#F-100 3/19/79

Memorandum 79-13

Subject: Study F-100 - Guardianship-Conservatorship Revision (Conclusiveness of Order Settling Intermediate Account)

Existing Law

Court Commissioner Frank Dana of Los Angeles has raised the problem caused by the rule in California that an order approving and settling a guardian's intermediate account is not conclusive but may be reviewed and corrected on a subsequent accounting. See In re Estate of DiCarlo, 3 Cal.2d 225, 44 P.2d 562 (1935); In re Estate of Vucinich, 3 Cal.2d 235, 44 P.2d 567 (1935); Estate of Setzer, 192 Cal. App.2d 634, 13 Cal. Rptr. 683 (1961); Guardianship of Stallings, 85 Cal. App.2d 443, 193 P.2d 114 (1948); Estate of Jacobson, 56 Cal. App.2d 255, 132 P.2d 229 (1942); In re Estate of Eaton, 38 Cal. App.2d 180, 100 P.2d 813 (1940).

Although the order is not conclusive, the order settling a guardian's intermediate account does have three important effects:

First, the rule of non-finality has been held to apply when the challenge is by the ward but not when the challenge is by the guardian. Estate of Joslin, 165 Cal. App.2d 330, 332 P.2d 151 (1958). The reason for this is that intermediate accounts are usually filed ex parte and without a hearing, and the ward is usually unrepresented and is incapable of protecting his or her own interests; it would therefore be "grossly unjust" to make the order conclusive against the ward. In re Estate of DiCarlo, supra at 232, 44 P.2d at 565. This reasoning does not apply to the guardian who should be estopped by his or her prior sworn accounts. Estate of Joslin, supra at 341, 332 P.2d at 157.

Second, an order settling an intermediate account is given prima facie effect, and the burden is on the person attacking it. In re Estate of DiCarlo, supra at 234, 44 P.2d at 566.

Third, the ward's right to reopen is not absolute; whether the account will be reexamined is discretionary with the court. Estate of Joslin, supra at 342, 332 P.2d at 158.

Whether these guardianship rules apply also to conservatorships is not clear. W. Johnstone & G. Zillgitt, California Conservatorships

§ 2.19, at 39 (Cal. Cont. Ed. Bar 1968). Although the question has not been decided, it may be that the following provision of existing conservatorship law makes an order settling an intermediate account conclusive:

> 2103. Any judgment, order or decree of court made pursuant to the provisions of this division, unless reversed on appeal taken under preceding Section 2101, shall be final and shall release the conservator and his sureties from all claims of the conservatee and of any persons affected thereby based upon any act directly authorized, approved or confirmed in the judgment, order or decree. . . .

(The comparable guardianship provision, Section 1557.2, is limited to orders authorizing purchases of real property or authorizing investments.)

Commission's Proposed Legislation

The Commission's proposed legislation generally continues existing Section 2103 in new Section 2103 (omitting, however, the words "shall be final") and applies the section to guardianship as well as conservatorship proceedings:

> 2103. Unless reversed on appeal, a judgment, order, or decree made pursuant to this division releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby, based upon any act or omission directly authorized, approved, or confirmed in the judgment, order, or decree. . . .
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> Comment. Section 2103 continues the substance of former Section 2103 (conservatorship) except that new Section 2103 applies to inaction approved by the court as well as to action. See also Conservatorship of Harvey, 3 Cal.3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970) (protection extended to the conservator's attorney). New Section 2103 supersedes former Section 1557.2 (guardianship) which applied only to orders authorizing purchases of real estate or investments.

When the Commission's consultant (Mr. Elmore) reviewed proposed Section 2103, he pointed out that the section might have the effect of changing the guardianship rule of non-finality of orders settling intermediate accounts. After discussing the matter at length with Mr. Elmore, the staff decided against further revision of the section, leaving ultimate resolution of the question to the courts. Mr. Arne Lindgren, Chairman of the State Bar Subcommittee on Guardianship-Conservatorship Revision, informs us that he favors a rule of conclusiveness. In view of the comments of Commissioner Dana and Mr. Lindgren,

the Commission may now wish to resolve the question in the proposed legislation.

Policy Considerations

Other relevant law. It is the rule in the overwhelming majority of the United States jurisdictions that the ward is not bound by an order settling a guardian's intermediate account. See 39 Am. Jur.2d Guardian and Ward § 165, at 127 (1968); Annot., 99 A.L.R. 996 (1935).

The California rule applicable to executors and administrators (Prob. Code § 931) gives persons under legal disability the right to move to reopen a prior account for cause:

> 931. The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account.

With respect to a testamentary trustee, however, an account may not be reopened, absent concealment or deceit. 55 Calif. L. Rev. 948 (1967); see Prob. Code § 1123 ("[a] decree rendered under the provisions of this chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being"). See also Estate of DeLaveaga, 50 Cal.2d 480, 326 P.2d 129 (1958) (settlement of account of testamentary trustee not conclusive as to matters not actually passed upon).

Arguments in favor of a rule of conclusiveness. The rule of conclusiveness may already be the law in conservatorship proceedings. Moreover, a rule of conclusiveness would appear to apply only to those matters adequately disclosed in the account.

The Commission's proposed legislation expands the notice to be given of accounts. Compare proposed Sections 2621 and 1460 (notice to ward if 14 or older and to conservatee, to spouse, and to any interested person who has appeared in the particular matter, unless court dispenses with such notice, and to persons who have requested special notice) with W. Johnstone & G. Zillgitt, California Conservatorships § 2.7, at 29

(Cal. Cont. Ed. Bar 1968). Whether or not there are objections to the account, the court has the duty to scrutinize the account with the best interest of the ward or conservatee in mind. This is one of the purposes of the periodic accounting to the court.

To establish clearly a rule of conclusiveness, the language making orders "final" should be restored to proposed Section 2103 and a provision should be added to make clear that the section applies to an order settling an account:

> 2103. (a) Unless reversed on appeal, a judgment, order, or decree made pursuant to this division is final and releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby, based upon any act or omission directly authorized, approved, or confirmed in the judgment, order, or decree. For the purposes of this section, "order" includes an order settling an account of the guardian or conservator, whether an intermediate or final account.
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> (b) This section does not apply where the judgment, order, or decree is obtained by fraud or conspiracy or by misrepresentation contained in the petition or in the judgment, order, or decree as to any material fact.
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> Comment. Section 2103 continues the substance of former Section 2103 (conservatorship) except that the second sentence of subdivision (a) has been added for clarity and new Section 2103 applies to inaction approved by the court as well as to action. See also Conservatorship of Harvey, 3 Cal.3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970) (protection extended to the conservator's attorney).
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> The second sentence of subdivision (a) makes clear that the rule of finality applies to an order settling an intermediate account. This changes the rule of former guardianship law pursuant to which an order settling an intermediate account could be reopened and reexamined at the behest of the ward. See, e.g., In re Estate of DiCarlo, 3 Cal.2d 225, 44 P.2d 562 (1935); Estate of Joslin, 165 Cal. App.2d 330, 332 P.2d 151 (1958). The rule under former conservatorship law was unclear. W. Johnstone & G. Zillgitt, California Conservatorships § 2.19, at 39 (Cal. Cont. Ed. Bar 1968).
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> New Section 2103 supersedes former Section 1557.2 (guardianship) which applied only to orders authorizing purchases of real estate or investments.

Arguments against a rule of conclusiveness. Most hearings on accounts are in fact nonadversary in nature. Notice to an incompetent or a very young person is a fiction. If such a person is to be bound by the order, abuses and injustices will occur and there will be little

protection against a scheming fiduciary. See, e.g., Guardianship of Stallings, supra. The majority United States rule of non-finality is well-considered.

Proposed Section 2103 could be revised to give the ward or conservatee an express right to move to reopen orders settling an intermediate account:

> 2103. ~~Unless reversed on appeal, a~~ (a) A judgment, order, or decree made pursuant to this division , when it becomes final, releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby , based upon any act or omission directly authorized, approved, or confirmed in the judgment, order, or decree. This ~~section~~ subdivision does not apply where the judgment, order, or decree is obtained by fraud or conspiracy or by misrepresentation contained in the petition or in the judgment, order, or decree as to any material fact.
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> (b) Within three years following the making of an order settling an intermediate account, the court may, upon application by the ward or conservatee and for good cause shown, reopen and reexamine the account. Notice shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1. The prior order settling the account is prima facie evidence of the correctness of the account.
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> Comment. Section 2103 continues the substance of former Section 2103 (conservatorship) except that subdivision (b) is new and new Section 2103 applies to inaction approved by the court as well as to action. See also Conservatorship of Harvey, 3 Cal.3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970) (protection extended to the conservator's attorney).
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> Subdivision (b) is based on former guardianship law except that the time for reopening a prior account is limited to three years. See In re Estate of DiCarlo, 3 Cal.2d 225, 44 P.2d 562 (1935); Estate of Joslin, 165 Cal. App.2d 330, 332 P.2d 151 (1958). The rule under former conservatorship law was unclear. W. Johnstone & G. Zillgitt, California Conservatorships § 2.19, at 39 (Cal. Cont. Ed. Bar 1968).
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> New Section 2103 supersedes former Section 1557.2 (guardianship) which applied only to orders authorizing purchases of real estate or investments.

Respectfully submitted,

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