

Memorandum 77-68

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Court Supervision of Guardian or Conservator of the Estate)

At the September 1977 meeting, the Commission directed the staff to prepare a memorandum with additional background concerning the extent and manner of court supervision over the exercise of powers and the performance of duties by a guardian or conservator of the estate. The Commission was also interested in how this problem is treated in analogous statutes such as the Independent Administration of Estates Act (Prob. Code §§ 591-591.7).

Existing Guardianship-Conservatorship Scheme

Under Division 4 (guardianship) of the Probate Code, a guardian of the estate may sometimes act without court approval, but most acts require specific court approval. Table 1 on page 2 of this memorandum lists various actions and indicates whether court approval is required under existing law.

Under existing conservatorship law, the difficulty in determining whether court approval is required is because, in most situations, both Section 1852 (incorporation by reference of general powers of guardian of estate) and Section 1853 (additional powers which court may grant) apply. In such a case, the question is whether the listing of a power in Section 1853 (additional powers) supersedes a similar general power which a guardian of the estate may exercise without court approval. There is a conflict of authority on this point. Compare Olson v. United States, 437 F.2d 981, 985 (Ct. Cl. 1971), with Place v. Trent, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, ___ (1972).

TABLE 1

COURT SUPERVISION UNDER EXISTING GUARDIANSHIP-CONSERVATORSHIP LAW

<u>Guardian's Power/Duty:</u>	<u>Guardian- ship section:</u>	<u>Court approval required?</u>	<u>Analogous Conservator- ship section:</u>	<u>Court approval required?</u>
Pay ward's debts	1501	No	1858	No
Collect debts due to ward	1501	No	1853	?
Give discharge to ward's debtor	1501	Yes	1853	Yes
Represent ward in actions	1501	No	1853	?
Pay wage claims	1501a	No	1853	?
Support ward & family	1502	No	1855	No
Use ward's income though ward has parents living	1504	Yes	1857	Yes
Prosecute partition action	1506	Yes*	1853	Yes
Agree to partition	1506	Yes	1853	Yes
Defend partition action	1508	No	1853	?
Dedicate property to public agency	1515	Yes	1853	Yes
Dedicate easements	1515	Yes	1853	Yes
Accept deed in lieu of foreclosure	1515.5	Yes	1853	Yes
Give proxies to vote stock	1517	No	1853	?
Vote stock	1517	No	1853	?
Waive notice of or consent to meeting of shareholders	1517	No	(no specific provision)	
Maintain minor's insurance	1518	Yes	(not applicable to adults)	
Sell or encumber property to support ward and family	1530	Yes	1853	Yes
Compromise suits and claims	1530a	Yes	1853	Yes
Modify obligations owed to ward	1530a	Yes	1853	Yes
Borrow money without security to improve property	1533	No	1853	?
Borrow money with security to improve property	1533, 1534a	Yes	1853	Yes
Convey property subject to preexisting contract	1537	Yes	1853	Yes
Convey property claimed by another	1537.5	Yes	1853	Yes
Make agreements concerning mining claims	1583	Yes	1853	Yes
Execute lease for less than a year at \$250/mo. or less or month to month lease	1538.6	No	1853	?
Exchange property	1540	Yes	1853	Yes
Pay surplus income to next of kin	1558	Yes	1856	Yes
Pay ward's funeral expenses	1560	Yes	(no specific provision)	

(* Approval may be obtained ex parte. Prob. Code § 1506.)

Court Supervision Under Independent Administration of Estates Act

The Independent Administration of Estates Act (Prob. Code §§ 591-591.7) was enacted to provide an optional procedure for estate administration which would eliminate much of the court supervision normally required. 7 B. Witkin, Summary of California Law, Wills and Probate § 443A, at 61 (8th ed. Supp. 1976). The executor or administrator must petition the court for authority to proceed under the act, notice must be given, and any person interested in the estate may appear and object to the granting of such authority. Prob. Code § 591.1.

Under the act, there are three categories of powers for the purpose of court supervision. First, there are powers which the executor or administrator may exercise without court supervision. These are listed in Probate Code Section 591.6. Second, there are powers which the executor or administrator may exercise without court supervision only if advice of the proposed action has been given to the persons affected and no objection has been made. These are listed in Probate Code Section 591.3. Finally, certain powers were considered too important to be safely left to unsupervised action (7 B. Witkin, supra § 443F, at 65), and these may not be exercised without court authorization or confirmation. These are listed in Probate Code Section 591.2.

The powers which may be exercised under Probate Code Section 591.6 without court supervision are as follows:

(a) To manage, control, convey, divide, exchange, partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases.

(b) To invest and reinvest money of the estate in deposits in banks and insured savings and loan association accounts and to direct obligations of the United States maturing not later than one year from the date of investment or reinvestment; to invest and reinvest any surplus moneys in his hands in any manner provided by the will.

(c) To borrow; to place, replace, renew or extend any surety bond upon any property in the estate.

(d) To abandon worthless assets or any interest therein.

(e) To make ordinary or extraordinary repairs or alterations to buildings or other property.

(f) To vote a security, in person or by general or limited proxy.

(g) To sell or exercise stock subscription or conversion rights.

(h) To hold a security in the name of a nominee or in other form without disclosure of the estate, so that title to the security may pass by delivery, but the executor or administrator is liable for any act of the nominee in connection with the security so held.

(i) To insure the assets of the estate against damage or loss, and the executor or administrator against liability with respect to third persons.

(j) To allow, pay, reject, contest and compromise any claim by or against the estate by compromise; to release, in whole or in part, any claim belonging to the

estate to the extent that the claim is uncollectible; to institute, compromise and defend actions and proceedings.

(k) To pay taxes, assessments, and other expenses incurred in the collection, care and administration of the estate.

(l) To continue the operation of the decedent's business to such extent as he shall deem to be for the best interest of the estate and those interested therein.

(m) To pay a reasonable family allowance for a period not to exceed 12 months.

The powers which may be exercised under Probate Code Section 591.3 without court supervision if advice of the proposed action has been given are as follows:

(a) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in Sections 770 and 771.5 when sold for cash.

(b) Leasing real property for a term in excess of one year if the will authorizes or directs the personal representative to lease property.

(c) Entering into any contract, other than a lease of real property, not to be performed within two years.

(d) Continuing for a period of more than six months from the date of appointment of the executor or administrator of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his death, or the sale or incorporation of such business.

(e) The first payment of, or any increase in the payments of, a family allowance.

(f) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan association accounts, and in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment.

The powers which may be exercised only with court supervision as prescribed in Probate Code Section 591.2 are as follows:

(a) Sale or exchange of real property whether sold individually or as a unit with personal property.

(b) Allowance of executor's and administrator's commissions and attorney's fees.

(c) Settlement of accountings.

(d) Continued payment of a family allowance for a period in excess of twelve (12) months.

(e) Preliminary and final distributions and discharge.

(f) Borrowing money or executing a mortgage or deed of trust or giving other security.

(g) Leasing any real property (1) if the will does not authorize or direct the personal representative to lease property, and (2) the rental exceeds two hundred fifty dollars (\$250) per month and the term exceeds one year.

(h) Completing a contract entered into by the decedent to convey real or personal property.

(i) Determining third party claims to real and personal property if the decedent died in possession of, or holding title to, such property, or determining decedent's claim to real or personal property title to or possession of which is held by another.

Court Supervision of Conservators Under Uniform Probate Code

The scheme under the Uniform Probate Code is to give the conservator (equivalent to guardian or conservator of the estate under California law) very broad powers which may be exercised without notice and without court authorization or confirmation. See Uniform Probate Code §§ 5-424, 5-425. These powers may also be either enlarged or restricted by the court. Id. § 5-426. The State Bar published a report in 1973 which was critical of the Uniform Probate Code approach, saying: "The California approach is more consistent with the principle of allowing the conservator to exercise powers reasonably related to the estate of the protected person than is the approach of the UPC giving the fiduciary absolute powers to deal with the property of the estate without court order." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 179 (1973).

Section 5-425 of the Uniform Probate Code provides that a conservator "may expend or distribute income or principal of the estate without Court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents," and sets forth guiding principles.

Section 5-424 of the Uniform Probate Code provides that a conservator "has power without Court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee," and, "acting reasonably in efforts to accomplish the purpose for which he was appointed," to do the following:

- (1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;
- (2) receive additions to the estate;
- (3) continue or participate in the operation of any business or other enterprise;
- (4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;
- (5) invest and reinvest estate assets in accordance with subsection (b);
- (6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset for a term within or extending beyond the term of the conservatorship in connection with the exercise of any power vested in the conservator;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

Policy Options

A plan entailing minimum court supervision might be adopted along the lines of the Uniform Probate Code with all powers exercisable by a guardian or conservator of the estate without court approval unless the court limits the powers. The staff recommends against such an approach. It is too radical a departure from California law, has been criticized by the State Bar, and does not provide sufficient safeguards where major actions are concerned.

At the other extreme, the Commission might adopt a plan entailing maximum court supervision along the lines of existing law (see Table 1

infra) with court approval required (either before or after the fact) of all but the most routine transactions. Such a plan has the disadvantage of being costly to the estate.

The best balance between the need to minimize the cost of the proceeding and the need to provide some supervision of major actions can probably be achieved by a hybrid plan. A plan requiring court approval of transactions involving more than a specified dollar amount or percentage of estate value would require difficult valuations in many cases. The staff believes that a scheme adapted from the Independent Administration of Estates Act would make it possible to provide clear rules. All powers could be categorized into one of three groups: (1) those considered too drastic or important to be exercised without court supervision (e.g., sales of real property or long term leases), (2) those in an intermediate class exercisable without court supervision if advice of proposed action is given to interested persons and no objection is interposed, and (3) routine matters which ought to be conducted without court supervision (e.g., bank deposits, payment of taxes, and defense of actions). Possibly also the court could be given discretion to shift powers from one category to another. Cf. Prob. Code § 1853 (additional powers).

Respectfully submitted,

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