#F-30.300 7/28/78

Memorandum 78-42

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Medical Treatment of Ward or Conservatee)

Attached as Exhibit 1 is a letter from W. Allen Bidwell, Deputy County Counsel, Los Angeles. We will not take up at the August meeting his suggestions concerning a separate special procedure for authorization of medical treatment without the need for a guardianship or conservatorship. However, the staff would like to take up at the August meeting (when Mr. Bidwell is present) his suggestions concerning the provisions of the redrafted statute relating to medical treatment. We suggest the following revisions in the redrafted statute in light of his suggestions. You should read his letter for further information concerning the suggestions. His discussion of them starts at the middle of page 2 of his letter.

§ 2354. Medical treatment of conservatee not adjudicated to lack capacity to make medical decisions

In subdivision (c), the following should be substituted for the phrase "in any case where the conservator determines in good faith based upon medical advice that the case is an emergency case in which the conservatee faces loss of life or serious bodily injury if such treatment is not performed":

> in any case where the conservator determines in good faith based upon medical advice that the case is an emergency case in which the medical treatment is required because (1) such treatment is required for the alleviation of severe pain or (2) the conservatee has an unforeseen medical condition, which, if not immediately diagnosed and treated, will lead to disability or death.

§ 2355. Medical treatment of conservatee adjudicated to lack capacity to make medical decisions

Mr. Bidwell suggests that the following additional sentence might be added at the end of this section:

> For the purposes of this section, "necessary medical treatment" means treatment of an existing or continuing physical condition which may foreseeably become life-endangering or which will predictably result in a serious threat to the patient's health.

The staff is concerned that the definition may be too restrictive and would prefer to delete "necessary medical treatment to be performed upon

the conservatee" and insert in lieu thereof "medical treatment to be performed on the conservatee which the conservator in good faith based on medical advice determines to be necessary."

§ 2357. Court ordered medical treatment

Section 2357 of the redrafted statute should be replaced with the following:

2357. (a) As used in this section:

(1) "Guardian or conservator" includes a temporary guardian of the person or a temporary conservator of the person.

(2) "Ward or conservatee" includes a person for whom a temporary guardian of the person or temporary conservator of the person has been appointed.

(b) If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under Section 2353, 2354, or 2355, and the ward or conservatee is unable to give an informed consent to such medical treatment, the guardian or conservator may petition the court under this section for an order authorizing such medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to such medical treatment.

(c) The petition shall state, or set forth by medical affidavit attached thereto, all of the following:

(1) The nature of the medical condition of the ward or conservatee which requires treatment.

(2) The recommended course of medical treatment which is considered to be medically appropriate.

(3) The threat to the health of the ward or conservatee if authorization to consent to the recommended medical treatment is delayed or denied by the court.

(4) The predictable or probable outcome of the recommended course of medical treatment.

(5) The medically available alternatives, if any, to the course of treatment recommended.

(6) The reasonable efforts made to obtain an informed consent from the ward or conservatee.

(d) Upon the filing of the petition, the court shall notify the attorney of record for the ward or conservatee, if any, or shall appoint the public defender or private counsel under Section 1471, to represent the ward or conservatee at the hearing on the petition.

(e) The hearing on the petition may be held pursuant to an order of the court prescribing the notice to be given of the hearing. The order shall specify the period of notice of the hearing and the period so fixed shall take into account (1) the existing medical facts and circumstances set forth in the petition or in the medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the ward or conservatee permits, of giving adequate notice to all interested persons.

(f) A copy of the notice of hearing or of the order prescribing notice of hearing, and a copy of the petition, shall be personally served or mailed, as prescribed in the order, on all of the following:

(1) The ward or conservatee.

(2) The attorney of record for the ward or conservatee, if any, or the attorney appointed by the court to represent the ward or conservatee at the hearing.

(3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the ward or conservatee and any known relatives of the ward or conservatee within the second degree.

(g) Notwithstanding subdivisions (e) and (f), the matter may be submitted for the determination of the court upon the proper and sufficient medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and stipulate that there remains no issue of fact to be determined.

(h) The court may make an order authorizing the recommended course of medical treatment of the ward or conservatee and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the recommended course of medical treatment for the ward or conservatee if the court finds from all of the evidence presented to the court all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.

(i) Upon petition of the ward or conservatee or other interested person, the court may order that the guardian or conservator obtain or permit specified medical treatment to be performed upon the ward or conservatee. Notice of the hearing on the petition under this subdivision shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Section 2357 is new. The section serves the same purpose as Section 5358.2 of the Welfare and Institutions code; but Section 2357 provides for notice to interested persons, for the appointment of counsel to represent the ward or conservatee where necessary, for the presentation to the court of medical affidavits showing the need for the medical treatment, and for findings by the court before an order authorizing the treatment is made. Subdivision (i) has no counterpart in the Welfare and Institutions Code section.

Respectfully submitted,

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July 27, 1978

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John H. DeMoully, Executive Director
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Dear Mr. DeMoully:

In response to your letter of July 12, 1978, enclosed is the draft version of a medical consent procedure for an adult patient who requires necessary medical treatment, who is unable to give an informed consent thereto, and for whom a conservatorship of the person would be otherwise inappropriate. A fairly detailed comment on various aspects of the procedure is also enclosed.

There are perhaps other procedures which could be devised to accomplish the same end, but the enclosed procedure most closely approximates the traditional method by which the probate court hears and determines petitions of various types.

You will note that only the medical facility, treating physician or surgeon is qualified to petition. This was done because they will be the ones who are in touch with the nature of the medical problem and the ability of the adult patient to give an informed consent to the proposed course of treatment. This was also done because they are the ones faced with the problem of what to do when they have a patient whose competence to consent to necessary medical treatment is in doubt, but who has no court appointed conservator of the person. I will leave it to your judgment and discretion whether that category should be enlarged to include spouse, children, blood relatives, and/or friends. Arguments can be made both ways.

Nothing was written or said about costs of the proceeding. Aside from the time of the Public Defender

(if appointed by the court to represent the patient), the County should not bear the cost of the attorney appointed to represent the patient. Who pays the attorney should perhaps be determined by the parties in each individual case because in actuality, benefits are conferred both upon the patient (if all goes well) and on the medical facility and doctors (who know that they) are in fact actually authorized to undertake a specific course of medical treatment). Most hospitals belong to an association which has attorneys acting for it on an on-going basis. It would probably be relatively easy for such attorneys to take on and deal effectively with these medical consent problems on behalf of their institutional clients.

We have purposefully stayed away from any requirement that the court find the patient incompetent to give or withhold consent to the required medical treatment, since that is a very sensitive word these days. You will undoubtedly note, however, that the evidenciary findings required of the court are tantamount to a finding of incompetence so that, if the form or label has subtly changed, the content has not.

Turning to the First Exposure Draft of the Law Revision Commission, the following comments are made with respect to the medical consent procedure found in Sections 2404 and 2406:

1. We find in practice that a great variety exists in the definition of "emergency" employed by different doctors and hospital staffs. Differing legal definitions also exist, to wit:

   a. Welfare and Institutions Code Section 5358 exempts from its procedure only emergency cases in which the conservatee faces loss of life or serious bodily injury. However, this applies only to surgery, thus providing no real working definition of emergency.

   b. Wheeler v. Barker (1949) 92 Cal. App.2d 776, 785, defines emergency as an "unforeseen combination of circumstances which calls for immediate action." While appropriately broader, it is too unspecific to provide adequate guidance.

c. For Medi-Cal purposes, emergency services are defined by 22 Cal. Admin. Code, Section 51056 (a) to be: "[T]hose services required for alleviation of severe pain, or immediate diagnosis and treatment of unforeseen medical conditions, which, if not immediately diagnosed and treated, would lead to disability or death." This is the best of the three and perhaps provides the best working definition. It should be incorporated by reference or codified in Exposure Draft Section 2404 (a), or some better, more clear-cut definition worked out. The elimination of uncertainty in this area is a large part of the key to a workable procedure.

2. The word "permanently" should be deleted from Section 2404 (c) in accordance with the discussions at our meeting on July 8 in Los Angeles.

3. The word "necessary" in Section 2404 will have to be adequately defined, inasmuch as many doctors are incapable of distinguishing between emergency and necessary or between necessary and elective medical treatment in actual (as opposed to theoretical) practice. We have always defined "necessary medical treatment" as that which treats an existing or continuing physical condition which may foreseeably become life-endangering or which will predictably result in a serious threat to the patient's health.

4. Section 2406 of the Exposure Draft will be unworkable for all intents and purposes. It is patterned after Welfare and Institutions Code Section 5358.2, which has not worked well at all in the year and a half since its enactment. This is the consensus of opinion of most of the County Counsel's offices in the State who have had to use it. The Public Defender routinely refuses to waive hearings, even when there is private agreement that the treatment is needed. The courts here normally require the Public Guardian in L.P.S. conservatorships to prepare and file the petition for authority to consent to medical treatment, despite the fact that Welfare and Institutions Code Section 5358.2 places the burden of "petitioning" the court for a "hearing" on the conservatee. Most of the judges and attorneys working with that section feel that there would be due

process problems if that section were challenged. A further defect of Section 5358.2 is that it makes no specific provision for shortening the normal 10 day notice period required for hearing a petition, nor does it specifically permit the court to prescribe those persons to whom notice shall be given. Both are of momentous significance when the situation is urgent but not yet emergent.

The criteria required for transferral of the power to consent from the conservatee to the conservator is nowhere set forth. That in and of itself will make it subject to challenge in the appellate courts sooner or later, because what you are in effect saying is that the conservatee is incompetent to give an informed medical consent to necessary medical treatment. Enclosed is a draft version of a wholly revised Section 2406. Although it is much longer, it addresses most of the problems left unresolved by Welfare and Institutions Code Section 5358.2, which were unintentionally imported into Exposure Draft Section 2406.

Inasmuch as I will not be able to attend the Friday, August 4 meeting in San Francisco, and revisions to the medical consent materials may not have been completed by that date, I wonder whether you might consider deferring further discussion of medical consent areas until the September meeting in San Francisco, so that others attending will have a chance to review and consider these areas at greater length. I leave that decision in your capable hands.

Very truly yours,

JOHN H. LARSON
County Counsel

By W. Allen Bidwell
W. ALLEN BIDWELL
Deputy County Counsel

WAB:jt

Enclosures

SECTION 2406. COURT ORDERED MEDICAL TREATMENT

§2406. If the ward or conservatee, or person for whom a guardianship or conservatorship petition has been filed, requires medical treatment for an existing or continuing medical condition which is not authorized under Section 2403 or 2404, and such person is unable to give an informed consent thereto, the guardian, conservator, or temporary conservator may petition the court for an order authorizing such medical treatment.

The petition shall incorporate, or set forth by medical affidavit attached thereto, the following: the nature of the medical condition which requires treatment; the course of treatment which is deemed medically appropriate; the threat to the health of the patient if authorization to consent to the recommended treatment is delayed or denied by the court; the predictable or probable outcome of the recommended course of treatment; any medically available alternatives to the treatment recommended; and, the reasonable efforts made to obtain an informed consent from the patient.

Upon the filing of the petition, the court shall notify the attorney of record for the ward, conservatee, or proposed conservatee, if any, or appoint the public defender or other attorney to represent the person at the hearing.

A hearing to determine whether medical treatment for an existing or continuing condition will be authorized by the court may be held pursuant to an order of the court prescribing notice of hearing. The period for notice of hearing set forth therein shall be based upon the existing medical facts and circumstances contained in the petition filed and/or set forth in a medical affidavit presented to the court, and upon fairness to all interested parties. A copy of the notice of hearing or of the order prescribing notice of hearing and a copy of the petition shall be served upon the ward, conservatee or proposed conservatee, his attorney of record, if any, or the attorney appointed by the court, and upon such other persons as the court shall require, including any known relatives within the second degree.

At the time of the hearing, if it appears from all relevant evidence presented to the court that the existing or continuing medical condition requires treatment, that if untreated, there is a probability that the condition will become life endangering or result in a serious threat to the physical health of the patient, and that the patient is unable to give an informed consent to the recommended

course of medical treatment, the court may find that the person is unable to make the decision whether to consent or withhold consent to such medical treatment, and that the guardian, conservator, or temporary conservator should be authorized to consent to such medical treatment on behalf of the ward, conservatee, or proposed conservatee. The matter may be submitted for the determination of the court upon the proper and sufficient medical affidavits or declarations, if the parties so stipulate and there remains no issue of fact to be determined.

Upon such findings as set forth hereinabove, the court shall authorize the conservator or temporary conservator to consent to such medical treatment as may be appropriate for the medical condition of the ward, conservatee, or proposed conservatee set forth in the petition.