#F-30.300 7/24/78

Memorandum 78-45

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Review of Redrafted Portions of Proposed Legislation)

The staff has redrafted the first portion of the proposed legislation on guardianship-conservatorship law to reflect the decisions and suggestions made at the July meeting. The redrafted portion is attached.

The staff is hopeful that each Commissioner and expert adviser will study the redrafted portion carefully prior to the August meeting so that any matters that should be brought to the Commission's attention will be raised for Commission consideration.

We point out in this memorandum the matters that we believe should be given special attention in reviewing the attached redraft. For the most part, these matters are ones of major importance or provisions that presented some difficulty in drafting. We made numerous technical revisions in preparing the redraft, drawing from staff suggestions and suggestions of various Commissioners. These revisions are not noted in this memorandum.

We are hopeful that, at the August meeting, the attached portion (at least) of the proposed legislation can be approved for printing. We are hopeful we can have our printed report ready in printed form for review early in December, together with the printed bill. At that time, the Commission, the State Bar Subcommittee, and our other expert advisers will have another opportunity to review the proposed legislation. However, it is desirable to make all necessary revisions now, because if revisions are made after our report is printed, it will be necessary to make revisions in the Comments by a special committee report adopted by the legislative committees that consider the proposed legislation. We would like to keep the legislative committee report as short as possible.

§§ 1400-1446. Definitions

The prior draft contained definitions of the following: guardian of the person, guardianship of the person, conservator of the person, conservatorship of the person, guardian of the estate, guardianship of the estate, conservator of the estate, and conservatorship of the

estate. These definitions caused confusion. The staff was to consider whether they were needed and, if so, to redraft them. We decided to omit them as unnecessary.

§§ 1460, 2543(c). Posting requirement

As directed by the Commission, the staff has limited the posting of notice at the courthouse requirement to notices required in connection with sales. The Commission desired that Section 1460 contain a reference to the posting requirement, and we have included subdivision (c) in Section 1460 for this purpose. We have included the actual posting requirement in subdivision (c) of Section 2543 because it applies to posting of notices that include notices other than notices of hearings. (Section 1460 is limited to notice of hearing.) We urge our expert advisers to examine subdivision (c) of Section 2543 and to suggest any needed revisions.

§§ 1470-1472. Appointment of legal counsel

Sections 1470-1472 are new and consolidate in one series of provisions the various provisions relating to legal counsel formerly scattered throughout the statute. You should study these new provisions and the Comments with care. We did not include a provision providing that the determination of reasonable attorney's fees "may be made only after a hearing if a hearing is requested." Such a provision is not included in comparable provisions in other statutes.

Section 1471 is believed to reflect the decisions made at the last meeting. Note that counsel is required to be appointed only in those cases (1) where the conservatee requests legal counsel either to oppose a petition or to support the conservatee in a conservatee's petition in the specific instances listed in the section and (2) where the court determines that the appointment of counsel is necessary. See the section and the discussion in the Comment to the section.

§ 1489. Effect on appointment of guardian by parent or other person for a minor

We have drafted a new transitional provision to adjust appointments of guardians under prior law to the new nomination scheme provided in the proposed law. The new provision--Section 1489--is somewhat comparable to Section 1488 of the proposed law.

§§ 1500-1502. Nomination of guardian

These are new provisions designed to implement the decision at the July meeting. Read the sections and Comments with care. Note that we have also required (paragraph (4) of subdivision (b) of Section 1511) that notice of the hearing on appointment of a guardian be given to the person nominated if not the petitioner.

We have greatly liberalized the nomination procedure to permit a nomination in the petition, at the hearing on the petition, or in a signed writing executed before or after the petition is filed. We see no harm from such liberalization; we believe that the parent or parents should have the right to nominate the guardian whenever a guardian is needed. The court has some discretion in refusing to appoint the person nominated as guardian.

Note that Section 1501 changes the result in a California Court of Appeal case where a father in his will attempted to appoint a guardian for the insurance proceeds the child received on his father's death. See the Comment to Section 1501.

§ 1510. Petition for appointment

Note subdivision (c)(5) requiring a listing in the petition of any person nominated as guardian for the proposed ward under Section 1500 or 1501.

We have added subdivision (f) to this section. The language of this subdivision is taken from the Judicial Council form now in use.

§ 1511. Notice of hearing

Note that subdivision (b)(4) requires notice of any person nominated as guardian for the proposed ward under Section 1500 or 1501.

Note that subdivision (c)(3) requires notice to the person having the care of the proposed ward (if other than the person having legal custody) if the ward is under the age of 14. If the ward is 14 years of age or older, the ward is served with a copy of the notice of hearing so no copy is required to be sent to the person having the care, but a copy is always required to be served on the person having legal custody.

§ 1512. Amendment of petition to disclose newly discovered proceeding affecting custody

This new section is designed to alert the court to any other proceeding affecting the custody of the proposed ward that was not disclosed in the guardianship petition. The section is broader than directed by the Commission at the last meeting, the direction at the last meeting being to generalize the requirement that a subsequent adoption petition by a nonrelative guardianship petitioner be disclosed.

§ 1513. Investigation and report by court-designated officer

Senate Bill 1584, which has been enacted, added a provision to the section from which Section 1513 is drawn. The provision, which the staff has not continued in Section 1513, is that if a report is made under Section 1543 (nonrelative guardianship), then no investigation may be made under Section 1513.

You will recall that Professor Bodenheimer objected to the special report made under Section 1543 on the ground that the report made under that section was a report made by an agency that had an interest in the matter--often an interest that was contrary to the proposed guardian--and the report was not likely to be fair and objective to the proposed guardian. The Commission decided to continue both provisions on the assumption that the court could order an investigation and report under Section 1513 if the circumstances were such that such a report was warranted. The provision of SB 1584 would preclude the investigation and report under Section 1513. Accordingly, the staff has noted the omission of this provision of SB 1584 in the Comment to Section 1513 and justified the omission along the lines indicated above. See the Comment to Section 1513.

§ 1514. Appointment of guardian

Subdivisions (c) and (d) have been revised to conform to the new nomination of guardian scheme.

§ 1541. Additional contents of petition for guardianship

At the last meeting, the Commission directed the staff to delete subdivision (b) and to generalize this provision. We have generalized the provision to require that all pending proceedings of which petitioner is aware to be disclosed in the guardianship proceedings in all

guardianship petitions. However, we have not deleted subdivision (b) of Section 1541 because we believe it serves an additional purpose. It requires disclosure of a previous adoption proceeding that concluded adversely to the petitioner for guardianship. Accordingly, the provision should not be deleted since this is relevant information of which the guardianship court should be aware. The existing Judicial Council form is consistent with the proposed statute as now drafted by the staff.

§ 1543. Report on suitability of guardian

The Commission has not dealt with the problem identified by Professor Bodenheimer: The investigation under Section 1543 is made by the agency that may have an interest in seeing the adoption go forward and the guardianship defeated. The Commission might wish to add a provision to Section 1543 to provide that, upon request of the petitioner, the court shall direct that an investigation also be made under Section 1513, such investigation to be made at the expense of the petitioner.

§ 1821. Contents of petition

Subdivision (f) will be adjusted to reflect any changes the Commission makes in Section 1831 (discussed later in this memorandum).

Subdivision (g) is new. This subdivision triggers an investigation and report by the court investigator which may result in a determination by the court that the proposed conservatee need not attend the hearing (Section 1825).

§ 1823. Citation to proposed conservatee

Subdivision (b)(2) will be revised to reflect the Commission's decision with respect to Section 1831.

Subdivision (b)(5) has been revised to reflect the limitations on the right to appointed counsel determined by the Commission at the last meeting.

§ 1825. Attendance of proposed conservatee at hearing

Subdivision (a)(3) has been added to reflect the decision made at the last meeting.

§ 1826. Information to proposed conservatee by court investigator; investigation and report

Should the following be substituted for subdivision (g):

> (g) Determine whether the proposed conservatee opposes the establishment of the conservatorship, or objects to the proposed conservator or prefers another person to act as conservator, and has not retained legal counsel and desires the court to appoint legal counsel.
>
> (h) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee, whether or not the proposed conservatee opposes the establishment of the conservatorship.

Subdivision (g) above would alert the court to the need to appoint counsel prior to the hearing, and subdivision (h) would advise the court concerning the desirability of appointing legal counsel under subdivision (b) of Section 1471.

§ 1828. Information to proposed conservatee by court

The staff suggests the deletion of subdivision (c)(1).

§ 1829. Persons who may support or oppose petition

The staff suggests that ", in person or by legal counsel," be inserted after "hearing" in this section. We suggest a comparable addition be made in all comparable sections.

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

The staff has had continuing concerns about the uncertainty as to the capacity of a conservatee to act or engage in activities when a conservatorship is established. Attached to this memorandum is a staff study (yellow pages) pointing out the problem and indicating that the new attached draft will not help to resolve the uncertainty that exists under the existing law. In the staff study, on pages 6-8, is a staff proposal which we believe will permit the court to make an appropriate order that will provide the necessary certainty. In the ordinary case where the conservatee is clearly incompetent to perform any act requiring capacity or engage in any activity requiring capacity, we do not believe that the proposal will create any burden for the court. In other cases, we believe that the determination and resolution of the problem of the conservatee's capacity at the time the conservatorship is

created will avoid the need for later determinations on specific issues (such as the capacity to make a will) and will provide the necessary flexibility without unduly burdening the court. If the proposal is adopted, we do not believe that it will present any difficulty in conforming the remainder of the statute to the proposed revision of Section 1831. You should study the staff study and proposed Section 1831 set out in the staff study with care. Nat Sterling was primarily responsible for preparing the staff study.

§ 1832. Effect of adjudication of lack of legal capacity

This is a new section added to the proposed legislation in accord with the decisions made at the last meeting. See discussion in this memorandum under Section 1831.

§ 1850. Court review of conservatorship

Subdivision (b) has been added to this section by the staff. In view of Section 1851 (visitation and findings by court investigator), the staff does not believe that this chapter is workable as a practical matter in the cases described in subdivision (b).

§ 1851. Visitation and findings by court investigator

The second sentence of subdivision (a) has been added pursuant to the Commission decision at the last meeting.

In response to a suggestion by Commissioner Miller, we have added the last sentence to subdivision (b). Should copies of the report be available to other persons in addition to the conservator?

§ 1852. Notification of counsel; representation of conservatee at hearing

The staff has retained this section because it adds something to Section 1471 (mandatory appointment of legal counsel), and we believe the section is better located here than compiled in Section 1471. However, this is a decision that should be reviewed by the Commission.

§ 1860. When conservatorship terminates

Subdivision (b) is added to Section 1860 to reflect the decision made at the last meeting. However, having given the matter further consideration, the staff recommends that this subdivision be deleted and instead Section 1860 be revised to read:

1860. (a) A conservatorship continues until terminated by the death of the conservatee or by order of the court.

(b) If a conservatorship is established for the person of a married minor, the conservatorship does not terminate if the marriage is dissolved or is adjudged a nullity.

The staff makes this recommended change because we believe it will be a lot of wasted court time and expense to terminate the existing conservatorship, establish a guardianship for the remainder of the minority of the former conservatee, and then have to go through the procedure of again establishing a conservatorship. We believe that any lack of consistency of concepts in the draft with respect to retaining a conservatorship for a married minor whose marriage is adjudged a nullity (but not permitting the establishment of a conservatorship for such a minor--See Section 1800) is far offset by the practical benefits of the staff proposal.

§ 1863. Hearing and judgment

The staff suggests that ", in person or by legal counsel," be inserted after "appear" in the second sentence of subdivision (a).

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

The second sentence of this section has been revised to reflect the Commission decision at the last meeting.

§ 2108. Additional powers and duties granted guardian nominated by will

This section has been revised to reflect the change from the existing appointment scheme to the new nomination scheme for guardians. The Commission previously determined that this section should apply only to a guardian appointed in a will.

Should the will also be permitted to dispense with the requirement that the guardian make periodic accountings to the court?

This section and the Comment should be studied with care.

§ 2109. Powers and duties of guardian as to particular property; allocation of duties between guardians; instructions from court

This is basically a new section. The section and Comment should be studied with care. Subdivision (a) is a new proposal by the staff and is drawn from subdivision (b) of Section 2107 (powers and duties of guardian of nonresident). We believe that this subdivision is useful

and should be included in the proposed statute. Subdivision (b) reflects the decisions made at the last meeting.

§ 2253. Change of conservatee's residence generally

The staff has revised Section 2253 to take into account the views expressed at the last meeting. The revision of the section presents a difficult problem. On the one hand, there is a great need for an expeditious determination of the request to remove the conservatee from the place of residence since the conservatee will suffer irreparable harm if such change of residence is not permitted and the provision for emergency changes in place of residence (Section 2254) without a court order is strictly limited to emergency situations. On the other hand, the seven-day hearing requirement allows very little time for an investigation and report by the court investigator. We have tried to redraft the section within the seven-day hearing framework because we did not want to delay the hearing on the request.

We have limited the cases where the court investigator makes an investigation in subdivision (b) to the cases where the "court directs."

The section and the Comment should be studied with care. Note that the conservatee is entitled to appointed counsel under Section 1471.

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

Subdivision (d) is added to reflect the decision at the last meeting.

The staff cannot recall or justify why "unfit for habitation" was changed to "unsafe for habitation" in this section. Perhaps a better phrasing would be "unfit or unsafe for habitation." That phrasing would pick up both concepts.

§ 2324. Nominated guardian

We have revised this section to reflect the change from the appointment to the nomination system for guardians. Note that the person making the nomination must waive the filing of the bond whereas under the former provision no bond was required for an appointed guardian. Section 2324 is similar in concept to Section 2321 (waiver of bond by conservatee).

§§ 2353-2357. Medical treatment of ward or conservatee

These new provisions were drafted to reflect decisions made at the last meeting. The sections and Comments should be studied with care.

§ 2405. Submitting disputed claim to commissioner, judge pro tempore, or probate judge for summary determination

Section 2405 is a new provision, based on Section 718, which the Commission at the last meeting requested the staff to draft for inclusion in the statute. Section 2405 picks up what the staff believes is the portion of Section 718 that is useful in the case of a guardianship or conservatorship.

§ 2406. Submitting dispute to arbitration

Section 2406 is a new provision suggested by the staff and not previously considered by the Commission. Should there be a provision requiring a petition for approval and notice thereof in this section?

§ 2407. Determination of ownership of property claimed or held by another

This is a new section suggested at the last meeting. The section and Comment should be studied with care. If the section is approved, Section 2558 of the Exposure Draft should be deleted.

§ 2432. Order authorizing periodic payments of compensation of fees to guardian or conservator or attorney

This is a new section drawn along lines suggested at the last meeting. This section and the Comment requires careful study.

§ 2459. Life insurance; medical, retirement, and other plans and benefits

We have revised this section along the lines suggested at the last meeting. The section and the Comment should be studied carefully.

§ 2461. Contingency fee contract with attorney

We have added this new section drawn along the lines suggested at the last meeting. The section should be studied with care.

§ 2462. Representation in actions and proceedings

Commissioner Miller suggested revision of Section 2462 somewhat along the following lines but the staff has not included this revision in the redrafted statute:

2462. (a) Subject to Section 2463, unless another person is appointed for that purpose, the guardian or conservator may:

(1) Institute and maintain actions and proceedings for the benefit of the ward or conservatee or the estate.

(2) Defend actions and proceedings against the ward or conservatee or the estate.

(3) Intervene or otherwise appear in actions and proceedings to protect the interests of the ward or conservatee or estate.

(b) Nothing in this section prevents the guardian or conservator, with court approval, from appearing in any action or proceeding where another person has been appointed for the purpose of bringing the action or proceeding if the court in which the guardianship or conservatorship of the estate proceeding is pending determines that such appearance is necessary to protect the interest of the ward or conservatee or the estate.

The staff does not consider paragraph (3) of subdivision (a) to be necessary and believes that it is bad policy to permit, as permitted by subdivision (b), the estate to support two different persons bringing or defending an action.

§ 2543. Manner of sale

This section has been revised to add the sentence making reference to Section 1460 and to add subdivision (c). The revised section should be studied with care.

Respectfully submitted,

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Executive Secretary

STAFF STUDY

Effect of Appointment of Conservator or Determination of Incompetence

Under existing Probate Code Section 1751, a conservator may be appointed for a person who "is unable properly to provide for his personal needs for physical health, food, clothing or shelter" or for the property of a person who "is substantially unable to manage his own financial resources, or resist fraud or undue influence." In addition, a conservator may be appointed for a person for whom a guardian could be appointed. A guardian may be appointed for an "incompetent person" under Probate Code Section 1460.

The consequence of this statutory scheme is that there are two types of conservatees--conservatees who have been found to be incompetent and conservatees who have not been found to be incompetent. The mere fact that a conservator is appointed is not a determination that the conservatee is in any way "incompetent." Shuck v. Myers, 233 Cal. App.2d 151, 43 Cal. Rptr. 215 (1965). It is safe to say that a conservatee who has been found to be incompetent is under greater disabilities than the conservatee who has not, but just what those disabilities are is not always easy to specify.

In some cases, appointment of a conservator alone, without a finding of incompetence, is sufficient to deprive the conservatee of legal capacity. For example, a person for whom a conservator has been appointed may appear in court proceedings only through a conservator of the estate or a guardian ad litem. Code Civ. Proc. § 372; In re Marriage of Higgason, 10 Cal.3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973). Service of process must be made on the conservator and the court can dispense with service on the conservatee. Code Civ. Proc. § 416.70. The office of a trustee is vacated by appointment of a conservator for the trustee. Civil Code § 2281(1)(c). There are numerous other provisions that give the exercise of a right to the conservator rather than the conservatee. See, e.g., Corp. Code § 702 (conservator may vote shares held by conservator without a transfer of shares into the holder's name); Prob. Code § 190.2 (disclaimer of testamentary and other interests by conservator).

A finding of incompetence imposes greater disabilities on the conservatee. The conservatee may not contract or, presumably, make a gift.

Board of Regents v. Davis, 14 Cal.3d 33, 120 Cal. Rptr. 407, 533 P.2d 1047 (1975). The conservatee may not convey property. Gibson v. Westoby, 115 Cal. App.2d 273, 251 P.2d 1003 (1953) (guardianship). The conservatee no longer has capacity to exercise an inter vivos power of appointment. Estate of Wood, 32 Cal. App.3d 862, 108 Cal. Rptr. 522 (1973). Incompetence terminates an agency relationship. Civil Code §§ 2355-2356; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343 (1926). Whether the finding of incompetence affects the right to vote, marry, or make a will is not so clear however.

The California Constitution, Article II, § 3, provides that the Legislature must provide for the disqualification of electors "while mentally incompetent." The Legislature has not yet done so, although AB 372 (Antonovich) presently moving through the Legislature would require the county clerk to cancel the registration of a person for whom a conservator is appointed upon demonstration in court that the person does not have the mental capacity to complete an affidavit of registration.

Marriage is a personal relation arising out of a civil contract to which the consent of the parties "capable of making that contract" is necessary. Civil Code § 4100. While it has been determined that a conservatee who is incompetent loses contractual capacity, it has not been determined that the conservatee loses capacity for the marriage "contract." However, the marriage may be annulled if at the time of marriage the conservatee was of "unsound mind," and the marriage may be dissolved on the basis of "incurable insanity." Civil Code §§ 4425(c), 4506(2). It has not been held that a finding of incompetence constitutes a determination of unsoundness of mind or insanity for purposes of marriage. It should be noted, however, that the basis of contractual capacity is also soundness of mind and a conservatee found to be incompetent does lose contractual capacity. See Civil Code §§ 38-40, 1556-1557.

In order to make a will, a conservatee must be of "sound mind." Prob. Code §§ 20-21. While the basis of contractual capacity is also soundness of mind, it has not been held that an incompetent conservatee lacks testamentary capacity. In fact at least one California case has held that an adjudication of incompetence in a guardianship proceeding

is not equivalent to a determination that a testator is incapable of testamentary disposition. Estate of Powers, 81 Cal. App.2d 480, 184 P.2d 319 (1947).

The law is replete with provisions that impose disabilities on incapacitated persons. The standards for determining incapacity are varied. In addition to "incompetence" and "unsoundness of mind," disabilities may be imposed on persons who are "insane," "incapacitated," "disabled," or who lack "contractual capacity." Whether a conservatee who has been found to be incompetent satisfies any of these standards in most cases has never been determined. Standards that appear similar have different meanings in the context in which they apply:

> The law governing insane and incompetent persons in the State of California is primarily statutory. An examination of the statutes involved and the cases relevant thereto will serve to indicate the definitive variants of the term "insanity" and the possibility of its use in different situations. Among others can be noted: (1) insanity or incompetency with relation to capacity to contract (Civ. Code, §§ 38-40); (2) insanity or incompetency with relation to capacity to make testamentary disposition (Prob. Code § 20 [citations]); (3) insanity with relation to capacity to commit crime (Pen. Code, § 26); (4) insanity as "mental illness" which warrants confinement under provisions of Welfare and Institutions Code, division 6; and (5) insanity and incompetency pursuant to which, under Probate Code, section 1460, letters of guardianship are issued. "Insanity" may and does mean a variety of different things. Depending on the pertinent statute, a variety of issues of fact can be the subject of litigation. And, depending on which statute is invoked, the parties to the litigation are different and the results obtained are to different ends. In re Zanetti, 34 Cal.2d 136, 141, 208 P.2d 657, ___ (1949).

From the preceding discussion, it can be seen that appointment of a conservator imposes some disabilites on the conservatee; a finding of incompetence imposes further, though indeterminate, disabilities; and in general the law is very uncertain in this area. Part of the uncertainty is due to the fact that many statutes are apparently drafted on the erroneous assumption that appointment of a conservator, or a finding of incompetence, renders the conservatee incapacitated for purposes of those stautes. In fact, even a finding of incompetence in the conservatorship proceeding does not accomplish this result, and the issue of incapacity must be litigated by applying the language of the statute to the facts in a particular case.

There are a number of possible approaches that can be taken to improve the law in this area. One would be to review the standards of the various statutes that impose disabilities for incapacity, and develop a uniform scheme. This would be a major undertaking, and the staff recommends that we not get involved in it at this time. It would, however, be a worthwhile project to straighten it all out.

Another possibility would be to have a declaration that the conservatee lacks legal capacity for all purposes. This might be useful in a situation where the conservatee is plainly incapacitated for any conceivable purpose, and it would thereby avoid repeated court orders or litigation over capacity for particular purposes. There is danger in this approach, however, since a person with some capacity should not necessarily have all abilities removed. And, if the person is entirely without understanding, the declaration of lack of legal capacity would have only limited usefulness since the person probably will not be out on the streets making contracts and conveyances, signing papers and documents, and the like.

A more fruitful approach may be to specify precisely what abilities or disabilities the conservatee has. This was the approach of early working drafts of the Uniform Probate Code:

> After appointment of a conservator and until termination of the conservatorship, the protected person is incapable of incurring a debt, transferring or encumbering his property, except by will, or otherwise affecting his business affairs unless the contract or other transaction is authorized or confirmed by the court or by the conservator. The protected person lacks capacity to sue or be sued, to exercise, except by will, or release a power of appointment, to exercise powers as a trustee, conservator, personal representative, custodian for a minor or attorney in fact, modify or terminate a trust, without authorization or confirmation by the court. The existence of a conservatorship has no bearing on the capacity of the protected person to marry, to vote or exercise other civil rights.

This provision was ultimately not adopted by the Uniform Commissioners, however, and Section 5-408(5) simply provides that, "An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has not effect on the capacity of the protected person." We do not know the reasons for this switch; it does, however, leave all issues of capacity open to future

litigation. See Effland, Caring for the Elderly Under the Uniform Probate Code, 17 Ariz. L. Rev. 373, 398-402 (1975).

Perhaps one reason the original Uniform Probate Code draft was rejected is that it would have imposed on all conservatees the same disabilites regardless of differences in their conditions. A provision could be drafted to permit the court to tailor specific incapacities for the particular conservatee. There is precedent for this approach in California under Lanterman-Petris-Short conservatorships. Under Welfare and Institutions Code Section 5357, an officer providing conservatorship investigation makes a report to the court with recommendations concerning the legal disabilities to be imposed upon the conservatee:

> The report shall also recommend for or against the imposition of each of the following disabilities on the proposed conservatee:
>
> (a) The privilege of possessing a license to operate a motor vehicle. If the report recommends against this right and if the court follows the recommendation, the agency providing conservatorship investigation shall, upon the appointment of the conservator, so notify the Department of Motor Vehicles.
>
> (b) The right to enter into contracts. The officer may recommend against the person having the right to enter specified types of transactions or transactions in excess of specified money amounts.
>
> (c) The right to refuse or consent to treatment related specifically to the conservatee's being gravely disabled. The conservatee shall retain all rights specified in Section 5325 [right to refuse convulsive treatment, psychosurgery, etc.].
>
> (d) The right to refuse or consent to other medical treatment unrelated to remedying or preventing the recurrence of the conservatee's being gravely disabled which is necessary for the treatment of an existing or continuing medical condition. The report shall include an evaluation of such condition and the current treatment for such condition, if any.

A court order denying the conservatee the privilege of possession of a driver's license does not require the Department of Motor Vehicles to comply; the Department must proceed against a conservatee's license on the basis of findings supported by the weight of evidence before the Department. 58 Ops. Cal. Atty. Gen. 502 (____). It is interesting to note that this section at one time contained a provision relating to the right to possess and carry firearms.

The existing draft of Section 1831 adopts the approach of LPS conservatorships somewhat. It authorizes the court to make express decisions with respect to the contractual capacity of the conservatee and

the capacity to make medical decisions. In addition, it permits the court to make a determination that the conservatee "lacks legal capacity." It should be obvious by now that the meaning of this determination is unknown and probably unknowable. The Commission decided at the July meeting to add a provision to the new law to equate "lack of legal capacity" with "incompetence". This new provision would continue the substance of existing law, but the meaning of "incompetent" is almost as uncertain as the meaning of "lack of legal capacity."

The staff suggests that the court be given broad discretion in withdrawing or limiting the legal capacity of the conservatee, not only as to contractual capacity, but as to other abilities as well, such as testamentary capacity. Such a provision might read:

§ 1831. Withdrawal or limitation of capacity of conservatee

1831. (a) If the court determines that it is necessary for the protection of the conservatee or the conservatee's estate, the court may by order do either of the following:

(1) Adjudicate that the conservatee lacks legal capacity. A determination of lack of legal capacity is equivalent to an adjudication of incompetence, incapacity, disability, or unsoundness of mind, as those terms or concepts are used in the law of this state other than criminal statutes.

(2) Withdraw or limit the legal capacity of the conservatee to do any one or more of the following:

(i) Enter into contracts, incur debts, encumber property, make conveyances, or make gifts. The court may withdraw the power of the conservatee to enter into specified types of transactions, transactions in excess of a specified amount, and transactions other than specified types.

(ii) Create, modify, or terminate a trust.

(iii) Delegate powers or waive rights.

(iv) Exercise or release a power of appointment.

(v) Make or revoke a will.

(vi) Exercise powers as a guardian, conservator, personal representative, custodian, or other fiduciary or agent.

(vii) Possess a license to operate a motor vehicle. If the court so orders, the conservator shall notify the Department of Motor Vehicles of the order.

(viii) Do any other act or engage in any other activity.

(b) The failure or refusal of the court to make an order pursuant to subdivision (a) is not a determination that the conservatee has legal capacity for any purpose.

[remainder of section unchanged]

Comment. Subdivision (a) of Section 1831 supersedes the provision of former Section 1751 for appointment of a conservator on the ground that the conservatee is a person "for whom a guardian could be appointed." Under former Section 1460, a guardian could be appointed for a person who is "incompetent." Appointment of a guardian for an adult under former law constituted a judicial adjudication of incapacity under Section 40 of the Civil Code and made void any contract entered into by the ward after such determination. Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 604-05, 275 P. 794, 799-800 (1929). An order appointing a conservator on the ground that the conservatee was a person for whom a guardian could be appointed was an adjudication of incompetence and rendered the conservatee incapable of contracting. Board of Regents State Univs. v. Davis, 14 Cal.3d 33, 38 n.6, 43, 533 P.2d 1047, 1051 n.6, 1054, 120 Cal. Rptr. 407, 411 n.6, 414 (1975).

Appointment of a conservator, whether or not the court imposes additional disabilities on the conservatee, has the effect of limiting the capacity of the conservatee. See, e.g., Code Civ. Proc. §§ 372 (conservatee may appear in court proceedings only through conservator of estate or guardian ad litem), 416.70 (service of process on conservator; court may dispense with service on conservatee); Prob. Code § 190.2 (disclaimer of interests by conservator); Civil Code § 2281(1)(c) (office of trustee vacated by appointment of a conservator for trustee).

Subdivision (a)(1) permits the court to withdraw all legal capacity from the conservatee. Because of the substantial impact this has upon the civil rights of the conservatee, withdrawal of all legal capacity should be done sparingly and only in cases where it is clearly necessary and appropriate. It affects not only the rights and powers listed in subdivision (a)(2), but also such matters as the right to marry (Civil Code §§ 4100, 4425(c), 4506(2)) and the right to give consent for any purpose. It should be noted, however, that the right to consent to medical treatment is governed by subdivision (c), and the right to vote is governed by Section ____ [depends upon enactment of AB 372]. The capacity required for each right of the conservatee differs, so a blanket order under subdivision (a)(1) should not be made automatically. See discussion under subdivision (a)(2).

Subdivision (a)(2) grants the court broad discretion in imposing disabilities on the conservatee. It is intended to enable the court to devise an order having a limited impact on the civil rights of the conservatee, and to enable the court to tailor the order to the needs of the particular conservatee. It is modeled upon Section 5357 of the Welfare and Institutions Code (Lanterman-Petris-Short Act conservatorships). Each disability listed in subdivision (a)(2) has its own standard, which may require a differing degree of capacity. See, e.g., Civil Code §§ 40 (person of unsound mind may make no conveyance or other contract, or delegate a power or waive a right), 2355-2356 (agency terminated by incapacity to act or incapacity to contract); Probate Code §§ 20-21 (person of sound mind may make a will), 401 (executor may not be a person

adjudged incompetent by reason of want of understanding), 423 (administrator must be competent). The listing of disabilites in subparagraphs (i) through (vii) of subdivision (a)(2) is not exclusive, and the court may withdraw or limit the capacity of the conservatee for any other purposes under subparagraph (viii), where appropriate.

Under subdivision (a), the legal capacity of the conservatee may only be withdrawn; it may not be established. If the legal capacity of the conservatee is not withdrawn, the issue of whether the conservatee has legal capacity for a particular purpose must be independently determined at the time the issue arises. Subdivision (b) implements this policy. Even if the court were to find that a conservatee has legal capacity for any or all purposes, that finding would be effective only as of the time of the finding, and would not determine any issue of legal capacity for a particular purpose as of a subsequent time.

If such a provision is adopted, the staff suggests that the conservatee be informed of the consequences of withdrawal or limitation of legal capacity, and that the continued need for the withdrawal or limitation be subject to biennial review. This could easily be accomplished by the addition of a few words to Sections 1826 (appointment and duties of court investigator), 1828 (information to proposed conservatee by court), 1851 (visitation and findings by court investigator), and 1852 (notification of counsel; representation of conservatee at hearing). The Commission has already determined to implement just such a scheme for the capacity of the conservatee to make medical decisions.