formal petition has been filed under that Act or not.

§ 1601.

I would suggest adding "when it is no longer necessary that the minor have a guardian." Compare comment to § 2650. Also, a parent should be one of the persons permitted to petition for termination of the guardianship.

§ 1820(b).

I wonder whether there is any way to have the changeover from guardianship to conservatorship take place automatically. Guardianship may lapse and there is no one who petitions for conservatorship in a case where there is severe retardation or mental disability. Perhaps the court on its own motion should continue a guardian as conservator when the need is clear.

§ 1870.

The draft does not include the appointment of counsel for a minor in a guardianship proceeding. Civil Code section 4606, effective in 1977, provides that the court may appoint counsel for the child. When there is a contest over custody (or guardianship), independent representation of the minor is desirable in certain cases.

§ 2210.

This draft proposes to eliminate transfers of guardianship proceedings to other states. I consider the present § 1603 which authorizes such transfers to be a most desirable provision. Considering the mobility of the population, there will be many guardians who move elsewhere. When permission is given by the court to move with the minor, there should be no great difficulty about sending a court memorandum (with copy to the guardian) to the trial court of the new residence. Details can be worked out by Judicial Council rule. An interstate procedure would preserve the continuity of the guardianship and obviate the necessity for entirely new proceedings in the second state. The Uniform Child Custody Jurisdiction Act provides for various cooperative procedures between the states which are beginning to work.

§ 2751(c).

I regret very much that you seem to feel bound by section 917.7 of the Code of Civil Procedure to except guardianship of the person from the stay-on-

appeal provision of this section. Please see my article on adoptions, 49 S. CAL. L. REV. at 89-96.

I hope that some of these comments will be of use to the Commission.

Sincerely,

Brigitte M. Bodenheimer

Brigitte M. Bodenheimer
Professor of Law

BMB:hf

cc: Prof. Jean Love