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Memorandum 89-43

Subject: Study L-1062 - Priority for Appointment as Administrator

At the last meeting, the Commission considered a proposal by the California Association of Public Administrators, Public Guardians, and Public Conservators to give the public administrator higher priority for appointment as administrator of an intestate estate. The Commission decided not to recommend the Association's proposal, but invited the Association to refine and resubmit it.

Attached to this Memorandum as Exhibit 1 is a letter from Douglas Kaplan, President of the Association, with a new proposal. The Association now asks for a limited revision of the priorities of Section 8461: At present, a conservator or guardian of the estate of the decedent is immediately ahead of the public administrator in priority for appointment as administrator. The Association would exclude temporary guardians and conservators from priority, and would limit priority to the case where the guardian or conservator has filed the first account with the court (required one year after appointment -- Prob. Code § 2620). The Association thinks this limitation would take care of the most serious problems of misappropriation by unscrupulous guardians and conservators.

The priority for a guardian or conservator was added in 1984 by a bill sponsored by the State Bar, recommended by the 1983 State Bar Conference of Delegates, and supported by the State Bar Estate Planning, Trust and Probate Law Section. The State Bar argued that the guardian or conservator is already familiar with the estate, and it is therefore more convenient to appoint the guardian or conservator as administrator than to appoint the public administrator.

It is primarily abuses by private, professional conservators that the Association of Public Administrators, Public Guardians, and Public Conservators wants to address by revising the appointment priorities. The Association sent us case histories for the last meeting. A copy of these case histories is attached as Exhibit 2. The problem of private professional conservators is being studied by the Assembly Committee on

Aging and Long Term Care. Also Senator Mello has introduced several bills on the subject, one of which (SB 642) requires private professional conservators to file an annual statement with the county clerk, including a statement whether the conservator has ever resigned or been removed as conservator, and the circumstances. The bill defines "private professional conservator" as:

> a person or entity appointed as conservator of the person or estate, or both, of two or more conservatees who are not related to the conservator by blood or marriage, except a bank or other entity authorized to conduct the business of a trust company, or any public officer or public agency including the public guardian, public conservator, or other agency of the State of California.

If legislation on private professional conservators is enacted, it may reduce the need for other remedial legislation, such as that being proposed by the Association. Nonetheless, the Association's suggestion to exclude a temporary conservator from priority seems sound. Whether we should go beyond that to exclude a guardian or conservator who has not yet filed an account is a closer question. When the ward or conservatee dies, the guardian or conservator must file a final account to be discharged. Although the question of who should be appointed administrator may arise before the final account of the guardian or conservator has been settled, if the guardian or conservator has misappropriated estate funds, that may be discovered when the final account is considered. If so, there is no real need to exclude a guardian or conservator from priority merely because the first account has not yet been filed.

If the Commission decides to recommend a change in existing law, the staff can prepare a draft of a Tentative Recommendation for consideration at the next meeting. The Tentative Recommendation can then be distributed to interested persons and organizations for review and comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

CALIFORNIA STATE ASSOCIATION OF PUBLIC ADMINISTRATORS, PUBLIC GUARDIANS, AND PUBLIC CONSERVATORS

March 30, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Commissioners:

The California Association of Public Administrators, Public Guardians and Conservators respectfully requests your assistance in amending Section 8461 of the California Probate Code as soon as it can possibly be done.

It is the position of the Association that only those conservators/guardians who have received full powers rather than temporary appointment should be allowed the priority of letter "1" of this section. Those with temporary authority from the court have not had sufficient time to demonstrate their ability and should not be favored over public administrators who are trained to do the work of administering an estate.

We would suggest that this section be worded to state that conservators/guardians who have been appointed with full powers and who have held the position long enough to make one settlement with the court wherein the account of all financial matters was approved are eligible to be considered for appointment.

We believe that since these accountings are traditionally rendered one year after appointment that this period of time would probably be sufficient to expose potential wrongdoing. This would be especially true in those cases where the conservatee's family received notice of the court hearing and could review the accounting for errors, concealment of assets or other types of misappropriation.

Present wording of the section allows conservators/guardians of short duration an undeserved priority and we believe it is essential to change the wording before the field of private, for profit, conservators grows even more widespread.

Very truly yours,

Douglas A. Kaplan

DOUGLAS A. KAPLAN
PRESIDENT, CALIFORNIA ASSOCIATION
Public Administrators, Public Guardians and Conservators

Case Histories

Riverside County

1. The Gonzales Estate was referred to this office on December 15, 1986. The estate was reported as indigent with no funds for burial.

Our investigation revealed that Gonzales owned one-half interest in an $80,000 home at the onset of the conservatorship and approximately $10,000 in personal property assets. However, because of delays by the conservator, escrow did not close and Gonzales lost his half interest in the home. All personal property assets were liquidated and the funds spent by the conservator, including payment of conservator fees.

The private conservator had Gonzales placed in a retirement home but failed to apply for benefits pending the close of escrow. All providers went unpaid. Creditor's claims against this estate total $12,565.73, including an unpaid mortuary claim. There are no assets and these claims will not be paid.

2. The Estate of Edwin Corby was referred to us with an estimated value of $30,000 when, in fact, the conservator knew the decedent had $70,000 in cash and a house valued at $78,000.

In the Petition for Probate, the conservator stated that there were no known relatives or heirs-at-law when, in fact, she had telephoned and written a letter contacting the relatives of a predeceased spouse.

Santa Cruz County

1. The matter of Ruth Vill was investigated by our office at the insistence of friends of the deceased and relatives of her recently deceased husband. Mr. Vill obtained a new bookkeeper at the retirement of his bookkeeper of long standing. He died within a few weeks after and the bookkeeper insinuated herself into the life of the clinically depressed widow.

She secluded Mrs. Vill from her neighbors, friends, and the relatives of her husband. When the bookkeeper took trips, she placed Mrs. Vill in nursing homes for custodial care. Prior to the death of her husband, Mrs. Vill took medication which permitted her to live a somewhat normal life and her friends often saw her socially.

The bookkeeper petitioned the Court to become Mrs. Vill's conservator. She was appointed and, within a few weeks, Mrs. Vill died.

Our investigation revealed that only a portion of the assets were listed for the Petition. The bank accounts of the bookkeeper and ward had been co-mingled. The bookkeeper had borrowed funds form the ward which were secured by a deed of trust. The deed was reconveyed without a corresponding deposit into the account of the ward for payoff of the note.

Litigation initiated by the Public Administrator resulted in an out-of-court settlement wherein the estate recovered funds transferred from the ward's long-standing bank accounts into the joint account of the ward and the bookkeeper. Bank employees were deposed and stated that Mrs. Vill seemed drugged the day of the transfer.

Santa Cruz County (continued)

We believe that Mrs. Vill's estate would have been administered by the bookkeeper without our intervention. It is doubtful that all the assets would have been shown on the Inventory and Appraisement or distributed to the out-of-state heirs.

2. Bandar Case shows that the conservator became the administrator of the estate. He distributed assets from the estate prior to the expiration of the creditor claim period and without Court authority. He failed to file Inventory and Appraisement and returned correspondence of creditors without opening the envelopes. This person was not competent to serve in this capacity.

3. Lundberg Case demonstrates the unwillingness of child of predeceased spouse (stepdaughter to the decedent) to search for blood-kin heirs. The Public Administrator was in the process of petitioning the Court for appointment when the stepdaughter expressed her intention of becoming the administrator of the estate. The Public Administrator had already requested a search for heirs from a professional firm because the decedent resided in a nursing home and no one had relative information. The search for heirs was not successful for approximately a year. By the time they were found, the estate was in a condition to be distributed and the stepdaughter had made no effort to try to find blood-kin heirs who lived in Sweden.

San Diego County

1. Baily Case: Prior to appointment as conservator, Mr. "X" served as the financial planner for Baily. During that period, a Gift Tax Return for $512,216 of municipal bonds was filed. The sum of $85,000 was paid from Baily's funds as the donor. An additional Gift Tax Return was later filed for a $110,500 value and municipal bonds were filed creating a payment from Baily of $23,792 in tax as the donor. The recipients were Mr. "X" and his wife.

Upon appointment as conservator for Baily, the Court ordered a full accounting of the management of Mr. Baily's affairs during the period Mr. "X" has served as a financial manager. The gifts of the municipal bonds were omitted from the accounting.

As conservator, Mr. "X" allowed and encouraged Baily to write codicils to his will. The ninth codicil aroused the curiosity of Baily's niece by law, although she was named as a beneficiary. This codicil made Mr. "X" a beneficiary of one-sixth of the estate.

Mr. "X" caused a $700,000 trust to be amended so that, rather than come into Baily's estate at death, it would pay direct to himself and the niece by law.

San Diego County (continued)

In 1981, Mr. "X" was appointed personal representative of the Baily's decedent estate. The niece reported her findings to the district attorney and an investigation revealed the information shown above. The Public Administrator was named successor administrator of the estate.

2. Whelan Case: This individual originally owned hundreds of acres of land which included a rundown dairy. Whelan was up in her eighties and not able to manage the dairy at a profit. Some of the outlying land had to be sold for payment of taxes. She was fortunate to have a good attorney firm represent her and offer tax advise and general management advise. She had written a will in 1975 and reaffirmed the will in 1978 declaring her intention to leave the remaining land to the State for the purpose of a bird and wildlife sanctuary.

In 1980, a gentleman of short acquaintance persuaded her to break with the law firm and convinced her to let him become her conservator. Actually, he became the conservator of her estate and another person served as the conservator of her person.

The conservator convinced Whelan to write a new will leaving him the portion of the land where the dairy was. At the time of writing the new will, the conservator unwisely wrote to the conservator of the person stating, "It's time to strike for a new will while I have her under my thumb."

At Whelan's death in 1985, the conservator of the estate became executor of the will. The conservator of the person saw that, during the five years of the conservatorship, millions of dollars were spent improving the dairy and the grounds surrounding it and that taxed were owing on the remainder of the land.

The matter was turned over to the Attorney General who investigated and brought in the Public Administrator. The earlier will was restored and the State of California will have its sanctuary.