#F-30.300 6/30/78

First Supplement to Memorandum 78-39

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

This supplement continues the review of the comments received on the Exposure Draft.

§ 2515. Payment of debts and expenses generally

Mr. Price (Exhibit 2) comments:

> 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 activitiy 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 conservatee made a large purchase and, after imposition of a conservatorship, it were determined that the purchase was an irrational act, due to factors not known to the provider, would this be a "reasonable" debt? If not, an individual might avoid the consequences of his own intentional improvidence with a "friendly" conservatorship.

The requirement that debts under paragraphs (1) and (2) of subdivision (a) be "reasonable" is new. The staff suggests the words "and reasonable" be deleted from both paragraphs, retaining the requirement that the debts be "just." This will make the section a closer reflection of existing law and will avoid the problem identified by Mr. Price.

§ 2516. Priority for wage claims

Commissioner Lee (Exhibit 5) makes three suggestions:

First, the second sentence of subdivision (d) should be revised so that the guardian or conservator may refuse to pay wage claims where "there is reasonable cause to believe that the claim ~~is~~ may not be valid." This change is suggested to give the guardian or conservator a bit more latitude.

Second, subdivision (e) should be revised to require notice of the application.

Third, a new provision should be added to allow the matter to be summarily determined by a commissioner or referee under Probate Code

Section 718 (would require written agreement of guardian or conservator and wage claimant to submit matter).

§ 2520. Extent of court supervision

To conform to other provisions and to eliminate the last clause of subdivision (a) (which becomes unnecessary with the revision of Section 2625 of the Supplemental Material), the staff recommends that Section 2520 be revised to read:

> § 2520. Extent of court supervision
>
> 2520. (a) Unless this article specifically provides for a proceeding to obtain court approval or requires court approval, the powers and duties set forth in this article may be exercised or performed by the guardian or conservator without court approval, instruction, or confirmation. Nothing in this subdivision precludes the guardian or conservator from seeking court approval, instructions, or confirmation pursuant to Section 2403.
>
> (b) Upon petition of the ward or conservatee, a creditor, or any person interested in the estate, or upon the court's own motion, the court may limit the authority of the guardian or conservator under subdivision (a) as to any particular power or duty or as to particular powers or duties. Notice of the hearing on a petition under this subdivision shall be given for the period and in the manner prescribed in Chapter 3 (commencing with Section 1460) of Part 1.

The reference to Section 2403 is to the instructions section, which is renumbered from its former number 2503.

§ 2523. Deposit or investment of money

Section 2523 permits the guardian or conservator to deposit money in a bank or certain other savings institutions. The last sentence provides that the money may be withdrawn without order of court. Commissioner Lee (Exhibit 5) would qualify this as follows:

> The money may be withdrawn without order of court unless deposited pursuant to Section 2328 [money deposited to controlled account is excluded in computing bond].

Section 2523 is a section that was included to permit deposits in accounts that may be withdrawn without court order. We recognize that the Exposure Draft is unclear. However, the Commission has determined to add a new section (set out as Section 2456 of the Supplemental Material) relating to deposits withdrawal only on court order. This new section

would go in the same area of the statute as Section 2523 of the Exposure Draft, and the two adjacent sections and their official Comments should take care of Commissioner Lee's concern.

The last sentence of the Comment to Section 2523 provides: "if the guardian or conservator desires to make a deposit or investment in an amount in excess of the amount fully covered by insurance, the deposit or investment can be made only with court authorization." Mr. Johnstone notes that this statement is not clear from the section and asks why it is included here. We will expand the Comment to make the point clear.

Mr. Price (Exhibit 2) comments concerning the Commission note under Section 2523:

> 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).

Section 1831(a)(2) of the Exposure Draft would permit the conservatee to have an account in her own name.

§ 2456 [Supplemental Material]. Deposits and investments withdrawable only on court order

This is a new section to be found in the Supplemental Material (June 1978) and is noted for your attention at this point.

§ 2525. Deposit of securities in securities depository

Section 2525 authorizes securities to be deposited in a "securities depository." The section continues former law. Commissioner Lee (Exhibit 5) asks whether this means that securities may be held in street name. The answer to this appears to be yes since a "securities depository" is defined in Section 30004 of the Financial Code as follows:

> 30004. "Securities depository" means any person or group of persons who acts as the custodian of securities in accordance with a system for the central handling of securities whereby all securities of a particular class or series of any issues deposited within the system are treated as fungible and may be transferred or pledged by bookkeeping entries effected by that person without physical delivery of such securities.

Commissioner Lee asks whether it is wise, particularly in the case of an institutional fiduciary, to permit securities to be held in street name.

§ 2526. Maintaining home of ward or conservatee and dependents

Mr. Johnstone asks whether "shall" should not be substituted for "may" in this section. The Commission will recall that all sections granting powers are phrased using "may" rather than "shall." This is because Section 2501 provides that the guardian or conservator shall exercise a power when ordinary prudence so requires.

§ 2528. Life insurance and medical, retirement, and other benefits

Mr. Price (Exhibit 2) suggests that "mutual fund and other dividend reinvestment plans initiated by a conservatee prior to imposition of the conservatorship should be added to" the matters listed in this section.

§ 2530. Taxes and tax returns

Mr. Price (Exhibit 2) says, "A natural addition to this section would be the exercise of elections, such as subchapter S corporation holdings, gain deferral options, etc." This is a good suggestion. The staff has some concern as to what language would be appropriate to carry out the suggestion.

Commissioner Lee (Exhibit 5) would change "may" to "shall" (guardian or conservator "shall" make tax returns, etc.). As previously noted, all powers are phrased using "may."

Garrett Elmore (Exhibit 4) asks whether the power to compromise tax claims given by Section 2530 is limited by the section in the compromise article (Section 2502 set out in Supplemental Material) which requires court approval of a compromise where the liability created exceeds $25,000. Under the proposed law as now drafted, it appears that the answer to this question is yes. The staff believes that court approval should not be required to compromise taxes. Accordingly, we would add at the beginning of Section 2530: "Notwithstanding Section 2502,".

§ 2533 [Exposure Draft]. Compromise of claims and actions; extension, renewal, or modification of obligations

Commissioner Lee (Exhibit 5) comments:

> Most courts have contingent fee limits for litigation on behalf of minors (some for contee as well). As the court generally fixes fee anyway, shouldn't fees be included in 2533(b)?

(It should be noted that Section 2533 of the Exposure Draft has been superseded by new Article 5 (commencing with Section 2500) of Chapter 6 of the Supplemental Material.)

The provisions covering this matter are Section 3302 and Section 3601 of the Supplemental Material (yellow pages 1-2, 10). These provisions appear to be adequate.

§§ 2500-2508 [Supplemental Material]. Compromise of claims and actions

The new provisions on compromise of claims and actions (found on the white pages in the Supplemental Material) are appropriate for discussion here.

§ 2535. Abandonment of valueless property

Commissioner Lee (Exhibit 5) comments:

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

§ 2536. Advances by guardian or conservator

Mr. Price (Exhibit 2) comments:

> 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 judgments.

§ 2537. Care of estate pending delivery to personal representative

Mr. Price (Exhibit 2) comments:

> 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".

The substance of this suggestion is recommended by the staff.

§ 2542. Terms of sales

Mr. Price (Exhibit 2) comments with respect to subdivision (c) of Section 2542:

> 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 cost 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.

§ 2543. Manner of sale

When a guardian or conservator undertakes to sell real or personal property, Section 2543 requires that the procedure applicable to sales

by administrators be followed. Under Probate Code Section 780, the administrator must cause notice of the time and place of real property to be published. However, if authority is given in a will to sell property, the executor may sell it with or without notice under Probate Code Section 757, subject to review by the court for fairness. Mr. Price suggests that Section 2543 incorporate the procedure for sale under Section 757 rather than under Section 780 so that publication is not necessary before the sale although the sale should remain subject to review and confirmation by the court.

§ 2544. Listed stocks, bonds, and securities; United States obligations

Mr. Price (Exhibit 2) suggests that "consideration be given to the inclusion of state, federal, and municipal securities, including agencies thereof, in the categories set forth in subdivision (a)(1)." This addition would be appropriate to the extent that there is a relatively fixed market price at any given time for these securities.

Commissioner Lee comments:

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

The reason the change is recommended is that the situations covered by the section are ones where the market price for the property sold is established on the exchange and need not be shown to be a fair one before the sale is authorized by the court. The decision whether to sell a particular security (and the capital gains and other considerations involved in the decision) is one that the guardian or conservator should be competent to make. The staff is reluctant to adopt the view that the court has the function of serving as an investment and tax counselor with respect to sales of securities on an established exchange. The guardian or conservator will be held to the standard of ordinary prudence. The authority to sell without prior court approval will result in the saving on a stock or security sale of the cost of a petition for approval. On balance, the staff believes that Section 2544 is a significant improvement in existing law.

§ 2545. Sale or other disposition of tangible personal property

Mr. Price (Exhibit 2) suggests that "the sum of $1,000 be raised to $5,000 in order to allow summary sales of items such as an automobile. The 5% limitation should be retained."

Commissioner Lee (Exhibit 5) points out: "The $1000 limit is on proceeds received not Fair Market Value of items sold." The problem with placing the limit on the "fair market value of the interest of the estate in tangible personal property" is that it may not be possible to realize that amount under the circumstances that require the sale. And the cost of going to court for approval may exceed the amount to be realized from the sale. The sales can and will be reviewed on the accounting to determine whether the guardian or conservator exercised ordinary prudence under the circumstances in making the sale.

Commissioner Lee (Exhibit 5) asks: "If a 12 year old can disapprove surgery, why have a 14 age limit here [subdivision (c)(1)]."

§ 2555. Leases permitted without court order

Commissioner Lee (Exhibit 5) asks: "What consideration causes $750/mo. rather than $250 as per administrator whose duties are limited in duration to the closing of estate?" Perhaps the provision relating to the administrator should be revised upward but that is beyond the scope of this project. There is little doubt but that the last few years have seen a substantial increase in property values and a somewhat corresponding increase in rents.

§ 2557. Dedication or conveyance of real property or easement with or without consideration

Mr. Price (Exhibit 2) suggests: "This section should include the power to consent as a lienholder to such conveyance or dedication by the owner of property subject to the lien." The staff believes that this is a desirable revision. In addition, the section needs other revisions to conform to decisions made by the Commission at the last meeting with respect to a comparable section. Accordingly, the staff suggests that Section 2557 be revised to read:

§ 2557. Dedication or conveyance of real property or easement with or without consideration

2557. (a) If it is for the advantage, benefit, and best interests of the estate and those interested therein, the guardian or conservator, with the approval of the court, may do any of the following either with or without consideration:

(1) Dedicate or convey any real property of the estate or any interest therein to any public entity (including but not limited to the United States or any agency or instrumentality thereof) for any purpose.

(2) Dedicate or convey an easement over any real property of the estate to any person for any purpose.

(3) Convey, release, or relinquish to any public entity any access rights to any street, highway, or freeway from any real property of the estate.

(4) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under paragraph (1), (2), or (3) by the owner of property subject to the lien.

(b) To obtain the approval of the court, the guardian or conservator or any person interested in the estate shall file a petition with the court. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Section 2557 continues the substance of former Section 1515 with the addition of paragraph (4) of subdivision (a).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451
Definitions
  Conservator, § 2400
  Court, § 1418
  Guardian, § 2400
Petition must be verified, § 1450

If this provision is approved, the staff will add a provision comparable to paragraph (4) of subdivision (a) to Section 3101 (page 11 of green pages of Supplemental Material).

§ 2571. Purchase of home for ward or conservatee or dependents

Mr. Johnstone notes that Section 2571 uses the phrase "for the advantage, benefit, and best interest of the ward or conservatee and of those legally entitled to support and maintenance from the ward or conservatee" while Section 2540(c) (purposes of sales) uses the phrase "for the advantage, benefit, and best interest of the ward or conservatee, of the estate, or of those legally entitled to support, maintenance, or education from the ward or conservatee." The staff was aware of the difference in language. What, if any, change does the Commission wish to make in either section?

§ 2575. United States and State of California obligations; listed stocks, bonds, and other securities

See the comment of Mr. Price under Section 2101 of Memorandum 79-39.

Commissioner Lee (Exhibit 5) comments:

> 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.

Mr. Elmore (Exhibit 4) states:

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

However, paragraph (2) of subdivision (a) was put in Section 2575 to deal with this problem.

§ 2580. Petition for approval of proposed action

Mr. Price (Exhibit 2) comments:

> Section 2580 Subsection (a)(5) creates a power of which is, at least in one way, more extensive 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.

To the same effect is the comment of Mr. McCallum (Exhibit 3):

> While I understand the advantages of and possible need for Section 2580, I am particularly concerned with the consequences of (b)(5) and the possibility of making an irrevocable transfer of the Conservatee's property into a trust, thus circumventing the Court's supervision.

It should be noted that an action can be taken under the exercise of substituted judgment article only upon court order after notice to all interested persons (Section 2581) after adequate provision for the conservatee and dependents is made (Section 2582) and all the relevant circumstances are taken into consideration (2583). The notice requirement under Section 2581 includes notice to the persons required to be named in a petition for the appointment of a conservator (spouse and relatives within second degree). With these restrictions on the exercise of substituted judgment, the staff believes that a trust may be the most appropriate estate planning technique under the circumstances of a

particular estate and the use of a trust should be expressly authorized. Moreover, we believe that there will be cases where all persons concerned will be in support of the petition. Hence, we recommend no change in the statute.

§ 2585. No duty to propose action

Commissioner Lee (Exhibit 5) comments:

> 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.

§ 2591. Powers that may be granted

Mr. Elmore (Exhibit 4) suggests revisions in the Comment to this section. The staff has substantially revised the first portion of the Comment to read as follows:

> Comment. Section 2591 is based on the second paragraph of former Section 1853. Under former Section 1853, the court could authorize a conservator to exercise certain powers without the necessity of obtaining specific prior court approval in each case. Under Section 2590, this authority is broadened to include guardians as well as conservators.
>
> Except to the extent the court for good cause otherwise orders, a testamentary guardian appointed by a will may, to the extent provided in the will, exercise any one or more of the powers listed in Section 2591 without notice, hearing, or court approval, confirmation, or instructions. See Section 2108.
>
> Some of the powers listed in former Section 1853 are not listed in Section 2591 because they are codified in this division as powers exercisable without court approval unless the power is restricted by the court. See Sections 2451 (power to collect debts and benefits), 2458 (power to vote shares and securities in person or by proxy), 2459 and 2460 (power to continue or obtain insurance), 2461 (power to pay or compromise taxes), 2462 (power to maintain actions and proceedings other than partition, and to defend actions and proceedings), 2465 (power to abandon property). The remaining powers from former Section 1853 are recodified in Section 2591. The power to commence and maintain an action for partition is retained in Section 2591 (formerly included in the power to institute and maintain all actions) since court approval is otherwise required. Section 2463.

No change is proposed in the last paragraph of the existing Comment other than to correct a couple of section references to reflect the renumbering of certain sections. The numbering of the sections in the

portion of the Comment set out above reflects the numbering of the sections as renumbered in the outline included in the Supplemental Material (June 1978).

§ 2601. Wages of ward or conservatee

Mr. Johnstone raises a question about giving the court discretion to make wages a part of the estate. The "unless otherwise ordered by the court" clause at the beginning of the section has this effect. In this respect, the section continues existing law. See former Sections 1910 (conservatee), 1561 (adult ward). With respect to the wages of a minor ward, Civil Code Section 212 provides: "The wages of a minor employed in service may be paid to him, until the parent or guardian entitled thereto gives the employer notice that he claims such wages." Accordingly, we recommend no change in the section.

§ 2610. Filing inventory and appraisement

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

> 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 came 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.

The staff has no solution to this problem. Perhaps persons in attendance at the meeting may have some suggestions.

§ 2620. Presentation of account for settlement and allowance

At the June meeting, the Commission requested the staff to redraft this section to provide for a statement of the contents of the account. The following draft is submitted for Commission consideration:

> § 2620. Presentation of account for settlement and allowance
>
> 2620. (a) At the expiration of one year from the time of appointment and thereafter not less frequently than biennially, unless otherwise ordered by the court, the guardian or conservator

shall present the account of the guardian or conservator to the court for settlement and allowance.

(b) The account shall state the period covered by the account and contain a summary showing all of the following:

(1) If the first account, the amount of appraisement; if a subsequent account, the amount chargeable from the prior account.

(2) The amount of cash receipts, excluding principal items.

(3) The gains on sales or other increases in assets, if any.

(4) The amount of disbursements.

(5) The losses on sales or other dispositions of assets, if any.

(6) The amount of property on hand.

(c) The account shall contain itemized schedules showing receipts, disbursements, transactions, and balance of property on hand.

(d) The petition for approval of the account or a report accompanying the account shall contain all of the following:

(1) Descriptions of all sales, purchases, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedules.

(2) Explanations of any unusual items appearing in the account.

(3) Any additional information required by the court.

(e) The petition requesting approval of the account may include additional requests for approval, instruction, or confirmation authorized by this division.

(f) When an account is rendered by or on behalf of two or more joint guardians or conservators, the court, in its discretion, may settle and allow the account upon the verification of any of them.

Comment. Section 2620 supersedes former Sections 1553 and 1904. Subdivisions (a) and (f) continue the substance of former Section 1904. Subdivisions (b), (c), (d), and (e) are new. Subdivisions (b), (c), and (d) are drawn from local court rules. Subdivision (e) makes clear that the petition for approval of the account may include such additional requests as requests for compensation for services rendered by the guardian or conservator of the estate, compensation for services rendered by the attorney for the guardian or conservator of the estate, compensation for the guardian or conservator of the person, monthly personal allowance for the conservatee, monthly allowance for the support of the conservatee and the dependents of the conservatee, or distribution of excess income to next of kin of the conservatee. The courts generally prefer to determine these kinds of matters when an account is being settled. See W. Johnstone & G. Zillgitt California Conservatorships §§ 6.8, 6.26, 6.45 (Cal. Cont. Ed. Bar 1968).

CROSS-REFERENCES

Account must be verified, § 1450
Definitions
  Conservator, § 2600
  Court, § 1418
  Guardian, § 2600
Effect of court authorization or approval, § 2107
Nonresident ward or conservatee, § 2107
Review of sales, purchases, and other transactions, § 2625

§ 2623. Compensation and expenses of guardian or conservator

In the interest of completeness, the staff suggests that paragraph (1) of subdivision (a) be revised to read:

> (1) The amount of the reasonable expenses incurred in the execution of the trust, including the cost of any surety bond furnished , ~~and~~ reasonable attorney's fees , and such compensation for services rendered by the guardian or conservator of the person as the court determines is just and reasonable .

This addition makes clear that compensation for the services of the guardian or conservator of the person may be included in the account of the guardian or conservator of the estate.

§ 2625 [Supplemental Material]. Review of sales, purchases, and other transactions

Revised Section 2625, contained in the Supplemental Material, is noted for your consideration at this point.

§ 2630. Petition by guardian or conservator

The staff recommends that provision be made for the fixing of the compensation of the guardian or conservator of the person upon petition of the guardian or conservator of the estate. We propose that Section 2630 be revised specifically to permit this. We also propose that a new section, Section 2632, be added to permit petition by the guardian or conservator of the person (giving that guardian the same right we propose to give the attorney). The text of the two sections follows:

Article 4. Court Order Fixing Compensation for Guardian, Conservator, or Attorney

§ 2630. Petition by guardian or conservator

> 2630. (a) At any time after the filing of the inventory and appraisement, but not before the expiration of three months from the issuance of letters, the guardian or conservator may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator for services rendered to the estate to that time.

(2) The attorney for services rendered by the attorney to the guardian or conservator.

(3) The guardian or conservator of the person for services rendered in that capacity to that time.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation as the court determines is just and reasonable to the guardian or conservator for services rendered to the estate or to the guardian or conservator of the person for services rendered as guardian or conservator of the person, or to both, and (2) such compensation as the court determines is reasonable to the attorney for services rendered to the guardian or conservator. The compensation so allowed shall thereupon be charged to the estate.

(d) If the guardian or conservator is a nonprofit charitable corporation described in Section 2104, the compensation of the guardian or conservator and the compensation of the attorney representing the guardian or conservator, in each instance, shall be for services actually rendered and shall not be based upon the value of the estate.

Comment. Section 2630 is based on former Section 1556 (second paragraph), with the addition in subdivision (d) of Section 2630 of provisions in former Sections 1907 and 1908 relating to nonprofit charitable corporations. In addition to the notice prescribed by subdivision (b), the court may require further or additional notice. See Section 1462.

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451
Definitions
  Conservator, § 2600
  Court, § 1418
  Guardian, § 2600
Fee for attorney rendering account for dead or incompetent guardian or conservator, § 2642
Petition must be verified, § 1450

§ 2632. Petition by guardian or conservator of person

2632. (a) At any time permitted by Section 2630 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time in such capacity.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate.

Comment. Section 2632 is new. The section is comparable to Section 2631 and is in accord with prior practice. See W. Johnstone & G. Zillgitt, California Conservatorships § 6.26, at 244 (Cal. Cont. Ed. Bar 1968) ("The conservator of the person does not account to the court. . . . His petition for fees for his services may be part of the account of the conservator of the estate or he may file a separate petition for fees.").

CROSS-REFERENCES

Accounting, compensation for guardian of person, § 2623
Appealability of order for compensation, § 2750
Clerk sets petition for hearing, § 1451
Definitions, court, § 1418
Petition must be verified, § 1450

§ 2660. Resignation of guardian or conservator

Mr. McCallum (Exhibit 3) comments:

> Section 2660 could result in a successor taking possession of assets or accepting fiduciary duties without the benefit of being fully informed on the acts of his predecessor or the full nature of the account. Where continuity is required, I suggest a temporary or special Guardian or Conservator be appointed with limited powers and duties.

The staff believes that it would be better, if practical, to deal with this problem by giving the court express authority to make such orders as are necessary to cover the transition during the period prior to the settlement of the accounts of the resigning guardian or conservator. Perhaps the persons in attendance at the meeting can provide some suggestions that might solve this problem.

§ 2702. Petitioner required to give requested special notice

Mr. Elmore (Exhibit 4), referring to Section 2701, points out that the third sentence of the Comment to Section 2702 is incorrect and suggests other revisions in the Comment to Section 2702 to reflect decisions made since this Comment was drafted. The staff will revise the Comment along the lines he suggests.

§ 2704. Request for, and furnishing of, notice of filing of inventory and appraisement

Mr. Johnstone suggests that, in the interest of clarity, the phrase ", including any supplementary inventory and appraisement," be added after "appraisement" in the third line of subdivision (e) on page 210 of the Exposure Draft.

§ 2751. Stay

Under Section 2751, the general rule is that an appeal from an order in guardianship or conservatorship stays the operation and effect of the order. However, subdivision (c) makes an exception to this general rule in proceedings for guardianship of the person (in effect, child custody), and applies Section 917.7 of the Code of Civil Procedure (no stay of child custody orders). In this respect, Section 2751 appears to continue existing law.

Professor Bodenheimer (Exhibit 7) comments on Section 2751:

> 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.

The pertinent pages of Professor Bodenheimer's article are reproduced and attached to this supplement as Exhibit 1. Professor Bodenheimer argues very persuasively against the no stay rule of Section 917.7, stressing that changes of custody should be minimized and that, unless the child's physical or emotional health is endangered, the status quo should be preserved until the appeal is concluded. Justice Duniway described the problem as follows:

> This case illustrates the almost impossible position in which an appellate court is placed when it is called upon to review an order of the superior court transferring the custody of a child from one of two divorced parents to the other.
>
> * * * * *
>
> How can an appellate court, 16 months or more after the order is made, take any intelligent action? If we were to reverse, we would change a "status quo" of 16 months' duration without having any knowledge as to what the current situation is. Had a stay been granted, the same problem would arise upon affirmance.
>
> * * * * *
>
> [T]he fact that the order is not stayed is in itself a further argument against reversal. Under these circumstances, it can be predicted that reversals will be rare indeed.

Stack v. Stack, 189 Cal. App.2d 357, 11 Cal. Rptr. 177 (1961).

Although Professor Bodenheimer advances specific proposals for revision of Section 917.7 of the Code of Civil Procedure (see pages 94-96 of her article), it would seem that that is beyond the scope of the

guardianship-conservatorship revision. The question presented is, assuming the no stay rule of Section 917.7 is not good policy, should we nonetheless continue the rule in guardianship proceedings that applies in child custody matters generally, or should we adopt Professor Bodenheimer's suggestions for revision of the general rule--but only for guardianship proceedings--with the consequent problem of litigants selecting the form of action to achieve the desired result?

§§ 3000-3154 [Supplemental Material]. Community and Homestead Property

These provisions are found in the supplemental Material (June 1978) and are discussed separately in the Second Supplement to Memorandum 78-39.

§§ 3300-3612 [Supplemental Material]. Chapters 1-4 of Part 7 (Other Protective Proceedings

This new material is found in the Supplemental Material (June 1978) (yellow pages) and is noted for your consideration at this point.

§§ 3700-3803 of Exposure Draft (Pages 232-241)

We received no comments on this material.

SEC. 4 (Page 241 Exposure Draft)

The staff plans to revise this section to permit the Judicial Council and any other public officials to take any actions necessary before the operative date in order that the new statute can go into operation on the operative date. (This would include, for example, preparing forms and developing any needed transitional court rules.)

Rules of Construction For the Probate Code (Yellow Pages 242-243 Exposure Draft)

We received no comments on this proposal.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

B. Preserving the Custody Status Quo Pending Accelerated Appeal

1. *The Present Legal Situation*

One of the goals to which the adoption process should be directed is the prevention of repetitive changes in the custody of the child. The familiarity of the child with his daily surroundings is very important, and is worthy of preservation by the adoption law whenever possible.[420]

Unfortunately, the current law does not adequately protect the stability of a child's surroundings while custody orders of trial courts are on appeal. The problems which occur during appeal of a custody determination can be illustrated by two California cases. *C.V.C. v. Superior Court*,[421] discussed earlier in another context,[422] involved a 2-year-old girl who had lived with prospective adoptive parents for some 8 months under an agency placement. After an unverified telephone complaint the agency demanded the return of the child. The trial court ordered the child to be delivered over to the agency. The prospective adopters immediately filed notice of appeal. Their motion for

---

with a stable home environment to assure healthy psychological development. Securing early finality of an adoption decree for the benefit of the adoptee is therefore not an important consideration in adult adoptions. It has been pointed out that adoption of adults could more accurately be described as "designation of an heir." *Id.* at 652. *See also* tenBroek, *supra* note 353, at 264-65; Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 Cornell L. Rev. 566, 577-80 (1969), both of which list additional motivations for some adult adoptions.

Many states, including California, permit the adoption of adults with simplified proceedings which do not require the consent of the natural parent. *See, e.g.*, Cal. Civ. Code § 227p (West Supp. 1975). The case of Adoption of Sewall, 242 Cal. App. 2d 208, 51 Cal. Rptr. 367 (1966), illustrates the potential for abuse which exists under such statutes. *Sewall* involved the adoption of a younger woman by a 72-year-old man, which the adopter's relatives sought to set aside after his death on the ground of fraudulent representations by the adoptee. While expressing doubt that the statute of limitations of the adoption law was intended to apply to adult adoptions, the court determined that the time period for attack on an adult adoption on the basis of fraud was tolled until discovery of the fraud. *Id.* at 223, 226, 51 Cal. Rptr. 378-79, 381; *see* Wadlington, *supra*, at 575-76.

Because the proposed 6-month statute of limitations for attack on an adoption is tailored specifically to the needs of children, it is recommended that the result in the *Sewall* case be codified. Attack on adult adoptions should be governed by the general fraud statute of limitations of Cal. Civ. Pro. Code § 338(4) (West Supp. 1975), and by other time bars of general law.

420. *See* text accompanying notes 40-47 *supra*; Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. Colo. L. Rev. 495 (1975).

421. 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973).

422. *See* text accompanying notes 364-76 *supra*.

a stay of enforcement was refused by the trial court. The child was then taken from the adopters and the same day was placed with new prospective adoptive parents. The appellate court, after refusing a writ of supersedeas, ruled that the child's removal from the adopters was improper. Justice Friedman sharply criticized taking the child "from the only home it had ever known."[423] Even so, the court did not restore the child to the original adopters, since further proceedings might have necessitated yet another change.[424]

Similarly, *In re Marriage of Russo*[425] held that the trial court's order changing custody of a child from the mother to the father was improper and reversed the order, but determined that the status quo—the father's custody—should be maintained pending a new hearing in the trial court. Justice Sims expressed some hope that "the injustice done the mother may be righted,"[426] but since 1 year and 8 months had elapsed between the modification order and the decision on appeal, the chances of a return of the child to the mother were probably slim.[427] In this case also the court had refused a writ of supersedeas to stay the change of custody pending appeal.[428]

Both appellate courts were seriously concerned about the children involved. Both courts abhorred the idea of moving the children a second time, with the possibility that upon a new trial a third shift of custody might occur. While they were aware of the dilemma they faced, the choice they made—preservation of the status quo *after* a reversible initial change of custody by the trial court—opened up the distinct prospect that by the time new proceedings were concluded a restoration of the child to his original home or custodian could no longer be expected realistically. Under this approach the child likely is to remain ultimately where he was moved in the first instance by an erroneous trial court decision. The decision in the lower court thus preempts the outcome on appeal.[429]

---

423. 29 Cal. App. 3d at 920, 106 Cal. Rptr. at 131. *See also id.* at 913 n.1, 106 Cal. Rptr. at 125-26 n.1.

424. *Id.* at 920-21, 106 Cal. Rptr. at 131.

425. 21 Cal. App. 3d 92, 98 Cal. Rptr. 507 (1971).

426. *Id.* at 94, 98 Cal. Rptr. at 517.

427. The court said that "the circumstances which have developed in the interim" must be considered. *Id.*

428. *Id.* at 93 n.7, 98 Cal. Rptr. at 516 n.7.

429. Much the same outcome was achieved in Stack v. Stack, 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961), where the appellate court in virtual despair refrained from even going through the motions of reversing an erroneous custody change that had become the status quo for 16 months. *Id.* at 358-59, 11 Cal. Rptr. at 179-80. The court

This unfortunate predicament faced by appellate courts in the review of custody orders is partially due to calendar delays on appeal which may seem like an eternity in relation to a child's "sense of time."[430] An even more important factor in producing the current problem was the enactment of then-Section 949(a) of the California Code of Civil Procedure in 1955.[431] Before 1955 any custody order made by the trial court was automatically stayed pending an appeal.[432] If there was an immediate need to move the child from a threatening environment, application for relief was made to the appellate court in which the appeal was pending and that court would order removal of the child or other protective measures if necessary.[433] In 1955 the legislature reversed the law: thereafter no custody order was to be automatically stayed pending appeal. The custody order was to be carried out unless the trial judge who made the order in his discretion granted a stay.[434] Appellate courts retained their power to order a stay by writ of supersedeas,[435] but the primary decision on whether to suspend a

---

called for a reappraisal and revision of the judicial process in this field. *Id.* at 372-73, 11 Cal. Rptr. at 188.

430. "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." BEST INTERESTS OF THE CHILD, *supra* note 27, at 43 (note).

431. Ch. 170, § 1, [1955] Cal. Stats. 659 (repealed 1968), was in most respects identical with CAL. CIV. PRO. CODE § 917.7 (West Supp. 1974), which replaced it.

432. Ch. 5, [1851] Cal. Stats. 107, *as amended* ch. 1407, § 1, [1955] Cal. Stats. 2525 (formerly CAL. CIV. PRO. CODE § 946) (repealed 1968); *see* ARMSTRONG, *supra* note 43, at 1047-56.

433. *See In re* Burr, 39 Cal. 2d 25, 243 P.2d 767 (1952); note 432 *supra*.

434. Ch. 1407, § 1, [1955] Cal. Stats. 2525 (formerly CAL. CIV. PRO. CODE § 946) (repealed 1968). CAL. CIV. PRO. CODE § 917.7 (West Supp. 1975) currently provides:

> The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding . . . . [P]rovided, the trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods as it may appear appropriate . . . .

435. Ch. 170, § 1, [1955] Cal. Stats. 659 (repealed 1968) (formerly CAL. CIV. PRO. CODE § 949a), the predecessor to CAL. CIV. PRO. CODE § 917.7 (West Supp. 1975), contained an express provision to this effect. *See* 44 CALIF. L. REV. 141, 145-46 (1956). The sentence in question was removed in 1968, presumably because it included questionable authority to issue injunctions. Ch. 1031, § 1, [1965] Cal. Stats. 2870; *see* ARMSTRONG, *supra* note 43, at 149 (Supp. 1966). However, appellate courts retained their power to issue writs. *See* CAL. CONST. art. VI, §§ 10-11 (West Supp. 1975); 44 CALIF. L. REV. at 145. In 1968, CAL. CIV. PRO. CODE § 923 (West Supp. 1975) was added, providing that the provisions of the chapter containing § 917.7 "shall not limit the power of the reviewing court . . . to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas . . . or to make any order appropriate to preserve the status quo . . . ."

custody order pending appeal was to be a matter for the trial court.[436] Naturally, a trial judge who has satisfied himself that a child should be separated from a former custodian can rarely be persuaded to halt carrying out the order he has just made. Moreover, appellate courts seldom grant writs of supersedeas to preserve the original custody status quo pending the appeal.[437]

The 1955 reversal of the law regarding the fate of custody orders pending appeal can be explained partially by the fact that our present insights concerning a child's basic need for continuity had not yet fully penetrated the consciousness of legislators and the legal profession. The legislative motives for moving from an automatic stay of a custody order to the extreme opposite, however, can only be understood fully by a review of the situation which existed prior to 1955.[438] The Supreme Court of California had taken the position at that time that the custody situation was frozen the moment an appeal was perfected, and that no further order concerning the child could thereafter be entered by the trial judge.[439] If the current custodian abused or mistreated the child, it was for the appellate court to decide whether the child should be moved from the dangerous surroundings.[440] If there was a need

436. *See, e.g.*, Mancini v. Superior Court, 230 Cal. App. 2d 547, 553, 41 Cal. Rptr. 213, 216 (1964):

> Application for a stay should not, other than '. . . in some unusual emergency' [citation omitted], in the first instance be made to the trial court. If the trial court refuses to grant such an application, application is then made to an appellate tribunal. Heretofore such an application was addressed in the first instance to the discretion of an appellate court. Now, in our opinion the question before the appellate court on supersedeas is—did the trial court abuse its discretion in granting or refusing a stay?

437. *See* C.V.C. v. Superior Court, 28 Cal. App. 3d 909, 105 Cal. Rptr. 123 (1973); *In re* Marriage of Rossa, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); note 436 *supra*. One additional reason is that supersedeas may not be issued to stay an order which has already been executed. *See* Superior Court v. District Court of Appeal, 65 Cal. 2d 293, 295-96, 419 P.2d 185, 188, 54 Cal. Rptr. 713, 717 (1966). However, a writ of mandate might be proper, depending on the circumstances. *Id.* at 295, 419 P.2d at 185, 54 Cal. Rptr. at 121. Supersedeas was granted, for example, in Adoption of Cox, 58 Cal. 2d 434, 374 P.2d 832, 24 Cal. Rptr. 864 (1962), holding that the trial court had abused its discretion in moving a child from the interim custody of its prospective adoptive parents after the natural parents had withdrawn their consent to adoption.

438. *See* State Bar Committee on Administration of Justice, *Report*, 29 CAL. ST. B.J. 224, 225 (1954).

439. "[J]urisdiction over *all* custody matters is removed on appeal from the trial to the appellate court." ARMSTRONG, *supra* note 45, at 1050; *see* Lamar v. Superior Court, 38 Cal. 2d 676, 680, 242 P.2d 321, 323 (1952).

440. *See In re* Barr, 38 Cal. 2d 23, 38-39, 243 P.2d 747, 759 (1952). "[I]f extraordinary circumstances requiring protection of the child arise the appeal arise, application may be made to the appellate court for appropriate relief." Lamar v. Superior Court, 38 Cal. 2d 676, 680, 242 P.2d 321, 324-25 (1952).

to make visiting arrangements, again this was for the appellate court to determine.[441] If a question arose concerning permission for the child to leave the state to attend a certain school, again the appellate court had to be approached.[442] Understandably, however, the appellate courts frequently refused to make interim orders.[443]

It was against this backdrop of appellate cases that the legislature acted in 1955. In view of the adamant position taken by the supreme court, a legislative change was needed to empower the trial judge himself to take needed action to remove a child from a dangerous situation and to order whatever interim measures were needed during the appeal. Relief from the appellate court might come too late or not at all.[444]

It is apparent that the legislature overshot the mark when it provided for immediate custody changes pending the appeal of the change order. It remedied serious shortcomings of prior law by giving the trial judge power to issue temporary and incidental orders for the benefit of the child. But at the same time it created the serious new problem that has been described—the virtual futility of an appeal if the order appealed from has been in effect long before the decision on appeal is rendered. The legislature was not unmindful of the double or triple shifts in custody that might result if a custody order is first carried out under the 1955 legislation and there is a subsequent reversal by the appellate court. It saw that this would cause hardship to the child, but felt that there would be few instances in which the conclusions of the trial court would be reversed.[445] At the time, the legislature could not foresee that appellate courts would feel constrained either not to reverse at all contrary to their better judgment,[446] or to reverse without moving the child[447]—in both instances making a deliberate choice to safeguard the child at the expense of frustrating the purposes of an ap-

441. *See* Gantner v. Superior Court, 38 Cal. 2d 688, 690, 242 P.2d 328, 329 (1952).

442. Lerner v. Superior Court, 38 Cal. 2d 676, 681-83, 242 P.2d 321, 323-25 (1952).

443. *Cf.* Gantner v. Gantner, 38 Cal. 2d 691, 692-93, 242 P.2d 329, 330-31 (1952) (companion case to Gantner v. Superior Court, 38 Cal. 2d 688, 242 P.2d 328 (1952)).

444. *See* 44 Calif. L. Rev. 141, 141-42 (1956).

445. *See id.*

446. *See, e.g.*, Stack v. Stack, 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961).

447. *See, e.g.*, C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 920-21, 106 Cal. Rptr. 123, 131 (1973); *In re* Marriage of Russo, 21 Cal. App. 3d 72, 93-95, 98 Cal. Rptr. 301, 316-17 (1971).

peals procedure. Further, the 1955 legislature could not foresee that it would soon be the role of appellate courts to mark new paths in adoption and custody law.[448] With hindsight, it is clear that the legislature went too far when it moved from an automatic stay to virtual automatic enforcement of every custody order pending an appeal.

2. *Recommendations*

Fourteen years ago the court declared in *Stack v. Stack* that "the time is ripe" for "the development of new and better techniques"[449] for dealing with custody orders pending an appeal. The time is overdue today. Two basic changes in the law are necessary to eliminate the harmful effects of the 1955 legislation while preserving its benefits. Child custody orders should generally be halted during the appellate process, as under pre-1955 law. However, the trial court should retain the authority to move the child from an environment that endangers his physical or emotional health to an extent that the advantages of stable surroundings are likely to be outweighed by their potential harm.[450] The trial court should have the additional authority to make visitation orders and other incidental temporary orders which may become necessary in the interim.

The second recommended change deals with the serious problem of delay in the appellate process. If the appellate court affirms the custody change ordered in the lower court, that change may have been held in abeyance for so long during the appellate process that there is again a problem of tearing a child away from a familiar surrounding. The advantage over current law is that a reversal on appeal leaves the child where he is, obviating two shifts of residence that are presently required, and an affirmance results in only one move of the child. But

448. *See, e.g., In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975); *In re* B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 496 P.2d 433, 101 Cal. Rptr. 541 (1972); Cheryl H. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); Guardianship of Marino, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973); C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973); *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967).

449. 189 Cal. App. 2d 357, 373, 11 Cal. Rptr. 177, 188 (1961).

450. This proposal is borrowed from the restrictions on modifications of custody included in the UNIFORM MARRIAGE AND DIVORCE ACT § 409(b)(3). This provision has been enacted in Colorado (COLO. REV. STAT. ANN. § 14-10-131(2)(c) (1973)), Kentucky (KY. REV. STAT. ANN. § 403.340(2)(c) (Supp. 1974)), and Washington (WASH. REV. CODE ANN. § 26.09.260(1)(c) (Supp. 1974)).

this is not a sufficient improvement. The solution must be to limit the duration of the appellate process.

Currently, expedited appellate review is available by regular appeal in juvenile court custody cases[451] or by review by writ of mandate or prohibition. *In re Raya*[452] demonstrates the possibilities for speedy appeal in dependency and neglect cases. Even though the decision on appeal was reached in only 1 month, speed by no means detracted from quality: the decision has become a leader.[453] Similarly, adoption and custody matters can reach the appellate courts by way of an extraordinary writ. Extraordinary relief in such situations is granted because normal appellate procedures are acknowledged to result in intolerable delay.[454] In view of the practical feasibility of expediting custody and adoption cases, whatever the procedural remedy, it is recommended that appeals in all custody and adoption cases be given absolute calendar priority. There will, of course, be *some* time lag between the lower court custody order and the judgment on appeal. If the status quo has been maintained in the meantime, no inordinate harm should result even though the child must be moved once after a speedy appeal. Some changes in custody are unavoidable.

Summarizing the suggestions made above, it is recommended that:

(1) Any custody order[455] should be stayed pending an appeal, except that the trial court or appellate court may order that the child be moved from an environment that seriously endangers his physical or emotional health to an extent that the harm likely to be caused by a change would be outweighed by its advantages to the child.[456] Additionally, the trial court should have the power to make any temporary orders regarding visitation and other incidental matters that may be necessary in the interim.

(2) Appeals in all custody matters should be so set for hearing as to take precedence over all other matters pending in the court to which the appeal is taken and should be disposed of with dispatch.

---

451. CAL. WELF. & INST'NS CODE § 800 (West Supp. 1975), provides that the "appeal shall have precedence over all other cases in the court to which the appeal is taken."

452. 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967).

453. The case has been reprinted in FOOTE, LEVY & SANDER, *supra* note 15, at 80 (Supp. 1971), and PAULSEN, WADLINGTON & GOSNELL, *supra* note 3, at 709.

454. *See, e.g.*, San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 546-47 (1972).

455. "Custody order" and "custody matters" are defined to be all-inclusive, so as to cover guardianship, juvenile dependency, adoption, habeas corpus, and custody disputes involved in marriage dissolution and any other proceedings.

456. *See* note 450 *supra*.