

September 11, 1980

Memorandum 80-83

Subject: Study L-702 - Guardianship-Conservatorship (Procedure for Appointment of Successor Conservator)

A letter from William S. Johnstone, Jr., points out the need for revision of the provision of the new guardianship-conservatorship statute specifying the procedure for the appointment of a successor guardian or conservator appointed to fill a vacancy. A copy of his letter is attached as Exhibit 1.

New Section 2110 of the Probate Code continues prior statutory language providing for notice and hearing on a petition for appointment of a successor guardian or conservator "as in the case of an original appointment." Although the case of Estate of Mims, 202 Cal. App.2d 332, 20 Cal. Rptr. 667 (1962), held that this language did not require the issuance and service of a citation on a proposed adult ward as would be required on an original appointment, the statute is unclear as to the extent to which other procedures on an original appointment (e.g., mandatory appearance of proposed conservatee and right to jury trial) apply when a successor is appointed.

To provide a clear statement in the statute, the staff has drafted the attached Recommendation Relating to Procedure for Appointment of Successor Guardian or Conservator. If the Commission approves the recommendation, we will introduce legislation to effectuate it at the 1981 legislative session. We do not believe that it is necessary to distribute a tentative recommendation for review and comment. If the Commission also approves the other recommendation on the meeting agenda relating to support of a conservatee spouse from community property (Memo 80-82), the staff proposes to consolidate these two recommendations into one recommendation, to be entitled "Recommendations Relating to Revision of the Guardianship-Conservatorship Law."

Respectfully Submitted,

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May 13, 1980

Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
Stanford Law School
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Re: California Conservatorships

Dear John:

As you know, Susan House and I are in the process of preparing the Second Edition to California Conservatorships, incorporating your handiwork into the book. I believe that she has written to you once concerning a problem which we observed.

Another subject has arisen which I think you might want to look at. It deals with the appointment of a successor guardian or conservator (Section 2110). It provides for notice and hearing "as in the case of an original appointment". This subject was discussed in the Estate of Mims 202 C.A.2d 332 (1962) and addresses the question whether or not a new citation must be issued and personally served on the conservatee, and more importantly, whether such issuance and service was a jurisdictional requirement. Mims held that it was not.

That case, in addition to addressing itself to the jurisdictional aspect of appointment of successor guardians/conservators, raises the question whether or not all of the procedures required in an initial appointment (including issuance and service of a citation) are required by 2110, and, perhaps, more importantly, necessary. I would appreciate any comments that you have on this.

Regards,



William S. Johnstone, Jr.

WSJ/ph

STAFF DRAFT

RECOMMENDATION

relating to

PROCEDURE FOR APPOINTMENT OF SUCCESSOR CONSERVATOR

If a vacancy occurs in the office of guardian or conservator, the court may appoint a successor "after notice and hearing as in the case of an original appointment."¹ In a case involving the appointment of a successor guardian for an incompetent adult,² this language was construed not to require that a citation be issued and served on the ward as would have been required had the petition been for an original appointment.

However, the case did not determine to what extent other procedural formalities of an original appointment apply to the appointment of a successor guardian or conservator. In proceedings for the original appointment of a conservator, the proposed conservatee must ordinarily be produced at the hearing.⁴ If the proposed conservatee is not willing or is medically unable to attend the hearing, an investigation and report by a court investigator is required.⁵ The proposed conservatee

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1. Prob. Code § 2110. Section 2110 was enacted by Chapter 726 of the Statutes of 1979 as part of the new comprehensive guardianship-conservatorship law pursuant to recommendation of the California Law Revision Commission. See Recommendation Relating to Guardianship-Conservatorship Law, 14 Cal. L. Revision Comm'n Reports 501 (1978). The new law becomes operative January 1, 1981. The provision in Section 2110 for notice and hearing as in the case of an original appointment was a continuation of prior statutory language. See Prob. Code §§ 1582 (guardianship), 1954 (conservatorship), repealed as of January 1, 1981.
 2. Under the new guardianship-conservatorship law, there are no longer guardianships for adult incompetents; these provisions have been superseded by the new conservatorship law. See Prob. Code § 1485.
 3. Estate of Mims, 202 Cal. App.2d 332, 20 Cal. Rptr. 667 (1962).
 4. See Prob. Code § 1825.
 5. Prob. Code § 1826.

is entitled to a trial by jury on the issue of whether a conservatorship should be established.⁶

The Commission recommends clarifying legislation to ensure that the procedural formalities of an original appointment will not be applied when a successor conservator is to be appointed. Procedural safeguards are needed when the question of the establishment of the conservatorship is being determined, since the establishment of a conservatorship adversely affects the conservatee's legal capacity.⁷ The appointment of a successor conservator, however, merely involves the substitution of one officer of the court for another and therefore does not affect a substantial right of the conservatee.⁸

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Section 2110 of the Probate Code, relating to guardianships and conservatorships.

The people of the State of California do enact as follows:

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6. Prob. Code 1827. The question of who is to be appointed as a conservator (as distinguished from the establishment of the conservatorship) is a matter to be determined by the court. See Prob. Code §§ 1452, 1810-1813; Comment to Probate Code § 1827.
 7. See Prob. Code § 1872.
 8. Estate of Mims, 202 Cal. App.2d 332, 340, 20 Cal. Rptr. 667, ____ (1962).

Probate Code § 2110 (amended). Appointment to fill vacancy

SECTION 1. Section 2110 of the Probate Code is amended to read:

2110. When (a) Except as provided in subdivision (b), when for any reason a vacancy occurs in the office of guardian or conservator, the court may appoint a successor ~~after notice and hearing as in the case of an original appointment~~ guardian or conservator in the manner provided in this division for an initial appointment .

(b) When the petition is for appointment of a successor conservator:

(1) Sections 1823 to 1828.5, inclusive, do not apply to the proceeding for the appointment of the successor conservator.

(2) In addition to the persons specified to receive notice under Section 1822, notice of the time and place of the hearing and a copy of the petition shall be mailed to the conservatee at least 15 days before the hearing on the petition.

Comment. Section 2110 is amended to make clear that the section preserves the rule of Estate of Mims, 202 Cal. App.2d 332, 20 Cal. Rptr. 667 (1962) (adult ward need not be served with citation as on original appointment where petition is for successor guardian). Thus under Section 2110, when a petition for the appointment of a successor conservator is filed, it is not necessary to have a citation issued (Section 1823) or served (Section 1824), attendance of the conservatee at the hearing (Section 1825) is not required, and an investigation and report by a court investigator (Section 1826) is not required. There is no right to trial by jury on the appointment of a successor conservator. See Section 1452. This is consistent with the rule applicable to the initial appointment of a conservator (as distinguished from the establishment of the conservatorship) where there is no right to trial by jury. See the Comment to Section 1827.