#30.300 6/23/77

First Supplement to Memorandum 77-43

Subject: Study 30.300 - Guardianships and Conservatorship

Suggestions of Garrett H. Elmore, Consultant-Memo. No. 1.

POLICY QUESTIONS

Question 1. Should there be a different structure for the proposed revision of Divisions 4 and 5 of the Probate Code?

Suggestion: Two different structures are suggested. In view of the heavy use of the code sections, and the view of some practitioners that changes in existing wording should be limited, it is suggested that the Executive Committee of the State Bar Section on Probate and Trust Law and the land title association be contacted in advance for views on (i) restructuring, and (ii) extent of revision.

Structure A (favored by the writer)

Create Div. 4 - Guardians and Conservators

Subdivide

Part 1 Guardians
Part 2 Conservators
Part 3 Provisions Common to Guardians and Conservators
Part 4 Disposition of Community and Homesteaded Property
Part 5 Veterans' Guardianship Act

In support, it is to be noted that Divisions 4 and 5 now contain much duplicative matter. When amendments are made it is often necessary to amend both Divisions, though this is not always done in practice.

By defining "fiduciary" to mean guardian or conservator, as the case may be in new Part 3, it should be possible to eliminate duplication relating to venue, foreign wards or conservatees, and also matter in Oath, Bond and Letters (Sec. 1480), Powers and Duties (Sec. 1500), Sales, Mortgages, Leases and Conveyances (Sec. 1530), Inventory and Accounts (Sec. 1550), Suspension, Removal and Resignation (1580), Requests for Special Notice-Transfers (Sec. 1600), Appeals (Sec. 1630) and Temporary Guardians or Conservators (Sec. 1640). Some "choosing" would be required in the case of "appeals." It is true there are some "cross overs" with no literal duplication in the foregoing.

The objection to the above is that it is a somewhat larger task and therefore opens the possibilities of misprision and opposition from some practitioners who favor minimal change in this field.

In the writer's belief the approach should be explored in the interest of greater clarity.

Structure B

Create new Div. 3

Subdivide

Part 1 Guardianship
Part 2 Conservatorship
Part 3 Disposition of Community Property (etc.)
Part 4 Veterans' Guardianship Act

Question 2. Should the Act undertake "sectionalization" except to a minor extent?

Suggested. No. It does not seem desirable to re-write present Sec. 1435.1 re incompetent spouse at this time, unless both the form and the principle meet with approval, in general, of land title association representatives. The procedure in question was revised in 1959 by a committee of the land title association. The procedure is inexpensive and adapted to small property holdings. Should inquiry be made as to how the law is now working and for any needed changes?

The Probate Code itself does not seem to permit partial sectionalization, except in the instance selected (Sec. 1435.1). As to this instance, it is believed that its style is "compact" drafting which is difficult to sectionalize.

Question No. 3. What provisions should be made for existing guardianships as to (i) principle and (ii) form?

Suggested: No present solution. It is believed the present treatment even in the form of "transitional provisions," should be placed in the Code itself. Further, should there be some provisions endeavoring to cover the problem of capacity to contract of adults now under guardianship and constructive notice to third persons. If letters of guardianship become letters of conservatorship, will third persons claim they can contract with the ward or conservatee, even though they may not do so now, when they are on notice of guardianship. Is it is clear that in

the transition, individual petitions are not required, and the change is automatic? It is believed the concept of prescribing limitations that might appear on letters of conservatorship might be explored. Alternatively, should provisions be added, in substance, that it is the duty of a person proposing to contract with a conservatee to determine from the record of the proceeding the extent, if any, to which the conservatee has legal capacity to contract?

Question 4. Is it satisfactory to refer to C.C. 4600 for the guidelines in appointing a guardian for the person of a minor? See new Sec. 1453 and proposed amendment to C.C. 4600.

Suggested: To obtain the uniformity referred to in cases such as Guardianship of Marino, 30 Cal. App.3d 952, it is believed the reference method in new Sec. 1453 is appropriate. However, the question is suggested as to whether in another bill or in this Act (depending on whether the "single subject" rule of legislative bills applies), similar treatment should be made in other code provisions, e.g., Juvenile Court Law. Also, in new Sec. 1453, it is suggested express reference be made to the need for particular findings required under Marino and related cases, when custody is not awarded to a parent. Otherwise, the practitioner and courts are apt to overlook this requirement.

Question 5. Should the testamentary appointment or appointment by deed, of a guardian of the person of a minor by a parent, the other parent consenting in writing if living and competent, have any greater court consideration than expressed in new Sec. 1451 which incorporates C.C. 4600 as it will be amended?

Suggested: Proposed C.C. 4600 gives to such designation only a preference among persons otherwise equally entitled; its placement in new subd. (3) suggests that the preference be below a parent or a person in whose home the minor is living in a wholesome and stable environment. Case law to date does not appear to resolve the point of how much weight should properly be given, either under present C.C. 4600 or in a guardianship proceeding. One possible solution is to eliminate the authority to nominate, as to guardianship of the person. Another is to leave the existing framework of C.C. 4600 as to preferences, and add, in substance: Notwithstanding the foregoing, the court may appoint a person

nominated by a parent pursuant to Section 1452 of the Probate Code if it finds (findings would have to be spelled out or present last paragraph of C.C. 4600 would have to be adapted).

Question 6. Should the testamentary or deed appointment mentioned in Question 5 have a "third" preference as guardian of the estate?

Suggested: The preference as indicated in new Sec. 1452 on this subject should be further studied. It does not seem appropriate to insert as a new provision that the guardian of the person have the "first" preference. There is no necessary relationship between the skills required. Again, it is suggested that a provision such as that suggested above under Question 5, Suggested, last sentence, might be an appropriate treatment. The present code sections on nominated guardians are general. Circumstances may have changed. On the other hand, the nomination may be very current. The use of "preferences" as a means to take care of such nominations and the proper exercise of the court's paramount duty (to do what is best for the minor) is questioned.

Question No. 7. The new Act omits the present provisions that (subject to some restraint) a minor at age 14 or thereafter may appoint his or her guardian.

Suggested: This change seems appropriate to the writer, but since it is a change of practical importance, should views of the State Bar Executive Committee above mentioned be informally sought?

Question No. 8. What provision, if any, should be made for the case of an incompetent (unmarried) minor? The proposed sharp distinction between guardians and conservators based on minority alone seems to leave uncovered protection for the incompetent minor who reaches majority.

Suggested: No solution is suggested at present, beyond the concept that there might be provisions for continuing a minor's guardianship for a period during which application for a conservatorship might be made. The other solution is a form of dual guardianship-conservatorship in case of an incompetent minor or a minor who becomes incompetent during minority. How this case is now being handled would be of interest.

Question No. 9. Should the substance of present Sec. 1463 permitting an adult to execute a writing in the same manner as a witnessed will which nominates a guardian for himself or herself be continued?

Suggested: Yes. This is fairly recent legislation (1963) and is believed to be used with some frequency.

Garrett Elmore