#L-1040 ns3
07/01/86

First Supplement to Memorandum 86-54

Subject: Study L-1040 - Estate and Trust Code (Public Guardians and Public Administrators)

The Commission has received letters concerning the draft statute on public guardians and public administrators from Harry P. Drabkin, Deputy County Counsel for Stanislaus County (Exhibit 1), from Howard Serbin, Deputy County Counsel for Orange County (Exhibit 2), and from the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 3). The letters raise the following points concerning the draft:

§ 2900. Creation of office. Mr. Drabkin states that all 58 counties now have an office of public guardian, even though the statute makes creation of the office by the county board of supervisors permissive. "I think that this should no longer be an option and this should be a mandatory office."

§ 2901. Termination of office. Consistent with his position on creation of the office of public guardian, Mr. Drabkin would eliminate the provision for termination of the office of public guardian by the county board of supervisors.

§ 2905. Termination of authority of public guardian. Mr. Drabkin states that there are inconsistent practices among the counties on the procedure for succession of persons to the public guardianship, some counties requiring a court order and some considering it a ministerial act by the clerk. Mr. Drabkin would standardize practice by adding to Section 2905, "The clerk shall issue new letters of guardianship or conservatorship upon request of the successor public guardian."

§ 2907. Advance on expenses of public guardian. This section provides for reimbursement to the county for funds advanced to the public guardian for administration of the estate. Mr. Drabkin notes that the estate may not necessarily be sufficient for this purpose, and suggests that the statute be revised to recognize this--"the county shall be reimbursed therefore *to the extent possible* out of any funds or property of the estate." The staff believes this is not a desirable addition to the statute--it seems to imply that if the estate is insufficient, reimbursement must come from another source, presumably through personal liability of the public administrator.

§ 2921. Application for appointment. Subdivision (b) requires the public guardian to apply for appointment as guardian or conservator of the person or estate if the court so orders after notice to the public guardian and a determination that the appointment is necessary. Mr. Serbin opposes this provision because it interferes with the balance of powers between the judiciary and the executive branch of local government. "Particularly in a County where the Public Guardian is the Lanterman-Petris-Short investigating officer, there are already so many mandated deadlines and services a Public Guardian must provide, he needs some discretion as to where to place his remaining time and resources. There are many cases that after investigation appear appropriate for private agencies or family members to be conservator. The proposed change would cause the Public Guardian to be appointed when he is not the most appropriate choice, before investigation is complete, simply because this alternative is most familiar to a Court." The staff notes (1) it is not clear under existing law whether the public guardian must take estates ordered by the court--the staff reads existing law to require it; and (2) we have added provisions to the draft for prior notice to the public guardian and a determination by the court that appointment is necessary, in response to concerns like Mr. Serbin's.

§ 2923. Letters, oath, and bond. This section requires the public guardian to procure letters in the same manner and by the same proceedings as for issuance of letters to other persons. Mr. Drabkin is concerned that this may require the public guardian to make a new petition. Rather than requiring the public guardian to "procure" letters, he would provide simply that letters "shall be issued" to the public guardian.

§ 7600. Notice of death. Section 7600 requires a public officer or employee, hospital, or other person to notify the public administrator of the death of a person without known beneficiaries. Failure to comply with this requirement creates liability for any resulting damage. Mr. Drabkin believes this provision is weak and practically unenforceable. The nature and extent of the liability, and in whose favor it runs, are unclear. "If you are going to have a penalty I think that there should be a minimum monetary punishment, or that such failure should be considered at least a misdemeanor."

§ 7641. Appointment of public administrator. Mr. Drabkin notes that existing Probate Code Section 460 provides that where there is immediate need for appointment of a personal representative, a special administrator may be appointed, or the judge "may direct the public administrator to take charge of the estate." Mr. Drabkin observes that the exact meaning of this phrase is unclear--may the court appoint on its own motion without notice or petition, and does the public administrator take charge as special administrator or as administrator? The Commission's draft on opening estate administration deals with this problem by providing that the court may appoint the public administrator as special administrator. That draft should make cross-reference to Section 7641(b), which requires prior notice to the public administrator.

§ 7645. Expiration of term of office. Mr. Drabkin believes this section should clearly state the procedure for actual change of public administrators--"Letters ... shall be issued by the clerk upon the request of the successor public administrator."

§ 7680. Summary disposition authorized. Subdivision (a)(1) provides for summary disposition of estates under $10,000 "without further court authorization." Mr. Drabkin notes that in some cases there is prior court involvement in ordering the public administrator to take charge of the estate, and in other cases there is no prior court involvement. He suggests that summary disposition of estates under $10,000 be available without court authorization, but that where the public administrator was originally ordered by the court to take charge of the estate, a final account must be filed.

Subdivision (c) is a new provision that allows the public administrator to file petitions with the court if necessary for proper administration. Mr. Serbin writes to suggest that the Public Administrator be allowed to have a will interpreted in connection with summary proceedings. This would cure the problem of a small estate that cannot be summarily disposed of because of a purported will or wills that are of questionable validity, that appear inconsistent with each other, or that otherwise need interpretation. Presumably, the new provision would allow this. Actually, Mr. Serbin believes a preferable approach would be to provide for interpretation of a will by the court

in the context of a Section 630 distribution. "I believe it would save the distributees hardship and would avoid unnecessary costs and delays if the new Estate and Trust Code you are writing included a provision that allowed the Probate Court to interpret wills and determine heirship in conservatorship estates that could be distributed pursuant to Section 630 but for questions of identifying the distributees."

§ 7683. Distribution of property. Subdivision (a) provides for distribution to the decedent's beneficiaries. The State Bar notes that existing law provides for distribution to the decedent's beneficiaries "or to other persons or public entities entitled thereto by law." The Bar thinks it is important to include this language because when a veteran dies in a post hospital, distribution is made to the "post fund". The post fund is not a beneficiary in the technical sense of the term because it is neither a devisee nor an heir (person entitled under the statutes of intestate succession). The staff believes that if this is a problem in the context of the public administrator statute, it must also be a problem in the context of distribution generally, and should be dealt with generally.

Subdivision (c) requires the public administrator to promptly transmit escheated funds to the State Treasurer or Controller. Mr. Drabkin believes the statute should specify to which of these state officers the funds should be paid.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

STANISLAUS COUNTY

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June 20, 1986

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

IN RE: REVISION OF PUBLIC ADMINISTRATOR AND PUBLIC GUARDIAN STATUTES

Thank you for your letter of June 4, 1986. I certainly do have a desire and expect to back it up by deeds to review and comment on staff materials in the future on this subject.

Concerning the materials you sent me, I make the following comments. Section 2900 and Section 2901 gives each county board of supervisors the option of appointing a public guardian and terminating that office. I understand now that all fifty-eight counties have the office of public guardian. Although it may be beyond the scope of the law revision commission, I think that this should no longer be an option and this should be a mandatory office. In that connection, I think that Section 2900 should read:

> "The board of supervisors of each county shall appoint a public guardian and such subordinate positions as may be necessary, and fix the compensation therefor."

I believe the present wording of Section 2901 should be eliminated and all the other Sections renumbered to show its elimination.

I do not believe that Section 2905 sets forth with enough clarity the procedure when there is a change of public guardian. In some counties the Court has made an order terminating the appointment of the prior public guardian and confirming the appointment of the successor public guardian. In other counties, the clerk merely changes the name on the letters, and there is no Court action. I suggest that that Section be rewritten as follows:

> "The authority of the public guardian or ex officio public guardian ceases upon the termination of his or her tenure in office as public guardian or ex officio public guardian, and his or her authority vests in his or her successor. The clerk shall issue new letters of guardianship or conservatorship upon request of the successor public guardian."

The problem I see in Section 2907 is that there may be instances when funds have been advanced and become uncollectable. For instance, it may be necessary to pay funds to preserve property which through subsequent litigation may be lost to the estate. The statute as presently worded does not privde for such a contingency. I suggest that that Section be reworded as follows:

> "(a) Necessary expenses of the public guardian in the conduct of any guardianship or any conservatorship estate may be advanced by the county. If so ordered by the board of supervisors, such expenses are a county charge, but the county shall be reimbursed therefor to the extent possible out of any funds or property of the estate by the public guardian."

I believe that Section 2923 retains an ambiguity from the prior statute. Particularly what does the word "procure" mean? The Section starts off stating:

> "If the public guardian is appointed as guardian or conservator:
>
> (a) The public guardian shall procure letters of guardianship or conservatorship in the same manner and by the same proceedings as letters of guardianship or conservatorship are issued to other persons."

If the public guardian has been apointed, why is it necessary for him to procure letters? To me the connotation of "procure" means to apply for. This is reinforced by the words "in the same manner and by the same proceedings" which implies a new petition. I suggest that the subsection be rewritten as follows:

> "(a) Letters of guardianship or conservatorship shall be issued to the public guardian in the same manner as letters of guardianship or conservatorship are issued to other persons."

Concerning public administrators, I make the following suggestions:

Section 7600(d) is very weak and practically unenforceable. How does one determine the damage that results from the failure of a person to report a death to the public administrator? It would be a very rare set of facts that would enable any recovery under this Section. It states "any damage." "Any damage" to whom? To the estate of the deceased, to the county because it has lost the fees it would have earned? If you are going to have a penalty I think that there should be a minimum monetary punishment, or that such failure should be considered at least a misdemeanor.

Section 7645(b) has the same defect as Section 2923 in that it does not clearly state the procedure for the actual change of public administrators. I suggest that it read as follows:

> "If the compensation of the public administrator is paid by salary and not by fees, the authority of the public administrator ceases upon termination of his or her tenure in the office of public administrator, and his or her authority vests in the successor in the office of the public administrator. Letters testamentary, of administration, administration with the will annexed, or special administrator shall be issued by the clerk upon the request of the successor public administrator."

I am bothered by the word "further." in Section 7680(a)(1) second sentence. As I read the Section, it applie when the public administrator takes control of the assets or is appointed personal representative of the estate. The word "further" in this context implies that there was prior Court authorization. If there was prior Court authorization, I believe it should be completed and the case closed. If there was not prior Court action, the word "further" implies that there was and therefore should be. I suggest that subsection be amended to read as follows:

> "(1) The total value of the estate of the decedent does not exceed Ten Thousand Dollars ($10,000.00). The authority provided by this paragraph may be exercised without court authorization but where the estate was ordered into the hands of the public administrator by a court, a final account shall be filed."

Section 7683(c) retains a present ambiguity. It states that the administrator shall promptly transmit to the treasurer or controller all money etc. I believe that the statute should specify to which of these state officers these funds should be paid.

I see no mention of Probate Code Section 460. That is the Section concerning causes for appointment of a special administrator. It ends with the phrase ". . . or he may direct the public administrator to take charge of the estate." As far as I am aware, it has never been explained as to what the exact meaning of this phrase is. May the Court on its own motion appoint the public administrator as special administrator without notice or petition? When the Court directs the public administrator to take charge of an estate, does the public administrator do so as special administrator or administrator? I do not intend to go into all the ramifications of this wording, but only to bring this problem to your attention. I believe it should be addressed along with the other statutes concerning public administrators.

Very truly yours,

MICHAEL H. KRAUSNICK
County Counsel

By Harry P. Drabkin
Harry P. Drabkin
Deputy County Counsel

HPD/sjp

Exhibit 2

Hall of Administration
P.O. Box 1379
Santa Ana, California 92702
June 23, 1986

California Law Revision Commission
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Palo Alto, California 94306

Attention: Nathaniel Sterling

Dear Mr. Sterling and Commissioners:

I am a Deputy County Counsel for Orange County. As such, I am one of the deputies assigned to represent the Orange County Public Administrator/Public Guardian.

In a number of cases, the Public Guardian has been conservator for the estate of a person who died with very few assets, and with a purported will or wills that were either of questionable validity, that appeared inconsistent with each other, or that otherwise needed interpretation. These were cases in which the assets could have been distributed pursuant to Probate Code 630 but for the need for the Court to determine the validity of the purported will or wills or to interpret them.

Most or all of these cases were referred to the Public Administrator. Because Probate Code Section 1143 does not appear to provide a mechanism for a Court to rule on wills, a formal estate had to be opened in each case. Of course, this resulted in a significant delay in distribution and cost borne by the eventual distributees. In some cases, after payment of costs of administration there remained virtually nothing for distribution.

I believe it would save the distributees hardship and would avoid unnecessary costs and delays if the new Estate and Trust Code you are writing included a provision that allowed the Probate Court to interpret wills and determine heirship in conservatorship estates that could be distributed pursuant to Section 630 but for questions of identifying the distributees.

In these estates, the conservator could seek a ruling on the validity and interpretation of purported wills, or on the order of intestate succession, prior to submitting his petition for distribution. No 630 affidavit would be necessary. While creditors would not have the protection of there being a formal estate, the Legislature has already determined that no estate should be necessary where a decedent leaves property not exceeding the 630 limits, if the distributee is identifiable. There seems no reason for a creditor of a person who leaves only $10,000.00 cash and a will of questionable validity to have a decedent's estate from which to seek satisfaction of his claim, while a creditor

of a person who leaves the same amount but a clearly valid will does not have such a remedy.

Under this new law, the current time limit for filing a will contest after probate (Probate Code Section 380) could apply. Of course, all appropriate parties would need to get proper notice of the will interpretation proceeding.

If the Commission finds this suggestion is not feasible, I suggest that as another possible solution to the problem described herein, Probate Code Section 1143 be amended so the Public Administrator may have wills interpreted in (otherwise) summary proceedings.

On another matter, I wish to express my opposition to the proposed Estate and Trust Section 2911, which would mandate that a Public Guardian accept any conservatorship case ordered into his hands by the Court. I believe this interferes with the balance of powers between the judiciary and the executive branch of local government. Particularly in a County where the Public Guardian is the Lanterman-Petris-Short investigating officer, there are already so many mandated deadlines and services a Public Guardian must provide, he needs some discretion as to where to place his remaining time and resources. There are many cases that after investigation appear appropriate for private agencies or family members to be conservator. The proposed change would cause the Public Guardian to be appointed when he is not the most appropriate choice, before investigation is complete, simply because this alternative is most familiar to a Court.

I stress that the opinions expressed herein are my individual views, which have not been reviewed by this office, the Public Administrator/Public Guardian, or the Court Board Of Supervisors. I am speaking only for myself by this letter.

I appreciate your consideration of the views expressed herein.

Howard Serbin

Howard Serbin, Deputy County Counsel

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
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June 23, 1986

Nathaniel Sterling, Esq.
Assistant Executive Secretary
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4000 Middlefield Road, Suite D-2
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Dear Mr. Sterling:

Re: LRC Memorandum 86-54

This letter is to confirm our conversation of June 20, 1986, regarding LRC memorandum 86-54. We have reviewed the memorandum for general content; however, we have not done a line by line examination for comparison with existing law. Having had the opportunity to give substantial input in the past, our only comment relates to Section 7683 regarding the distribution of property. Section 7683, subsection (a) provides in pertinent part:

> ". . .[T]he public administrator shall distribute any money or other property of the decedent remaining in the possession of the public administrator to the decedent's beneficiaries."

As noted in your "comments" this section is derived from Section 1144 of the existing law; however, Section 1144 has additional language after the word "beneficiaries" as follows:

> ". . .beneficiaries, or to other persons or public entities entitled thereto by law. . . ."

Please make sure this additional language is included at the end of Section 7683 (a), after the word "beneficiaries". This language is important because, for example, when a veteran dies in a post hospital, distribution is made to the "post fund." The word "beneficiaries" itself would not cover distribution to the public entity.

The undersigned does not intend to attend the upcoming LRC meeting in Monterey; it appears as though the preliminary work on the public guardian/public administrator statutes is in good

order. However, we note in your materials that San Francisco Mayor Dianne Feinstein urges the commission to allow small estates to escheat to the county rather than the state. If the commision does invite the Attorney General or State Controller to attend its meeting, we would like to be so advised. In the event you have any questions regarding this matter, do not hesitate to contact the undersigned at (619) 236-3651.

Very truly yours,

LLOYD M. HARMON, JR., County Counsel

By Leonard W. Pollard II

LEONARD W. POLLARD II, Deputy

LWP:naa
cc Jim Willett
Chuck Collier
Jim Devine
Jim Opel
Irv Goldring