

#F-30.300

1/19/78

Memorandum 78-9

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Substituted Judgment)

We have revised the draft statute considered at the last meeting relating to the doctrine of substituted judgment to take into account the various suggestions and to make other improvements. Attached is the revised draft statute, together with preliminary discussion briefly outlining the subject matter of the draft statute and a letter of transmittal to send the material to the State Bar Subcommittee. The attached Exhibits also would go to the State Bar Subcommittee.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

20 Pa. Cons. Stat. Ann. § 5536 (Purdon 1976)

Subdivision (b) of Section 5536:

(b) Estate plan.—The court, upon petition and with notice to all parties in interest, shall have the power to substitute its judgment for that of the incompetent with respect to the estate and affairs of the incompetent for the benefit of the incompetent, his family, members of his household, his friends and charities in which he was interested.

This power shall include, but is not limited to, the power to:

- (1) make gifts, outright or in trust;
- (2) convey or release his contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety;
- (3) release his powers as trustee, personal representative, custodian for minors, or guardian;
- (4) exercise or release his powers as donee of a power of appointment;
- (5) enter into contracts;
- (6) create for the benefit of the incompetent or others, revocable or irrevocable trusts of his property which may extend beyond his disability or life;
- (7) exercise options of the incompetent to purchase or exchange securities or other property;
- (8) exercise his rights to elect options and change beneficiaries under insurance and annuity policies or surrender the policies for their cash value;
- (9) exercise his right to claim or disclaim an elective share in the estate of his deceased spouse and renounce any interest by testate or intestate succession or by inter vivos transfer; and
- (10) change the incompetent's residence or domicile. In the exercise of its judgment for that of the incompetent, the court first being satisfied that assets exist which are not required for the maintenance, support and well-being of the incompetent, may adopt a plan of gifts which result in minimizing current or prospective income, estate or inheritance taxes, or which carries out a lifetime giving pattern. The court in exercising its judgment may consider the testamentary and inter vivos intentions of the incompetent in so far as they can be ascertained.

UNIFORM PROBATE CODE

Section 5-408. [Permissible Court Orders.]

The Court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons;

* * * * *

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the Court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The Court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 percent of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

* * * * *

Section 5-425. [Distributive Duties and Powers of Conservator.]

(a) 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 in accordance with the following principles:

* * * * *

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate.

* * * * *

Section 5-427. [Preservation of Estate Plan.]

In investing the estate, and in selecting assets of the estate for distribution under subsections (a) and (b) of Section 5-425, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the Court, the conservator and the Court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

Mass. Ann. Laws, Ch. 201, § 38

[As amended by 1976 Statutes, Ch. 515, effective July 1, 1978]

The probate court, upon the petition of a conservator or guardian, other than the guardian of a minor, and after such notice to all other persons interested as it directs, may authorize such conservator or guardian to take such action, or to apply such funds as are not required for the ward's own maintenance and support, in such fashion as the court shall approve as being in keeping with the ward's wishes so far as they can be ascertained and as designed to minimize insofar as possible current or prospective state or federal income, estate and inheritance taxes, and to provide for gifts to such charities, relatives and friends as would be likely recipients of donations from the ward. (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

Such action or application of funds may include but shall not be limited to the making of gifts, to the conveyance or release of the ward's contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to the exercise or release of his powers as donee of a power of appointment, the making of contracts, the creation of revocable or irrevocable trusts of property of the ward's estate which may extend beyond his disability or life, the exercise of options of the ward to purchase securities or other property, the exercise of his rights to elect options and to change beneficiaries under insurance and annuity policies, and the surrendering of policies for their cash value, the exercise of his right to an elective share in the estate of his deceased spouse, and the renunciation or disclaimer of any interest acquired by testate or intestate succession or by inter-vivos transfer. (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

The guardian or conservator in his petition shall briefly outline the action or application of funds for which he seeks approval, the results expected to be accomplished thereby and the tax savings expected to accrue. The proposed action or application of funds may include gifts of the ward's personal property or real estate, but transfers of real estate shall be subject to the requirements of chapter two hundred and two. Gifts may be for the benefit of prospective legatees, devisees or heirs apparent of the ward or may be made to individuals or charities in which the ward is believed to have an interest. The conservator or guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the ward insofar as they can be ascertained, and if the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of his estate as herein provided. The conservator or guardian shall not, however, be required to include as a beneficiary any person whom he has reason to believe would be excluded by the ward. (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
(415) 497-1731



February 8, 1978

To: Members of State Bar Subcommittee on Law Revision Commission
Guardianship-Conservatorship Revision

Attached is a tentative draft of the portion of the guardianship-conservatorship revision relating to the substitution of judgment doctrine and distribution of excess income and principal of estate.

We need your views on two questions:

- (1) Should the substitution of judgment doctrine be codified?
- (2) Assuming that the substitution of judgment doctrine is to be codified, what revisions should be made in the attached draft statute?

There will be some delay in producing the entire draft of the guardianship-conservatorship revision. In view of this delay, we are asking for the comments of the individual members of your subcommittee on this important matter at this time and would appreciate each of you sending us your comments within the next two weeks if possible.

Sincerely,

John H. DeMouly
Executive Secretary

SUBSTITUTION OF JUDGMENT DOCTRINE AND DISTRIBUTION OF
EXCESS INCOME AND PRINCIPAL OF ESTATE

PRELIMINARY DISCUSSION

The estate of a conservatee may be far in excess of the amount needed to cover the needs of the conservatee and those the conservatee is legally required to support. In such a case, if the excess income and assets of the estate are allowed merely to accumulate, they may be subjected to income taxes immediately and to inheritance or estate taxes later. Conservators have often sought to use various estate planning techniques to minimize these taxes and the expenses of administration where it appears from all the circumstances that the conservatee, if competent, as a reasonably prudent person would use such techniques. In other cases, there may be persons to whom the conservatee would in all probability have made gifts or provided support from his excess funds or assets, and there may be charities or other activities which the conservatee had shown an inclination to support.

In Estate of Christiansen,¹ the California Court of Appeal adopted the "doctrine of substituted judgment" pursuant to which a guardian of an adult incompetent person may make gifts from the estate to carry out the presumed donative intent of the ward. In Conservatorship of Wemyss,² the California Court of Appeal held that the doctrine of substituted judgment applies to a conservatorship.

The Commission recommends that the doctrine of substituted judgment be statutorily recognized in California. The legislation recommended by the Commission is drafted in a form which recognizes the principle and lists by way of illustration various matters that are to be considered in applying the principle, but the recommended legislation permits the court considerable discretion and flexibility in applying the doctrine under the circumstances of any particular case.

The recommended legislation also would clarify a number of matters that are uncertain under existing law. For example, the recommended

1. 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967).

2. 20 Cal. App.3d 877, 880, 98 Cal. Rptr. 85, 87 (1971).

legislation makes clear that the court may use the doctrine of substituted judgment to authorize the conservator to:

- (1) Exercise the right of the conservatee as a surviving spouse to elect to take under or against a will of the deceased spouse.³
- (2) Exercise a disclaimer on behalf of the conservatee.⁴
- (3) Exercise or release a power of appointment of which the conservatee is the donee.⁵

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3. The election problem arises in connection with a will which leaves community property in trust, including the community property interest of the surviving spouse, and contains a provision that, if the surviving spouse elects to take his or her statutory share of the community property, he or she will forfeit benefits under the will. Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965). It has been argued that a conservator ought to be able to exercise the right of the conservatee who is the surviving spouse to make this election. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.72, at 216-17 (Cal. Cont. Ed. Bar 1968).
 4. Disclaimers are authorized by Probate Code Sections 190-190.10, which allow beneficiaries to disclaim inter vivos gifts (outright or in trust), powers of appointment, and interests passing by will or by intestate succession, thereby avoiding inheritance taxation. G. Hemmerling, California Will Drafting Supplement § 14.23, at 115 (Cal. Cont. Ed. Bar 1976). Probate Code Section 190.2 provides that a disclaimer on behalf of a conservatee shall be made by the conservator of the estate of the conservatee, but the statute contains no guidelines for determining when a conservator should make a disclaimer for the conservatee and does not address the question of whether court approval is required.
 5. The authority of a conservator to exercise a power of appointment on behalf of the conservatee is not clear, but it has been said that "a conservator attempting to exercise a power should seek court authority." W. Johnstone & G. Zillgitt, California Conservatorships § 1.26, at 13 (Cal. Cont. Ed. Bar 1968). It is the prevailing American rule that a guardian may exercise a power of appointment for a ward unless a contrary intention appears in the instrument creating the power. 39 Am. Jur.2d Guardian and Ward § 104 (1968). If the power permits the conservatee to appoint to himself or herself, an appointment to a third person will affect the conservatorship estate. See California Will Drafting §§ 13.22-13.24, at 466 (Cal. Cont. Ed. Bar 1965) (tax consequences). Yet there are no standards provided in existing law for determining when a conservator should exercise or release a power of appointment.

(4) Exercise the power of the conservatee to revoke a revocable trust.⁶

043/142

DRAFT STATUTE

Article . Doctrine of Substituted Judgment

§ 2550. Petition for approval of proposed action

2550. (a) The conservator or other interested person may file a petition under this article for an order authorizing or requiring the conservator to take such action as is specified in the petition for the benefit of the conservatee or the estate or for the purpose of minimizing current or prospective state or federal income, estate, or inheritance taxes or expenses of administration or providing gifts to such charities and other objects, relatives, or friends as would be likely recipients of gifts from the conservatee.

(b) The action proposed in the petition to be taken by the conservator may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

6. The existing law is unclear whether a conservator may revoke a revocable trust created by the conservatee while competent, even with court authority. W. Johnstone, G. Zillgitt, & M. Levine, California Conservatorships Supplement § 5.72a, at 58 (Cal. Cont. Ed. Bar 1976); Drafting California Revocable Inter Vivos Trusts § 5.9, at 141 (Cal. Cont. Ed. Bar 1972). However, there is a "strong argument" in favor of giving the conservator such power. W. Johnstone, G. Zillgitt, & M. Levine, supra.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.

(6) Exercising options of the conservatee to purchase or exchange securities or other property.

(7) Exercising the rights of the conservatee to elect options and change beneficiaries under insurance and annuity policies or to surrender the policies for their cash value.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right of the conservatee to revoke or to surrender the right to revoke a revocable trust.

Comment. This article (commencing with Section 2550) is new and codifies the court-recognized doctrine of substituted judgment. See *Estate of Christiansen*, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967); *Conservatorship of Wemyss*, 20 Cal. App.3d 877, 98 Cal. Rptr. 85 (1971). Section 2550 is drawn from a portion of Mass. Ann. Laws, Ch. 201, § 38, as amended by 1976 Statutes, Ch. 515, effective July 1, 1978. See also 20 Pa. Cons. Stat. Ann. § 4436(b) (Purdon 1976); Uniform Probate Code § 5-408(3).

The first sentence of Section 2550 indicates the three general types of situations where the doctrine of substituted judgment under this article may be exercised:

(1) Where the action proposed to be taken by the conservator is for the benefit of the conservatee or the estate.

(2) Where the proposed action is designed to minimize taxes and expenses of administration.

(3) Where there is a person to whom the conservatee would in all probability have made gifts or provided support from his excess funds or assets or there are charities or other objects which the conservatee had shown an inclination to support.

The nonexclusive listing in subdivision (b) of the types of actions which may be proposed in the petition is drawn from the Massachusetts and Pennsylvania statutes and from the Uniform Probate Code provision, supra.

The listing in subdivision (b) will make clear that the actions listed may be taken by the conservator if approved by the court under this article. Under former law, the extent to which these types of actions could be taken by the conservator, whether court approval was required, and the relevant considerations in determining whether the action should be taken, were matters that were not covered by statute and the law was uncertain. See Preliminary Discussion, supra.

In the case of gifts of income from the conservatorship estate, this article supplements Section 2514 which authorizes gifts of surplus income to the "next of kin" of the conservatee under certain circumstances. Gifts of surplus income under this article are not limited to next of kin.

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§ 2551. Notice of hearing of petition

2551. Notice of the hearing of the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 to all of the following:

(a) The persons required to be given notice under Chapter 3 (commencing with Section 1460) of Part 1.

(b) The persons required to be named in a petition for the appointment of a conservator.

(c) Such other persons as the court may order.

Comment. Section 2551 is new.

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§ 2552. Adequate provision for conservatee and dependents required

2552. The court may approve a proposed action under this article only if the court is satisfied that the proposed action will have no adverse effect on the estate or that the estate remaining after the proposed action is taken will be adequate to provide for the reasonable foreseeable needs of the conservatee and for the support of those legally entitled to support from the conservatee, taking into account their age, physical condition, standards of living, and all other relevant circumstances.

Comment. Section 2552 recognizes that the conservatee and those legally entitled to support from the conservatee have first claim on the income and assets of the estate.

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§ 2553. Circumstances considered in determining whether to approve proposed action

2553. In determining whether to approve a proposed action under this article, the court shall take into consideration all the relevant circumstances, including but not limited to:

(a) The probability of the conservatee's recovery of sufficient mental competence to make a disposition of the estate.

(b) The past donative practices and conduct of the conservatee.

(c) The traits of the conservatee.

(d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.

(e) The wishes of the conservatee.

(f) Any known estate plan of the conservatee, including the conservatee's will, any revocable trust of which the conservatee is the settlor, 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.

(g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective legatees, devisees, or heirs apparent of the conservatee, and the prospective donees.

(h) The value, liquidity, and productiveness of the estate.

(i) The minimization of current or prospective income, estate, or inheritance taxes, and expenses of administration.

(j) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the mental competence to do so.

Comment. Section 2553 gives the court considerable discretion and flexibility in applying the doctrine of substituted judgment under the circumstances of the particular case. The listing in Section 2553 is not exclusive, and the weight to be given to any particular matter listed will depend upon the circumstances of the particular case. A matter not listed may be significant in a particular case. For example, the conservatee may have received property from a parent with the understanding that the conservatee would leave the property to the descendants of that parent. Such an understanding would be a circumstance for the court to take into account together with all other relevant circumstances.

§ 2554. Determination and order

2554. After hearing, the court may approve, modify and approve, or disapprove the proposed action and may direct the conservator to transfer or dispose of assets or take other action as provided in the court's order.

§ 2555. No duty to propose action

2555. Nothing in this article imposes any duty on the conservator to propose any action under this article, and the conservator is not liable for failure to propose any action authorized by this article.

Comment. Section 2555 is included to make clear that a conservator is not liable for the failure to propose an estate plan or other action under this article even though the conservatee, if competent and acting as a reasonably prudent person, would have developed a plan for his estate or have taken other action in order to minimize taxes and expenses of administration. The remedy for a person who believes that some action should be taken by the conservator under this article is to petition under Section 2550 for an order requiring the conservator to take such action with respect to estate planning or gift giving as is set out in the petition.