

Memorandum 78-33

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Community or Homestead Property of Spouse Lacking Legal Capacity)

Sections 1435.1-1435.18 of the Probate Code provide procedures for disposition of community and homestead property if either or both spouses is incompetent. The text of existing law is attached (pink pages). Revision of these provisions is necessary to conform with revision of the guardianship and conservatorship law and to recognize the recently enacted equal rights of spouses in community and homestead property. In addition, revision of these provisions is desirable to expand their scope and make them more useful.

The Commission has previously reviewed a draft of these provisions. The present draft (white pages) incorporates prior Commission decisions but also somewhat reorganizes and broadens the prior draft. Attached to the draft (yellow pages) is an explanatory portion that outlines the major changes from existing law. Less important changes are noted in the Comments to the individual sections.

Respectfully submitted,

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COMMUNITY OR HOMESTEAD PROPERTY OF INCOMPETENT PERSONS

Chapter 2A of Division 4 of the Probate Code (Sections 1435.1-1435.18) provides procedures to enable transactions involving community and homestead property despite the incompetence of either or both spouses.¹ Chapter 2A authorizes a special proceeding for court approval of a transaction without the necessity of appointing a guardian or conservator.² As an alternative to court approval of a transaction, Chapter 2A permits in some circumstances administration and disposition of the property in the guardianship or conservatorship estate of either or both spouses,³ or by the competent spouse with the consent of the guardian or conservator of the incompetent spouse.⁴

Chapter 2A achieves a generally sound balance between protecting the rights of an incapacitated spouse and avoiding the burden on the court of unnecessary supervisory duties. However, Chapter 2A is not sufficiently comprehensive in its coverage of authorized transactions. It contains provisions made obsolete by amendments to California community property law which vest each spouse with equal rights to control and dispose of community property, subject to joinder requirements.⁵ It fails to reflect changes made in California homestead laws to permit a married person's separate homestead⁶ and to remove the distinction

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1. Chapter 2A derives from earlier provisions of a more limited character. As early as 1873-1874, a special proceeding could be maintained to authorize a transaction involving homestead property. This remedy was the exclusive means by which such a transaction could be made. *Flege v. Garvey*, 47 Cal. 371 (1874). A similar special proceeding was added for community real property in 1919. 1919 Cal. Stats., Ch. 615. These procedures were consolidated in 1941 and were expanded to include community personal property in 1959. 1941 Cal. Stats., Ch. 1220; 1959 Cal. Stats., Ch. 125. Alternative procedures for disposition in a guardianship or conservatorship estate or with consent of the guardian or conservator were also added in 1959.
 2. Prob. Code §§ 1435.1, 1435.3. As to the purpose of the special proceeding in the case of real property transactions, see generally *Estate of Risso*, 156 Cal. App.2d 412, 319 P.2d 789 (1958).
 3. Prob. Code §§ 1435.1, 1435.15.
 4. Prob. Code §§ 1435.1, 1435.16, 1435.17.
 5. Civil Code §§ 5125 (community personal property) and 5127 (community real property).
 6. Civil Code §§ 1300-1304.

between separate property of husband and wife in the selection of a homestead.⁷ It is obscure in its treatment of community personal property transactions by a competent spouse. The statute itself is complex and difficult to follow.

For these reasons, Chapter 2A should be reenacted in a modernized form that clarifies the interrelation of the different procedures for authorizing transactions and is consistent in form and substance with the proposed conservatorship law revision.⁸ The major substantive changes recommended in Chapter 2A are outlined below.

The special proceeding for court approval of a transaction, without the necessity of appointing a guardian or conservator, should be expanded to increase its usefulness. The relief available in the proceeding should include a judicial declaration of legal capacity of a spouse for a transaction, or a court order disapproving the proposed transaction.⁹ The remedies in the special proceeding should be available to a spouse who lacks or is alleged to lack legal capacity as well as to a spouse who has legal capacity or a conservator.¹⁰ A spouse whose lack of legal capacity will be adjudicated in the proceeding should be advised by the court of the consequences of the proceeding and of his or her rights, including the right to a jury trial and appointed counsel if requested. If the spouse requests appointment of counsel, the court should be authorized to appoint the public defender or private counsel, in lieu of representation by the conservator of the estate of the spouse or the public guardian or public administrator.

7. Civil Code § 1238.

8. For example, each of the three major procedures enabling transactions should be set out in a separate chapter. The unnecessary distinctions between community real property and community real property subject to a homestead should be eliminated. The terms "competent" and "incompetent" should be replaced by more precise references to legal capacity or lack of legal capacity.

9. Cf. Prob. Code §§ 1138-1138.13 (jurisdiction of superior court may be invoked as to a particular matter in trust administration). Such relief would be useful primarily in transactions involving community personal property, for which requirements of joint action by spouses are limited. See Civil Code § 5125.

10. In case of a proceeding by a spouse who lacks legal capacity, appropriate provisions should be added to assure orderly proceedings and orderly consummation of any authorized transaction.

The alternative procedure of administration and disposition of property in the conservatorship estate of either or both spouses should likewise be expanded to increase its usefulness. A conservator of one spouse, with the approval of the appointing court, should be authorized to consent to inclusion of the entire property interest in the conservatorship estate of the other spouse.¹¹ The court having jurisdiction of the conservatorship in which property is to be included should have authority to control the procedure so that burdensome assets will not be added to an existing estate. The administration in one conservatorship estate should be terminable by revocation of consent or otherwise upon court order.

The alternative procedure of the competent spouse dealing with the community real and personal property, with the consent of the guardian or conservator of the incompetent spouse, is based upon the husband's former right to manage, control, and dispose of the property. This procedure should be replaced by one based on equal treatment of the spouses.¹²

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11. A transaction by the conservator administering the property would be subject to any joinder requirements for that type of transaction.
 12. It also should be made clear that the authority of the spouse having legal capacity to manage, control, and dispose of the community property does not extend to community property being administered in a revocable trust described in Civil Code Section 5113.5, or to community or homestead property being administered in the estate of the other spouse. However, the authority of the spouse having legal capacity should extend to a business or business interest that was being solely managed or operated by the spouse lacking legal capacity.

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PART 6. DISPOSITION OF COMMUNITY
AND HOMESTEAD PROPERTY

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

§ 3000. Application of definitions

3000. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

10904

§ 3004. Community property

3004. "Community property" means community real property (including property on which a homestead has been declared) and community personal property (including a business or an interest in a business) but does not include quasi-community property.

Comment. Section 3004 is intended to give the broadest scope to the meaning of "community property." A homestead may be declared on community real property pursuant to Civil Code Sections 1237-1238. Community property includes business property notwithstanding the fact that the spouse operating or managing the business has sole management and control of the business. Civil Code § 5125(d). Quasi-community property is treated as separate property for the purposes of this part. See Section 3016.

10905

§ 3008. Homestead

3008. "Homestead" means a homestead declared by either or both spouses on community property or on the separate property of a spouse but does not include a married person's separate homestead.

Comment. Section 3008 excludes a married person's separate homestead for purposes of this part since it affects the property rights of only one spouse. See Civil Code §§ 1300-1304.

10906

§ 3012. Lack of legal capacity

3012. (a) Except as provided in subdivision (b), a person lacks legal capacity if the person has the status described in subdivision (b) of Section 1801 (person for whom conservator of estate may be appointed), whether or not adjudicated.

(b) A person does not lack legal capacity if a conservator of the estate has been appointed for the person but the person's legal capacity has not been withdrawn or limited pursuant to Section 1831 (adjudication of lack of legal capacity or limitation of legal capacity).

Comment. Subdivision (a) of Section 3012 continues the effect of the definition of "incompetent" formerly found in Section 1435.2. Subdivision (b) limits the application of subdivision (a) to reflect the addition of provisions in Section 1831 permitting an independent adjudication of lack or limitation of capacity.

10909

§ 3016. Separate property

3016. "Separate property" includes quasi-community property.

Comment. Section 3016 makes clear that quasi-community property is treated as separate rather than community property for purposes of application of this part to homesteads. Compare Civil Code § 1237.5 ("separate property" does not include quasi-community property for purposes of homestead).

10910

Article 2. Application of Part

§ 3020. Scope

3020. If real or personal property or an interest therein or lien or encumbrance thereon is owned by husband and wife as community property, or as community or separate property subject to a homestead, and one or both of the spouses lacks legal capacity, the property, interest, lien, or encumbrance may be dealt with and disposed of as provided in Chapter 2 (commencing with Section 3050) (authority of spouse having legal capacity), Chapter 3 (commencing with Section 3100) (proceeding for particular transaction), and Chapter 4 (commencing with Section 3200) (administration in conservatorship estate).

Comment. Section 3020 is derived from former Sections 1435.1 and 1435.15.

10911

§ 3021. Mandatory or permissive nature of provisions

3021. (a) This part is mandatory for a transaction for which the joinder or consent of both spouses would be required by Section 1242,

1243 (homestead property), 5125, or 5127 (community property) of the Civil Code or by any other statute, if both spouses had legal capacity.

(b) This part is permissive and cumulative for transactions other than those described in subdivision (a).

Comment. Section 3021 is new.

Subdivision (a) states existing law as to transactions involving real property or interests therein (cf. *Flege v. Garvey*, 37 Cal. 371 (1874), decided under predecessor statute). As to transactions involving community personal property in which joint action is required (see Civil Code § 5125(c), (d)), former law did not provide a procedure for court authorization.

Subdivision (b) augments Sections 3051, 3054, and 3100, which provide a court forum for management of community personal property. A proposed disposition of community personal property may be brought before the court under Chapter 3 (proceeding for particular transaction) by the spouse having legal capacity, the conservator of the estate of the incapacitated spouse, or the incapacitated spouse. The procedure is not exclusive of other remedies. Under former law, the competent husband had the management and disposition of community personal property. See former Section 1435.1.

10914

§ 3022. Limitations

3022. Nothing in this part is intended to authorize any of the following:

(a) A transaction involving community property in a revocable trust described in Section 5113.5 of the Civil Code.

(b) A transaction by a married minor not otherwise authorized by statute.

Comment. Section 3022 is new. Subdivision (a) makes clear that, even though property transferred to a Civil Code Section 5113.5 trust remains community property, it may not be dealt with or disposed of under this part. Subdivision (b) makes clear that, although a minor may lack legal capacity, this part should not be construed to grant authority for transactions not otherwise granted by statute.

10915

Article 3. Procedure if Joinder or Consent Required

§ 3030. Persons required to join or consent

3030. A transaction for which the joinder or consent of both spouses would be required by Section 1242, 1243 (homestead property), 5125, or 5127 (community property) of the Civil Code or by any other

statute, if both spouses had legal capacity, shall be joined in or consented to by all of the following persons:

(a) Each spouse having legal capacity, if any.

(b) The conservator of the estate of each spouse, if any, being first authorized by order of court in the conservatorship proceeding pursuant to Section 2503 (instructions from or approval by court).

Comment. Section 3030 continues provisions of former Sections 1435.1, 1435.16(a), and 1435.17(a) and (b). The reference to Civil Code Section 5125, which requires joint action of spouses for certain community personal property transactions, is new; it applies to such matters as gifts of personal property and disposition of furniture and furnishings where consent is required by Civil Code Section 5125(b) and (c). The reference to Civil Code Sections 1242 and 1243 includes community property subject to a homestead.

If the consents or joinders required by Section 3030 are not obtained to enable dealing with or disposing of property pursuant to Chapter 2 (authority of spouse having legal capacity) or Chapter 4 (administration in conservatorship estate), a Chapter 3 proceeding is necessary (proceeding for particular transaction).

10916

§ 3031. Proceeding if joinder or consent not given

3031. If the persons required by Section 3030 to join in or consent to a transaction do not join or consent, the transaction shall be authorized by the court in a proceeding pursuant to Chapter 3 (commencing with Section 3100) (proceeding for particular transaction).

Comment. Section 3031 makes clear that a Chapter 3 proceeding (proceeding for particular transaction) is necessary if the necessary consents are not obtained to enable dealing with or disposing of property pursuant to Chapter 2 (authority of spouse having legal capacity) or Chapter 4 (administration in conservatorship estate).

CHAPTER 2. AUTHORITY OF SPOUSE HAVING LEGAL CAPACITYArticle 1. Community Real and Personal Property§ 3050. Authority of spouse having legal capacity

3050. (a) Subject to Section 3030 (persons required to join or consent), if one spouse has legal capacity and the other spouse lacks legal capacity, the spouse having legal capacity has the management and control of community real and personal property, and the power to deal with and dispose of the property, in the same manner as if both spouses had legal capacity.

(b) The authority and power of the spouse having legal capacity provided in subdivision (a) does not apply to a transaction involving community personal property, tangible or intangible, that is the subject of a permissive proceeding under Chapter 3 (commencing with Section 3100) (proceeding for particular transaction).

Comment. Subdivision (a) of Section 3051 supersedes provisions in the second sentence of former Section 1435.1, subdivision (a) of former Section 1435.16, and subdivision (a) of former Section 1435.17, that favored the husband. It implements the principle of equality between husband and wife.

Subdivision (b) is a new limitation on the authority of a spouse having legal capacity to deal with community personal property. It recognizes that a court proceeding may be brought under Chapter 3 (proceeding for a particular transaction) in cases where such a proceeding is not required. See Section 3053(a).

998/836

§ 3051. Protection of third persons

3051. If the spouse having legal capacity encumbers or transfers community personal property, tangible or intangible, contrary to the provisions of subdivision (b) of Section 3050, the encumbrance or transfer is valid as to bona fide encumbrancers or purchasers for value, and as to other third persons who act in good faith in reliance upon the apparent authority of the spouse.

Comment. Section 3051 is new.

§ 3052. Property in conservatorship estate not affected

3052. Nothing in this article shall be construed to grant the spouse having legal capacity authority to manage, control, deal with, or dispose of community property that is being administered in a conservatorship estate pursuant to Chapter 4 (commencing with Section 3200) (administration in conservatorship estate).

Comment. Section 3052 is new.

§ 3053. Other permissible actions

3053. Notwithstanding the authority granted by this article to a spouse having legal capacity, the spouse may do either of the following:

(a) Seek court authorization of a transaction involving community property pursuant to Chapter 3 (commencing with Section 3100) (proceeding for particular transaction) in a case in which court authorization is not required.

(b) Elect to consent to the administration of all or part of the community property as part of the conservatorship estate of the spouse lacking legal capacity pursuant to Chapter 4 (commencing with Section 3200) (administration in conservatorship estate).

Comment. Section 3053 is new.

Article 2. Separate Property Subject to Homestead

§ 3060. Authority of spouse owning property

3060. Subject to Section 3030 (persons required to join or consent), if a spouse having legal capacity owns separate property subject to a homestead (other than separate property owned by both spouses as joint tenants, tenants in common, or otherwise), and the other spouse lacks legal capacity, the spouse owning the property may deal with and dispose of the property as fully as though no homestead existed.

Comment. Section 3060 combines the substance of a portion of the last sentence of former Section 1435.16(a) and the first sentence of former Section 1435.16(b).

§ 3061. Other permissible action

3061. Notwithstanding the authority granted by this article to the spouse having legal capacity, the spouse may elect to consent to administration of separate property that is subject to a homestead as part of the conservatorship estate of the spouse lacking legal capacity pursuant to Chapter 4 (commencing with Section 3200) (administration in conservatorship estate).

Comment. Section 3061 combines a portion of the first sentence of former Section 1435.16(a) and the last sentence of former Section 1435.16(b).

CHAPTER 3. PROCEEDING FOR PARTICULAR TRANSACTIONArticle 1. Application of Chapter§ 3100. Nature of proceeding

3100. If one or both spouses lacks, or is believed to lack, legal capacity for a transaction that involves homestead property or community real or personal property, tangible or intangible, or an interest therein or lien or encumbrance thereon, a proceeding may be brought under this chapter for a court order for any of the following relief:

- (a) Authorization of the transaction.
- (b) Disapproval of the transaction.
- (c) Declaration that one or both spouses has legal capacity for the transaction.

Comment. Subdivision (a) of Section 3100 continues a portion of the first sentence of former Section 1435.1. Subdivisions (b) and (c) are new.

406/480

§ 3101. Transactions that may be subject of the proceeding

3101. The transactions that may be the subject of a proceeding under this chapter include, but are not limited to:

(a) Sale, conveyance, assignment, transfer, exchange, conveyance pursuant to a preexisting contract, encumbrance by security interest, deed of trust, mortgage, or otherwise, lease, including but not limited to a lease for the exploration for and production of oil, gas, minerals, or other substances, or unitization or pooling with other property for or in connection with such exploration and production.

(b) Assignment, transfer, or conveyance, in whole or in part, in compromise, composition, or settlement of any indebtedness, demand, or proceeding to which the property may be subject.

(c) Dedication or conveyance of the property, with or without consideration, for any purpose, to the United States or any agency or instrumentality thereof, or to the state or a city or county.

(d) Dedication or conveyance of an easement in or over the property, with or without consideration, to the United States or any agency

or instrumentality thereof, or to the state or a city, county, or district, or to any person, firm, association, or public or private corporation.

(e) Conveyance, release, or relinquishment, with or without consideration, of access rights to a street, highway, or freeway from the property to the state or a city or county.

(f) Conveyance or transfer without consideration, to provide gifts for such purposes, and to such relatives (including one of the spouses), friends, and other objects of bounty, as would be likely beneficiaries of gifts from the spouses.

Comment. Section 3101 continues a portion of former Section 1435.1, with the addition of the introductory note that the listing of transactions is nonexclusive. Subdivisions (c)-(e) are derived in part from Section 2557 (power of conservator to dedicate or convey real property or easement with or without consideration). Subdivision (f) is derived from Section 2580 (petition for approval of proposed action).

406/239

Article 2. Commencement of Proceeding

§ 3110. Court and venue

3110. (a) A proceeding under this chapter shall be brought by a petition filed in the superior court.

(b) If the proceeding affects real property, or a lien or encumbrance thereon, the proper county is the county in which the real property, or some part thereof, is situated, or, if a lien or encumbrance is affected, the county in which the real property, or some part thereof, subject to the lien or encumbrance is situated.

(c) If the proceeding affects only personal property, other than a lien or encumbrance on real property, the proper county is the county in which one or both of the spouses resides or the county in which a conservator of the estate of one or both of the spouses has been appointed or such other county as may be in the best interests of the spouses.

Comment. Section 3110 continues the substance of the introductory part of former Section 1435.4, with the addition of "or such other county as may be in the best interests of the spouses" in subdivision (c). See Sections 2201, 2202 (venue for guardianship or conservatorship).

§ 3111. Who may petition

3111. Any of the following persons may file, or join in, a petition under this chapter:

(a) Either spouse, including a spouse who lacks or is believed to lack legal capacity.

(b) A conservator of the estate of either spouse, as conservator.

Comment. Section 3111 continues the substance of the first sentence of former Section 1435.3, with the addition of the reference to joining in the petition of another, and the provision permitting a spouse lacking legal capacity, or believed to lack legal capacity, to file (or join in) a petition. See Section 3112 (representation of petitioning spouse lacking legal capacity).

406/183

§ 3112. Representation of petitioning spouse lacking capacity

3112. If a spouse who lacks or is believed to lack legal capacity is a petitioning spouse, the court may do any of the following:

(a) Permit the spouse to appear without a representative.

(b) Appoint a guardian ad litem for the spouse.

(c) Require the spouse to be represented by the conservator of the estate of the spouse, if any.

(d) Take such other action as the circumstances warrant.

Comment. Section 3112 is new. It supplements new provisions allowing a spouse lacking legal capacity to be a petitioner. See Section 3111.

968/609

§ 3113. Appointment of conservator of estate not required

3113. If a proceeding under this chapter is brought by a spouse having legal capacity or by the conservator of the estate of a spouse, it is not necessary to appoint a conservator of the estate of the other spouse.

Comment. Section 3113 continues the substance of the second sentence of former Section 1435.3 and extends it to situations where a proceeding is brought by a conservator.

Article 3. Petition§ 3120. Permissible allegations in petition

3120. (a) Several proposed transactions may be included in one proceeding.

(b) The petition may contain inconsistent allegations and may request relief in the alternative.

Comment. Section 3120 is new. It implements the new nature of the special proceeding under this chapter which permits a petition for court disapproval of a particular transaction or a judicial declaration of legal capacity. See Section 3100.

968/612

§ 3121. Required contents of petition

3121. The petition shall set forth all of the following information:

(a) The name, age, and residence of each spouse.

(b) If one or both spouses has been adjudicated to lack legal capacity, the fact of such adjudication. If one or both spouses is believed to lack legal capacity, the facts upon which the belief is based.

(c) If there is a conservator of the estate of a spouse, the name of the conservator, the county in which the conservatorship proceeding is pending, and the court number of the proceeding.

(d) If a spouse alleged to lack legal capacity is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name of the institution.

(e) The names and addresses of the adult relatives within the second degree of each spouse alleged to lack legal capacity, if known to the petitioner. For the purposes of this subdivision, "relative" does not include a spouse.

(f) A sufficient legal description of the property that is the subject of the transaction.

(g) An allegation of the status of the property, whether community property, community property subject to a homestead, or separate property subject to a homestead.

(h) The estimated value of the property.

(i) The terms and conditions of the proposed transaction, including the names of all parties thereto.

(j) The relief requested.

Comment. Section 3121 continues the substance of portions of former Sections 1435.4 and 1435.6. The listing of adult relatives in subdivision (d) is not limited to those "in this state." The relief requested under subdivision (j) may be in the alternative. Section 3120. Section 3121 states the required contents of a petition under this chapter regardless of the relief sought. For special allegations that depend upon the relief sought, see Sections 3122-3124.

968/617

§ 3122. Petition for court order authorizing transaction

3122. If the proceeding is brought for a court order authorizing a particular transaction, the petition shall set forth, in addition to the information required by Section 3121, all of the following information:

(a) Facts establishing lack of legal capacity of one or both spouses for the particular transaction.

(b) Facts that may be relied upon to show that the authorization sought is for one or more of the following purposes:

(1) The advantage, benefit, or best interests of the spouses or their estates.

(2) The care and support of either spouse or of such persons as either spouse may be legally obligated to support.

(3) The payment of taxes, interest, or other encumbrances or charges for the protection and preservation of the property.

Comment. Section 3122 continues the substance of portions of former Section 1435.4.

968/620

§ 3123. Petition for court order disapproving transaction

3123. If the proceeding is brought for a court order disapproving a particular transaction, the petition shall set forth, in addition to the information required by Section 3121, the facts that warrant disapproval of the particular transaction.

Comment. Section 3123 is new. It implements the policy of Section 3100 to permit a proceeding for court disapproval of a particular transaction.

§ 3124. Petition for court order declaring legal capacity for trans-
action

3124. If the proceeding is brought for a court order declaring that one or both spouses has legal capacity for a particular transaction, the petition shall set forth, in addition to the information required by Section 312i, the facts that establish the legal capacity of one or both spouses for the particular transaction.

Comment. Section 3124 is new. It implements the policy of Section 3100 to permit a proceeding for a judicial declaration of legal capacity for a particular transaction.

Article 4. Notice

§ 3130. Contents of notice

3130. The notice of hearing of the petition shall state the name of each spouse alleged to lack legal capacity, the name of the petitioner, and the relief for which the court order is requested. The notice in other respects shall conform to Section 1463 (form of notice).

Comment. Section 3130 continues the substance of the third paragraph of former Section 1435.5.

§ 3131. Notice to spouse having legal capacity

3131. The petitioner shall cause a copy of the notice of hearing and of the petition to be served upon any spouse not alleged to lack legal capacity. Service shall be made in the manner provided in Section 415.10, 415.20, or 415.40 of the Code of Civil Procedure, or in such other manner as may be authorized by the court. Service shall be made not later than 10 days prior to the hearing.

Comment. Section 3131 is new. It implements the policy to permit a proceeding under this chapter to be brought by a person other than a spouse having legal capacity.

§ 3132. Citation to nonpetitioning spouse alleged to lack legal
capacity

3132. Except as provided in Section 3133:

(a) Upon the filing of the petition, the clerk shall issue a citation to each nonpetitioning spouse alleged to lack legal capacity, setting forth the time and place of hearing.

(b) The citation and a copy of the petition shall be served upon the spouse, whether within or without the state, in the manner provided by law for the service of a summons in a civil action, other than by publication. If service cannot with reasonable diligence be so made, service of the citation may be made by publication pursuant to Section 415.50 of the Code of Civil Procedure; no copy of the petition need then be served. Service shall be made not later than 10 days prior to the hearing if served within the state, otherwise three weeks before the hearing.

Comment. Section 3132 continues the substance of the first and second paragraphs of former Section 1435.5. The clerk sets the petition for hearing when filed. Section 1451.

968/628

§ 3133. Notice to conservator in lieu of citation

3133. (a) Unless the court otherwise orders, if spouse alleged to lack legal capacity has a conservator of the estate, no citation to the spouse need be issued.

(b) If no citation is issued, the petitioner shall cause a copy of the notice of hearing and of the petition to be served upon the conservator. Service shall be made in the manner provided in Section 415.10, 415.20, or 415.40 of the Code of Civil Procedure, or in such other manner as may be authorized by the court. Service shall be made not later than 10 days prior to the hearing.

Comment. Section 3133 continues the substance of the fourth paragraph of former Section 1435.5. Subdivision (a) grants the court discretion to require a citation. Subdivision (b) adds a reference to Code of Civil Procedure Section 415.40 (service outside state). It is the duty of a conservator to appear and represent the interests of the spouse alleged to lack legal capacity. Section 3137.

968/629

§ 3134. Notice to public guardian or public administrator

3134. (a) If there is no conservator of the estate of a spouse alleged to lack legal capacity, or if service cannot be made as provided in Section 3133, the petitioner shall cause a copy of the notice of hearing and of the petition to be served upon the public guardian, or if none, upon the public administrator, of the county in which the petition was filed, or upon the deputy or assistant of the officer.

(b) Service shall be made in the manner provided in Section 415.10, 415,20(a), or 415.30 of the Code of Civil Procedure. Service shall be made not later than 10 days prior to the hearing.

Comment. Section 3134 continues the substance of a portion of the sixth paragraph of former Section 1435.5. Section 3134 limits service on the public administrator to cases where there is no public guardian, and eliminates the requirement that the officer be "personally" served. It is the duty of the public guardian or administrator to appear and represent the interests of the spouse alleged to lack legal capacity. Section 3137.

405/591

§ 3135. Notice to Director of Mental Health or of Developmental Services

3135. (a) If a spouse alleged to lack legal capacity for the transaction is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the petitioner shall cause a copy of the notice of hearing and of the petition to be mailed to the director of the appropriate department at the director's office in Sacramento. Notice shall be mailed not later than 10 days prior to the hearing.

Comment. Section 3135 continues the substance of former Section 1435.6.

Note. This section may be unnecessary. Existing law imposes no mandatory duty on the officers, and Section 3140 provides for a public defender to represent a spouse lacking legal capacity.

10918

§ 3136. Notice to relatives

3136. The petitioner shall cause a copy of the notice of hearing and of the petition to be mailed, first-class mail, postage prepaid, to the adult relatives named in the petition at the addresses set forth in the petition. Notice shall be mailed not later than 10 days prior to hearing.

Comment. Section 3136 continues the substance of the fifth paragraph of former Section 1435.5.

Article 5. Hearing and Order

§ 3140. Representation of spouse alleged to lack legal capacity

3140. (a) A conservator, public guardian, or public administrator served pursuant to this article shall, and the Director of Mental Health or the Director of Developmental Services served pursuant to this article may, appear at the hearing and represent the spouse alleged to lack legal capacity.

(b) If the spouse is not otherwise represented, the court may in its discretion appoint a guardian ad litem to represent the interests of the spouse.

(c) Upon request of the spouse, the court shall appoint the public defender, or if none or if the public defender is unable to act, private counsel, to represent the spouse.

(d) The court may fix a reasonable fee, to be paid out of the proceeds of the transaction or otherwise as the court may direct, for all services rendered by privately engaged counsel, the public defender or other court-appointed counsel, the public guardian, public administrator, or guardian ad litem, and by counsel for such persons.

Comment. Subdivision (a) of Section 3140 continues the substance of portions of former Sections 1435.5 (fourth and sixth paragraphs) and 1435.6.

Subdivision (b) continues the substance of the second paragraph of former Section 1435.7.

Subdivision (c) is new.

Subdivision (d) continues the substance of portions of former Sections 1435.5 (sixth paragraph) and 1435.7 (second paragraph). Subdivision (d) adds references to the public defender and other court-appointed counsel, and to counsel for the public guardian, public administrator, and guardian ad litem; former law had no express provisions relating to such counsel.

§ 3141. Presence of spouse at hearing

3141. (a) If the spouse alleged to lack legal capacity has not previously been so adjudged in a proceeding under this division or, if previously so adjudged, has been restored to legal capacity as provided in this division, the spouse, if able to attend, shall be produced at the hearing.

(b) If the spouse is not able to attend because of a mental or physical condition, the affidavit or certificate of a duly licensed physician, surgeon, or other medical practitioner, or the certificate of the medical superintendent or acting medical superintendent of a state hospital in this state in which the spouse is a patient, is prima facie evidence of the facts therein stated as to the inability of the spouse to attend. If the spouse is an adherent of a religion whose tenets and practices call for reliance upon prayer alone for healing and is under treatment by an accredited practitioner of the religion, an affidavit as to inability to attend by the accredited practitioner is acceptable. Emotional or psychological instability shall not be considered good cause for absence unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate psychological damage.

Comment. Section 3141 continues the substance of the first paragraph of former Section 1435.7, with the addition of the last two sentences. Compare Section 1825(b) and (c) (attendance of proposed conservatee).

10921

§ 3142. Rights of spouse

3142. The court, before commencement of the hearing on the merits, shall inform the spouse alleged to lack legal capacity or, if the spouse is not present, the person representing the spouse, of all of the following:

(a) The legal standards by which the issue is determined.

(b) That a determination adverse to the spouse may result in approval of the proposed transaction and will affect the spouse's right to contract, manage, and control the spouse's property that is the subject of the proposed transaction.

(c) That the spouse has the right to legal counsel of the spouse's own choosing, including the right to have legal counsel appointed by the court, if the spouse is not satisfied with representation by the public guardian, public administrator, Director of Mental Health, Director of Developmental Services, or guardian ad litem.

(d) That the spouse has the right to jury trial on the issue of alleged lack of legal capacity.

Comment. Section 3142 is new. It is adapted from the form of citation issued to a proposed conservatee. Section 1823.

§ 3143. Right to jury trial

3143. The spouse alleged to lack legal capacity has the right to jury trial on the issue of alleged lack of legal capacity.

Comment. Section 3143 is new. It is consistent with the right to jury trial on a petition for appointment of a conservator. Section 1827.

§ 3144. Order disapproving transaction or declaring legal capacity

3144. If it appears to the court that the spouse alleged to lack legal capacity has legal capacity for the proposed transaction, or that the proposed transaction should be disapproved, the court shall so order and shall take no action upon any request in the petition for authorization of the proposed transaction.

Comment. Section 3144 is new. It implements the policy of Section 3100 to permit a proceeding under this chapter for disapproval of a transaction of a declaration of legal capacity for a transaction.

§ 3145. Order authorizing transaction

3145. (a) If it appears to the court that the property that is the subject of the proposed transaction is homestead or community property of the spouses and that either or both of the spouses alleged to lack legal capacity then lacks legal capacity for the proposed transaction, the court shall so adjudge.

(b) If it further appears to the court that the request in the petition that the proposed transaction be authorized should be granted, the court may then so order and may authorize the petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order. The court may withhold authorization if the person authorized to act lacks legal capacity.

Comment. Section 3145 continues the substance of former Section 1435.8. The last sentence of subdivision (b) is added to give the court discretion where there is neither a spouse having legal capacity nor a conservator of the estate of either spouse to carry out the transaction.

§ 3146. Terms or conditions in order authorizing transaction

3146. In an order authorizing a transaction, the court may prescribe such terms or conditions as may be appropriate, including, but not limited to, requiring the joinder or consent of another person or requiring the investment of all or part of proceeds of the sale or exchange of homestead property in the purchase of another home.

Comment. Section 3146 is new. It makes express the court's authority to make appropriate orders, including orders protecting homestead rights.

§ 3147. Restoration to legal capacity

3147. (a) A person who has been adjudged to lack legal capacity for a transaction and who is not then the subject of pending proceeding under Part 3 (commencing with Section 1800) (conservatorship), or a relative or friend of the person, may at any time apply by petition to have the fact of the person's restoration to legal capacity for the transaction judicially determined.

(b) The petition shall be filed in the proceeding under this chapter and shall allege that the person then has legal capacity for the transaction. The court retains jurisdiction to hear and determine the petition. Proceedings on the petition shall be as prescribed in Chapter 3 (commencing with Section 1860) of Part 3 (termination of conservatorship).

(c) A determination of restoration to legal capacity for the transaction does not prejudice or affect anything theretofore lawfully done pursuant to and in accordance with a prior order under this chapter.

Comment. Section 3147 continues the substance of former Section 1435.14.

Article 6. Consummation of Transaction

§ 3150. Bond

3150. (a) Unless the court for good cause dispenses with the bond, the court shall require the petitioner to give a bond conditioned on the duty of the petitioner to account for and apply the proceeds of the

transaction to be received by the petitioner only as the court may by order direct.

(b) The bond shall be given by an authorized surety company, or by two or more individual sureties approved by the court. Unless the court for good cause determines that it may be for a lesser amount, the bond shall be in an amount not less than the following:

(1) If given by an authorized surety company, the value of the personal property, including cash and any note or notes, to be received by the petitioner, as determined by the court.

(2) If given by individual sureties, twice the amount specified in paragraph (1).

(c) Sections 2328, 2330, 2332, 2335, 2336, and 2337 (bond of guardian and conservator) are applicable to the bond of the petitioner under this chapter.

Comment. Section 3150 continues the substance of former Section 1435.9, with the addition of provisions for deposit in a control account (Section 2328) and filing a "cash bond" (Section 2332).

12342

§ 3151. Execution, delivery, and recording of documents

3151. (a) The petitioner shall, upon receipt of the consideration therefor, execute, acknowledge, and deliver any necessary instruments or documents as directed by the court, setting forth therein that they are made by authority of the order.

(b) The petitioner shall cause a certified copy of the order to be recorded in the office of the recorder of each county in which is situated any real property affected by the order or upon which there is a lien or encumbrance affected by the order.

(c) If a sale is made upon a credit pursuant to the order, the petitioner shall take the note or notes of the person to whom the sale is made for the amount of the unpaid balance of the purchase money, with such security for the payment thereof as the court shall by order approve. The note or notes shall be made payable to the petitioner or, if the petition was made by a conservator, to the petitioner as conservator.

Comment. Subdivisions (a) and (b) of Section 3151 continue the substance of the first paragraph of former Section 1435.10. Subdivision (c) continues the substance of the first paragraph of former Section 1435.12.

§ 3152. Validity of conveyance or other disposition

3152. A sale, conveyance, assignment, transfer, exchange, encumbrance, security interest, mortgage, deed of trust, lease, dedication, release, or relinquishment, and any instrument or document made pursuant to the court's order is as valid and effectual as if the property affected thereby were the sole and absolute property of the person making it.

Comment. Section 3152 continues the substance of the second paragraph of former Section 1435.10.

§ 3153. Liability of conservator

3153. Notes, encumbrances, security interests, mortgages, leases, or deeds of trust, executed as provided in this chapter by a petitioning conservator create no personal liability against the conservator so executing unless the conservator is one of the spouses, and then only to the extent that personal liability would have resulted had both spouses had legal capacity and joined in the execution.

Comment. Section 3153 continues the substance of former Section 1435.11.

§ 3154. Further proceedings if transaction not consummated

3154. (a) If the other party to the transaction neglects or refuses to consummate a transaction authorized by the court, the court may vacate the order authorizing the transaction after such notice to the parties to the transaction as the court on application of the petitioner directs.

(b) If the order authorized the sale or encumbrance of property, the petitioner may by supplemental petition apply to the court for an order authorizing any other sale or encumbrance of the property to the advantage, benefit, or best interests of the spouses or their estates. The supplemental petition and notice of hearing shall be served and mailed as provided in Article 4 (commencing with Section 3130) except that no further citation shall be issued and a copy of the supplemental petition and notice of hearing shall be served upon any person who has

appeared as representative of a nonpetitioning spouse or upon counsel of record for a nonpetitioning spouse or as the court may otherwise direct.

(c) If it appears to the court that the other sale or encumbrance is to the advantage, benefit, or best interests of the spouses or their estates and that the request in the supplemental petition that the transaction be authorized should be granted, the court may so order and may authorize the petitioner to do and perform acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order.

Comment. Section 3154 continues the substance of former Section 1435.13. In subdivision (a), the term "other party" replaces "any person to the transaction, other than petitioner" to make clear that a nonpetitioning spouse cannot by his or her acts cause an authorized transaction to fail. In subdivision (b), wording as to service of copies of the supplemental petition is changed to recognize that a spouse lacking legal capacity is represented in the proceeding.

CHAPTER 4. ADMINISTRATION IN CONSERVATORSHIP ESTATEArticle 1. General Provisions§ 3200. Scope of chapter

3200. Community real and personal property and property subject to a homestead may be administered in the conservatorship estate of either or both spouses pursuant to this chapter.

Comment. Section 3200 supersedes the introductory portion of former Section 1435.15 (alternative procedure). Chapters 2 (authority of spouse having legal capacity), 3 (proceeding for particular transaction), and 4 (administration in conservatorship estate) provide alternative means of dealing with and disposing of community and homestead property.

968/639

§ 3201. Authority of court to make determinations

3201. (a) The court having jurisdiction of the conservatorship estate of either or both spouses has jurisdiction to determine all of the following:

(1) The validity of a homestead.

(2) Whether property is community property or the separate property of either spouse.

(b) The court shall make the determination prescribed in subdivision (a) before it authorizes administration of the property in the conservatorship estate pursuant to this chapter.

Comment. Section 3201 continues the substance of a portion of former Section 1435.15.

968/651

§ 3202. Authority of court to control property included in estate

3202. The court having jurisdiction of the conservatorship estate in which property is to be included pursuant to this chapter for purposes of administration may, upon its own motion or upon petition of a spouse having legal capacity or the conservator of the estate of either spouse, do any of the following:

(a) Order that some or all of the community real and personal property or property subject to a homestead be not included.

(b) Permit a revocation of the written consent for such inclusion, with or without terms or conditions.

(c) Order administration of some or all of the included property terminated, with or without terms or conditions.

(d) Make such other orders as may be appropriate for the orderly administration of the conservatorship estate or to protect the interests of the spouses.

Comment. Section 3202 is new. It is intended to state expressly the powers of the court as to receipt and handling of additional assets. Section 3202 recognizes the right to revoke the consent to this type of administration.

968/689

Article 2. Separate Property Subject to Homestead

§ 3210. Administration of separate property owned by one spouse

3210. Subject to Section 3030 (persons required to join or consent), if there is a conservator of the estate of a spouse owning separate property subject to a homestead (other than separate property owned by both spouses as joint tenants, tenants in common, or otherwise), the property may be included in and dealt with and disposed of as a part of the conservatorship estate.

Comment. Section 3210 combines the substance of a portion of the first sentence of former Section 1435.16(a) and the last sentence of former Section 1435.16(b). The requirement of former Section 1435.16(a) that, if the homestead was on the separate property of the husband, the wife, if competent, consent to management in the husband's estate, is omitted. This change conforms to the policy of equal rights of the spouses and gives effect to recent amendment of the homestead laws removing the distinction between the separate property of husband and wife in selection of a homestead. See Civil Code § 1238 (as amended 1976 Cal. Stats., Ch. 463).

Note. There appears to be no constitutional impediment to applying Section 3210 to a homestead on separate property of the husband declared by the wife before it becomes operative. The wife, if competent, may simply decline to make the necessary joinder in any transaction.

968/697

§ 3211. Administration of separate property owned by both spouses

3211. Subject to Section 3030 (persons required to join or consent), if separate property subject to a homestead is owned by both spouses as joint tenants, tenants in common, or otherwise, the property

may be administered in the conservatorship estate of either or both spouses by any of the following means:

(a) If a spouse has legal capacity, the spouse may consent in writing that the property be included in and dealt with and disposed of as a part of the conservatorship estate of the other spouse.

(b) If there are conservators of the estates of both spouses, the property of each spouse may be included in and dealt with and disposed of as a part of the conservatorship estate of that spouse, but both conservators shall concur therein under appropriate orders of court.

(c) If there are conservators of the estates of both spouses, the court having jurisdiction of the conservatorship estate of either spouse, upon such notice as it shall prescribe, may authorize the conservator to consent in writing that the property of the spouse be included in and dealt with and disposed of as a part of the conservatorship estate of the other spouse.

Comment. Subdivision (b) of Section 3211 continues the second sentence of former Section 1435.16(c). Subdivisions (a) and (c) are new and are intended to add flexibility to the administration of separate property subject to homestead in conservatorship estates. Cf. Section 3220 (administration of community property).

405/598

Article 3. Community Property

§ 3220. Administration of community property

3220. Subject to Section 3030 (persons required to join or consent), all or part of the community real and personal property, including community property subject to a homestead, may be administered in the conservatorship estate of either or both spouses by any of the following means:

(a) If a spouse has legal capacity, the spouse may consent in writing that the property be included in and dealt with and disposed of as a part of the conservatorship estate of the other spouse.

(b) If there are conservators of the estates of both spouses, an undivided one-half interest in the property may be included in and dealt with and disposed of as a part of the conservatorship estate of each spouse, but both conservators shall concur therein under appropriate orders of court.

(c) If there are conservators of the estates of both spouses, the court having jurisdiction of the conservatorship estate of either spouse, upon such notice as it shall prescribe, may authorize the conservator to consent in writing that the property be dealt with and disposed of as a part of the conservatorship estate of the other spouse.

Comment. Subdivision (a) of Section 3220 continues the substance of subdivision (a) of former Section 1435.17 but extends the procedure to cases where the husband has a conservatorship of the estate and adds provisions of procedural detail. Provisions of subdivision (b) of former Section 1435.17 that vested management, control, and disposition of community property in the husband, subject to joinder requirements, when the wife had a conservator of the estate are not continued.

Subdivision (b) continues the substance of subdivision (c) of former Section 1435.17.

Subdivision (c) is new. It is intended to add flexibility to the administration of community property in conservatorship estates. Cf. Section 3211 (administration of separate property owned by both spouses).

CHAPTER 5. EFFECT OF TRANSACTIONS UNDER THIS PART§ 3250. Purchase of another home

3250. (a) The court authorizing a sale or exchange of community or separate property subject to a homestead pursuant to this part may, upon its own motion, or upon petition of the spouse having legal capacity or the conservator of the estate of either spouse, and upon such notice to the other spouse or such other persons as the court shall prescribe, authorize the investment of the proceeds, or part thereof, in another home for the spouses, to be held by the same tenure as the homestead property sold or exchanged.

(b) A court authorizing a conservator to join in the sale or exchange of community or separate property subject to a homestead may require that such joinder be made only if the proceeds, or part thereof, are to be invested in another home for the spouses, to be held by the same tenure as the homestead property sold or exchanged.

Comment. Section 3250 is based upon the first sentence of the fourth paragraph of former Section 1435.16. However, the provisions are revised to refer to any sale or exchange authorized by the court under this part, to permit the court to act upon its own motion, to prescribe notice to persons other than a spouse, and to refer to investment of only part of the proceeds in a new home. The word "exchange" has been added in the first part of subdivision (a) for technical consistency. Subdivision (b) contains new provisions expressly recognizing the court's power to make an order protecting homestead rights in joinder authorizations.

§ 3251. Homestead exemptions

3251. The proceeds of a sale of community or separate property subject to a homestead pursuant to this part, and any property taken in exchange therefor or acquired with such proceeds, shall enjoy the exemptions prescribed in Sections 1265 and 1265a of the Civil Code, provided, in case of property so taken or acquired, the declaration required by Section 1265a is made by the petitioner with leave of court, or by such other person or persons as the court may designate.

Comment. Section 3251 is based on the second paragraph of former Section 1435.12 and the second sentence of the fourth paragraph of former Section 1435.16 and extends to sales under Chapter 2 as well as under Chapters 3 and 4. Provisions are added permitting the court to

designate a person other than the petitioner to make the new declaration since the petitioner may fail or be unwilling to act. Wording in former Section 1435.12 referring to proceeds of a sale made "with court approval" is not continued because it is unnecessary and inconsistent with Chapter 2 (authority of spouse having legal capacity).

405/593

§ 3252. Community property interests

3252. (a) The proceeds, rents, issues, and profits of community property dealt with or disposed of under this part, and any property taken in exchange for the community property or acquired with the proceeds, are community property.

(b) Proceedings or transactions pursuant to this part do not alter the rights of the spouses in community property, or the proceeds, rents, issues, or profits of community property except as provided in this part for the management and disposition of community property.

Comment. Subdivision (a) of Section 3252 continues the substance of the first portion of the second paragraph of former Section 1435.12. Subdivision (b) continues the substance of portions of the last paragraph of former Section 1435.17.

CHAPTER 2A. MANAGEMENT, CONTROL, AND DISPOSITION
OF COMMUNITY PROPERTY AND HOMESTEAD
PROPERTY OF INCOMPETENT PERSONS

§ 1435.1 (repealed)

1435.1. Where real or personal property or any interest therein or lien or encumbrance thereon is owned by husband and wife as community property or as community property or separate property subject to a homestead, and one or both of the spouses is incompetent, such property, interest, lien, or encumbrance may be sold and conveyed, assigned, transferred or exchanged, conveyed pursuant to any preexisting contract, encumbered by pledge, deed of trust or mortgage, leased, including a lease for the exploration for and production of oil, gas, minerals or other substances, or unitized or pooled with other property for or in connection with such exploration and production, or assigned, transferred or conveyed, in whole or in part, in compromise, composition or settlement of any indebtedness, demand, or proceeding to which such property may be subject, or any easement therein or thereover conveyed or dedicated, with or without consideration, to the State or any county or municipal corporation or any district or to any person, firm, association, or public or private corporation; all in the manner provided in this chapter, notwithstanding the provisions of Section 1242, 1243, or 5127 of the Civil Code. Nothing herein is intended to or shall affect the husband's management and control of community personal property unless he is incompetent as hereinafter defined.

08926

§ 1435.2 (repealed)

1435.2. As used in this chapter the word incompetent shall mean a legal, not a medical disability and shall be measured by functional incapacities. It shall be construed to mean or refer to any adult person who, in the case of a guardianship of the person, is unable properly to provide for his own personal needs for physical health, food, clothing or shelter, and, in the case of a guardianship of the estate, is substantially unable to manage his own financial resources. "Substantial inability" shall not be evidenced solely by isolated instances of negligence or improvidence.

§ 1435.3. (repealed)

1435.3. The spouse not incompetent, or the guardian of the estate of either incompetent spouse, as such guardian, may petition the court for an order under this chapter. If one spouse is incompetent, proceedings may be taken under this chapter by the competent spouse, as petitioner, without the necessity of appointing a guardian for the incompetent spouse.

08928

§ 1435.4 (repealed)

1435.4. The petition shall be verified and filed in the superior court of the county in which the real property, or some part thereof, or which is subject to the lien or encumbrance affected, is situated, or, if the proceeding affects only personal property other than a lien or encumbrance on real property, in the superior court of the county in which the spouses or either of them reside or in which a guardian for either spouse has been appointed; and shall set forth the following:

(a) The name, age, and residence of both spouses and, if one or both of them has been adjudged incompetent, the fact of such adjudication, otherwise the facts establishing incompetency.

(b) The name of the guardian, if any, and the county in which the guardianship proceeding is pending, and the court number of said proceeding.

(c) The names and addresses of the adult relatives of the incompetent person or persons within the second degree residing in this State, other than a spouse, if such names and addresses are known to the petitioner.

(d) An allegation as to the status of the property described in the petition, whether homestead or community or both.

(e) The estimated value of the property.

(f) A sufficient legal description of the property.

(g) The terms and conditions of the proposed transaction, including the names of all parties thereto.

(h) Such facts, in addition to the incompetency of the spouse or spouses, as may be relied upon to show that the order sought is for the advantage, benefit, or best interests of the spouses or their estates; or for the care and support of either of them, or of their minor child

or children, or of such members of their families as either of them may be legally obligated to support; or to pay taxes, interest or other encumbrances and charges for the protection and preservation of the homestead or the community property.

08929

§ 1435.5 (repealed)

1435.5. Upon the filing of the petition the clerk shall set the petition for hearing by the court and, except as later in this section provided, shall issue a citation directed to the spouse or spouses not petitioning, setting forth the time and place of such hearing. Notice of the hearing shall be given as hereinafter provided. The citation and a copy of the petition shall be served on the spouse or spouses not petitioning, whether within or without the state, in the manner provided by law for the service of a summons in a civil action, other than by publication, at least 10 days before the hearing if served within the state, otherwise three weeks before the hearing.

In the event the citation and copy of the petition cannot, with reasonable diligence, be so served on a spouse, service of the citation may be made by publication pursuant to Section 415.50 of the Code of Civil Procedure. No copy of the petition need then be served on such spouse.

Notice of the hearing of the petition shall give the name or names of the incompetent persons, the name of the petitioner and the purpose for which the order is sought, referring to the petition for further particulars, and notifying all interested persons to appear at the time and place mentioned in the notice and show cause, if any they have, why the order should not be made.

If there is a guardian of the estate of a spouse, no citation to such spouse need be issued if a copy of the notice and of the petition be served upon such guardian in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court at least 10 days before the hearing. It shall be the duty of such guardian so served to appear and represent the interests of his ward.

A copy of the notice and petition shall be mailed, by the petitioner, by prepaid, first-class mail, at least 10 days before the hearing, to the adult relatives named in the petition at their addresses set forth in the petition.

If there is no guardian of the estate of the incompetent spouse to whom the citation is issued or if such guardian cannot be served as otherwise provided for in this section, a copy of such notice and petition shall be served personally upon the public guardian or public administrator of the county in which the petition was filed or upon his deputy or assistant in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure at least 10 days prior to the hearing and it shall be the duty of such public guardian or administrator to appear and represent the interests of such incompetent spouse. For all such services rendered by the public guardian or administrator he may be allowed a reasonable fee, to be fixed by the court, which fee shall be paid out of the cash proceeds of the transaction or otherwise as the court shall direct.

08931

§ 1435.6 (repealed)

1435.6. If the alleged incompetent person is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Health, the petition shall set forth the name of such institution, and a copy of such notice and petition shall be mailed to the Director of Health at his office in Sacramento at least 10 days prior to the hearing, and the director may appear and represent the interests of such incompetent spouse.

§ 1435.7 (repealed)

1435.7. If a spouse alleged in the petition to be incompetent has not been so found in proceedings under Division 4 or Division 5, or thereafter has been restored to capacity as in this code provided, such spouse, if able to attend, must be produced at the hearing. If such spouse is not able to attend by reason of mental or physical condition, the affidavit or certificate of a duly licensed physician, surgeon, or other medical practitioner, or the certificate of the medical superintendent or acting medical superintendent of a state hospital in this

State in which such spouse is a patient, shall be prima facie evidence of the facts therein stated as to the inability of the spouse to attend.

If such spouse is not represented at the hearing by his guardian, or by the public guardian or public administrator or his deputy or assistant, or by the Director of the State Department of Health, the court may, in its discretion, appoint a guardian ad litem to represent the interests of such spouse, and he may be allowed a reasonable fee to be fixed by the court and paid out of the cash proceeds of the transaction or otherwise as the court shall direct.

§ 1435.8 (repealed)

1435.8. If it appears to the court that said property is the homestead or community property of the spouses, and if it also appears that a spouse is or the spouses are then incompetent or has or have been so found under Division 4 or Division 5 of this code and has not or have not been restored to capacity, it shall so adjudge. If it further appears to the court that the petition should be granted it may then so order and authorize the petitioner to do and perform all acts and execute and deliver all papers, documents, and instruments necessary to effectuate the same.

08932

§ 1435.9 (repealed)

1435.9. The court shall require the petitioner to give a bond conditioned on the duty of the petitioner to account for and apply the proceeds of the transaction to be received by him only as the court may by its order or any subsequent order direct. Such bond, with two or more persons or an authorized surety company as surety, to be approved by the judge if the surety is not an authorized surety company, shall be in such sum as the court shall order, which sum shall be not less than twice the value of the personal property, including cash and any note or notes, to be received by said petitioner as determined by the court or, when the bond is given by an authorized surety company, not less than the value of such personal property as so determined. The provisions of Sections 1483, 1483.1, 1483.2, 1483.3, 1488, 1489, and 1490 of this code relating to guardians and the bonds thereof are hereby made applicable

to petitioners and the bonds thereof under the provisions of this chapter. The court in its order may, however, for cause shown, reduce or dispense with such bond.

§ 1435.10 (repealed)

1435.10. The petitioner shall, upon receipt of the consideration therefor execute, acknowledge, and deliver any necessary instruments or documents as directed, setting forth therein that they are made by authority of the order, and a certified copy of the order must be recorded in the office of the recorder of each county in which is situated any land which, or an encumbrance on which, is affected thereby.

Any sale, conveyance, assignment, transfer, pledge, mortgage, lease, or deed of trust and any instrument or document made in pursuance of such order is as valid and effectual as if the property affected thereby was the sole and absolute property of the person making such sale or executing such instrument.

§ 1435.11 (repealed)

1435.11. Any note or notes, pledges, mortgages, leases or deeds of trust so executed by a petitioning guardian as such, shall create no personal liability against the guardian so signing, unless said guardian is one of the spouses and then only to the extent that such personal liability would have resulted had both spouses been competent and joined in such execution.

08933

§ 1435.12 (repealed)

1435.12. If a sale is made upon a credit in pursuance of the order, the petitioner must take the note or notes of the person to whom the sale is made for the amount of the unpaid balance of the purchase money, with such security for payment thereof as the court shall by order approve. Such note or notes shall be made payable to the petitioner or if his petition was made as guardian, then made payable to him as such guardian.

The proceeds, rents, issues and profits of community property dealt with or disposed of under the provisions of this chapter, and any property taken in exchange therefor, shall be community property; and the

proceeds of sale of homestead property and any property taken in exchange therefor, or acquired with such proceeds with court approval, shall enjoy the exemptions prescribed in Sections 1265 and 1265a of the Civil Code; provided, in the case of property so taken or acquired, the declaration required by said Section 1265a is made by the petitioner, with leave of court.

§ 1435.13 (repealed)

1435.13. If, after the authorization of any transaction under this chapter, any person to such transaction, other than the petitioner, neglects or refuses to consummate such transaction, the court, after such notice to such other party as the court on application of the petitioner shall direct, may vacate the order authorizing such transaction. In the event the original order provided for the sale or encumbering of any real or personal property, any other sale or encumbrance found by the court to be to the advantage, benefit or best interests of the spouses may be authorized by the court upon a verified supplemental petition copies of which shall have been served on the same persons and at the same time and in the same manner as the original application, except that no further citation need be issued.

08935

§ 1435.14 (repealed)

1435.14. Any person who has been found to be incompetent in proceedings under this chapter and is not then the subject of pending proceedings under any other chapter of this code, or any relative or friend of such person, may at any time apply by a verified petition filed in the same proceeding to have the fact of his restoration to capacity judicially determined. Such petition shall allege that such person is then sane or competent. The court, in proceedings under this chapter, shall retain jurisdiction to hear and determine any such petition. The proceedings upon such petition shall be as prescribed in Sections 1471 and 1472 of this code. Any adjudication of restoration to capacity shall not prejudice or affect anything theretofore lawfully done pursuant to and in accordance with any prior order made under the provisions of this chapter.

§ 1435.15 (repealed)

1435.15. As an alternative to the procedure elsewhere in this chapter prescribed, where there is a guardian of the respective estates of one or both of the spouses, the court having jurisdiction of the or either such estate shall for the purposes of administration under Section 1435.16 or 1435.17 have jurisdiction to determine the validity of the homestead and whether or not specific property is in fact community property or the separate property of one or both of the spouses, and thereafter to authorize the guardian or guardians to deal with or dispose of such homestead or community property or consent to such dealing therewith or disposition thereof, in the manner hereinafter provided.

08936

§ 1435.16 (repealed)

1435.16. (a) Where the homestead property is community property or the separate property of the husband of whose estate the guardian has been appointed and the wife, being competent, consents thereto in writing, such homestead property may be included in and dealt with and disposed of as a part of the guardianship estate, but the wife must join in any such dealing therewith or disposition thereof. Where there is a guardian of the estate of the wife, the husband, being competent, may deal with or dispose of such homestead property, but the guardian of her estate must join therein, being first thereunto duly authorized by an order of court under Section 1516 of this code.

(b) Where homestead property is the separate property of the wife and there is a guardian of the estate of the husband, the wife, being competent, may deal with or dispose of the homestead property as fully as though no homestead existed thereon provided the guardian of the estate of the husband join therein, being first thereunto duly authorized by order of court under Section 1516 of this code. Where there is a guardian of the estate of the wife, such homestead property may be included in and dealt with and disposed of a a part of the guardianship estate, but the husband, being competent, must join in any such dealing therewith or disposition thereof.

(c) Where there are guardians of the respective estates of both husband and wife, the homestead property, if community property or the

separate property of the husband, may be included in and dealt with and disposed of as a part of his guardianship estate or, if the separate property of the wife, then as a part of her guardianship estate; but the guardian of the estate of the other spouse must join in any such dealing therewith or disposition thereof, being first thereunto duly authorized by an order of court under Section 1516 of this code. If the homestead property is the separate property of both spouses as joint tenants, tenants in common, or otherwise, the respective interests of each may be included in and dealt with or disposed of as a part of their respective guardianship estates but both guardians must concur therein under appropriate orders of court.

The court, on petition of the guardian of either estate or of the competent spouse, with such notice to the other as the court shall prescribe, may authorize the investment of the proceeds in another home for the spouses, to be held by the same tenure as the homestead property so sold or exchanged. The proceeds of the sale of homestead property and any property taken in exchange therefor or acquired with such proceeds shall enjoy the exemptions prescribed in Sections 1265 and 1265a of the Civil Code; provided, in the case of property so taken or acquired the declaration required by Section 1265a is made by the petitioner with leave of court.

08938

§ 1435.17 (repealed)

1435.17. (a) Where there is a guardian of the estate of the husband, and the wife, being competent, consents thereto in writing, such community property may be included in and dealt with or disposed of as a part of the guardianship estate of the husband. The wife must join in any such dealing with or disposition of community real property.

(b) Where there is a guardian of the estate of the wife, the husband, being competent, has the management, control and disposition thereof but, in lieu of the joinder of the wife required by Section 172a of the Civil Code, the guardian of her estate must join therein, being first thereunto duly authorized by an order of court under Section 1516 of this code.

(c) Where there are guardians of the respective estates of both husband and wife, an undivided one-half interest in such community

property may be included in and dealt with and disposed of as a part of the guardianship estate of the husband and an undivided one-half interest therein as a part of the guardianship estate of the wife, but both guardians must concur therein under appropriate orders of court.

Proceedings under this section shall not alter the character of the property or the proceeds, rents, issues or profits thereof, or the rights of the respective spouses therein save as herein expressly provided with respect to the procedure for the management and disposition thereof.

§ 1435.18 (repealed)

1435.18. Where in this chapter reference is made to a guardian, guardianship estate, or the court having jurisdiction of such estate, such reference shall be deemed to include a conservator, conservatorship estate, and the court having jurisdiction of the estate of the conservatee; and, in the event of a conservatorship, reference in Section 1435.16 or 1435.17 to Section 1516 of this code shall be deemed to refer to Section 1860 of this code.