

Memorandum 77-76

Subject: Study 30.300 - Guardianship-Conservatorship Revisions (Independent Exercise of Powers)

This memorandum, prepared by Garrett H. Elmore, concerns the independent exercise of powers by guardians and conservators. The term "independent exercise of powers" means exercise of powers without court supervision but subject to the requirements of accounting by the guardian or conservator.

Introduction

The Commission is considering the approach or approaches that might be taken to the "powers" sections. The Independent Administration of Estates Act, applicable to estates in probate, has been suggested as a possible pattern. The UPC approach of vesting broad "statutory powers" in the fiduciary, as in the Uniform Trustees Powers Act (1964), has been tentatively rejected.

It has been pointed out that Probate Code Section 1853 (Draft Section 2590 et seq.) permits the court, in a conservatorship, upon petition, to grant a broad spectrum of powers, with the right to impose limitations, but that this authority appears to have been seldom granted by courts. Further, it has been suggested that the present statutes are unsatisfactory because they do not list, even by example, powers (such as the power to purchase insurance) that may be exercised by the fiduciary without going to court.

The workability of the Independent Administration of Estates Act, which relies in part upon the giving of "advice of proposed action" in advance of consummating certain listed transactions, seems uncertain. Even so, that act did not carry out the proposal of its State Bar sponsors because certain transactions, mainly limited to real property, were required by the Legislature to follow the "old" procedure.

It is the purpose of this memorandum to present the writer's views, as tentative, on the various problems involved and to suggest, more as an interested attorney than as Consultant, one substantive change as a partial solution.

The Usefulness of Section 1853 (Draft Sec. 2590 et seq.)

Section 1853 was a pioneer section in California, inserted by the State Bar committee which drafted the Conservatorship Act of 1957. Its apparent purpose was to permit a conservatorship to be administered, as to management, like an express trust which had all the "boilerplate" included. Thus, at that time, there was much interest in certain California trust circles in a statute providing "standard" powers for trustees. Though the Uniform Act mentioned was not then in being, patterns existed in Texas and Arkansas. See Schloss, A Proposal For A Trustees Powers Act in California, 38 Sou. Cal. Law Rev. 312 (1965).

The significant feature of Section 1853 is that it is a "grant" type of statute, in contrast with a "statutory powers" statute or a statute permitting a trustor to incorporate powers "by reference." It may be surmised that many California trial courts, accustomed to the close regulation of guardianships in California which existed for many years (and still exists), were reluctant to "grant" the powers as a whole, or in part, It also seems probable that the need for letters of a special type compounded the problem.

Soon after the Uniform Act became available, the Conference of Delegates passed a modified version, applicable to testamentary trusts. The principal feature, as the law went on the books after

work by the Committee on Administration of Justice, was that it continued the "grant" approach. The law, expanded to apply to inter vivos trusts, is in effect. Pro. C. 1138.1, 1120.2.

In contrast, the Independent Administration Act mentioned above is of the "statutory power" and not "grant type." As noted, its effect is modified by the requirement for "advice of proposed action" in certain transactions. See Pro. C. 591 et seq.

Also in contrast, and an example of the unmodified "statutory power" type is the California Uniform Gifts To Minors Act. Though a court may intervene, the custodian has broadly stated "statutory powers." See Civ. C. 1158 (f), 1158.1, 1162.

Though its wording may perhaps be subject to minor changes, and provisions should be added (as in Draft Sec. 2596 (b)) to overcome the interpretation in one case cited in the draft Comment, it is the writer's belief Section 1853 should be retained, unless a full-scale Independent Administration Act is the chosen pattern, and is able to be achieved, legislatively. Thus, Section 1853 might be useful in particular situations, even though of the "grant" type.

Independent Administration Approach of Pro. C. 591 et seq.

It is not known whether the same opposition would likely be encountered if the "Independent Administration" pattern were to be proposed for guardianships and conservatorships.

It is to be pointed out that the "advice of proposed

action" procedure would be used in somewhat different circumstances. Should not the ward or conservatee be entitled to receive such notices? Or would it only be upon specific request? Again, estates involve windfalls in some instances and inheritances in others. On the other hand, a guardianship or conservatorship deals with the property already acquired and the owner of that property is not able to act personally. Would there be informal objections to the court and misunderstanding as to how the system works?

If a "full scale" Independent Administration Act cannot be obtained, it is the writer's present view that the Independent Administration approach is unsatisfactory. Also, the present Independent Administration Act is difficult to read and, if considered as a permanent statute, should be re-worded. (However, that is not within the scope of this study).

More Explicit Statement Of Powers That May Be
Exercised Without Court Authority.

It is not clear whether this approach involves merely bringing together all explicit statutory provisions and adding provisions that would make express the powers that are implied from the statutory power of management, or whether a "statutory powers" act is contemplated. It is believed the former is contemplated. The writer has endeavored to single out and state what might be termed powers incident to management, with slight expansion. It does not seem possible to draft such provisions

without (1) employing ambiguous words and the "include, but are not limited to" format. "Ordinary" management duties may vary according to the estate. On the other hand, if the category approach is used, e. g., power to sell personal property, the problem of up to what amount is involved as well as other possible limitations.

On the other hand, if a "limited" statutory powers approach is to be taken, the writer has found difficulty in drafting. What may be "ordinary" in one estate may involve the principal asset in another estate. Again, to what extent would a category involving the right to sell real estate in the same manner as a trustee be accepted by title companies and those interested in publication of legal notices?

Perhaps a pattern can be found elsewhere that would permit the "category" approach but thus far the writer has difficulty in making the necessary selections. In other words, a "limited statutory powers" approach seems difficult to draft.

Statutory Powers In a Special Type Estate.

This is the concept which the writer advances for consideration. In brief, it is the writer's premises (1) many guardianships or conservatorships involve comparatively simple administration and at best only one or two major transactions; for example, a widow or widower with a home, some money in bank, some investments and rights under various plans or laws. (2) the risk of theft or other mishandling is

small in relation to the benefits of a simplified proceeding, both to the courts and the parties and their attorneys. (3) There are many citizens in California possessing assets which under today's inflation are modest who cannot afford repeated trips of their attorney to the court (or the preparation of papers) to comply with what in effect are statutes mainly dating back 100 years.(4) A broad "statutory powers" act which can be used in any type of guardianship or conservatorship does not fit the needs of California since it can be abused.

In brief, the scheme would

(1) Split off estates which consist principally of real property owned wholly or partly by the ward or conservatee and used by him or her as a residence and of bank, savings and loan and similar deposits, securities, pension and other rights, marital awards, automobiles and furniture and furnishings, of a then value of \$100,000, or less, over and above liens and encumbrances.

(2) Enact a "statutory powers" (and not a "grant") act, with power to sell and mortgage real property included.

(3) Permit the court, for good cause, to impose limitations in particular cases, and permit a petition by interested persons to revoke the "statutory powers" procedure.

(4) Permit an interested person to serve a request for "advice of proposed action" in prescribed form, and adopt the probate provisions for subsequent procedure. The request would not be limited to major acts, but could not be a "shotgun" request.

(5) Permit the fiduciary to submit the matter to the court under "regular" procedures.

(6) Require issuance of a special form of letters but in simple form, i. e., referring to the California Probate Code Sections and certain statutory powers vested in the fiduciary thereby.

(7) Permit the fiduciary to seek the broader authority under the "grant" provisions of Sec. 1853, but letters thereunder would replace letters previously issued.

(8) Exonerate third persons who relied upon the letters without actual notice of their revocation or limitation.

(9) Provide procedure for determining value.

Attached as Exhibit A is a "mock up" of the scheme, which illustrates the tupe of statute contemplated.

There are, of course, problems as to form and policy (e. g., amount) and a question of unconstitutional special procedure may be raised.

In the view of the writer, there is need for legislation directed to a great body of the citizens of this state whose estates are not comparable with the estates of those who are well off. Real property is often given special treatment in California laws. A "statutory power" as part of streamlined procedure can turn upon ownership of a particular type of real property, as one of the tests. The proposal would not limit the power to sell real property to the home, but in this type of estate it would be uncommon for the fiduciary later to acquire other types of real property and deal with it

frequently in the course of administration. As to personal property in this type of estate, it seems probable the principal transactions would be "routine" such as getting higher interest rates, changing stocks or bonds, and dealing with retirement, pension, disability or welfare benefits or insurance programs. In the writer's view, there is little need to submit these transactions to the court specifically. The sole objection appears to be the occasional dishonest or negligent fiduciary.

The Legislature in this state has indicated in the past its willingness to simplify in the probate area. Examples: Independent Administration Act (probate); Pro. C. 630 (increase to \$20,000 in the amount of personal property that can be paid or transferred to the spouse and other persons upon affidavit and without commencement of probate); Pro. C. 640 et seq. (increase to \$20,000 amount of estate, including real property, which may be set aside to spouse or minor children, without probate, value above and above liens and also amount of homestead); Pro. C. 1143 (increase to \$5,000 from \$2,000 the value of a personal property estate which can be "summarily administered" by the public administrator); Pro. C. 1430.5 (increase to \$20,000 from \$10,000 amount of money of minor which may be deposited under a "control" account, and without guardianship); Civ. C. 1260 (increase in homestead value to \$30,000 from \$20,000, thereby permitting surviving spouse to take property free of probate, the value being over and above liens). It may also be noted that the Gifts to Minors Act (Civ. C. 1154 et seq.)

permits gifts of securities, money and insurance, to be administered by a custodian without court supervision, without limit as to amount; further, the Legislature has permitted a bequest to be made (rather than a gift), with the property thereafter held under the Act without court supervision. Another example of decreased court supervision is found in removal of court supervision over testamentary trusts as to trusts created after a 1976 date; the continuing jurisdiction and supervision is replaced by the power to invoke court supervision in the same manner as inter vivos trusts (Pro. C. 1120).

It is believed this background is relevant to any change which the Commission may sponsor for diminished court supervision. As to the writer's suggested approach, supra, the decreased court supervision involved is a moderate relaxation.

Garrett H. Elmore
Consultant

Article 6.5

Estates of \$100,000 or Less

With Certain Assets.

Sec. 2580. Application of Article.

Sec. 2580. This article applies when it appears, at the time of application for letters, or upon later petition

(a) The estimated value of the estate, over and above all liens and encumbrances, is \$100,000 or less.

(b) The estate consists principally of some or all of the following:

(1) Real property owned by the ward or conservatee or in which the ward or conservatee has an undivided ownership interest which within the preceding 2 years was occupied by the ward or conservatee as his or her principal residence.

(2) Money, currency, cash items, bank accounts and amounts on deposit with any financial institution, as such term is defined in Section 605, stocks, bonds and other securities described in Section 771.

(3) Interests in or monies payable under retirement or disability systems or plans, private or public.

(3) Interests in or monies payable under insurance or annuity contracts and health care plans.

(4) Interests in or monies payable under workers' compensation and similar laws.

(5) Monies payable under public welfare and similar laws.

(6) Monies payable under or interest in property awarded by, an order or decree or a settlement agreement in a marital matter.

(7) Furniture and furnishings.

(8) An automobile or automobiles.

Add: ?

Sec. 2581. Court Must Inquire.

Sec. 2581. It is the duty of the court, whether or not an application has been made, to cause an inventory and appraisement to be made in the manner provided by law and within such time as the court may order, when it appears that the estate is or may be an estate subject to the provisions of this article, and to defer the granting of letters, except letters of a temporary guardian or conservator.

Sec. 2582. Findings and Order. If, upon the hearing upon the application for letters of guardianship or conservatorship held after filing of the inventory and appraisement, the court finds that the then value of the estate, over and above all liens and encumbrances is \$100,000 or less and that the estate principally consists of some or all of the assets described in Section 2580, the court shall order the issuance of letters in the form provided in Section 2583.

Sec. 2583. Form of letters.

Sec. 2583. The letters shall include the notation in substance: "Issued pursuant to Sections 2580 and following, California Probate Code vesting certain statutory powers in the guardian/conservator." Any limitation, restriction or condition imposed

by the court upon the exercise of a power shall be set forth verbatim in the letters.

Sec. 2584. Statutory Powers Granted.

Sec. 2584. Subject to any limitations, restrictions or conditions ordered by the court, the issue of letters to a guardian or conservator pursuant to this article authorizes the guardian or conservator, without obtaining judicial approval, confirmation or instructions to do any or all of the following with respect to the estate and its management:

(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 and unitization and pooling agreements.

(b) To invest and reinvest money of the estate in deposits in banks (including a bank operated by it), savings and loan associations, and credit unions, to the extent such deposits or investments are insured under any law of the United States, now or hereafter in effect; to invest and reinvest surplus monies in accordance with investment principles applicable to trustees of express trusts.

(c) To borrow; to place, replace, renew or extend any encumbrance upon any property of the estate.

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

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

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

(g) To sell or exercise stock subscription 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 guardian or conservator 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 guardian, conservator, ward, conservatee and estate against liability with respect to third persons.

(j) To allow, pay, reject, contest and compromise any claim by or against the guardian, conservator, ward, conservatee.

(k) To release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible.

(l) To institute, compromise and defend actions and proceedings but this subdivision does not authorize the compromise of an action for wrongful death of, or injuries to, a ward or conservatee without approval of the court in which the action is pending.

(m) To pay and contest taxes and assessments.

(n) To pay other expenses incurred in the collection, care and management of the estate, but this subdivision does not authorize payment of compensation of the guardian or conservator, or of attorneys representing the guardian, conservator, ward, conservatee or the estate unless such compensation has been fixed by a court of proper jurisdiction. (Note: Based on Sec. 591.6 with minor changes.)

Sec. 2585.. Revocation or Limitation of Authority.

Sec. 2585. The court, upon petition of a spouse or other relative, a creditor or other person interested, and after hearing upon notice given in the manner and for the period prescribed by Section _____ and such other notice as the court may order, for good cause may revoke the authority of the guardian or administrator to act under this article or revoke or impose limitations, restrictions or conditions upon the exercise of any power or powers. In such case new letters shall be issued to conform to the court's order.

Sec. 2586. Request For Advice of Proposed Action.

Sec. 2586. A spouse or other relative, a creditor or other person interested may serve upon the guardian or administrator or the attorney of record for the guardian or administrator a written request for "advice of proposed action." The request shall pertain to an act or acts authorized by this article and shall be either in the form of a brief description of the matter or type of matter which is the subject of the request. A request shall not merely refer to Section 2583 or a particular subdivision thereof. The procedure for responding to a request and the effect of failure to respond shall be as provided in Section 591.4.

Sec. 2587. Reliance of Third Persons Upon Letters.

Sec. 2587. A third person who has relied upon the issuance of letters pursuant this article may continue to rely upon the authority evidenced thereby when the third person has no actual notice of revocation or of the imposition of limitations conditions or restrictions thereon.

Sec. 2588. Right To Ask For Court Approval or For Broader Powers.

Sec. 2588. A guardian or conservator to whom letters have been issued pursuant to this article may

(a) Seek court approval, confirmation or instructions pursuant to Section 2504 or other provisions of this code as to a particular transaction or matter, in the same manner as if the power or powers had not been granted pursuant to this article.

(b) Petition for a grant of broader powers pursuant to Article 7 (commencing with Section 2590) of Chapter 6 but upon the granting of such broader powers, new letters shall be issued and the letters under this article shall be recalled.