

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION

AUGUST 3 AND 4, 1978

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on August 3 and 4, 1978.

Law Revision Commission

Present:	Howard R. Williams, Chairman	John D. Miller
	Beatrice P. Lawson, V. Chairman	Thomas E. Stanton, Jr.
	Judith Ashmann	Laurence N. Walker
Absent:	George Deukmejian, Senate Member	Jean C. Love
	Alister McAlister, Assembly Member	Bion M. Gregory, <u>Ex Officio</u>

Staff Members Present

John H. DeMouilly	Robert J. Murphy III
Nathaniel Sterling	

Consultant Present

Garrett H. Elmore, Guardianship-Conservatorship

Members of State Bar Subcommittee

Present:	William S. Johnstone, Jr.	
Absent:	Arne S. Lindgren, Chairman	David Lee
	Hon. Arthur K. Marshall	Matthew S. Rae, Jr.
	Ann E. Stodden	

Other Invited Participants Present

W. Allen Bidwell, L.A. County Counsel's Office, August 3
Margaret Fraser, Assemblyman Lanterman's Staff, August 4
G. Sinclair Price, Vice President & Regional Trust Counsel,
United California Bank, August 3 and 4
Edward J. Wise, California Land Title Ass'n, August 4

ADMINISTRATIVE MATTERS

Minutes of July Meeting

The Minutes of the July 6, 7, and 8, 1978, Meeting were approved as submitted by the staff.

Minutes

August 3 and 4, 1978

STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP REVISION

The Commission reviewed various portions of the proposed legislation contained in the Exposure Draft (May 1978), the Supplemental Material (June 1978) and the Redraft of First Portion of the Proposed Legislation (July 1978). The Commission considered Memorandum 78-42 (medical treatment), First Supplement to Memorandum 78-39 (comments on Exposure Draft), a portion of Memorandum 78-45 (review of redraft of portions of proposed legislation), and additional staff suggestions handed out at the meeting.

The Commission made the following decisions.

Revision of Provisions of Probate Code Affected by AB 1417

At the request of the Commission, Ms. Margaret A. Fraser (Association Consultant from Assemblyman Lanterman's Office) appeared at the meeting to discuss with the Commission the various revisions that the redrafted statute would make in the Probate Code provisions affected by Assembly Bill 1417, enacted during the 1975-1976 Regular Session as Chapter 1357. She provided the members of the Commission with a copy of the Report of the Assembly Interim Committee on Judiciary on Probate Code Guardianships and Conservatorships (October 7, 1974). This report is not reproduced as a part of these minutes, but is a valuable background document that should be studied by persons interested in this subject. One recommendation of the Interim Committee was particularly noted--a recommendation that the existing guardianship and conservatorship statutes should be revised into one workable statute. Ms. Fraser also provided the Commission with a copy of a memorandum from Assemblyman Frank Lanterman to Senator Alfred H. Song which states the Assemblyman's views concerning various matters in connection with Assembly Bill 1417. This letter is attached as an exhibit to these minutes.

Various provisions of the redrafted statute were discussed with Ms. Fraser. Commission actions taken as a result of this discussion are recorded under the particular sections. Ms. Fraser reported that Assemblyman Lanterman planned to send his written comments on the Commission's draft statute and the Commission indicated that these comments would be considered by the Commission when received.

Court Authorization

Where prior court authorization is required, the statute should use the word "authorization." The entire statute should be checked and "authorization" should be substituted for "approval" where prior authorization is required. The Comment to an appropriate section should note that the court may confirm an action taken without prior authorization, but if the court does not approve an action taken without required prior authorization, the guardian or conservator may be surcharged.

Other Interested Person

The phrase "other interested person" should be substituted for "person interested in the estate" in the various provisions of the proposed legislation.

Nonprofit Charitable Corporation

Consideration should be given to consolidating in one provision the various provisions like subdivision (d) of Section 2630 of the Exposure Draft relating to the compensation of the guardian or conservator or the attorney representing the guardian or conservator. See also the last sentence of Section 2642.

Authorization for Medical Treatment for Adult Without Establishing Conservatorship

A relative or friend or medical facility should be authorized to petition under the procedure to be drafted.

The Commission discussed whether the statute should deal with the problem of whether a spouse or relative can give informed consent for a person who is unable to give informed consent because of lack of capacity or because the person is not conscious. The Commission declined to deal with the problem in the proposed legislation.

The staff should give consideration to including such a procedure in the temporary conservatorship statute or adding a provision for a special proceeding to obtain such an order.

§ 1200. Manner of giving notice in certain instances under law applicable to decedent's estates

A provision should be added to Section 1200 to indicate that Section 1200 does not apply to proceedings in connection with guardianships or conservatorships and that, whenever a provision of Division 4 (commencing with Section 1400) applies the provisions of the Probate Code

applicable to executors or administrators to proceedings under Division 4, a reference to Section 1200 in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

§ 1422. Other interested person

The following new section was added to the proposed legislation:

1422. "Other interested person" includes, but is not limited to, any interested state, local, or federal entity or agency and any interested public officer or employee of this state or a local public entity of this state or of the federal government.

Comment. Section 1422 is new. It makes clear that a public officer or employee or public entity may be an interested person for the purposes of this division. The section is consistent with provisions of prior law. See, e.g., former Section 1600 (request for special notice in guardianship proceeding); former Section 2002 (request for special notice in conservatorship proceeding).

§ 1454. Court investigator

Ms. Fraser noted that a bill had been introduced but not passed at the current session of the Legislature affecting the definition of the court investigator. Assemblyman McVittie was the author. She also noted that the meaning of "trained in law" may need to be clarified at some future time. The latter language comes from the Uniform Probate Code.

§ 1464. Form of notice

Subdivision (b) of this section was deleted, such provision being continued in new Section 1469.

§ 1469. Application of Sections 1200 and 1201 to proceedings under this division

A new section was added to read in substance:

1469. (a) When a provision of this division applies the provisions of this code applicable to executors or administrators to proceedings under this division, a reference to Section 1200 in the provisions applicable to executors or administrators shall be deemed to be a reference to this chapter.

(b) Section 1201 does not apply to proceedings under this division.

Comment. Section 1469 is new. Subdivision (a) insures that the notice provisions contained in this chapter will be used in all proceedings under this division. Some sections of this division

incorporate by reference and apply the procedures applicable to executors or administrators which include Section 1200 concerning notice. However, Section 1469 provides that notice is to be given under this chapter rather than as provided in Section 1200. For provisions of this division adopting procedures applicable to executors or administrators, see Sections 2543 (manner of sale), 2546 (mines and mining claims), 2551 (borrowing money and giving security therefor), and 2553 (order authorizing lease). See also Section 2100 (law governing where no specific provisions of this division applicable).

Subdivision (b) is an exception to the provisions of the sections referred to above which incorporate provisions applicable to executors or administrators. Section 1201 relates to additional notice by publication in case of a petition for leave to sell, or to give, an option to purchase a mining claim or real property worked as a mine, or for leave to borrow money or to execute a mortgage or deed of trust or to give other security, or for leave to execute a lease or sublease.

§ 1501. Nomination of guardian as to particular property

This section was revised to read:

1501. Subject to Section 1502, a parent or any other person may nominate a guardian for property that a minor receives from or by designation of the nominator including, but not limited to, property received by the minor by virtue of a gift, deed, trust, will, succession, insurance, or benefits of any kind.

The Comment should be adjusted to reflect the revision of this section.

The revised section clearly covers an insurance policy or a power of appointment exercised by the nominator.

§ 1511. Notice of hearing

Subdivision (c)(3) was revised to read:

(3) The person having the care of the proposed ward if other than the person having legal custody of the proposed ward.

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

This section was revised to read in substance:

1512. Within 10 days after the petitioner in the guardianship proceeding becomes aware of any proceeding not disclosed in the guardianship petition affecting the custody of the proposed ward (including any adoption, juvenile court, marriage dissolution, domestic relations, or other similar proceeding affecting the proposed ward), the petitioner shall amend the guardianship petition to disclose the other proceeding.

§ 1825. Attendance of proposed conservatee at hearing

Subdivision (a)(3) was revised to read in substance:

(3) Where the court investigator reports to the court that the proposed conservatee has expressly communicated that the proposed conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the establishment of the conservatorship, and (iii) does not object to the proposed conservator or prefer that another person act as conservator, and the court makes an order that the proposed conservatee need not attend the hearing.

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

The substance of the following was substituted for subdivisions (g) and (h) of this section:

(g) If the proposed conservatee opposes the establishment of the conservatorship, or object to the proposed conservator or prefers another person to act as conservator, and has not retained counsel, determine whether the proposed conservatee desires the court to appoint legal counsel.

(h) If the proposed conservatee has not retained counsel and does not plan to retain counsel, whether or not the proposed conservatee opposes the establishment of the conservatorship or objects to the proposed conservator, 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.

(i) Report to the court in writing, at least five days before the hearing, concerning all of the foregoing, including the proposed conservatee's express communications concerning both of the following:

- (1) Representation by legal counsel.
- (2) Willingness to attend the hearing.

The Comment should have references to sections that have significance in connection with the determinations contained in the report of the court investigator.

§ 1828. Information to proposed conservatee by court

Paragraph (1) of subdivision (c) was deleted.

§ 1831. Withdrawal or limitation of capacity of conservatee

The Commission considered the redraft of Section 1831 on page 6 of the background study attached to Memorandum 78-45. The Commission did

not complete its consideration of the section. However, paragraph (1) of subdivision (a) was revised to read but was not approved:

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

The above paragraph would be used only where a conservatee lacked capacity to make a will and lacked capacity to do all other acts and engage in all other activities requiring capacity.

Subdivision (b) of this section was revised to read in substance:

(b) If the court determines that the conservatee does not have the capacity to give informed consent to medical treatment for any and all forms of medical treatment, the court may (1) adjudge that the conservatee lacks the capacity to give informed consent to medical treatment and (2) by order give the conservator the powers specified in Section 2355. If an order is made under this subdivision, the letters of conservatorship shall include a statement that the conservator has the powers specified in Section 2355.

§ 2253. Change of conservatee's residence generally

To be consistent with the decisions made in connection with the attendance of the proposed conservatee on the petition to establish the conservatorship, subdivision (b)(8) and (d)(2) of this section should require an express communication by the conservatee.

Subdivision (d)(1) should be conformed to the standard for attendance of the conservatee at the hearing on the conservatorship petition (Section 1825) and a medical affidavit similar to that required in the case of the conservatorship hearing (Section 1825) should be required to back up the claim that the conservatee is unable to attend for medical reasons.

It was noted that this section includes amendments to be made by SB 1682 which has not yet passed the Legislature. The bill is on third reading in the second house.

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

The word "unfit" was substituted for "unsafe" in subdivision (a) of this section.

§ 2354. Medical treatment of conservatee not adjudicated to lack capacity to make medical decisions

Subdivision (a) of this section should be revised to refer to a case where the conservatee has not been adjudicated to lack the capacity to give informed consent for medical treatment and Section 1831 and other sections should conform to this change.

In subdivision (c), the following should be substituted for the phrase "in any case where the conservator determines in good faith based upon medical advice that the case is an emergency case in which the conservatee faces loss of life or serious bodily injury if such treatment is not performed":

in any case where the conservator determines in good faith based upon medical advice that the case is an emergency case in which the medical treatment is required because (1) such treatment is required for the alleviation of severe pain or (2) the conservatee has a medical condition which, if not immediately diagnosed and treated, will lead to disability or death.

This section, and other provisions related to medical treatment, should be submitted to medical practitioners for review and comment. In requesting such review and comment, the medical practitioners should be requested to comment on whether the words "diagnosed and" should be retained in the above provision or deleted.

§ 2355. Medical treatment of conservatee adjudicated to lack capacity to make medical decisions

The first sentence of this section was revised in substance to read:

If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, the conservator has the exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary and the conservator may require the conservatee to receive such medical treatment, whether or not the conservatee objects.

A provision should be added to Section 2355 to read in substance as follows:

(b) If prior to the establishment of the conservatorship the conservatee was an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the treatment required by the conservator under the provisions of this section shall be by an accredited practitioner of that religion.

It should be noted in the Comment that this provision does not preclude the court from making the order with respect to particular treatment under Section 2357.

§ 2356. Involuntary civil mental health treatment; Natural Death Act

Ms. Fraser called the Commission's attention to the fact that Assemblyman Lanterman has Assembly Bill 3122 which calls upon the Director of Mental Health to define what constitutes "mental health treatment facility" and may require some conforming revision of Section 2356.

§ 2357. Court ordered medical treatment

Section 2357 was revised to read in substance as follows:

2357. (a) As used in this section:

(1) "Guardian or conservator" includes a temporary guardian of the person or a temporary conservator of the person.

(2) "Ward or conservatee" includes a person for whom a temporary guardian of the person or temporary conservator of the person has been appointed.

(b) If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under Section 2353, 2354, or 2355, and the ward or conservatee is unable to give an informed consent to such medical treatment, the guardian or conservator may petition the court under this section for an order authorizing such medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to such medical treatment.

(c) The petition shall state, or set forth by medical affidavit attached thereto, all of the following so far as is known to the petitioner at the time the petition is filed:

(1) The nature of the medical condition of the ward or conservatee which requires treatment.

(2) The recommended course of medical treatment which is considered to be medically appropriate.

(3) The threat to the health of the ward or conservatee if authorization to consent to the recommended medical treatment is delayed or denied by the court.

(4) The predictable or probable outcome of the recommended course of medical treatment.

(5) The medically available alternatives, if any, to the course of treatment recommended.

(6) The reasonable efforts made to obtain an informed consent from the ward or conservatee.

(d) Upon the filing of the petition, the court shall notify the attorney of record for the ward or conservatee, if any, or shall appoint the public defender or private counsel under Section 1471, to consult with and represent the ward or conservatee at the hearing on the petition.

(e) The hearing on the petition may be held pursuant to an order of the court prescribing the notice to be given of the hearing. The order shall specify the period of notice of the hearing and the period so fixed shall take into account (1) the existing medical facts and circumstances set forth in the petition or in the medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the ward or conservatee permits, of giving adequate notice to all interested persons.

(f) A copy of the notice of hearing or of the order prescribing notice of hearing, and a copy of the petition, shall be personally served or mailed, as prescribed in the order, on all of the following:

(1) The ward or conservatee.

(2) The attorney of record for the ward or conservatee, if any, or the attorney appointed by the court to represent the ward or conservatee at the hearing.

(3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the ward or conservatee and any known relatives of the ward or conservatee within the second degree.

(g) Notwithstanding subdivisions (e) and (f), the matter may be submitted for the determination of the court upon the proper and sufficient medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and further stipulate that there remains no issue of fact to be determined.

(h) The court may make an order authorizing the recommended course of medical treatment of the ward or conservatee and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the recommended course of medical treatment for the ward or conservatee if the court finds from all of the evidence presented to the court all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.

(i) Upon petition of the ward or conservatee or other interested person, the court may order that the guardian or conservator

obtain or permit or consent to specified medical treatment to be performed upon the ward or conservatee. Notice of the hearing on the petition under this subdivision shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Section 2357 is new. The section serves the same purpose as Section 5358.2 of the Welfare and Institutions code; but Section 2357 provides for notice to interested persons, for the appointment of counsel to represent the ward or conservatee where necessary, for the presentation to the court of medical affidavits showing the need for the medical treatment, and for findings by the court before an order authorizing the treatment is made. Subdivision (i) has no counterpart in the Welfare and Institutions Code section.

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

In the introductory portion of subdivision (a), the words "that have been" were deleted.

In the second line of the Comment, the word "monthly" was deleted. In the sixth line of the Comment, "arising from" was substituted for "by" and in the fourth sentence of the second paragraph, "court should" was substituted for "court may".

The substance of the following was added at the end of the first paragraph of the Comment:

Periodic payments to the attorney providing periodic services to the estate avoid a number of problems that exist when payment is delayed until the time of the accounting of the guardian or conservator. The periodic payment provides funds to cover overhead expenses the attorney has paid in connection with providing the services during the period covered by the payment. Periodic payments also avoid the difficult problem of determining the value of the loss of use of money caused by delay in payment and protect against variations in the value of money which may be significant in a period of double digit inflation. Where services are rendered on a periodic basis, Section 2432 provides a means to deal with these problems without the need to make frequent accountings merely to permit payment to the attorney or the guardian or conservator.

§ 2543. Manner of sale

In the introductory portion of subdivision (b), "Section 1469" was substituted for "subdivision (b) of Section 1464" and the last sentence of subdivision (b) was deleted.

§ 2544. Listed stocks, bonds, and securities; United States obligations

The introductory clause was revised to read: "Except as specifically limited by order of the court, subject to Section 2541,"

§ 2545. Sale or other disposition of tangible personal property

The introductory clause was revised to read: "Subject to subdivisions (b) and (c) and to Section 2541,"

In subdivision (b), the amount was changed from \$1,000 to \$5,000 and the five percent provision was deleted.

§ 2546. Mines and mining claims

In this section, "Section 1469" was substituted for "subdivision (b) of Section 1463".

§ 2551. Borrowing money and giving security therefor

In subdivision (a), "Section 1469" was substituted for "subdivision (b) of Section 1463".

§ 2553. Order authorizing lease required

In this section, "Section 1469" was substituted for "subdivision (b) of Section 1463".

§ 2556. Conveyance to complete contract

Section 2556 was revised to read in substance:

§ 2556. Conveyance to complete contract

2556. (a) If an adult conservatee is bound by a contract in writing to convey any real property or to transfer any personal property, executed by the conservatee while competent or executed by the conservatee's predecessor in interest, or if a ward or conservatee has succeeded to the interest of a person bound by a contract in writing to convey any real property or transfer any personal property, and the contract is one that can be specifically enforced, the court may by order authorize and direct the guardian or conservator to convey or transfer the property to the person entitled thereto. To obtain such order, the guardian or conservator or any person claiming to be entitled to such conveyance or transfer shall file a petition with the court setting forth the facts upon which the claim is predicated.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) If the transaction relates to real property, a certified copy of the order of the court shall be recorded in the office of

the county recorder in each county in which any portion of the real property is located.

(d) After entry of the order, the person entitled thereunder has a right to the possession of the property, and to hold the property according to the terms of the order, as if the property had been conveyed or transferred in accordance with the terms of the order. The guardian or conservator shall execute the conveyance or transfer according to the directions of the order, and the court may enforce execution of the order by process.

Comment. Section 2556 supersedes former Section 1537. Section 2556 is drawn from Section 850, the first sentence of Section 851, the last sentence of Section 852, and a portion of Section 853, all of which were incorporated by reference in former Section 1537. Section 2556, like Section 850, applies to specifically enforceable contracts to transfer personal property, thus expanding the scope of former Section 1537 which was limited to contracts to convey real property.

The jurisdiction of the probate court under Section 2556 is not exclusive, and an independent action for specific performance, apart from the guardianship or conservatorship proceeding, may be maintained. Cf. Bewick v. Mecham, 26 Cal.2d 92, 156 P.2d 757 (1945); O'Donnell v. Lutter, 68 Cal. App.2d 376, 156 P.2d 958 (1945) (decendent's estate).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451

Definitions

Conservator, § 2400

Court, § 1418

Guardian, § 2400

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

Petition must be verified, § 1450

§ 2557. Dedication or conveyance of real property or easement with or without consideration

The section was revised to read in substance:

2557. (a) If it is for the advantage, benefit, and best interests of the estate and those interested therein, the court may authorize the guardian or conservator to do any of the following, either with or without consideration:

(1) Dedicate or convey any real property of the estate or any interest therein to any public entity (including but not limited to the United States or any agency or instrumentality thereof) for any purpose.

(2) Dedicate or convey an easement over any real property of the estate to any person for any purpose.

(3) Convey, release, or relinquish to any public entity any access rights to any street, highway, or freeway from any real property of the estate.

(4) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under paragraph (1), (2), or (3) by the owner of property subject to the lien.

(b) To obtain the authorization of the court, the guardian or conservator or any other interested person shall file a petition with the court. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Section 2557 continues the substance of former Section 1515 with the addition of paragraph (4) of subdivision (a).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451

Community and homestead property, court authorization of transaction, § 3101

Definitions

Conservator, § 2400

Court, § 1418

Guardian, § 2400

Independent exercise of powers, § 2591

Petition must be verified, § 1450

§ 2559. Exchange of property

Assuming that Section 2558 of the Exposure Draft will be deleted, a new section, to be numbered as Section 2558, was inserted, to read in substance:

§ 2558. Exchange of property

2558. (a) Whenever it is for the advantage, benefit, and best interests of the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee, the court may authorize the guardian or conservator to exchange any property of the estate for other property upon such terms and conditions as the court may prescribe. Such conditions may include the payment or receipt of part cash by the guardian or conservator.

(b) To obtain the authorization of the court, the guardian or conservator or any other interested person may file a petition with the court. Except as provided in subdivision (c), notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) If the petition is for authorization to exchange stocks, bonds, or other securities as defined in Section 771 for different stocks, bonds, or other securities, the court, upon a showing of good cause, may order that the notice be dispensed with.

(d) After authorization by the court, the guardian or conservator may execute the conveyance or transfer to the person with whom the exchange is made to effectuate the exchange.

Comment. Section 2558 continues the substance of former Section 1540 except that the reference to those legally entitled to support, maintenance, or education from the ward or conservatee is substituted for the former reference to members of the ward's family the ward is legally bound to support and maintain. Instead of incorporating by reference the provisions of this code governing exchanges of property by administrators as did former Section 1540, comparable provisions drawn from Section 860 are included in Section 2558. Notice may be dispensed with if an order is obtained under subdivision (c). In any case, the court may extend or shorten the time for notice pursuant to Section 1462.

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451

Definitions

Conservator, § 2400

Court, § 1418

Guardian, § 2400

Exchange of tangible personal property, § 2545

Independent exercise of powers, § 2591

Petition must be verified, § 1450

§ 2570. Authority to invest generally

This section should be phrased in terms of a power of the guardian or conservator to make a particular investment in any type of property. The section should cover any type of real or personal property. The section should make clear that court authorization is required for each particular investment.

§ 2571. Purchase of home for ward or conservatee or dependents

This section was revised to read in substance as follows:

2571. When authorized by order of the court, the guardian or conservator may purchase:

(a) Real property in this state as a home for the ward or conservatee if such purchase is for the advantage, benefit, and best interest of the ward or conservatee.

(b) Real property as a home for those legally entitled to support and maintenance from the ward or conservatee if such purchase is for the advantage, benefit, and best interest of the ward or conservatee and of those legally entitled to support and maintenance from the ward or conservatee.

§ 2575. United States and State of California obligations; listed stocks, bonds, and other securities

In subdivision (a)(2), the word "estate" was inserted following "federal".

In subdivision (b), the following was deleted: "or continue an investment policy of a prudent nature being followed with respect to the estate of the ward or conservatee at the time of the appointment of the guardian or conservator".

Article 9. Doctrine of Substituted Judgment

The title of this article should be "Substituted Judgment"; the words "Doctrine of" were deleted.

§ 2580. Petition for authorization of proposed action

Subdivision (a)(2) was revised to read:

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon death of the conservatee.

Substitute the following for subdivision (b)(7):

(7) Exercise the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights, under any of the following:

- (i) Life insurance policies, plans, or benefits.
- (ii) Annuity policies, plans, or benefits.
- (iii) Mutual fund or other dividend reinvestment plans.
- (iv) Retirement, profit sharing, and employee welfare plans and benefits.

§ 2581. Notice of hearing on petition

Notice should be required to heirs presumptive under intestate succession.

§ 2582. Adequate provision for conservatee and dependents required

In the second line of the text of the section, the word "determines" was substituted for "is satisfied".

§ 2583. Circumstances considered in determining whether to authorize proposed action

The first portion of subdivision (f) was revised to read:

(f) Any known estate plan of the conservatee, including but not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and

In subdivision (j), the words "federal and state" were deleted.

In subdivision (k), the word "would" was substituted for "might". The question was raised whether subdivision (d) codifies case law language. The staff should check this.

§ 2586. Production of conservatee's will and other relevant estate plan documents

The substance of the following new section was added to the proposed legislation:

2586. (a) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee (including but not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated) shall deliver such document to the court for examination by the court, and by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.

(b) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person; and, if such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.

Comment. Section 2586 is new and permits the court to require production of the conservatee's estate plan for examination in proceedings under this article. Under the Evidence Code, the conservator is the holder of the lawyer-client privilege when the client has a conservator. See Evid. Code § 953(b). Under Evidence Code Section 912, the holder of the privilege may waive the lawyer-client privilege. Accordingly, there is no need to rely on Section 2586 if the conservator is willing to waive the lawyer-client privilege and have the lawyer produce the will or other document for consideration in the proceeding under this article. However, Section 2586 provides a procedural means for permitting examination of the will or other document and at the same time protecting the confidentiality of the document to the extent practical in cases where the document is not in the possession of the lawyer who drafted it for the conservatee or where the conservator refuses to

waive the lawyer-client privilege or where it is desired to preserve the confidentiality of the document to the extent permitted by the section. Where the document is in the custody of a person other than the lawyer who drafted it for the conservatee, Section 2586 changes prior law. *Vigne v. Superior Court*, 37 Cal. App.2d 346, 99 P.2d 589 (1940), held that the probate court lacked statutory authority to require the custodian of the conservatee's will (the custodian was not the lawyer who drafted the will) to deliver the will to the ward's guardian. Section 2586 provides a limited exception to this holding by permitting the court to compel such a custodian to deliver the will to the court for confidential consideration by the court and the attorneys in connection with a petition under this article.

CROSS-REFERENCES

Definition, court, § 1418

§ 2591. Powers that may be granted

The first portion of the Comment was revised to read as follows:

Comment. Section 2591 is based on the second paragraph of former Section 1853. Under former Section 1853, the court could authorize a conservator to exercise certain powers without the necessity of obtaining specific prior court approval in each case. Under Section 2590, this authority is broadened to include guardians as well as conservators.

Except to the extent the court for good cause otherwise orders, a guardian nominated by will may, to the extent provided in the will, exercise any one or more of the powers listed in Section 2591 without notice, hearing, or court approval, confirmation, or instructions. See Section 2108.

Some of the powers listed in former Section 1853 are not listed in Section 2591 because they are codified in this division as powers exercisable without court approval unless the power is restricted by the court. See Sections 2451 (power to collect debts and benefits), 2458 (power to vote shares and securities in person or by proxy), 2459 (power to continue insurance), 2460 (liability and casualty insurance), 2462 (power to maintain actions and proceedings other than partition, and to defend actions and proceedings), 2465 (power to abandon property), 2468 (taxes and tax returns). The remaining powers from former Section 1853 are recodified in Section 2591. The power to commence and maintain an action for partition (which former Section 1853 included the power to institute and maintain all actions) is retained in Section 2591 since court approval is otherwise required to commence a partition action. Section 2463.

§ 2616. Examination concerning assets of estate

The staff was requested to check to determine whether "innocent" (the last word in the Comment) is correctly used. [A check after the

meeting reveals that "innocent" is the word used in Section 613 which is incorporated by reference in Section 2616, so the staff does not plan to substitute another word for "innocent".]

§ 2620. Presentation of account for settlement and allowance

The following section was substituted for Section 2620 of the Exposure Draft:

§ 2620. Presentation of account for settlement and allowance

2620. (a) At the expiration of one year from the time of appointment and thereafter not less frequently than biennially, unless otherwise ordered by the court, the guardian or conservator shall present the account of the guardian or conservator to the court for settlement and allowance.

(b) The account shall state the period covered by the account and contain a summary showing all of the following:

(1) If the first account, the amount of appraisement; if a subsequent account, the amount chargeable from the prior account.

(2) The amount of any supplemental appraisement filed within the period covered by the account.

(3) The amount of cash receipts, excluding principal items.

(4) The gains on sales or other increases in assets, if any.

(5) The amount of cash disbursements, excluding principal items.

(6) The losses on sales or other decreases in assets, if any.

(7) The amount of property on hand.

(c) The account shall contain itemized schedules showing receipts, disbursements, transactions, and balance of property on hand.

(d) The petition for approval of the account or a report accompanying the petition shall contain all of the following:

(1) Descriptions of all sales, purchases, changes in the form of assets, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedules.

(2) Explanations of any unusual items appearing in the account.

(3) Any additional information required by the court.

(e) The petition requesting approval of the account may include additional requests for authorization, approval, instruction, or confirmation authorized by this division.

(f) When an account is rendered by or on behalf of two or more joint guardians or conservators, the court, in its discretion, may settle and allow the account upon the verification of any of them.

Comment. Section 2620 supersedes former Sections 1553 and 1904. Subdivisions (a) and (f) continue the substance of former Section 1904. Subdivisions (b), (c), (d), and (e) are new. Subdivisions (b), (c), and (d) are drawn from local court rules. Subdivision (e) makes clear that the petition for approval of the account may include such additional requests as requests for compensation for services rendered by the guardian or conservator of the estate, compensation for services rendered by the attorney for the guardian or conservator of the estate, compensation for the guardian or conservator of the person, monthly personal allowance for the conservatee, monthly allowance for the support of the conservatee and the dependents of the conservatee, periodic payments to the guardian or conservator or attorney, or distribution of excess income to next of kin of the conservatee. The courts generally prefer to determine these kinds of matters when an account is being settled. See W. Johnstone & G. Zillgitt California Conservatorships §§ 6.8, 6.26, 6.45 (Cal. Cont. Ed. Bar 1968).

CROSS-REFERENCES

Account must be verified, § 1450

Definitions

Conservator, § 2600

Court, § 1418

Guardian, § 2600

Effect of court authorization or approval, § 2107

Nonresident ward or conservatee, § 2107

Review of sales, purchases, and other transactions, § 2625

§ 2623. Compensation and expenses of guardian or conservator

Paragraph (1) of subdivision (a) was revised to read:

(1) The amount of the reasonable expenses incurred in the management of the estate, including the cost of any surety bond furnished, reasonable attorney's fees, and such compensation for services rendered by the guardian or conservator of the person as the court determines is just and reasonable.

§§ 2630-2632. Compensation for guardian, conservator, or attorney

Consideration should be given to making this article a separate chapter. The provision for periodic payments should perhaps be included in the same chapter.

Section 2630 was revised to read:

§ 2630. Petition by guardian or conservator

2630. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of three months from the issuance of letters, the guardian or conservator may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator for services rendered to the estate to that time.

(2) The guardian or conservator of the person for services rendered in that capacity to that time.

(3) The attorney for services rendered by the attorney to the guardian or conservator of the person or estate.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation as the court determines is just and reasonable to the guardian or conservator for services rendered to the estate or to the guardian or conservator of the person for services rendered as guardian or conservator of the person, or to both, and (2) such compensation as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate. The compensation so allowed shall thereupon be charged to the estate.

(d) If the guardian or conservator is a nonprofit charitable corporation described in Section 2104, the compensation of the guardian or conservator and the compensation of the attorney representing the guardian or conservator, in each instance, shall be for services actually rendered and shall not be based upon the value of the estate.

Comment. Section 2630 is based on former Section 1556 (second paragraph), with the addition in subdivision (d) of Section 2630 of provisions in former Sections 1907 and 1908 relating to nonprofit charitable corporations. In addition to the notice prescribed by subdivision (b), the court may require further or additional notice. See Section 1462.

The matter of compensation for services of the guardian or conservator and the attorney in connection with obtaining instructions from the court is left to the discretion of the court. The court has discretion, for example, whether to allow compensation where instructions are sought concerning (1) a transaction that does not require court authorization or (2) a transaction covered by a previously made order granting authority for independent exercise of powers. See, e.g., Sections 2450 (right to petition for instructions concerning exercise of estate management powers); 2595 (right to petition for instructions where order granting authority for independent exercise of powers made).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451

Definitions

Conservator, § 2600

Court, § 1418

Guardian, § 2600

Fee for attorney rendering account for dead or incompetent guardian or conservator, § 2642

Petition must be verified, § 1450

§ 2631. Petition by attorney

This section should be numbered Section 2632 and should be expanded to include the attorney for the guardian or conservator of the person. The following new section was added to the proposed legislation:

§ 2631. Petition by guardian or conservator of person

2631. (a) At any time permitted by Section 2630 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time in such capacity.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate.

Comment. Section 2631 is new. The section is comparable to Section 2631 and is in accord with prior practice. See W. Johnstone & G. Zillgitt, California Conservatorships § 6.26, at 244 (Cal. Cont. Ed. Bar 1968) ("The conservator of the person does not account to the court. . . . His petition for fees for his services may be part of the account of the conservator of the estate or he may file a separate petition for fees.").

CROSS-REFERENCES

Accounting, compensation for guardian of person, § 2623
Appealability of order for compensation, § 2750
Clerk sets petition for hearing, § 1451
Definitions, court, § 1418
Petition must be verified, § 1450

§ 2640. Continuing jurisdiction of court

Following "necessary," in the fourth line of this section, the following was added: ", by the removal or resignation of the guardian or conservator,".

§ 2641. Death of ward or conservatee; disposition of assets

The word "reasonable" was added before "expenses" in the fourth line of the text of the section.

§ 2660. Resignation of guardian or conservator

This section was revised to read in substance:

2660. A guardian or conservator may at any time file with the court a petition tendering the resignation of the guardian or conservator. The court may allow such resignation when it appears proper, to take effect at such time as the court may fix, and may make any order as may be necessary to deal with the guardianship or

conservatorship during the period prior to the appointment of a new guardian or conservator and the settlement of the accounts of the resigning guardian or conservator.

Section 2660, as redrafted, is drawn in part from Section 1125.1 of the Probate Code (resignation of trustee).

§ 2700. Requests for special notice

This section was revised to read:

2700. (a) At any time after the issuance of letters of guardianship or conservatorship, the ward if over 14 years of age or the conservatee, any relative or creditor of the ward or conservatee, or any other interested person, in person or by attorney, may file with the clerk of the court a written request for special notice of the filing or commencing of any one or more or all of the following:

(1) Petitions to direct, authorize, or confirm the sale, lease, encumbrance, conveyance, or exchange of property.

(2) Petitions for transfer of the proceeding to another county.

(3) Inventory and appraisal of the estate, including any supplemental inventory and appraisal.

(4) Accounts of the guardian or conservator.

(5) Petitions for the authorization to commence an action for the partition of property.

(6) Petitions for allowances of any nature payable from the estate of the ward or conservatee.

(7) Petitions for the investment of funds of the estate or for the purchase of real property.

(8) Petitions for the removal, suspension, or discharge of the guardian or conservator.

(9) Proceedings for the final termination of the guardianship or conservatorship proceedings.

(10) Petitions to direct or allow payment of a debt or claim or to fix, direct, or allow payment of attorney's fee.

(11) Petitions to fix, direct, or allow payment of the compensation or expenses of a guardian or conservator.

(12) Petitions to direct, approve, or modify payments for the support, maintenance, or education of the ward or conservatee or a person legally entitled to support, maintenance, or education from the ward or conservatee.

(13) Petitions filed pursuant to Section 2423 (payment of surplus income to relatives of conservatee) or Article 9 (commencing with Section 2580) of Chapter 6 (substituted judgment).

(14) Petitions filed pursuant to Section 2359 or Section 2403 (instruction from or approval by court).

(15) Petitions filed pursuant to Article 10 (commencing with Section 2590) of Chapter 6 (independent exercise of powers).

(16) Petitions for the adjudication of the merits of any claim under Section 2407 (determination of ownership of property claimed or held by another) or Section 2556 (conveyance to complete contract).

(17) Petitions filed pursuant to Article 5 (commencing with Section 2500) of Chapter 6 (compromise of claims and actions or extension, renewal, or modification of obligations).

(18) Petitions to fix the residence of the ward or conservatee at a place not within this state.

(19) Petitions to remove property to another jurisdiction.

(b) The request for special notice shall be so entitled and shall set forth the name of the person and the address to which notices shall be sent. If the request is for all of the matters referred to in subdivision (a), the request may refer generally to the provisions of this section.

(c) A copy of the request shall be served on the guardian or conservator or on the attorney for the guardian or conservator.

(d) The original of the request when filed with the clerk shall be accompanied by a written admission or proof of service.

Comment. Subdivisions (a), (c), and (d) of Section 2700 continue the substance of former Sections 1600 and 2002, with the addition of express provision for special notice of the matters listed in paragraph (3) and paragraphs (10)-(17) of subdivision (b). Subdivision (a) in its first clause is based on former Section 2002, but the balance is derived from former Section 1600. The provision in paragraph (7) of subdivision (a) for special notice of petitions for the purchase of real property is drawn from the third sentence of former Section 1557.1.

Paragraphs (10), (11), and (12) of subdivision (a) are specific provisions that are included within the broad scope of paragraph (6) of that subdivision but are included to make clear that special notice may be requested of petitions described in those paragraphs. The inclusion of the specific paragraphs does not limit the broad scope of paragraph (6).

The first sentence of subdivision (b) continues the substance of the first sentence of former Section 2003 and supersedes that sentence and the first clause of the first sentence of Section 1601. The second sentence of subdivision (b) is new but continues existing practice. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.10, at 31 (Cal. Cont. Ed. Bar 1968).

If a petition is one listed in Section 2700 and special notice of the petition is requested, special notice must be given under this chapter even though the particular provision under which the

petition is filed permits an ex parte petition. See, e.g., Sections 2456 (court controlled deposit or account), 2463 (authorization to commence partition action).

The ward, if over 14 years of age, or conservatee may request special notice under Section 2700, whether or not the court has dispensed with notice to the ward or conservatee under Section 1460.

CROSS-REFERENCES

Appointment of counsel for ward or conservatee, §§ 1470-1472

Definitions

Court, § 1418

Interested person, § 1422

§ 2702. Petitioner required to give special notice

The Comment to this section should be revised to read:

Comment. Section 2702 supersedes the last portion of former Section 1601 and all of former Section 2004. Section 2702 continues the substance of former Section 2004 except that the time for giving the notice has been increased from 10 to 15 days and the provision for shortening the time for the notice is new.

The provision of former Section 1601 that no notice is required when the petition is for the sale of perishable or certain other property is not continued. Section 2543 provides that the manner of sale shall conform to the procedure used for sales by administrators and Section 770 permits an administrator to sell perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, without notice. Accordingly, there is no need to continue the provision of former Section 1601 that no notice is required in such cases.

The provision of former Section 1601 which required a copy of the petition, application, account, or proceeding to accompany the notice has not been continued. No comparable requirement was contained in the conservatorship statute.

§ 2704. Request for, and furnishing of, notice of filing of inventory and appraisal

Language should be added to subdivision (e) to make clear that the notice includes any supplemental inventory and appraisal.

This section should be combined with Section 2700 if possible.

§ 2750. Appealable orders

The following revisions were made in this section:

(1) Subdivision (c) was revised to read:

(c) Adjudicating the merits of any claim under Section 2407 (determining ownership of property claimed or held by another) or Section 2556 (conveyance to complete contract).

(2) The following was added at the end of subdivision (i): "or a person legally entitled to support, maintenance, or education from the ward or conservatee."

(3) The references in subdivision (j) were corrected by substituting "Section 2423 (payment of surplus income to relatives of conservatee)" for "Section 2613" and "Article 9" for "Article 8" and adding at the end "(substituted judgment)."

§ 2751. Stay

The Commission considered Professor Bodenheimer's article and comments relating to this section and decided not to change the section. There was some feeling on the part of the Commission that the views of practitioners in the field should be solicited concerning Section 917.7 of the Code of Civil Procedure and other Commissioners took the view that the rule stated in Section 917.7 was a sound rule. The matter will be given further consideration when the child custody study is considered.

§ 2806. Order for transfer

In the second line of the text of the section, the word "the" before the word "assets" was deleted.

§ 2807. Manner of transfer; conditions

This section was revised to read:

2807. If a transfer is ordered, the court may direct the manner of transfer and impose such terms and conditions as may be just.

§ 2906. Notice

The first sentence of this section was revised to read:

Upon the filing of a petition for the appointment of a guardian under this part, notice of the time and place of hearing on the petition shall be given as provided in Section 1511.

§ 2908. Petitions and accounts; notices and hearings

The third sentence of subdivision (b) of this section was revised to read:

Not less than 15 days prior to the date fixed for the hearing, written notice of the time and place of hearing shall be mailed to the e office of the Veterans Administration having jurisdiction over the area in which the court is located and to the guardian and to any others entitled to notice under subdivision (c) of Section 1460 or who have requested special notice pursuant to Chapter 9 (commencing with Section 2700) of Part 4.

The last sentence of subdivision (b) was deleted.

§ 3701. Setting aside personal property of absentee

The \$5,000 amount specified in this section should be increased to \$20,000 unless the federal statute has a limitation of \$5,000. A comparable revision will be required in other provisions of the chapter.

§ 3801. Notice

Notice should be required to California creditors known to the petitioner.

§ 3802. Certificate of nonresident fiduciary

The words "in such state" were added at the end of subdivision (a).

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

Date

Chairman

Executive Secretary

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Minutes
August 3 and 4, 1978

Assembly California Legislature

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Committee on Ways and Means

FRANK LANTERMAN

VICE CHAIRMAN
MINORITY

August 14, 1975

MEMO TO: Senator Alfred H. Song
Chairman, Senate Judiciary Committee

FROM: Assemblyman Frank Lanterman

SUBJECT: Author's responses to opposition to
AB 1417 (Lanterman)

I. Committee on Probate and Trust Law -- State Bar of California
(Analysis dated August 11, 1975)

1) CRITERIA FOR APPOINTMENT

The State Bar is not opposed to the elimination of the term "incompetent." However, in doing so, it believes consideration must be given to the effect of such elimination on existing California law (e.g. individual's capacity to contract, marry, dissolve marriage, vote, and act as fiduciary).

RESPONSE: AB 1417 eliminates the term "incompetent" and substitutes "incapacitated" in order to provide a more accurate description of persons who are functionally unable to manage certain aspects of their personal or financial affairs without attaching the stigma of incompetence. This is to emphasize the person's physical, rather than mental, status because "incompetent" is derived from the Latin term, non compos mentis a psychiatric-medical term. Historically incompetency, or non compos mentis, has been linked and used interchangeably with such terms as "insanity," "idiocy," and "lunacy" in statutes and case law.

2) NOTICE TO PROPOSED WARD/CONSERVATEE

The State Bar has no objection to the principle of adequate notice to the proposed ward/conservatee. However, recitation of those legal consequences of guardianship/conservatorship which are not statutorily defined is questionable. Furthermore, legal consequences should be in the language of the code.

RESPONSE: AB 1417 requires that the citation to the proposed ward/conservatee contain a list of the legal consequences "which may follow" the appointment of a guardian/conservator. The intent of the bill is to inform the proposed ward/conservatee of the possible legal disabilities of guardianship/conservatorship under current statute and case law. For example, the power of the guardian/conservator to determine the ward/conservatee's place of residence is clearly spelled out in statute (Sections 1500 and 1851 of the California Probate Code).

All of the potential deprivations listed in AB 1417 have been established in statute or case law in California.

3) APPOINTMENT OF LEGAL COUNSEL

The State Bar does not oppose the right to counsel in guardianships/ conservatorships, such right being explained to the individual, or the use of the Public Defender in cases of financial inability. However, to make appointment of counsel mandatory upon the court investigator's determination of the "wishes" of the non-appearing proposed ward/conservatee, and in the case of an appearing proposed ward/conservatee absent a "knowing and intelligent" waiver, appears unnecessary and costly, and tantamount to mandatory appointment in many cases.

RESPONSE: AB 1417 does not require mandatory appointment of counsel in all cases. The bill provides that if a proposed ward/conservatee is not physically able to attend the hearing, the court investigator shall personally interview the proposed ward/conservatee and determine whether he wishes to be represented by counsel and, if so, whether he has retained counsel and, if not, the name of an attorney he wishes to retain. If the proposed ward/conservatee does not request to be represented by counsel, no attorney is appointed.

If the proposed ward/conservatee is present at the hearing, AB 1417 requires the court to appoint counsel unless the proposed ward/conservatee makes a knowing and intelligent waiver of counsel. If such a waiver is made, no attorney is appointed.

The State Bar: No requirement for appointment of legal counsel should be required in the case of voluntary conservatorships.

RESPONSE: If a guardianship/conservatorship is truly "voluntary" then the proposed ward/conservatee may waive his right to counsel either to the court investigator or in court in person.

4) PRESENCE OF PROPOSED WARD/CONSERVATEE IN COURT

The State Bar questions limitation of avoidance of attending the hearing to "physical inability" and the mandatory appointment of a court investigator in every case of non-appearance.

RESPONSE: AB 1417 eliminates the current provision that a proposed ward/conservatee may be excused from the hearing if his presence in court "would retard or impair the recovery of such person or would increase his mental debility...." This provision has been used to excuse persons from court if such persons would be emotionally or psychologically upset by the proceedings. Because of the fundamental rights which are at stake in the guardianship/conservatorship proceeding the author believes that the proposed ward/conservatee should be present if he is physically able to attend.

If the presence of a proposed ward/conservatee is medically inadvisable because of the potential deleterious effect on the individual physically (e.g. high blood pressure, heart condition), it is the intent of AB 1417 that such persons be excused from attending the hearing. A clarifying amendment can be added if necessary.

The author is unwilling to make a distinction between "voluntarily requested proceedings" and those sought by third parties because of the possibility that coercion or deception could be used to induce a person to self-petition for guardianship/conservatorship.

5) ADMISSION OF HEARSAY EVIDENCE

The State Bar: In uncontested matters, and for that matter in contested matters where no objection is raised to the admission of certain evidence, to the extent the language of the bill limiting the admission of hearsay evidence alters or restricts existing evidence rules, it would appear unduly restrictive and unnecessary.

RESPONSE: AB 1417 provides that "The rules of evidence shall apply, and no hearsay evidence which is not otherwise admissible by exception in a court of law shall be admitted into evidence." The bill simply provides that the rules of evidence, including those relating to hearsay, shall apply in guardianship/conservatorship proceedings, as they do in any court of law. If the hearsay evidence is otherwise admissible by exception, then such evidence can be admitted in guardianship/conservatorship proceedings.

6) RIGHT TO JURY TRIAL

The State Bar has no objection to codification of this rule.

7) ANNUAL REVIEW

The State Bar does not object to some form of periodic review of guardianships/conservatorships. However, consideration should be given to the following:

a. Making a distinction between voluntarily requested conservatorships and those requested by third parties.

b. Requiring only biennial review after the first year in order to coincide with financial accountings.

c. Allowing recertification as to need based on a medical affidavit.

RESPONSE: The author does not believe a distinction should be made between voluntary and third-party guardianships/conservatorships, for the reason cited above.

Limiting review to once every two years is not sufficient protection to wards/conservatees, particularly if the guardianship/conservatorship is of the person.

The intent of AB 1417 is to change the present system in which medical evidence is often the only evidence submitted to support a petition for guardianship/conservatorship. Recertification on the basis of medical need would not inform the ward/conservatee of his legal rights. Nor would it allow him the opportunity to contest the guardianship/conservatorship or provide the court with information on whether the present guardian/conservator is acting in the best interest of the ward/conservatee.

8) RIGHT OF WARD/CONSERVATEE TO TERMINATE PROCEEDINGS

The State Bar objects to placing the burden of proof on the guardian/conservator to prove continued incapacity in proceedings to terminate the guardianship/conservatorship.

RESPONSE: Incapacity is not a continuing disability, and a person who has been incapacitated at one point in time should not be presumed to be permanently incapacitated. The burden of proof in proceedings to terminate a guardianship/conservatorship, like the burden of proof in mental health conservatorships, should rest on the guardian/conservator.

II. California Bankers Association (Letter dated May 5, 1975)

I. NOTICE TO PROPOSED WARD/CONSERVATEE

The California Bankers Association objects to the requirement that the citation to the proposed ward/conservatee contain the facts showing the necessity for the appointment of a guardian/conservator on the grounds that such facts may be embarrassing to the proposed ward/conservatee.

RESPONSE: The author has made an amendment which will transmit the specific facts showing the necessity of a guardianship/conservatorship to the proposed ward/conservatee in a confidential document which will not become a matter of public record.

2) ANNUAL REVIEW

The California Bankers Association feels that annual review is unnecessary for guardianships/conservatorships of the estate only.

RESPONSE: Guardianship/conservatorship of the estate can pose severe restrictions on the ward/conservatee's rights to manage his financial affairs. Furthermore, there is no reason to assume that incapacity to manage one's financial affairs is a permanent disability. Annual review will insure that a ward/conservatee will have the opportunity to have his case reviewed by the court to determine whether he has regained his capacity to manage his financial affairs.

3) TERMINATION OF GUARDIANSHIPS/CONSERVATORSHIPS

The California Bankers Association would request an amendment absolving the guardian or conservator of the estate for failing to resist such a petition.

The author has made this amendment.

4) TEMPORARY GUARDIANSHIPS/CONSERVATORSHIPS

The California Bankers Association objects to the 30-day limits on temporary guardianships/conservatorships.

The author has made an amendment which allows the court for good cause to extend the powers of a temporary guardian/conservator pending completion of the hearing on the appointment of a general guardian/conservator.