#L-3051

jd382
12/11/90

Memorandum 91-11

Subject: Study L-3051 - Pour-Over Will for Conservatee

Section 2580 of the Probate Code permits the conservator or other interested person to file a petition under the "substituted judgment" provisions to obtain an order of the court authorizing or requiring the conservator to take a proposed action for various listed purposes, including:

> (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.

Although substituted judgment can be used to create a trust with provisions for the disposition of the conservatee's estate upon the death of the conservatee, the substituted judgment provisions do not authorize the conservator with court approval to make a will for the conservatee.

We have received a letter from attorney Michael Anderson of Sacramento (Exhibit 1) which takes the view that it is "incredibly illogical" for the substituted judgment statute to permit a revocable trust, but not to permit its usual companion document, a pour-over will.

The issue raised is: **Should the conservator be authorized to make a pour-over will for the conservatee that devises to a living trust property that may be discovered at the conservatee's death that was unintentionally omitted from the trust?** The staff recommends that such a provision be added to the substituted judgment statute. Such a narrowly drawn provision would permit the estate planning attorney to act with more confidence in drafting a revocable living trust under the substituted judgment provisions for a conservatee. Reviewing and approving a pour-over will of the type described would not impose any

significant burden on the court which is requested to review and approve a trust under the substituted judgment provisions.

Johnstone and House, California Conservatorships and Guardianships § 13.3 (1990) summarizes the situation as follows:

> The creation and funding of a revocable living trust through the substituted judgment provisions has become increasingly popular. . . . The creation and funding of such a trust under Prob C. §2580 serves the dual purposes of lifetime management of assets and testamentary disposition.
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> Finally, it should be pointed out that, for all the flexibility of the substituted judgment provisions, they cannot be used to permit the conservator to execute a will for the conservatee or to execute a power of appointment held by the conservatee. The ability is reserved to the conservatee, personally, because of the requirements of Prob C §6100. Prob C §1871(c); Estate of Wood (1973) 32 CA3d 862, 108 CR 522. See also Conservatorship of Romo (1987) 190 CA3d 279, 235 CR 377, in which the court held that neither the conservator, his or her counsel, nor the probate court may execute a will on the conservatee's behalf under Prob. C §2580. The court reached this conclusion based in part on the detailed language of Prob C § 2580(b), which does not include the execution of wills among the permissible § 2580 transactions. The court was also influenced by Prob C 6100 (former Prob C §20), which permits anyone over the age of 18 who is "of sound mind" to execute a will, and by Estate of Carlson (1970) 9 CA3d 479, 481, 88 CR229, 231, in which the court held that "the right to make a will . . . is purely statutory; subject to the complete control by the Legislature." Nevertheless, practically speaking, the purposes of a will can be accomplished by the creation and funding of a revocable living trust with testamentary provisions under §2580.

The substituted judgment statute includes special protections for the conservatee before a proposed action can be authorized or directed. See the discussion from Johnstone and House, California Conservatorships and Guardianships §§13.4, 13.5 (1990) (set out as Exhibit 2). These protections require the involvement of the conservatee to the extent the conservatee has understanding and require consideration of the estate plan and desires of the conservatee.

Although the staff recommends only a pour-over will to pick up inadvertently omitted property when a trust is created under the substituted judgment provisions, the letter from attorney Michael

Anderson (Exhibit 1) raises the broader issue: **Why can a trust be created under the substituted judgment provisions, but not a will, when both documents accomplish the same basic purpose?** This would permit, for example, the making of a will exercising a power of appointment given to the conservatee which by its terms can only be exercised by the conservatee's will. The staff recommendation is so narrow that it would not authorize the execution of a will transferring the property covered by the power of appointment to the trust created under the substituted judgment provisions.

The staff would implement its recommendation by amending Section 2580 as set out below. The amendment authorizes the conservator to make a pour-over will for the conservatee that devises to the trust property that may be discovered at the conservatee's death that was unintentionally omitted from the trust.

Probate Code § 2580 (amended). Petition to authorize proposed action

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition 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.

(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, and making for the conservatee a will devising to the trust so created any property that was unintentionally omitted from the trust, or revoking a will made pursuant to this paragraph if the trust is revoked under paragraph (10) .

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

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

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

(9) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

(10) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

Respectfully submitted,

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CA LAW REV. COMM'N
DEC 06 1990
RECEIVED

December 4, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: California Probate Code Section 2580.5

To whom it may concern:

In the case of the Conservatorship of Romo 1987 First District 190 Cal. App. Third 279. The court held in construing Section 2580.5 that it did not authorize the court to allow the conservator to sign a Pour-Over Will.

In respect to estate planning the companion document that is prepared with a Revocable Trust is a Pour-Over Will. It seems incredibly illogical that when Section 2580.5 was considered and enacted that they left out the idea that a Pour-Over Will could not be created under this provision.

Could you, in your next meeting of the commission, propose the amendment of California Probate Code Section 2580 to permit the drafting of a Pour-Over Will or even a Will.

Your help in this matter is greatly appreciated.

Sincerely,

MICHAEL J. ANDERSON

MJA/fa

§13.4 IV. CONSERVATEE INVOLVEMENT

The actions that can be authorized under Prob C §2580 may have significant consequences to the conservatee and the estate, both before and after death. Therefore, special protections are given to the conservatee before the proposed action can be authorized or directed.

First, the conservatee must receive 15 days' notice of the hearing of a petition under Prob C §2580. Prob C §§2581(a), 1460(a)–(b)(2).

Second, before the court may authorize or direct the proposed action, the court must find that the conservatee does not oppose the action, or, alternatively, if he or she does oppose it, that the conservatee lacks the capacity to enter into the transaction personally. Prob C §2582(a). In other words, if the conservatee has the capacity to take the action personally (*e.g.*, to execute a living trust with testamentary provisions), and the conservatee opposes the proposed action, the court may not authorize the conservator to proceed. See Cal L Rev'n Comm'n Comment to Prob C §2582. Because the creation of the conservatorship automatically deprived the conservatee of the capacity to contract (Prob §1872(a)), which is required to create a living trust, presumably the capacity determination required under Prob C §2582(a) is one of actual fact rather than of law and it is neither foreclosed by the general rule of Prob C §1872(a) nor requires a formal separate order under Prob C §1873 broadening the conservatee's capacity. See Prob C §1873 and §19.12.

Third, before authorizing or directing the action, the court must determine that, if the action is taken, either it will have no adverse effect on the conservatee's estate, or the remaining estate will be adequate to support the conservatee and his or her legal dependents. In making this determination, the court must consider the ages, physical conditions, standards of living, and all other relevant circumstances of the conservatee and his or her legal dependents. Prob C §2582(b).

Fourth, when relevant, the court must take into account the conservatee's wishes, and if it finds that the conservatee lacks legal capacity for the proposed transaction, the court must evaluate the probability of the conservatee's recovery of legal capacity. Prob C §2583(a), (e).

Finally, if the court finds that the appointment of legal counsel would be "helpful to the resolution of the matter" or "is necessary to protect the person's interests," the court may appoint legal counsel for the conservatee under Prob C §1470(a). See §6.57. Payment of the fees for such service may later be ordered by the court. Prob C §1470(b).

§13.5 V. OTHER CONSIDERATIONS

Apart from the considerations described above, which must be taken into account by the court in ruling on a Prob C §2580 substituted judgment petition, the court may take several other factors into account. When gifts or estate planning are involved, the court will consider the conservatee's past donative declarations, practices, and conduct. Prob C §2583(b). Also important are the relationship and intimacy of the conservatee with the prospective donees, their standards of living, and the extent to which they would be likely objects of the conservatee's bounty. Prob C §2583(d). The actual estate plan of the conservatee, if known, is always pertinent to a proposed gift or estate planning transaction, and an estate plan includes the conservatee's will and other testamentary documents, but also other contract or ownership rights designed to take effect at the death of the conservatee or another. Prob C §2583(f). For discussion of restrictions surrounding the disclosure of the will and related documents, see §13.10. Similarly, the likely devolution of the conservatee's estate at death, taking into account the actual life expectancy of the conservatee and heirs and legatees, will have a bearing on the proposed gift or estate planning transaction. Prob C §2583(g).

Tax laws and the tax impact of the transaction on the conservatee and others may be important to any transaction proposed under Prob C §2580, whether of a lifetime estate management or testamentary nature. Prob C §2583(i)–(j). Likewise, the value, liquidity, and productiveness of the estate are to be considered. Prob C §2583(h). Finally, the court will be interested in the traits of the conservatee, as well as his or her wishes, in making its determination, because the court will generally weigh "the likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so." Prob C §2583(c), (e), (k).