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T&E – 2005 –05

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

RE: Project No. 2004-01: Amendment of Probate Code Sections 1900-1901 and 2351.5

Section/Committee and Contact (s):

Section/Committee: Trusts and Estates Section
Date of Action: Unanimous approval by Executive
Committee of Trusts and Estates Section,
April 25, 2004; Unanimous approval by Incapacity
Committee of Trusts and Estates Section, April 19, 2004

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Digest:

California law currently contains provisions designed to give registered domestic partners the rights and responsibilities of married persons. Various amendments to the Probate Code have been enacted that treat domestic partners as having the same rights and responsibilities in connection with Probate proceedings that spouses have. However, not all statutes that potentially affect the rights of domestic partners have been modified.

Probate Code Section 1900 currently provides:

The appointment of a conservator of the person or estate or both does not affect the capacity of the conservator to marry

Probate Code Section 1901 further provides:

(a) The court may by order determine whether the conservatee has the capacity to enter into a valid marriage, as provided in Part 1 (commencing with Section 300) of Division 3 of the Family Code, at the time the order is made.

In addition, Probate Code Section 2351.5 provides in part:

... (b) A limited conservator does not have any of the following powers or controls over the limited conservatee unless such powers or controls are specifically requested in the petition for appointment of a limited conservator and granted by the court in its order appointing the limited conservator . . .

(3) To consent or withhold consent to the marriage of the limited conservatee . . .

No reference is made in these sections nor anywhere else in the Probate Code to the right to enter into a domestic partnership when a person is under a conservatorship or limited conservatorship, although the similar treatment now afforded to domestic partners and spouses under California law suggests that a person's right while under conservatorship to enter into and to terminate a domestic partnership should be co-equal with that same person's right to enter into or terminate a marriage.

This proposal would remedy the current failure to address the issue of capacity to enter into domestic partnership in the context of conservatorships by modifying Probate Code Sections 1900, 1901 and 2351.5 to add language addressing the right to enter into a domestic partnership.

Application:

This bill will modify the law applicable to conservatees and limited conservatees to allow conservatees and limited conservatees to retain the right to enter into a domestic partnership unless that right is specifically taken away at the time of the imposition of the conservatorship or pursuant to later petition.

Illustrations:

A person placed under a conservatorship under current law may be denied the right to enter into a domestic partnership on the ground that the person would need to enter into a contract in order to create a

domestic partnership and that such rights are denied by the conservatorship. Under the revised provisions, a person would retain the ability to determine that he or she wished to enter into a domestic partnership and to be able to confer upon a domestic partner the various rights belonging to a domestic partner in the same manner such rights could be conveyed to a spouse.

Documentation:

The author is unaware of any documentary evidence of particular problems raised by the failure to conform the Probate Code to the recently enacted Family Code provisions. However, given the widespread adoption of rights of domestic partnership under both the Probate Code and the Family Code, it is clear that persons desiring to enter into domestic partnerships will be subject of conservatorships in the future and need the protections put in place here.

History:

Although there have been various amendments to bring domestic partners into parity with married persons, no legislation dealing with this particular issue has previously been proposed

Pending Litigation:

None known.

Likely Support/Opposition:

The Trusts and Estates Section will support this. This proposal would be supported by members of the legislature who have supported other legislation intended to give domestic partners rights similar to married persons.

Fiscal Impact:

No anticipated fiscal impact.

Germaneness:

This proposed legislation affects the rights of persons being placed under probate conservatorships and is thus uniquely within the scope of the section's interests and knowledge.

Proposed Legislation:

SECTION 1. Section 1900 of the Probate Code is amended to read:

1900. The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry *or to enter into a registered domestic partnership.*

SEC. 2. Section 1901 of the Probate Code is amended to read:

1901. (a) The court may by order determine whether the conservatee has the capacity to enter into a valid marriage, as provided in Part I (commencing with Section 300) of Division 3 of the Family Code, *or to enter into a registered domestic partnership, as provided in Section 297 of the Family Code,* at the time the order is made.

(b) A petition for an order under this section may be filed by the conservator of the person or estate or both, the conservatee, any relative or friend of the conservatee, or any interested person.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

SEC. 3. Section 2351.5 of the Probate Code is amended to read:

2351.5. (a) Subject to subdivision (b):

(1) The limited conservator has the care, custody, and control of the limited conservatee.

(2) The limited conservator shall secure for the limited conservatee such habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate and as will assist the limited conservatee in the development of maximum self-reliance and independence.

(b) A limited conservator does not have any of the following powers or controls over the limited conservatee unless such powers or controls are specifically requested in the petition for appointment of a limited conservator and granted by the court in its order appointing the limited conservator:

(1) To fix the residence or specific dwelling of the limited conservatee.

(2) Access to the confidential records and papers of the limited conservatee.

(3) To consent or withhold consent to the marriage of, *or the entrance into a registered domestic partnership by*, the limited conservatee.

(4) The right of the limited conservatee to contract.

(5) The power of the limited conservatee to give or withhold medical consent.

(6) The limited conservatee's right to control his or her own social and sexual contacts and relationships.

(7) Decisions concerning the education of the limited conservatee.

(c) Any limited conservator, the limited conservatee, or any relative or friend of the limited conservatee may apply by petition to the superior court of the county in which the proceedings are pending to have the limited conservatorship modified by the elimination or addition of any of the powers which must be specifically granted to the limited conservator pursuant to subdivision (b). The petition shall state the facts alleged to establish that the limited conservatorship should be modified. The granting or elimination of such powers is discretionary with the court. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(d) The limited conservator or any relative or friend of the limited conservatee may appear and oppose the petition. The court shall hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded. If any of the powers which must be specifically granted to the limited conservator pursuant to subdivision (b) are granted or eliminated, new letters of limited conservatorship shall be issued reflecting the change in the limited conservator's powers.

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