#30.300 12/22/77

First Supplement to Memorandum 77-82

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Letters From State Bar Subcommittee Concerning Powers and Duties)

In connection with its consideration of the chapter on powers and duties of guardians and conservators of the estate, the Commission decided in October to seek preliminary guidance from the individual members of the State Bar Subcommittee on Guardianship and Conservatorship concerning the extent of court supervision which should be required and concerning various other matters. The Executive Secretary then wrote to the six subcommittee members, posing eight specific questions (see below). We have received responses from four of the six subcommittee members. These are attached to this memorandum as Exhibits 1 through 4. Exhibit 5 (attached) is a letter from the subcommittee chairman to the individual members, uring their cooperation and describing the procedure the subcommittee will follow.

The eight questions posed are reproduced below, with the paraphrased responses of Commissioner David Lee (Exhibit 1), William Johnstone (Exhibit 2), subcommittee chairman Arne Lindgren (Exhibit 3), and Judge Arthur Marshall (Exhibit 4). (Pages 1 through 4 of Judge Marshall's letter deal with Parts 1 and 2 of our draft; these comments will be the subject of a separate memorandum.) These responses generally support the approach recommended by Garrett Elmore in Memorandum 77-82 to describe powers exercisable without court approval (see responses to questions 3 and 7), although Mr. Johnstone is skeptical of giving a guardian powers as broad as a conservator's (see Mr. Johnstone's response to questions 2 and 7). Opinion was divided on whether we should require less court supervision in the case of the small estate (see responses to question 8), although the staff and Mr. Elmore have decided to abandon this idea.

Questions and Responses

1. The approach of the staff draft is to provide consolidated provisions relating to powers and duties to apply to both guardians and conservators. Is this a sound approach?

Lee: No. While many powers and duties are common, to consolidate them will create confusion.

Johnstone: Yes, with certain exceptions. Section 1853 (additional powers) and certain other sections should be limited to conservatorships; probably there are sections that should be limited to guardianships.

Lindgren: Yes.

Marshall: Yes.

2. The staff draft adopts the approach of generally requiring prior court approval but permits the court to grant the guardian or conservator the power to independently exercise any or all of the listed powers without prior court approval subject to the court's power to impose such limitations and conditions as it may specify in its order. See present Prob. Code § 1853. Among the conditions that might be imposed would be a requirement of prior notice to specified persons (as under the Independent Administration of Estates Act). Is this a sound approach?

Lee: The approach of the Independent Administration of Estates Act would not work well in guardianship-conservatorship, since the ward or conservatee is in no position to object, and to give notice to other family members would invite officious intermeddling.

Johnstone: Ambivalent. Questionable whether Section 1853 (additional powers) should be applied to guardianships. Application of Independent Administration of Estates Act is interesting, but perhaps should be limited to conservatorships.

Lindgren: Generally yes, although the Independent Administration of Estates Act approach will probably not work well in guardianship-conservatorship. Certain powers (e.g., to make conservative investments or lease property) should be automatically granted without court limitation. Where the court is authorized to limit powers, it will probably do so out of excessive caution.

Marshall: Yes.

3. The Commission's consultant plans to review the various powers and duties of guardians and conservators under the consolidated provisions of the staff draft with a view to determining the feasibility of specifying in the statute powers and duties that might be exercised by any guardian or conservator without prior court approval. Do you have any suggestions concerning existing powers and duties that now require

prior court approval that might appropriately be exercised by any guardian or conservator without court approval?

Lee: There should be authority for the guardian or conservator to act without prior court approval in appropriate cases.

Johnstone: There should be authority for action without prior court approval. The acts to be specified might be patterned after the Independent Administration of Estates Act (viz., Prob. Code § 591.2).

Lindgren: The powers that should be automatically granted without prior court approval or court limitation might include the power to buy and sell securities (at least within fairly conservative areas) and the power to lease property within certain limitations.

Marshall: With respect to sale of real property, there should be provision for the guardian or conservator to petition the court for authority to sell without awaiting confirmation proceedings.

4. It has been suggested that consideration be given to permitting a trust company a broader power to exercise powers and duties without prior court approval than other guardians or conservators. The justification for this suggestion is that the trust company is a skilled guardian or conservator that does not require the close supervision a less skilled guardian or conservator may require and the proposal would reduce the cost to the estate of obtaining court orders for the more routine matters in connection with the management of the estate. Do you believe that this proposal has merit? If so, where would you draw the line between the powers and duties that the trust company could exercise without prior court approval and those that would require prior court approval?

Lee: The presumption that trust companies have greater expertise than individual fiduciaries concerning investments is false.

Johnstone: The proposal to give trust companies broader powers has merit in the abstract, but may be politically unsound.

Lindgren: There should be no distinction between institutional and individual fiduciaries.

Marshall: There should be no distinction between institutional and individual fiduciaries.

5. Should there be explicit authority for the court to confirm past acts of a guardian or conservator who has acted without obtaining

advance court approval where advance approval is required by statute? See generally Place v. Trent, 27 Cal. App.3d 526, 530, 103 Cal. Rptr. 841, 843 (1972).

Lee: Yes.

Johnstone: Yes.

Lindgren: Yes.

Marshall: Yes.

6. Should the conservatorship provision which insulates a conservator against claims based on any act authorized by the court unless the authorization was obtained by fraud, conspiracy, or misrepresentation (Prob. Code § 2103; Conservatorship of Harvey, 3 Cal.3d 646, 651-52, 477 P.2d 742, 744-45, 91 Cal. Rptr. 510, 512-13 (1970)) be broadened to apply also to guardianships? See also Prob. Code §§ 1539, 1557.2, 1593, 1602, 1631.

Lee: Assuming that there is wisdom in limiting liability of fiduciaries, there is no logical reason to distinguish between guardianships and conservatorships.

Johnstone: Yes.

Lindgren: Yes.

Marshall: Yes.

7. The Commission has also discussed an alternative scheme that might be used instead of the scheme in the staff draft. Is there merit to the concept of developing for guardianship-conservatorship law a scheme analogous to the Independent Administration of Estates Act (Prob. Code §§ 591-591.7), with powers of guardians and conservators divided into three categories: (1) those requiring specific court approval in all cases, (2) those exercisable without court approval, and (3) those which require notice of the proposed action with an opportunity for interested persons to object? Are there persons interested in the guardianship or conservatorship estate who would be sufficiently interested to object to a proposed action? Do you believe that this scheme should be adopted for the guardianship-conservatorship law? Do you have any comments on the present workings and usefulness of the Independent Administration of Estates Act as amended by the Legislature?

Lee: The approach of the Independent Administration of Estates Act would not work well in guardianship-conservatorship, since the ward or

conservatee is in no position to object, and to give notice to other family members would invite officious intermeddling.

Johnstone: Application of the approach of the Independent Administration of Estates Act to conservatorship is generally sound, but it should not be applied to guardianships. Perhaps ratification of the conservator's independent acts should be required at the time of each accounting. There are frequently parties available to scrutinize the conservator's proposed acts. The Independent Administration of Estates Act has been beneficial to the extent used, but courts have limited its usefulness to some extent.

Lindgren: The approach of the Independent Administration of Estates Act is probably not workable in the guardianship-conservatorship context, since it is not clear who will ultimately have an interest in the guardianship-conservatorship estate.

Marshall: The approach of the Independent Administration of Estates Act would be helpful to guardians and conservators, as would the division of powers into three categories as discussed by the Commission. There are persons sufficiently interested in the guardianship-conservatorship estate to object to a proposed action. The Independent Administration of Estates Act has proven useful and is working quite well.

8. Do you have any comments on the feasibility and usefulness of the plan for separate treatment of small estates . . . ?

Lee: Can the harm which could befall a person whose estate is under $100,000 be any less than that to one whose estate exceeds $10,000?

Johnstone: The smaller estate may well need more protection than the larger one.

Lindgren: In smaller estates more flexibility might prove useful and avoid the necessity for constant court involvement.

Marshall: It would be useful to treat small estates differently and more expeditiously than present procedures permit.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

First Supplement to Memorandum 77-82 EXHIBIT 1

SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA
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DAVID C. LEE
PROBATE COMMISSIONER

November 2, 1977

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoully:

I am responding to your letter of October 21, 1977 regarding the Commission's request for views of proposals concerning guardianship/conservatorship changes.

I am somewhat dismayed to discover that I am negatively impressed by all of the proposals. As I read the proposals they break down into five basic categories: 1, consolidation; 2, powers; 3, notice; 4, small estate handling; 5, limitation of fiduciary liability.

1, Consolidation. I distinguish guardianships of minors and similar proceedings for adults. The basic cause, duration, factual issues regarding need differ. The present law essentially is consolidated under Division 4. In Chapter 1 for instance 1404 pertains to incompetents and 1405 to minors. It is my experience that while many of the standards, powers and duties are common, confusion results particularly in the case of new attorneys. I feel the better organization would be to have separate Divisions for minors and adults. In this way should the legislature seek to amend the procedure involving one there would be no confusion. There there would be repetition of common provisions but that is preferable to confusion.

2, Powers. Granting of specific powers under 1853 is presently available. Unlike Independent Administration the automatic granting of such powers to a conservator/guardian could not be adequately contested by a conservatee/ward because of their disability.

Further, the administrative efficiency of such a grant of powers is questionable. The few requests for court supervision that we see in the courts are typically significantly troublesome to the fiduciary that court "hand holding" is desirable. The rest are of protective benefit to the ward/conservatee such as confirmation of sale (frequent overbids), sale and reinvestment in securities, etc. (the court often through inquiry determines that the fiduciaries' impressions are generated by a stock

broker without realizing that capital gains would negate any benefit of portfolio rearrangement).

Favored status granted to trust companies is based upon a presumption that they necessarily have greater expertise than individual fiduciaries. I think the presumption is false. The commission would be well advised to canvas the courts regarding investment prowess (common trust funds), post mortum tax planning and considerations of bank convenience vs. benefit to ward/conservatee, I am satisfied that such inquiry would cause the underlying presumption to be set aside.

There are always instances where a fiduciary must act at once without the luxury of time to get prior court approval. It is certainly wise to afford the opportunity to seek ratification and approval of such acts. Absent such an opportunity one can easily understand why some fiduciaries take no action. I, therefore, feel such an authority is appropriate (even though it de facto is employed even now). Query, does not PC 1880 give such power?

3, Notice. I favor notice as a vehicle for protection of procedural due process of those affected by a court proceeding. However, here we consider notice to parties whose interests are at best anticipatory. As a fiduciary a guardian/conservator has an obligation to satisfy the needs of the ward/conservatee. I fear that required notice would create officious intermeddlers of the ubiquitously disgruntled family member. Those truly interested can request special notice anyway so no real advantage is gained. Finally how does one determine to whom notice should be given. Should an 18 year old adult sibling be given notice of what a parent-guardian proposed to do in administering a child's estate? Naturally except for the invitation of contention mentioned above no real harm would befall the public by requiring notice; but what benefit would obtain? Would it not be a meaningless reform?

4, Small Estates. Can the harm which could befall a person whose estate is under $100,000 be any less than that to one whose estate exceeds $100,000?

5, Limited Liability. Assuming that there is wisdom in limiting liability of fiduciaries, there is no logical reason to distinguish between those for minors and incompetents and those for conservatees. However, I think that the case and sections cited are not as dispositive as the brief statement in item 6 suggests. PC 2103 refers to the finality of a court order. We may split hairs about whether extrinsic vs. intrinsic fraud theories of review of otherwise final orders is altered by 2103 but basically the issue raised in Harvey is finality of appealable court orders and not exculpatory provisions of guardianship/conservatorship law.

Generally all supervisory probate orders preceded by notice are appealable and as such are final orders not collaterally attachable. Certainly consistency should be the goal and for that reason review of this should be made. It should be borne in mind that conservatorships almost never result in any incompetence finding

notwithstanding ability for such a finding to be made. There being no incompetence, 2103 is consistent with general law of finality of orders. Guardianship orders, whether for minors or incompetents, are not final as to the ward until one year after the incapacity is lifted. Therefore, as far as collateral attacks and appeals no real inconsistencies exist.

Finally, I would like to urge reconsideration by the commission of their recommendation to terminate the distinction of Guardianship for incompetents and Conservatorships. I feel a value exists in retaining the two procedures and cannot hope to best the analysis as stated in Regents v. Davis (1975) 14 C. 3d 33.

Sincerely,

David C. Lee

David C. Lee
Probate Commissioner (by mhn)

DCL:mhn

cc: Arne S. Lindgren, Esq.
cc: William S. Johnstone, Jr., Esq.
cc: The Honorable Arthur K. Marshall
cc: Matthew S. Rae, Jr., Esq.
cc: Ms. Ann E. Stodden

EXHIBIT 2

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CABLE ADDRESS
HAHNLAW

November 8, 1977

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

Reference is made to your letter of October 21, 1977, concerning the subject of guardianship-conservatorship revision. I apologize for not responding earlier, however, my schedule has not permitted it. I will answer the questions raised in your letter in the numerical order in which they appear. Before doing so, however, I want to make one qualifying remark. It is my understanding from former correspondence in this matter that conservatorships are intended to apply to incompetent (or if not incompetent, of a condition now warranting a conservatorship) adults and married minors, while guardianships will apply only to minors.

1. Subject to the following qualifications, yes, I believe that consolidated provisions relating to powers and duties can apply to both guardians and conservators. The qualification deals with certain powers and duties which apply to one catagory or another, in which case they should be separately set forth. For example, the powers set forth in Probate Code §§1853, 1855-59, 1861, and 1862 probably do not apply to minors' guardianships, rather only to conservatorships. There well could be collateral provisions which should apply only to minors.

2. I am ambivalent toward your comments concerning powers. I have generally been in favor of use of 1853 powers in conservatorships and would endorse its application to all "incompetent" persons. Whether they should be made applicable to minors, however, I am not quite sure. From past experience courts have always cherished their custodia legis role with respect to minors (more so than with respect to adults) and whether there is sound reason for the distinction, I am not sure. Unfortunately, courts have not accepted the virtue of 1853 as its draftsman intended. Obviously, application of provisions

similar to the Independent Administration of Estates Act would give control to the fiduciary rather than the court. Being one of the primary draftsman of the Independent Administration of Estates Act, I obviously endorse its concept, and its application to conservatorships is interesting to think about. Perhaps the solution is to draft the 1853 powers along the lines of the Independent Administration rules, but limit their application to conservatorships.

3. I would pattern the powers to be exercised without prior court approval on the Independent Administration of Estates Act powers. We had hoped to include within those powers the power to sell real estate, but were unsuccessful. And, during the last year or so during the active real estate market in southern California, the requirement of bidding in open court proved extremely beneficial to estates, probate, guardianship and conservatorship alike.

4. In the abstract, I believe that there is merit in distinguishing between the exercise of powers and duties by a trust company on the one hand and by an individual on the other. Furthermore, and still in the abstract, I would think that with appropriate prior court approval, perhaps by the conservatee, if competent, and by either consent of relatives or at the least non-opposition by relatives, a trust company should be able to administer a conservatorship estate (question whether a minor's estate as well) as if it were a trustee of a trust. However, you are getting into a lot of politics in such a proposal, and I am not sure that the legislature would buy it. I would hate, for example, to see trust companies use their greater powers as a sales gimmick for increased conservatorship-guardianship business. If utilization of powers and procedures similar to the Independent Administration of Estates Act is embodied into the applicable statutes for all conservatorships, perhaps that is sufficient to permit trust companies to obtain the quasi-trustee powers which I know they would like to have.

5. Yes, but PC §1860 grants the power to a conservator to confirm prior acts. See California Conservatorships (CEB series) §5.9. This should definitely be incorporated into any new statute.

6. Yes. Assuming adequate notice to interested parties (compare the 1976 amendment to §1853 requiring notice to the conservatee), I think there is benefit to finality of court authorized acts. I would adopt in the new statute language similar to PC §§2005 and 2103.

7. I believe that my comments under paragraph 2 et seq. express my approval concerning the application of the Independent Administration of Estates Act to conservatorships (as distinguished from minors' guardianships), with, perhaps, ratification of a conservator's "independent" acts at the time of each interim accounting. As to your question whether anyone would be interested in objecting, the answer is "yes" depending upon circumstances of a particular case and the relationship of parties. To most there would be no objection, to some there would. As for present workings of the Act in connection with decedents' estates, once again the courts have dampened use of the Act because they basically are opposed to removal of their ultimate supervisory authority in all estates. For example, in Los Angeles County, not only is the affidavit of service of "Advice of Proposed Action" required to be filed in the proceeding (not contemplated in the Act), but the Court requires that all independent acts be specifically set forth in the final account and subjected to court approval. In practice the Act, to the extent that it is used, is beneficial and used primarily in eliminating court approval of creditor's claims and sale of marketable securities. However, I believe that as the Bar becomes more accustomed to use of the Act, it will receive greater use. I would predict the same with respect to conservatorships.

8. While I understand Garrett's motivation for sugesting separate treatment of small estates, since we are talking about someone managing and conserving the estate of another, I do not believe that a valid distinction concerning the subject of that management can be made because the estate is less than $100,000.00. In fact, it could be well argued that the smaller estate needs more protection against mismanagement than a larger estate.

I will be pleased to elaborate upon any of the foregoing comments at your call. One further comment. Many of the points you raised prove difficult to answer completely via a letter. Has consideration been given to the calling of a meeting of various consultants for the purpose of discussing in a dialogue form the pros and cons of the various questions raised? It would seem to me that this might prove beneficial.

Very truly yours,

William S. Johnstone, Jr.
of HAHN & HAHN

WSJ/kks

First Supplement to
Memorandum 77-82

EXHIBIT 3

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October 31, 1977

Mr. John Henry DeMoully
Executive Secretary
California Law
Revision Commission
Stanford Law School
Stanford, Calif. 94305

Dear Mr. DeMoully:

Thank you for your letter of October 21, 1977. My responses to your questions are as follows:

1. I agree with the staff approach to have consolidated provisions relating to the powers and duties as to both guardians and conservators.

2. Although I would be in general agreement to allow a guardian or conservator to exercise certain powers without court approval, subject to a court limiting those powers, I have the following thoughts for your consideration:

If the court is given the authority to limit the rights I am fearful that the court will opt in every instance to limit those rights and to simply throw the procedure back to its current method whereby the conservator or guardian would have to apply for court authority in every instance prior to making a move. I think also the "prior notice" to specified persons may not be appropriate in the guardianship and conservatorship area since in the probate area the personal representative is aware of those persons who could be affected by the actions to be taken; in the conservatorship and guardianship areas, the representative does not really know who might be affected since the conservatee or ward may have a will which disposes of his property in a fashion unrelated to the family members who presumably would be the persons to receive the notice that you plan to adopt. I feel certain powers should automatically be granted without court limitation-such as the power to buy and sell securities.

I think the ability to lease property within certain limitations should be authorized without the necessity of prior court approval. Investments outside fairly conservative areas should be approached, in my judgment, very carefully, particularly where the conservator or guardian is not a financial institution.

3. I am not in agreement that there should be a distinction between a financial institution's acting as conservators or guardians as contrasted to individuals. Since I am not in favor of that approach I do not believe it can be expected that we can cut even a finger line to define who is a "skilled" representative. Also, I think you will find that even if a corporate representative is not required to obtain court approval that probably they will anyway as an "insurance policy" against subsequent attack. I think you may well find that even in the probate area where a corporate fiduciary is authorized to take certain action under the Independent Administration of Estates Act that, rather than giving the prior notice, they are still opting to get formal court orders.

4. I do believe there should be some authority in The Act to allow a conservator or guardian to be able to obtain after the fact approval of actions which were taken without prior court approval.

5. I believe the guardianship section should also have the insulation against claims based on any act authorized by the court except where obtained by fraud, conspiracy, or misrepresentation.

6. With respect to adopting the Independent Administration of Estates' approach to guardianships and conservatorships, my concern is that one does not know during the lifetime of the conservatee or ward who is going to be interested in the estate at death. Although now the conservatorship area looks to heirs within the second degree, the actual persons who may benefit upon the death of the conservatee may not be within the classification of those heirs. Consequently, it is my general feeling that the generalized approach of the Independent Administration of Estates Act in the conservatorship-guardianship area may not be workable.

7. I do believe it will be very useful to have separate treatment for small estates. In the probate area we have for years tried to enlarge the ability to collect assets upon death without court involvement based on affidavit. Although the affidavit approach will not work in the conservatorship-guardianship area, I believe that in smaller estates more flexibility might prove useful and avoid the necessity of court involvement at every turn of the wheel.

Yours very truly,

Arne S. Lindgren
of LATHAM & WATKINS

First Supplement to Memorandum 77-82 EXHIBIT 4

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
ARTHUR K. MARSHALL, JUDGE

December 5, 1977

Mr. John H. DeMoully
Executive Secretary
California Law Revision
Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

The Chairman of the State Bar Subcommittee on Guardianship-conservatorship Revision asked me to make what comment I could on Division 4, Parts 1 and 2, to be added to the Probate Code (Sections 1400 - 1602).

May I say initially that I am in favor of the consolidation of all proceedings under conservatorship provisions of the Probate Code. By "all" I mean not only matters dealing with adults, but also minors as well. That has been a goal toward which the State Bar has been heading for many years, particularly since the passage of the original Conservatorship Act. However, I am agreeable to the retention of the term "guardian" with respect to minor wards, and the consolidation of all other proceedings under the conservatorship provisions, at least for the present. I do note that the guardianship provisions are carefully tied into the conservatorship requirements so that at least a degree of uniformity is achieved.

Many of my comments are somewhat technical, but they are required of me, as well as substantive criticism.

Section 1414, subdivision (a) states that a member of a "uniform service," et cetera. I do believe that the word should be "uniformed."

Section 1414 does not deal with anyone other than servicemen and women, and federal employees. However, what about the person who is missing and is not in the military or government service? Should there not be a provision for such persons?

Section 1460: I see no provision in this section for notice to the ward. I realize that notice to an infant is of no consequence, but where a ward is 14 years of age or older, I think notice should be given to him or her.

Section 1460 has several notes subscribed thereunder. The first inquires whether the provision as to posting be retained. In my opinion, posting is an archaic provision which, at one time, did notify all those who visited the courthouse. In olden days, that would be a substantial part of the citizenry; however, in modern times only a very small segment of the population frequents the courthouse and such notice really is not at all effective. I am aware of the fact that we are dealing with "notice to the whole world," and allegedly achieving such notice by posting. If that is what we wish to accomplish by posting, I believe more people would be informed by a one-time publication in a local newspaper than would be apprised by a posting on a bulletin board at the courthouse. Therefore, my thought would be to eliminate posting and instead, if we can think of no other solution for notice to the entire world, to publish in the local press.

The next commission note asks whether notice should be required to be given to all adult relatives within the second degree in every case where no notice procedure is otherwise provided. My answer to that would be in the affirmative. Where relatives are not otherwise informed, at least those adults falling within the second degree should be notified.

The last question is, "Should notice be given to the ward in cases where the ward is 14 years or older?" I previously responded to that in the affirmative.

The material sent to me goes from Page 11 to Page 13, and a blank sheet is interposed between those two pages. I am, therefore, unable to comment on Page 12.

Section 1465, subdivisions (1), (3), and (4) indicate that proof of notice may be made by the affidavit of the person who supplies such notice. Should not we also indicate that a declaration under pain of penalty of perjury would suffice?

Section 1470, subdivision (a) indicates that the "operative date" is "the date this division becomes operative..." I gather that the operative date is the effective date. If so, should not the

definition so indicate? A term should not be defined by employing the same word that is being defined.

Section 1476, subdivision (a) says that the term "guardian" means the "conservator of that adult or the conservator of the person in case of the married minor." What about a conservatorship of the estate of a married minor? Are not conservatorships to be granted for estates of married minors?

The caption of Section 1500 is "Appointment of Testamentary Guardian by Parent." Should it not be "General Testamentary Guardian"?

The next section, Section 1501, provided for the appointment of a special guardian, and to indicate the difference between 1500 and 1501 appointments, is not the word "general" necessary in Section 1500? If so, then subdivision (a) of Section 1500 should be amended by adding in the second line thereof the word "general" before the word "guardian."

Section 1500 indicates that appointments under this section may be made by will, by deed, or by a signed writing. I would suggest that deeds and signed writings be eliminated. A declaration by a parent as to a guardian for a child is just as important, if not more so, as a declaration for the appointment of an executor, or a will for the disposition of the testator's property. I do believe, therefore, that such an important declaration should be accorded the protection which is provided by compliance with provisions for a valid will.

Section 1501, subdivisions (a) and (b) should both indicate that the guardian is a special testamentary guardian.

As to the comment under Section 1501, wherein the commission remarks that a special testamentory guardian may coexist with a general guardianship, etc., all this should be, I believe, expressly provided for in the statute and not leave it to surmise and an investigation of decisional law.

Section 1510: This section provided that a guardianship is "necessary or convenient." The word "convenient" troubles me, especially when used in the same sentence with the word "necessary." Does this mean that even though a guardianship is "not necessary," we nevertheless can appoint a guardian where it is "convenient"? What does "convenient" mean? I do believe that the only "convenience" which permits the appointment of a guardian should be those

circumstances which require or necessitate appointment. If such is the case, then there is not need for the word "convenient."

Section 1515: Here, too, the word "convenient" should be stricken.

Section 1516: The phrase "or has been married" has been added to former Section 1433. Where a marriage has been annulled or dissolution has occurred, I see no reason why the protection of a guardian should be denied the minor. An ongoing marriage would appear to be necessary to make it possible to appoint a conservator. The draftsmen may be relying upon authority which would indicate that, once married, a minor becomes an adult regardless of the fate of the marriage. I am not sure that the authorities clearly so hold.

Section 1600, subdivision (b) indicates that a guardianship of the person terminates when the ward marries. I would like to see this language extended to provide "but a petition for guardianship may be again filed when such marriage is annulled or dissolved and that ward has not as yet attained his or her majority."

Section 1601: This section also indicates that a guardianship may be terminated if it is no longer "convenient." I previously discussed my doubt as to the standard of "convenience."

The draftsman should indicate a disposition of the following problem: Where a petition to revoke letters of guardianship is filed, what notice should then be given to a ward (or conservatee) who was considered incompetent by the court investigator when said investigator questioned the proposed ward prior to the original appointment? According to Section 1580, a petition to revoke letters should follow the provisions of Section 1755. Section 1755, in turn, refers to the requirements of Section 1754. The latter section indicates that a citation should be served on the ward (or conservatee). Should such citation be required also where a petition to revoke letters is filed, especially where the court investigator has previously found the ward to be incompetent and such finding occurred within a few months of the petition for revocation of letters?

A further inquiry is: Should a court investigator again be sent out to interview the ward-conservatee? And lastly: Should the ward-conservatee be required to attend if no certificate is filed

by a physician indicating that the ward-conservatee is physically unable to appear?

Your letter (attached) of October 21 to me asks several questions. The answer to Question 1 is, yes, the approach of the staff is a sound one.

The same reaction to Question 2; yes, it is a sound approach.

As to Question 3, the power of sale of real property is one that should be exercised with some caution, yet the guardian-conservator may find it necessary and beneficial to the estate of the ward-conservatee to act quickly and without court approval of such a sale. May I suggest that guardian-conservator be given the right to petition the court for the right to sell without awaiting confirmation proceedings. A hearing on such matter can be held and, if it would appear to be advantageous to the estate, the court can grant such right and the guardian-conservator may proceed more expeditiously.

As to Question 4, I have found that court supervision of both trust companies and other types of guardians does pay dividends. Trust companies can get sloppy and careless, and can also ask for unreasonable fees for services.

I would answer Question 5 in the affirmative.

As to Question 6, I would also answer this in the affirmative.

As to Question 7, I do believe a series of provisions analogous to the Independent Administration of Estates Act would be helpful to guardians and conservators. The division into three categories would also be helpful. I do believe that there are persons interested in guardian or conservatorship estates who would be sufficiently interested to object to a proposed action. I further believe that the Independent Administration of Estates Act has proven to be useful and is working quite well, and would be even more effective if the executor or administrator could be granted the right to sell real property without the need of confirmation. I would suggest, however, that a petition for authority to so proceed be required under, for example, Section 588 of the Probation Code.

As to Question 8, yes, I do believe that it would be useful to treat small estates differently and more expeditiously than the present procedures do permit.

Very sincerely yours,

Arthur K. Marshall

AKM:sp

cc: Arne S. Lindgren
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October 27, 1977

Committee Members
State Bar Subcommittee on
Guardianship-Conservatorship Revision

Each of you should have received a letter from Mr. DeMoully dated October 21, 1977, requesting your comments on proposed approaches to various matters set forth in the letter. I would appreciate each of you commenting on the questions directly to Mr. DeMoully with a copy of your comments sent to me for our master file.

As and when additional questions are put to us please respond in the same fashion. I would hope that each of us would have the opportunity to review the entire proposed legislation - keeping in mind the revised draft will be sent out early next year. Looking forward to that date, I think it's desirable that the draft be broken down between members of our subcommittee in order to not burden all of us with the necessity of complete item by item review of the entire proposal. This is not to say that you will be excluded from giving your thoughts on the various sections of the proposed revision, but rather will assist us in having members of our committee who are particularly versed and able to advise our total subcommittee, which will in turn advise the Law Revision Commission as to our joint thoughts.

To this end I have arbitrarily selected those portions of the proposal which I hope individual members would take responsibility for. My arbitrary breakout is as follows:

PARTS 1 & 2	MARSHALL
PART 3	JOHNSTONE & LINDGREN
PART 4	LEE
(Chapters 1, 2, 3, 4 & 5)	
PART 4	STODDEN
(Chapters 6, 7, 8, 9, 10 & 11)	
PART 5	RAE

Once we have received the revised draft, I then hope we could have a meeting of our subcommittee within a relatively short time thereafter to facilitate our responding to the Law Revision Commission. I think we should contemplate having an all day meeting initially and then follow up with whatever meetings seem appropriate in order for us to meet the timetable of the Law Revision Commission.

Sincerely,

Arne S. Lindgren
of LATHAM & WATKINS

cc: Edmond R. Davis