

First Supplement to Memorandum 78-43

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Review of Redrafted Statute)

This supplement presents for Commission consideration two sections of the proposed guardianship-conservatorship law which the staff proposes to revise (Sections 1472 and 2356), and a new section not previously considered by the Commission (Section 2112).

§ 1472. Compensation of mandatory court-appointed counsel

Subdivision (b) of proposed Section 1472 (attached to this supplement as Exhibit 1) has been revised by the staff to include the provision added by Assembly Bill 3782 (McVittie) to require counties to pay the costs of court-appointed private counsel to the extent the conservatee or proposed conservatee lacks the ability to pay. (Assembly Bill 3782 has passed both houses.)

§ 2112. Application of federal Indian law

The staff has drafted proposed Section 2112 (attached to this supplement as Exhibit 2) in response to a comment we received from attorney John K. Spencer of San Francisco, as follows:

I am interested in what provisions, if any, have been made for the Agua Caliente Indians of Palm Springs, California, in the Guardianship-Conservatorship Code, with reference, in particular, to 25 USCA Section 954 dealing with the above Band of Mission Indians.

The text of 25 U.S.C. Section 954 is included in Exhibit 3 attached to this supplement. Since Section 954 imposes special rules when a guardian or conservator is appointed under California law for a member of the Agua Caliente Band, the staff proposes an explicit statutory acknowledgment of the supremacy of federal law on such matters. Although proposed Section 2112 states the obvious, it may alert the practitioner to the existence of federal provisions where Indians are concerned.

§ 2356. Limitations on application of chapter

Proposed Section 2356, as it currently appears in the draft statute, contains two subdivisions. Subdivision (a), continuing a portion of existing Probate Code Sections 1500 and 1851, forbids involuntary

civil mental health treatment for a conservatee other than under the Lanterman-Petris-Short Act. Subdivision (b), which is new, preserves the effect of an otherwise valid living will made by the conservatee under the Natural Death Act.

The staff has revised proposed Section 2356 (attached to this supplement as Exhibit 4) to redesignate subdivision (b) (living will) as subdivision (e) and to add subdivisions (b), (c), and (d). The three new subdivisions proposed by the staff are to ensure that the power of a guardian or conservator to consent to medical treatment for the ward or conservatee as provided in proposed Sections 2353-2355 and 2357 does not include a general power to consent to the administration of experimental drugs or convulsive treatment for the ward or conservatee, or to consent to sterilization of the ward or conservatee. These matters are governed by specific provisions of the Health and Safety Code and the Welfare and Institutions Code and include appropriate procedural protections for the patient. In *Guardianship of Tulley*, 83 Cal. App.3d 698, ___ Cal. Rptr. ___ (1978), the court held that a guardian had no general power to consent to sterilization of a brain-damaged ward except as specifically provided in the Welfare and Institutions Code; such an "awesome power" must be founded on explicit statutory authorization. Accord, *Guardianship of Kemp*, 43 Cal. App.3d 758, 118 Cal. Rptr. 64, 74 A.L.R.3d 1202 (1974). The staff is of the view that this is sound policy and that our statute should codify this rule and extend it to the administration of experimental drugs and convulsive treatment as well. (The staff has also redrafted the lead line to the section to comprehend the broader subject matter.)

Respectfully submitted,

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Staff Counsel

Exhibit 1

Staff Draft

§ 1472. Compensation of mandatory court-appointed counsel

1472. (a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel and shall make a determination of the person's ability to pay all or a portion of such sum.

(2) If the court determines that the person has the ability to pay all or a portion of such sum, the court shall order the conservator of the estate or, if none, the person to pay in such installments and in such manner as the court determines to be reasonable and compatible with the person's financial ability.

(3) In a proceeding under Chapter 3 (commencing with Section 3100) of Part 6 for court authorization of a proposed transaction involving community or homestead property, the court may order payment out of the proceeds of the transaction.

(4) If a conservator is not appointed for the proposed conservatee, execution may be issued on the order in the same manner as on a judgment in a civil action.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay such sum to the private counsel to the extent the court determines the person is unable to pay.

(c) The payment ordered by the court under subdivision (a) shall be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the duties of the public defender and the county has compensated such counsel. In the case of other court-appointed counsel, the payment shall be made to such counsel.

Comment. Section 1472 applies only where legal counsel is appointed under Section 1471. The section continues the substance of the third

paragraph of former Section 2006, with the addition of paragraph (3) of subdivision (a).

Section 1472 does not refer to the person's "present" ability to pay as did former Section 2006. This omission permits the court to order payment if the person furnished counsel has ability to pay later. This change is consistent with the 1978 amendments to comparable provisions in Penal Code Section 987.8 and Government Code Section 27712. [SB 1807.]

Subdivision (b) supersedes former Section 2007 which authorized a county without a public defender to compensate court-appointed counsel. Subdivision (b) applies to all counties and requires payment by the county to the extent the court determines that the person for whom counsel was appointed is unable to pay.

[Note. The provisions of subdivision (b) are added to existing law by AB 3782. Neither AB 3782 nor SB 1807 (referred to in the Comment) has been signed by the Governor as of September 6, 1978.]

Exhibit 2

Staff Draft§ 2112. Application of federal Indian law

2112. With respect to a guardianship or conservatorship proceedings to which Title 25, United States Code, applies, the provisions of that title supersede the provisions of this division to the extent inconsistent with this division.

Comment. Section 2112 is new and recognizes that, with respect to Indians subject to federal supervision, there are a number of provisions of federal law which concern guardianship or conservatorship and may be inconsistent with the provisions of this division. See, e.g., 25 U.S.C. §§ 379 (approval of Secretary of Interior required for certain conveyances by guardian or minor heir of deceased Indian), 954 (special rules applicable to guardian or conservator of member of Agua Caliente Band of Palm Springs, California).

Exhibit 3

AGUA CALIENTE (PALM SPRINGS) RESERVATION OF
CALIFORNIA; EQUALIZATION OF ALLOTMENTS

§ 954. Powers and duties of guardians—Appointment and continuance in office; notice to Secretary of state court proceedings; appearance

(a) No guardian or other fiduciary shall be appointed under State law for the estate of any member of the band, or continued in office, except with approval of the Secretary: *Provided*, That no conservator for any member of the band shall be appointed under State law or continued in office after the effective date of this Act, unless the individual Indian concerned, with the approval of the Secretary, personally petitions for the appointment or continuation of such appointment. The Secretary shall be given notice of all proceedings in the State court with respect to the estate of any member of the band which is being administered, and he may at any time appear as a party in such proceedings, and may exercise all rights accorded to a party under State law.

Management and disposition of trust property and property subject to restrictions against alienation by guardians, conservators, or fiduciaries; approved activities; approval of activities

(b) No guardian, conservator or other fiduciary appointed under State law shall, in his official capacity, participate in the management or disposition of any property or interest therein which is held in trust by the United States for a member of the band or is subject to restrictions against alienation imposed by the laws of the United States, execute or approve any use, expenditure, investment, deposit, or disposition of such property or interest therein, or proceeds therefrom, or receive any fee or other compensation for services hereafter performed with respect to such property or interest therein. The provisions of this subsection shall not preclude any such person, in his private capacity, from participating in the management or disposition of such property or interest therein with the specific approval of the Secretary of the Interior. Actions with respect to the use, expenditure, investment, deposit, or disposition of such property or interests therein, or proceeds therefrom, shall be valid and efficacious in all respects without participation of affirmation by any guardian, conservator, or other fiduciary appointed under State law.

Reports by guardians; failure or refusal to report; fraudulent, capricious, arbitrary or grossly erroneous reports; prosecution; appropriate relief

(c) The Secretary, at any time, may require any guardian, conservator, or other fiduciary appointed under State law for a member of the band to submit a full and complete report concerning his handling of the estate during the preceding six years. If any person or entity required to do so by the Secretary fails or refuses to so report, or, if having reported, the Secretary concludes that any action connected therewith is fraudulent, or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, he may request the Attorney General to cause an action to be brought in the name of the United States in the United States District Court for the Central District of California or in any such district court having jurisdiction over the person, or persons, and subject matter, for such relief as may be appropriate, and said courts are hereby granted jurisdiction to hear and determine such action.

**Delivery to Secretary of money or property at termination of
fiduciary relationship**

(d) The Secretary may require any money or property in the possession of a fiduciary at the time the fiduciary relationship is terminated, or which is recovered pursuant to sections 951-958 of this title, to be delivered to him to be held in trust for the individual Indian concerned.

Use and disposition of money or property held in trust by United States by the Secretary; consent of competent Indian; determination of competency; applicability of Administrative Procedure Act; time and place of hearing; judicial review

(e) Under such regulations as he shall provide, and with the consent of the individual Indian concerned, unless the Secretary determines such Indian to be incompetent by reason of minority or otherwise, in which case such consent shall not be required, the Secretary may use, advance, expend, exchange, deposit, dispose of, invest and reinvest, in any manner and for any purpose, any money or other property held by the United States in trust for such Indian. The Secretary shall make no determination that an adult Indian is incompetent except after according him an opportunity to be heard upon reasonable notice, in accordance with the provisions of the Administrative Procedure Act. Unless the Indian otherwise agrees, the hearing shall be held in the State of California within sixty days of the date of notice. A person aggrieved by a determination of incompetency made by the Secretary shall be entitled to judicial review of such determination in accordance with sections 701-706 of Title 5.

Authority of the Secretary under other provisions unaffected

(f) Nothing herein shall be deemed to limit any authority possessed by the Secretary under any other provisions of law.

As amended Pub.L. 90-597, Oct. 17, 1968, 82 Stat. 1164.

Reference in Text. The effective date of this Act, referred to in subsec. (c), is the date of enactment of Pub.L. 90-539, which was approved Sept. 21, 1959.

The Administrative Procedure Act, referred to in subsec. (e), is classified to section 551 et seq. of Title 5, Government Organization and Employees.

1965 Amendment. Subsec. (a), Pub.L. 89-597 substituted provisions requiring the Secretary to approve any guardian or other fiduciary appointed under state law for the estate of any member of the

band, or continued in office as guardian of the estate, and provisions requiring the Secretary to be given notice of state court proceedings involving the estate of any member of the band and power to appear in such proceedings, for provisions requiring the Secretary to request the appointment of a guardian of the estate of minor allottees and adult allottees needing assistance.

Subsecs. (b)-(f). Pub.L. 90-597 added subsecs. (b)-(f).

Exhibit 4

Staff Draft

§ 2356. Limitations on application of chapter

2356. (a) No conservatee shall be placed in a mental health treatment facility under the provisions of this division against the conservatee's will. Involuntary civil mental health treatment for a conservatee shall be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

(b) An experimental drug as defined in Section 26668 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 26668) of Chapter 6 of Division 21 of the Health and Safety Code.

(c) Convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) A ward or conservatee may be sterilized only as provided in Section 7254 of the Welfare and Institutions Code.

(e) The provisions of this chapter are subject to any valid and effective directive of the conservatee under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).

Comment. Subdivision (a) of Section 2356 continues the substance of the second paragraph of former Sections 1500 and 1851, respectively.

Subdivisions (b)-(d) are new and make clear that the provisions of other codes relating to highly intrusive forms of medical treatment are the only provisions under which such treatment may be authorized for a ward or conservatee, thus assuring that the procedural safeguards contained in those provisions will be applied. Subdivision (d) is consistent with Guardianship of Tulley, 83 Cal. App.3d 698, ___ Cal. Rptr. ___ (1978), and Guardianship of Kemp, 43 Cal. App.3d 758, 118 Cal. Rptr. 64, 74 A.L.R.3d 1202 (1974).

Subdivision (e) is new.

CROSS-REFERENCES

Definitions

Conservator, § 2350

Guardian, § 2350

Removal of conservator for failure to comply with subdivision (a),
§ 2650(g)

Note. Section 2356 has been revised to limit subdivision (a) to a conservatee as proposed by Assembly Bill 3122 (to the Governor on August 28, 1978), and to add subdivisions (b) through (d). Should subdivision (a) also apply to wards who are 14 years of age or older? Should Section 2650(g) be revised to apply to all of Section 2356? Note that there is no requirement that the meaning of "civil mental health treatment" be established by regulation.