

Memorandum 78-62

Subject: Study F-30.300 - Guardianship-Conservatorship Revision
(Community and Homestead Property)

The staff has revised the provisions relating to community and homestead property in accordance with the decisions made at the September 1978 meeting. The revised provisions are attached.

The staff directs the Commission's attention to two provisions:

§ 3051. Community property. The Commission decided that, if one spouse is incompetent, the other spouse having management and control of the community property should be subject to a fiduciary duty, similar to that imposed on the husband in the days before equal management and control. Likewise, if one spouse has a conservator, and the conservator is the other spouse, the other spouse should be subject to a fiduciary duty.

The case of the conservator-spouse the staff has no problem with; it is analogous to the duty of ordinary care and diligence imposed on a conservator generally by Section 2401, which is applicable to the other property of the conservatee. But, where the competent spouse is managing the community property not as a conservator, the ordinary standard of good faith seems appropriate. The fiduciary duty under prior law was not codified, but amounted to the duty to avoid fraud during marriage and act as a trustee after separation. The duty of good faith is adequate to redress fraud during marriage, and general law is operative as to the trust duty after marriage. To impose the fiduciary duty of a trustee on a competent spouse in dealing with the community property will hamstring the spouse and make it difficult to handle the property in the way he or she may have been accustomed. For this reason, the staff has omitted the fiduciary duty in favor of a duty of good faith in this situation.

§ 3145. Order authorizing transaction. Mr. Elmore has pointed out that, under existing law, the court cannot authorize a transaction unless a spouse is "incompetent" (which is defined in terms of the standard for a person for whom a conservator may be appointed). Prior drafts have omitted this requirement and substituted authority for the court to authorize a transaction if the person has a conservator or lacks capacity for the particular transaction. Mr. Elmore has made a case that the requirement of "incompetence" should not be omitted.

The problem raised by Mr. Elmore arises in the situation where the spouse lacking legal capacity has no conservator but is opposed to the transaction for which court authorization is sought. In this situation, it is proper that some finding greater than lack of capacity for the particular transaction be imposed. The staff has revised Section 3145(a)(3) to preclude the court from authorizing a transaction unless each spouse either (1) consents to the transaction, (2) has a conservator, or (3) is substantially unable to manage his or her own financial resources or resist fraud or undue influence (i.e., is a person for whom a conservator could be appointed).

Respectfully submitted,

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Assistant Executive Secretary

§ 3000

35/057

PART 6. MANAGEMENT OR DISPOSITION OF COMMUNITY OR HOMESTEAD
PROPERTY WHERE SPOUSE LACKS LEGAL CAPACITY

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

§ 3000. Application of definitions

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

Comment. Section 3000 is new.

35/058

§ 3002. Community property

3002. "Community property" means community real property and community personal property, including but not limited to community property on which a homestead has been declared and a community property business that is or was under the sole management and control of one of the spouses, but does not include community property in a revocable trust described in Section 5113.5 of the Civil Code.

Comment. Section 3002 gives broad scope to the meaning of "community property." For the purposes of this part, community property includes community property on which a homestead has been declared. A homestead may be declared on community real property pursuant to Civil Code Sections 1237-1238. Community property also includes business property notwithstanding the fact that a spouse now lacking legal capacity formerly had sole management and control of the business. See Civil Code § 5125(d). Even though community property in a revocable trust described in Section 5113.5 of the Civil Code remains community property, it is excluded from the provisions of this part because the trust property is administered pursuant to the trust.

35/059

§ 3004. Conservator

3004. "Conservator" means conservator of the estate and includes the guardian of the estate of a married minor.

Comment. Sections 3004, 3006, and 3008 supersede former Section 1435.18. Conservator of the estate includes a person appointed as conservator of the person and estate.

§ 3006

35/060

§ 3006. Conservatorship estate

3006. "Conservatorship estate" includes the guardianship estate of a married minor.

Comment. See Comment to Section 3004.

35/061

§ 3008. Conservatorship proceeding

3008. "Conservatorship proceeding" means conservatorship of the estate proceeding and includes a guardianship of the estate proceeding of a married minor.

Comment. See Comment to Section 3004.

35/062

§ 3010. Homestead

3010. "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 under Chapter 5 (commencing with Section 1300) of Title 5 of Part 4 of Division 1 of the Civil Code.

Comment. Section 3010 excludes a married person's separate homestead for purposes of this part. Such a homestead is on the separate property of a legally separated spouse, and thus affects the property rights of only one spouse. See Civil Code §§ 1300-1304.

35/063

§ 3012. Legal capacity

3012. For the purposes of this part:

(a) A spouse has legal capacity to manage, control, and dispose of the community property and to join in or consent to a transaction involving community or homestead property unless the spouse is a person described in subdivision (b).

(b) A spouse lacks legal capacity to manage, control, or dispose of the community property or to join in or consent to a transaction involving community or homestead property in either of the following cases:

(1) The spouse has a conservator.

(2) The spouse does not have sufficient capacity to manage, control, or dispose of the community property or to join in or consent to the transaction, as the case may be.

Comment. Section 3012 prescribes a definition applicable only for the purposes of this part. The legal capacity of a conservatee for other purposes is governed by Sections 1870-1896 (legal capacity of conservatee).

Section 3012 implements the policy that a conservator of the estate acts for the conservatee under this chapter. See Section 3004 (defining "conservator"). This rule is consistent with the duty of the conservator to manage and control the conservatorship estate and provides needed certainty for property transactions.

Subdivision (b)(2) recognizes that a spouse not having a conservator may lack legal capacity to manage, control, or dispose of the community property, or engage in a particular transaction, under principles of law otherwise applicable. See, e.g., Civil Code §§ 38, 39. Whether the spouse lacks capacity for the particular purpose depends upon the act involved and the standards otherwise applicable to determine capacity for that act.

It should be noted that a transaction may not be authorized under Chapter 3 (proceeding for particular transaction) against the wishes of a spouse lacking legal capacity unless the spouse is also a person for whom a conservator could be appointed. See Section 3145(a)(3). This continues the effect of former Section 1435.2 (transactions involving "incompetent spouse").

CROSS-REFERENCES

Definitions

Community property, § 3002
Conservator, § 3004
Homestead, § 3010

35/064

Article 2. General Provisions

§ 3020. Community property interests not affected

3020. (a) The proceeds, rents, issues, and profits of community property dealt with or disposed of under this division, and any property taken in exchange for the community property or acquired with the proceeds, are community property.

(b) Except as provided in this part for the management, control, and disposition of community property, nothing in this division alters the rights of the spouses in community property or in the proceeds, rents, issues, or profits of community property.

Comment. Subdivision (a) of Section 3020 continues the substance of the first portion of the second paragraph of former Section 1435.12.

§ 3021

Subdivision (b) continues the substance of portions of the last paragraph of former Section 1435.17.

CROSS-REFERENCES

Definition, community property, § 3002
Determination whether property community or separate, § 3023
Purchase of another home, § 3021
Right of spouse having legal capacity to manage, control, and dispose of community property, § 3051

35/065

§ 3021. Purchase of another home

3021. (a) The court authorizing a sale or exchange pursuant to this division of community or separate property subject to a homestead may, upon its own motion or upon request, make an order authorizing or requiring the investment of the proceeds, or part thereof, in another home for the spouses, to be held as community or separate property in the same manner as the homestead property sold or exchanged.

(b) The court authorizing a conservator to join in the sale or exchange of community or separate property subject to a homestead may, upon its own motion or upon request, make an order authorizing such joinder on the condition that the proceeds, or part thereof, be invested in another home for the spouses, to be held as community or separate property in the same manner as the homestead property sold or exchanged.

Comment. Section 3021 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 division, to permit the court to act upon its own motion, 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.

CROSS-REFERENCES

Definitions

Community property, § 3002
Conservator, § 3004
Homestead, § 3010
Homestead exemption, § 3022
Order authorizing transactions, conditions, § 3145(d)
Purchase of home for conservatee or dependents, § 2571
Purchase of home under Veterans' Guardianship Act, § 2913
Sale or exchange does not affect community property interests, § 3020

§ 3022. Homestead exemption

3022. (a) The proceeds of a sale pursuant to this division of community or separate property subject to a homestead shall enjoy the exemption prescribed in Section 1265 of the Civil Code.

(b) Any property taken pursuant to this division in exchange for community or separate property subject to a homestead, and any property acquired with the proceeds of a sale thereof, shall enjoy the exemption prescribed by Section 1265a of the Civil Code if the declaration required by that section is filed within the time therein prescribed by such person or persons as the court authorizing the sale or exchange may by order designate.

Comment. Section 3022 is based on the second paragraph of former Section 1435.12 and the second sentence of the fourth paragraph of former Section 1435.16 but expands former law to cover all sales under this division. Subdivision (b) is broader than former law. Under former law, only the petitioner could file the new declaration. Subdivision (b) authorizes the court to designate a person or persons (including but not limited to the petitioner) to make the new declaration. 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 the provision of Chapter 2 relating to the rights with respect to homestead property of a spouse having legal capacity.

CROSS-REFERENCES

Definitions

Community property, § 3002

Homestead, § 3010

Determination of validity of homestead, § 3023

27/944

§ 3023. Determination of validity of homestead or character of property

3023. (a) Except as provided in subdivisions (b) and (c), where one or both of the spouses has a conservator, the court in which any of the conservatorship proceedings is pending may hear and determine any of the following when the issue is raised in any proceeding under this division:

(1) The validity of a homestead.

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

(b) Any person having or claiming title to or an interest in the property, at or prior to the hearing on the issue, may object to the hearing if the court is not the proper court under any other provision of law for the trial of an action to determine the issue. If the objection is established, the court shall not hear and determine the issue.

(c) If a civil action is pending in respect to the issue and jurisdiction has been obtained in the court in which the civil action is pending, the court shall abate the hearing until the conclusion of the civil action.

Comment. Section 3023 applies to all proceedings under this division where an issue is raised whether property is homestead property or community or separate property. The section is consistent with the holding in Estate of Baglione, 65 Cal.2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966) (probate court has jurisdiction in a decedent's estate proceeding to determine the interest of each spouse in the community property).

Subdivision (a) is drawn from a portion of former Section 1435.15, which gave the conservatorship court jurisdiction to determine the validity of a homestead and the character of property in a proceeding under former Sections 1435.15-1435.17. The probate court also may have had similar jurisdiction under former Probate Code Section 1435.8 although the court's authority under that section was unclear. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.67, at 213 (Cal. Cont. Ed. Bar 1968). Compare Stratton v. Superior Court, 87 Cal. App.2d 809, 197 P.2d 821 (1948).

Subdivisions (b) and (c) are new and are drawn from a portion of Section 851.5 (title to property of decedent).

CROSS-REFERENCES

Definitions

- Community property, § 3002
- Conservator, § 3004
- Conservatorship proceeding, § 3008
- Homestead, § 3010

Determination of nature of property in proceeding for particular transaction, § 3105(d)

992/909

CHAPTER 2. MANAGEMENT, CONTROL, AND DISPOSITION

Article 1. Management, Control, and Disposition Generally

§ 3051. Community property

3051. (a) Subject to Section 3071, the right of a spouse to manage and control community property, including the right to dispose of

community property, is not affected by the lack or alleged lack of legal capacity of the other spouse.

(b) Except as provided in subdivision (c), if one spouse has legal capacity and the other has a conservator:

(1) The spouse who has legal capacity has the exclusive management and control of the community property including, subject to Section 3071, the exclusive power to dispose of the community property.

(2) The community property is not part of the conservatorship estate.

(c) If one spouse has legal capacity and the other has a conservator, the spouse having legal capacity may consent, by a writing filed in the proceeding, that all or part of the community property be included in and, subject to Section 3071, be managed, controlled, and disposed of as a part of the conservatorship estate.

(d) Except as provided in subdivision (e), if both spouses have conservators, an undivided one-half interest in the community property shall be included in and, subject to Section 3071, be managed, controlled, and disposed of as a part of the conservatorship estate of each spouse.

(e) If both spouses have conservators, when authorized by order of the court in which any of the conservatorship proceedings is pending, the conservators may agree in writing that all or specific parts of the community property shall be included in the conservatorship estate of one or the other of the spouses and, subject to Section 3071, be managed, controlled, and disposed of as a part of the conservatorship estate of that spouse.

Comment. Subdivisions (a) and (b) of Section 3051 make clear that the lack of legal capacity of one spouse does not affect the right of the spouse having legal capacity to manage and control community property or to dispose of such property, whether or not the other spouse has a conservator. As to when a spouse lacks legal capacity, see Section 3012. The authority given the spouse having legal capacity is limited by Section 3071 which applies in any case where joinder or consent would be required for a transaction if both spouses had legal capacity. The spouse having legal capacity has the duty of good faith in managing and controlling the property. See Section 3057. Where one of the spouses is conservator of the other, there is an additional duty to use ordinary care and diligence in the management and control of the community property. See Section 3057(b). Subdivisions (a) and (b) supersede 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. Subdivisions (a) and (b) replace these former provisions with rules that implement the principle of equality between husband and wife.

Subdivision (c) continues the substance of subdivision (a) of former Section 1435.17 but extends the procedure to cases where the husband has a conservator of the estate. Subdivision (d) continues the substance of subdivision (c) of former Section 1435.17. Subdivision (e) is new. It is intended to add flexibility to the administration of community property in conservatorship estates.

Community property is defined in Section 3002 to include both real and personal property, to include community property on which a homestead has been declared, and to include a community property business. Such a business, even if formerly managed by a spouse now lacking legal capacity, is included in the management, control, and disposition provisions of this section.

If both spouses have conservators, the approval of only one of the courts in which the conservatorship proceedings are pending is required under subdivision (e). However, if the other conservatorship proceeding is pending in another court, that court may order that the property not be included in that conservatorship estate. See Section 3054. If the court so orders, subdivision (d) of Section 3051 applies. Likewise, if a spouse having legal capacity consents as provided in subdivision (c) to inclusion of property in the conservatorship estate of the other spouse, the court in which the conservatorship proceeding is pending may order that the property not be included in the conservatorship estate. See Section 3054.

Section 3051 applies only where one spouse has legal capacity or both spouses have conservators. The section does not cover the situation where both spouses lack legal capacity and neither or only one has a conservator. In these situations, since Section 3051 applies only if both of the spouses lacking legal capacity have conservators, a conservator or conservators will need to be appointed in order to make the section applicable.

CROSS-REFERENCES

Community property interests, extent to which affected, § 3020

Definitions

Community property, § 3002

Conservator, § 3004

Conservatorship estate, § 3006

Conservatorship proceeding, § 3008

Legal capacity, § 3012

Determination whether property community or separate, § 3023

992/913

§ 3052. Separate property owned by one spouse subject to homestead

3052. If a spouse has a conservator and owns separate property subject to a homestead (other than separate property owned by both spouses as joint tenants, tenants in common, or otherwise), the property

shall be included in and, subject to Section 3071, be dealt with and disposed of as a part of the conservatorship estate.

Comment. Section 3052 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.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Conservatorship estate, § 3006

Homestead, § 3010

Determination whether property community or separate, § 3023

Purchase of another home, §§ 3021, 3022

992/914

§ 3053. Separate property owned by both spouses subject to homestead

3053. (a) As used in this section, "homestead property" means separate property subject to a homestead that is owned by both spouses as joint tenants, tenants in common, or otherwise.

(b) If one spouse has legal capacity and the other spouse has a conservator:

(1) The conservator may, after authorization by order of the court in which the conservatorship proceeding is pending, consent in writing that the spouse having legal capacity have the right to manage and control and, subject to Section 3071, dispose of the homestead property.

(2) The spouse having legal capacity may consent in writing that homestead property be included in and, subject to Section 3071, be dealt with and disposed of as a part of the conservatorship estate.

(c) Except as provided in subdivision (d), if both spouses have conservators, the interest of each spouse in the homestead property shall be included in and, subject to Section 3071, be dealt with and disposed of as a part of the conservatorship estate of that spouse.

(d) If both spouses have conservators, the conservators may, after authorization by order of the court in which any of the conservatorship

proceedings are pending, agree in writing that the homestead property be included in the guardianship estate of one of the spouses and, subject to Section 3071, be dealt with and disposed of as a part of the conservatorship estate of that spouse.

Comment. Subdivision (c) of Section 3053 continues the substance of the second sentence of former Section 1435.16(c). Subdivisions (b) and (d) are new and are intended to add flexibility to the administration of the property in conservatorship estates. The authority given by Section 3053 to the spouse having legal capacity, or to one or both conservators where conservators have been appointed, is limited by Section 3071 which applies in any case where joinder or consent would be required for a transaction if both spouses had legal capacity.

If both spouses have conservators, the approval of only one of the courts in which the conservatorship proceedings are pending is required under subdivision (d). However, if the other conservatorship proceeding is pending in another court, that court may order that the property not be included in that conservatorship estate. See Section 3054. If the court so orders, subdivision (c) of Section 3053 applies. Likewise, if a spouse having legal capacity consents to inclusion of property in the conservatorship estate of the other spouse, the court in which the conservatorship proceeding is pending may order that the property not be included in the conservatorship estate. See Section 3054.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Conservatorship estate, § 3006

Conservatorship proceeding, § 3008

Homestead, § 3010

Legal capacity, § 3012

Determination of

Character of property as community or separate, § 3023

Validity of homestead, § 3023

Purchase of another home, §§ 3021, 3022

992/915

§ 3054. Authority of court

3054. When homestead property as defined in Section 3053 or community property is included or proposed to be included in the conservatorship estate of a spouse, the court in which the conservatorship proceeding is pending, upon its own motion or upon petition of a spouse having legal capacity or the conservator of either spouse and upon such notice to such persons as the court prescribes, may do any of the following:

(a) Determine that the inclusion of some or all of the homestead property or community property that is proposed to be included in the conservatorship estate would not be in the best interest of the spouses or their estates and order that such property not be included.

(b) Permit revocation of a written consent for inclusion of property in the conservatorship estate, with or without terms or conditions.

(c) Determine that the continued inclusion of some or all of the homestead property or community property in the conservatorship estate is not in the best interest of the spouses or their estates and order that the inclusion of such property in the conservatorship estate be 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 3054 is new. It is intended to state expressly the powers of the court as to the receipt and handling of additional assets under this chapter and to recognize the right to revoke the consent to administration in one of the conservatorship estates.

CROSS-REFERENCES

Definitions

Community property, § 3002
Conservator, § 3004
Conservatorship estate, § 3006
Conservatorship proceeding, § 3008
Legal capacity, § 3012

Determination of

Character of property as community or separate, § 3023
Validity of homestead, § 3023
Effect on consent of death or subsequent lack of legal capacity, § 3055
Petition must be verified, § 1450
Proof of giving of notice, § 1468

34/722

§ 3055. Effect on consent of death or subsequent lack of legal capacity

3055. (a) If consent is given under this article that homestead property as defined in Section 3053 or community property be included in the conservatorship estate of a spouse, the death of either spouse terminates the consent.

(b) If a spouse consents under this article that homestead property as defined in Section 3053 or community property be included in the conservatorship estate of the other spouse:

§ 3056

(1) Subject to paragraph (2), the subsequent lack of legal capacity of the spouse giving the consent has no effect on the inclusion of the property in the conservatorship estate of the other spouse.

(2) The appointment of a conservator for the spouse giving the consent terminates the consent.

Comment. Section 3055 is new. If a conservator is appointed for a spouse that has given consent to inclusion of community or homestead property in the conservatorship estate of the other spouse, the appointment terminates the consent but the two conservators may, when authorized by order of the court, consent that the property continue to be included in the same conservatorship estate or may work out some other arrangement for the administration of the property as a part of a plan for the administration of the community and homestead property of the two spouses. See Sections 3051(c), (d) and 3053(c), (d). As to the revocation of consent or termination of inclusion of property in a conservatorship estate, see Section 3054.

CROSS-REFERENCES

Definitions

Community property, § 3002
Conservator, § 3004
Conservatorship estate, § 3006
Legal capacity, § 3012

27/947

§ 3056. Manner of management, control, and disposition of property as a part of a conservatorship estate

3056. Except as otherwise provided in this part and subject to Section 3021, when homestead property or community property is included in a conservatorship estate under this article for the purpose of management, control, and disposition, the conservator has the same powers and duties with respect to such property as the conservator has with respect to other property of the conservatorship estate.

Comment. Section 3056 makes applicable the property included in a conservatorship estate under this article the provisions of Part 4 (commencing with Section 2100) of Division 4 and any other applicable provisions. The introductory clause to Section 3056 recognizes the limitations on disposition imposed by Section 3071 (substitute for joinder or consent requirement) and other provisions, such as Sections 3020 (community property interests not affected), 3021 (purchase of another home), 3022 (homestead exemption), 3054 (authority of court), and 3055 (effect on consent of death or subsequent lack of legal capacity).

CROSS-REFERENCES

Definitions

Community property, § 3002
 Conservator, § 3004
 Conservatorship estate, § 3006
 Homestead, § 3010

31/548

§ 3057. Protection of rights of spouse who lacks legal capacity

3057. (a) Where a spouse lacks legal capacity and does not have a conservator, any interested person who has knowledge or reason to believe that the rights of such spouse in the community property are being prejudiced may bring an action on behalf of such spouse to enforce the duty of good faith in the management and control of the community property and to obtain such relief as may be appropriate.

(b) If one spouse has a conservator and the other spouse is managing or controlling community property, the conservator has the duty to keep reasonably informed concerning the management and control, including the disposition, of the community property. If the conservator has knowledge or reason to believe that the rights of the conservatee in the community property are being prejudiced, the conservator may bring an action on behalf of the conservatee to enforce the duty of good faith in the management and control of the community property and to obtain such relief as may be appropriate. If the conservator is the spouse of the conservatee, the conservator has the duty to use ordinary care and diligence in the management and control, including the disposition, of the community property, whether or not such property is a part of the conservatorship estate, which duty may be enforced in the same manner as the duty of good faith under subdivision (a) is enforceable.

Comment. Section 3057 is new. As to duty of good faith in managing and controlling community property, see Civil Code Section 5125(b). Where one of the spouses is the conservator of the other, subdivision (b) of Section 3057 imposes the duty to use ordinary care and diligence in managing and controlling community property, whether or not the property is a part of the conservatorship estate. To the extent the property is part of the conservatorship estate, this same duty exists under Section 2401 (duty of conservator to use ordinary care and diligence in management of estate).

Article 2. Substitute for Joinder or Consent Requirements

§ 3070. Article provides substitute for joinder or consent requirements of other statutes

3070. If the requirements of this article are satisfied with respect to a transaction described in Section 3071, the transaction is deemed to satisfy the joinder or consent requirements of the statute referred to in that section.

Comment. Section 3070 makes clear that a transaction that satisfies the provisions of this article is deemed to satisfy the joinder or consent requirement of the Civil Code section or other statutory provision referred to in Section 3071.

992/916

§ 3071. Substitution for joinder or consent

3071. (a) In case of a transaction for which the joinder or consent of both spouses is required by Section 1242, 1243, 5125, or 5127 of the Civil Code or by any other statute, if one or both spouses lacks legal capacity for the transaction, the requirement of joinder or consent shall be satisfied as provided in this section.

(b) Where one spouse has legal capacity for the transaction and the other spouse has a conservator, the requirement of joinder or consent is satisfied if both of the following are obtained:

(1) The joinder or consent of the spouse having legal capacity.

(2) The joinder or consent of the conservator of the other spouse given in compliance with Section 3072.

(c) Where both spouses have conservators, the joinder or consent requirement is satisfied by the joinder or consent of each such conservator given in compliance with Section 3072.

(d) In any case, the requirement of joinder or consent is satisfied if the transaction is authorized by an order of court obtained in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

Comment. Section 3071 continues provisions of former Sections 1435.1, 1435.16(a), and 1435.17(a) and (b). Civil Code Sections 1242 and 1243 require joint action by spouses to convey or encumber homestead property or to abandon a homestead. Civil Code Section 5127 requires joint action by spouses with regard to disposition of community real

property (lease for a longer period than one year or sale, conveyance, or encumbrance). 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). For the manner and form in which joinder in or consent to the transaction under Section 3071 is to be given, see Section 3073.

A spouse having a conservator of the estate is deemed to lack legal capacity for the purposes of this section. However, a good faith purchaser or encumbrancer for value is protected unless a notice of the establishment of the conservatorship is recorded. See Section 3074.

If a spouse lacks legal capacity and does not have a conservator, either:

(1) A conservator must be appointed for that spouse so the conservator can join in or consent to the transaction in order to satisfy subdivisions (b) and (c); or

(2) A proceeding may be brought under Chapter 3 to authorize the transaction, thereby avoiding the need to appoint a conservator, if the other spouse has legal capacity for the transaction or has a conservator.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Conservatorship proceeding, § 3008

Legal capacity, § 3012

Effect of compliance with this article, § 3070

27/949

§ 3072. Court order authorizing joinder or consent by conservator

3072. (a) Except as provided in subdivision (b), a conservator may join in or consent to a transaction under Section 3071 only after authorization by either of the following:

(1) An order of the court obtained in the conservatorship proceeding upon a petition filed pursuant to Section 2403 or under Article 7 (commencing with Section 2540) or 10 (commencing with Section 2580) of Chapter 6 of Part 4.

(2) An order of the court made in a proceeding pursuant to Chapter 3 (commencing with Section 3100).

(b) A conservator may consent without court authorization to a sale, conveyance, or encumbrance of community personal property requiring consent under subdivision (c) of Section 5125 of the Civil Code if the conservator could sell or transfer such property under Section

2545 without court authorization if the property were a part of the conservatorship estate.

Comment. Subdivision (a) of Section 3072 continues the requirement of former Sections 1435.16 and 1435.17 that the conservator be first authorized by order of the court before joining in a transaction where joinder is required and extends the requirement to cases where consent is required for a transaction involving community personal property. Subdivision (b) provides an exception to the requirement of a court order in certain cases where consent for a transaction involving community personal property is required. See Civil Code Section 5125(c) and Probate Code Section 2545. Subdivision (b) does not, however, dispense with the need for court authorization for a gift of community personal property or a disposition of community personal property without a valuable consideration. See Civil Code Section 5125(b).

CROSS-REFERENCES

Definitions

- Community property, § 3002
- Conservator, § 3004
- Conservatorship estate, § 3006
- Conservatorship proceeding, § 3008

3054

§ 3073. Form of joinder or consent

3073. (a) The joinder or consent under Section 3071 of a spouse having legal capacity shall be in such manner as complies with Section 1242, 1243, 5125, or 5127 of the Civil Code or other statute that applies to the transaction.

(b) The joinder or consent under Section 3071 of a conservator shall be in the same manner as a spouse would join in or consent to the transaction under the statute that applies to the transaction except that the joinder or consent shall be executed by the conservator and shall refer to the court order, if one is required, authorizing the conservator to join in or consent to the transaction.

Comment. Section 3073 is new and requires that the joinder or consent satisfy the requirements of the statute applicable to the transaction. Civil Code Section 1242 requires in part that the instrument by which a homestead is conveyed or encumbered be "executed and acknowledged" by both spouses or that each spouse "executes and acknowledges" a separate instrument so conveying or encumbering the homestead in favor of the same party or his successor in interest. Section 1243 of the Civil Code provides in part that a homestead can be abandoned by (1) a declaration of abandonment "executed and acknowledged" by husband and

wife, "jointly or by separate instruments," or (2) by a "conveyance or conveyances by both spouses as provided in Section 1242." Section 5125 of the Civil Code requires "written consent" of a spouse for certain dispositions of community personal property. Section 5127 of the Civil Code in part requires that "both spouses either personally or by duly authorized agent, must join in executing any interest by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered." Under Section 3073, a spouse having legal capacity must satisfy the requirements of the statute that applies to the transaction just as if both spouses had legal capacity. If one or both spouses has a conservator, the conservator or conservators must satisfy the requirements of the statute that applies to the transaction and, in addition, subdivision (b) of Section 3073 requires that the joinder or consent refer to the court order (if one is required by Section 3072) authorizing the conservator to join in or consent to the transaction. As to requirements in connection with a conveyance of real property by a conservator and the effect of the conveyance, see Section 2111(b) and (c).

CROSS-REFERENCES

Definitions

- Conservator, § 3004
- Legal capacity, § 3012

27/948

§ 3074. Bona fide purchaser or encumbrancer

3074. Notwithstanding any other provision of this article, a transaction that affects real property entered into with a purchaser or encumbrancer, in good faith and for a valuable consideration, is not affected by the fact that one or both spouses have conservators unless a notice of the establishment of the conservatorship or conservatorships, as the case may be, has been recorded prior to the transaction in the county in which the property is located.

Comment. Section 3074 is designed to protect innocent third parties who do not have knowledge of the existence of the conservatorship. The subdivision is comparable to Section 1875. Nothing in Section 3074 validates a transaction that is invalid under Civil Code Section 38 nor prevents rescission of a transaction under Civil Code Section 39 if the conservatee would lack sufficient capacity to join in or consent to the transaction absent the conservatorship.

18/499

CHAPTER 3. PROCEEDING FOR PARTICULAR TRANSACTION

Article 1. General Provisions

§ 3100. [Reserved]

§ 3101. "Transaction" defined

3101. As used in this chapter, "transaction" means a transaction that involves homestead property or community real or personal property, tangible or intangible, or an interest therein or a lien or encumbrance thereon, including, but not limited to, those transactions with respect thereto as are listed in Section 3106.

Comment. Section 3101 continues the substance of a portion of former Section 1435.1.

CROSS-REFERENCES

Definitions

Community property, § 3002

Homestead, § 3010

§§ 3102-3104. [Reserved]

992/927

§ 3105. Nature of proceeding

3105. (a) A proceeding may be brought under this chapter for a court order authorizing a proposed transaction, whether or not the proposed transaction is one that otherwise would require the joinder or consent of both spouses, if both of the following conditions are satisfied:

(1) One of the spouses is alleged to lack legal capacity for the proposed transaction, whether or not that spouse has a conservator.

(2) The other spouse either has legal capacity for the proposed transaction or has a conservator.

(b) A proceeding may be brought under this chapter for a court order declaring that one or both spouses has legal capacity for a proposed transaction.

(c) One proceeding may be brought under this chapter under both subdivision (a) and subdivision (b).

(d) In a proceeding under this chapter, the court may determine the validity of a homestead and whether property is community property or the separate property of either spouse.

(e) This chapter is permissive and cumulative for the transactions to which it applies.

Comment. Subdivision (a) of Section 3105 continues the substance of a portion of the first sentence of former Section 1435.1 except that the rules provided in Section 3012 determine whether a spouse lacks legal capacity for the purposes of this chapter. See Section 3012. For the purposes of this chapter, a spouse lacks legal capacity for a transaction if a conservator of the estate has been appointed for the spouse. See Sections 3004 (defining "conservator") and 3012 (legal capacity). This rule is consistent with the rule adopted in Section 3071 which requires the joinder or consent of the conservator rather than the spouse to a transaction requiring joinder or consent of both spouses.

Section 3012 (legal capacity) also covers the case where, applying the principles of law otherwise applicable, a spouse not having a conservator of the estate lacks capacity for the particular proposed transaction that is the subject of the proceeding. See generally Civil Code Sections 38 and 39. Section 3012 also supersedes former Section 1435.2, which defined "incompetent" in the same language that was used to describe an adult for whom a guardian could be appointed. The effect of former Section 1435.2 is continued, however, in Section 3145(a)(3), which precludes a court from ordering a transaction against the wishes of a spouse lacking legal capacity unless the spouse is also a person for whom a conservator could be appointed. Cf. Section 1801(b) (conservator of the estate).

The proposed transaction must be one that involves homestead property or community real or personal property, tangible or intangible, or an interest therein or a lien or encumbrance thereon, including, but not limited to, those transactions with respect thereto as are listed in Section 3106. See Section 3101 (defining "transaction"). See also Sections 3002 (defining "community property") and 3010 (defining "homestead"). Court authorization may be sought under this chapter in order to satisfy the requirements of Section 3071 (substitute for joinder or consent) or may be sought so that a transaction not requiring joinder or consent of both spouses cannot later be rescinded by someone acting on behalf of a spouse who may lack legal capacity for the transaction.

Approval of a proposed transaction in a proceeding under this chapter avoids the need to establish a conservatorship for a spouse lacking legal capacity merely in order to accomplish that transaction. Thus, where one spouse has a conservator of the estate and the other spouse lacks legal capacity for the transaction but does not have a conservator, a proceeding may be brought under this chapter to obtain authorization of the transaction and the need for the establishment of a conservatorship for the other spouse is avoided. See Section 3071. However, in order to bring a proceeding under subdivision (a), there must be at least one spouse having legal capacity for the transaction or a conservator of the estate for one of the spouses. See also Section 3111 and Comment to that section. Where both spouses have conservators of the estate, the procedure provided in this chapter is available to obtain court authorization as an alternative to the other methods provided in Section 3072.

Subdivision (b) is new. It covers the case where a spouse does not have a conservator and it is uncertain whether the spouse has legal

capacity for the proposed transaction. The court is requested to determine that the spouse has legal capacity for the transaction. If the court determines the spouse has legal capacity for the transaction and if the other spouse has legal capacity for the transaction, the two spouses can go ahead with the transaction without further court authorization as any other married persons having legal capacity. If the other spouse does not have legal capacity for the transaction, the transaction may be authorized under this chapter only if the spouse found to have legal capacity for the transaction is willing to join in or consent to the proposed transaction. See Section 3145.

Subdivision (c) enables a proceeding to be brought under this chapter, for example, to have one spouse declared to have legal capacity for a proposed transaction, to have the other spouse determined to lack legal capacity for the proposed transaction, and to authorize the proposed transaction.

Subdivision (d) continues the substance of a portion of former Section 1435.15, but subdivision (d) extends the former provisions to apply where neither spouse has a conservator.

Subdivision (e) makes clear that the procedure provided in this part is not exclusive of other remedies.

CROSS-REFERENCES

Appointment of conservator not required, § 3113

Definitions

Conservator, § 3004

Legal capacity, § 3012

Transaction, § 3101

Inconsistent allegations and alternative relief, § 3120

Persons who may file or join in petition, § 3111

Several proposed transactions may be included in one proceeding, § 3120

Transactions authorized, § 3101

992/932

§ 3106. Transactions that may be subject of the proceeding

3106. 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 or settlement of an indebtedness, demand, or proceeding to which the property may be subject.

(c) Dedication or conveyance, with or without consideration, of (1) the property or an interest therein to a public entity (including but not limited to the United States or an agency or instrumentality thereof) for any purpose or (2) an easement over the property to any person for any purpose.

(d) Conveyance, release, or relinquishment to a public entity, with or without consideration, of any access rights to a street, highway, or freeway from the property.

(e) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under subdivision (c) or (d) by the owner of property subject to the lien.

(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 3106 continues a portion of former Section 1435.1, with the addition of the introductory statement that the listing of transactions is nonexclusive. Thus, unlisted transactions (such as giving an option) are included within the scope of this chapter. Subdivisions (c), (d), and (e) are phrased in language derived from Section 2556 (power of conservator to dedicate or convey real property or easement with or without consideration). Subdivision (f) is new and is derived from Section 2580 (substituted judgment).

CROSS-REFERENCES

Definition, transaction, § 3101

992/940

Article 2. Commencement of Proceeding

§ 3110. Jurisdiction and venue

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

(b) Except as provided in subdivision (d), if the proceeding affects real property or a lien or encumbrance on real property, the proper county for commencement of the proceeding is either of the following:

(1) The county in which the real property, or some part thereof, is situated.

(2) The county in which a conservatorship proceeding of one of the spouses is pending.

(c) Except as provided in subdivision (d), if the proceeding affects only personal property, other than a lien or encumbrance on real property, the proper county for commencement of the proceeding is any of the following:

(1) The county in which one or both of the spouses resides at the time the petition is filed.

(2) The county in which a conservatorship proceeding of one of the spouses is pending.

(3) Such other county as may be in the best interests of the spouses.

(d) If both spouses have conservators and the conservatorship proceedings are pending in the same county, the proper county for the commencement of the proceeding, whether the proceeding affects real or personal property, is the county in which the conservatorship proceedings are pending.

Comment. Section 3110 continues the substance of the introductory portion of former Section 1435.4 with the following revisions. Paragraph (2) is added to subdivision (b) to permit the proceeding to be commenced in the county where a conservatorship proceeding for one of the spouses is pending. Paragraph (3) is added to subdivision (c). This addition conforms to Sections 2201 and 2202 (venue for conservatorship proceeding). Subdivision (d) is new and requires the proceeding to be commenced in the county where the conservatorship proceedings of both spouses are pending if both spouses have conservators. Since that court will be settling the accounts of the two conservators and otherwise acting on petitions in connection with the conservatorship estates, it is the appropriate court to commence a proceeding under this chapter, even where the proceeding involves real property located in another county.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Conservatorship proceeding, § 3008

992/943

§ 3111. Who may file or join in petition

3111. (a) Except as provided in subdivision (b), any of the following persons may file, or join in, a petition under this chapter:

- (1) Either spouse, whether or not the spouse has legal capacity.
- (2) The conservator of either spouse.

(b) If the petition requests approval of a proposed transaction, at least one of the petitioners shall be either a conservator or a spouse having legal capacity for the transaction.

Comment. Subdivision (a) of Section 3111 continues the substance of the first sentence of former Section 1435.3. The reference to joining in the petition of another is added. Also added is the provision permitting a spouse to file (or join in) a petition even though the spouse lacks legal capacity for the proposed transaction or is one whose legal capacity for the proposed transaction is to be determined in the proceeding. See Section 3012 (legal capacity). This addition reflects the expansion of the scope of the proceeding to include a determination that one or both spouses has legal capacity for the proposed transaction. See Section 3105(b).

Subdivision (b) of Section 3111 is consistent with the second sentence of former Section 1435.3. The subdivision is necessary to assure that, if the proposed transaction is approved, the petitioner will have the legal capacity to carry out the court's orders with reference to the transaction. The subdivision does not apply where the only relief requested in the petition is a declaration that one or both spouses has legal capacity for a proposed transaction.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

When proceeding may be brought, § 3105

992/945

§ 3112. Representation of petitioning spouse

3112. (a) If a petitioning spouse is one whose legal capacity for the proposed transaction is to be determined in the proceeding, the court may do any of the following:

- (1) Permit the spouse to appear without a representative.
- (2) Appoint a guardian ad litem for the spouse.
- (3) Take such other action as the circumstances warrant.

(b) If a petitioning spouse lacks legal capacity for the proposed transaction, the court may do either of the following:

(1) Require the spouse to be represented by the conservator of the spouse.

- (2) Appoint a guardian ad litem for the spouse.

§ 3113

Comment. Section 3112 is new. Subdivision (a) supplements subdivisions (a) and (b) of Section 3105 and paragraph (1) of subdivision (a) of Section 3111 (who may be a petitioner). Subdivision (b) is consistent with Section 2462 and Code of Civil Procedure Section 372.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

Representation of spouse alleged to lack legal capacity, § 3140

992/947

§ 3113. Appointment of conservator not required

3113. A proceeding may be brought under this chapter by the conservator of a spouse, or by a spouse having legal capacity for the proposed transaction, without the necessity of appointing a conservator for 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.

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

992/949

Article 3. Petition

§ 3120. Permissible allegations in petition

3120. (a) Several proposed transactions may be included in one petition and proceeding under this chapter.

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

Comment. Section 3120 is new. It implements the expanded character of the special proceeding under this chapter which permits a petition for court authorization of a proposed transaction or a judicial declaration of legal capacity for the proposed transaction or both. See Section 3105.

CROSS-REFERENCES

Orders authorized under chapter generally, § 3105

Proposed transactions, §§ 3101, 3105, 3106

Verification of petition, § 1451

§ 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 is alleged to lack legal capacity for the proposed transaction, a statement that the spouse has a conservator or a statement of the facts upon which the allegation is based.
- (c) If there is a conservator of a spouse, the name and address 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 for the proposed 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 name and address of the institution.
- (e) The names and addresses of the adult relatives within the second degree of each spouse alleged to lack legal capacity for the proposed transaction, if known to the petitioner.
- (f) A sufficient description of the property that is the subject of the proposed 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. See also Section 3105. 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 3122-3123.

CROSS-REFERENCES

Definitions

- Community property, § 3002
- Conservator, § 3004
- Conservatorship proceeding, § 3008
- Homestead, § 3010
- Legal capacity, § 3012
- Transaction, § 3101

Petition

- Alternative relief, requesting, § 3120
- Declaration of legal capacity, additional allegation, § 3123
- Inconsistent allegations permitted, § 3120
- Verification, § 1451

Proposed transactions

- Additional information, § 3122
- Several permitted in one petition, § 3120

31/477

§ 3122. Petition for court order authorizing transaction

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

(a) An allegation that one of the spouses has a conservator or facts establishing lack of legal capacity of the spouse for the proposed transaction.

(b) An allegation that the other spouse has legal capacity for the proposed transaction or has a conservator.

(c) An allegation that each spouse either: (1) joins in or consents to the proposed transaction, (2) has a conservator, or (3) is substantially unable to manage his or her financial resources or resist undue influence.

(d) 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.

(4) The providing of 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 3122 continues the substance of portions of former Section 1435.4. Subdivisions (a) and (b) are phrased to cover the situation where each of the spouses has a conservator. Subdivision (c) is added to conform to Section 3145(a)(3). It implements the policy of Section 3145 that the court may not authorize a transaction without the consent of the spouse lacking legal capacity unless the spouse is a person for whom a conservator could be appointed. Subdivision (d)(4) is new and conforms to the addition of subdivision (e) to Section 3106. See also Section 3145(b) (substituted judgment).

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

Transaction, § 3101

Several proposed transactions permitted in one petition, § 3120

31/478

§ 3123. Petition for court order declaring legal capacity for transaction

3123. If the proceeding is brought for a court order declaring that one or both spouses has legal capacity for a proposed transaction, the petition shall set forth, in addition to the information required by Section 3121, an allegation of the legal capacity of such spouse or spouses for the proposed transaction.

Comment. Section 3123 is new. It implements the policy of Section 3105 to permit a proceeding for a judicial declaration of legal capacity for a transaction.

CROSS-REFERENCES

Definitions

Legal capacity, § 3012

Transaction, § 3101

31/479

Article 4. Citation and Notice of Hearing

§ 3130. Citation to nonpetitioning spouse alleged to lack legal capacity; notice to conservator in lieu of citation

3130. (a) Except as provided in subdivision (b), upon the filing of the petition, the clerk shall issue a citation to each nonpetitioning spouse alleged to lack legal capacity for the proposed transaction, setting forth the time and place of hearing. The citation and a copy of the petition shall be served upon the spouse at least 15 days before the hearing.

§ 3131

(b) Unless the court otherwise orders, if a spouse alleged to lack legal capacity for the proposed transaction has a conservator, no citation to the spouse need be issued, and the petitioner shall cause a notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, to be served on the conservator at least 15 days before the hearing.

(c) Service under this section shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure.

Comment. Section 3130 supersedes the first, second, and fourth paragraphs of former Section 1435.5. Unlike the former provisions which dispensed with a citation where the spouse had a conservator, subdivision (b) grants the court discretion to require a citation. A reference to Code of Civil Procedure Section 415.40 (service outside state) is added in subdivision (c).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451

Definitions

Conservator, § 3004

Legal capacity, § 3012

Transaction, § 3101

Duty of conservator to appear and represent spouse, § 3140

Notice to Director of Mental Health or Director of Developmental Services, § 1461

Proof of giving of notice, § 1468

When service by mail deemed complete, § 1467

31/480

§ 3131. Notice to nonpetitioning spouse having legal capacity and relatives

3131. (a) At least 15 days before the hearing on the petition, the petitioner shall cause a notice of the time and place of the hearing and a copy of the petition to be served upon any nonpetitioning spouse not alleged to lack legal capacity for the proposed transaction.

(b) Service under subdivision (a) shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure.

(c) At least 15 days before the hearing on the petition, the petitioner shall mail a notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, to the adult relatives named in the petition at the addresses set forth in the petition.

Comment. Subdivisions (a) and (b) of Section 3131 are new. They implement the policy to permit a proceeding under this chapter to be brought by a person other than a spouse having legal capacity. See Section 3111.

Subdivision (c) continues the substance of the fifth paragraph of former Section 1435.5 except that the time of mailing has been lengthened from 10 to 15 days. Subdivision (c) is comparable to Section 1822 (notice of hearing on appointment of conservator).

CROSS-REFERENCES

Clerk sets petition for hearing, § 1451
Definition, legal capacity, § 3012
Mailing
 Manner of, § 1465
 Personal delivery in lieu of, § 1466
 When complete, § 1465
Proof of giving of notice, § 1468
When service by mail deemed complete, § 1467

31/482

Article 5. Hearing and Order

§ 3140. Representation of spouse alleged to lack legal capacity

3140. (a) A conservator served pursuant to this article shall, and the Director of Mental Health or the Director of Developmental Services served pursuant to Section 1461 may, appear at the hearing and represent a spouse alleged to lack legal capacity for the proposed transaction.

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

(c) If the spouse opposes the petition and is unable to retain legal counsel, upon request of the spouse, the court shall appoint the public defender or private counsel under Section 1471 to represent the spouse and, if such appointment is made, Section 1472 applies.

(d) Except as provides in subdivision (c), 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 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 paragraph) and 1435.6.

Subdivision (b) continues the substance of the second paragraph of former Section 1435.7 and supersedes the sixth paragraph of former Section 1435.5.

Subdivision (c) is added to assure that counsel will be appointed if requested by a spouse unable to retain legal counsel. Section 1472 relates to compensation for counsel appointed under subdivision (c).

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

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

Representation of petitioning spouse, § 3112

31/483

§ 3141. Presence of spouse at hearing

3141. (a) If a spouse is alleged to lack legal capacity for the proposed transaction and has no conservator, the spouse shall be produced at the hearing unless unable to attend the hearing.

(b) If the spouse is not able to attend the hearing because of medical inability, such inability shall be established (1) by the affidavit or certificate of a licensed medical practitioner or (2) 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, by the affidavit of the accredited practitioner.

(c) Emotional or psychological instability is not good cause for absence of the spouse from the hearing unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate psychological damage.

Comment. Section 3141 supersedes the first paragraph of former Section 1435.7. The section has been conformed with Section 1825 (attendance of proposed conservatee).

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

Representation of petitioning spouse, § 3112

31/484

§ 3142. Information to be given to spouse by court

3142. (a) If a spouse is alleged to lack legal capacity for the proposed transaction and has no conservator, the court, before commencement of the hearing on the merits, shall inform the spouse of all of the following:

(1) A determination of lack of legal capacity for the proposed transaction may result in approval of the proposed transaction.

(2) 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 opposes the petition and is unable to retain legal counsel.

(b) This section does not apply if the spouse is absent from the hearing and is not required to attend the hearing under the provisions of subdivision (a) of Section 3141 and any showing required by Section 3141 has been made.

Comment. Section 3142 is new. It is adapted from Section 1828 (relating to the information required to be given to a proposed conservatee) and Section 1823 (form of citation to proposed conservatee).

§ 3143. [Reserved]

31/486

§ 3144. Order declaring legal capacity

3144. (a) If the petition requests that the court make an order declaring a spouse to have legal capacity for the proposed transaction and the court determines that the spouse has legal capacity for the proposed transaction, the court shall so order.

(b) If the petition alleges that a spouse having no conservator lacks legal capacity for the proposed transaction and the court determines that the spouse has legal capacity for the transaction, the court shall make an order so declaring.

Comment. Section 3114 is new. It implements the policy of Section 3100 to permit a proceeding under this chapter for a declaration of legal capacity for a transaction.

CROSS-REFERENCES

Definitions

Conservator, § 3004
Legal capacity, § 3012

31/487

§ 3145. Order authorizing transaction

3145. (a) The court may authorize the proposed transaction if the court determines all of the following:

(1) The property that is the subject of the proposed transaction is homestead or community property of the spouses.

(2) One of the spouses then has a conservator or otherwise lacks legal capacity for the proposed transaction.

(3) The other spouse either has legal capacity for the proposed transaction or has a conservator.

(4) Each of the spouses either (i) joins in or consents to the proposed transaction, (ii) has a conservator, or (iii) is substantially unable to manage his or her own financial resources or resist fraud or undue influence. "Substantial inability" may not be proved by isolated incidents of negligence or improvidence.

(5) The proposed transaction is one that should be authorized under this chapter.

(b) If the proposed transaction is 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, the court may authorize the transaction under this chapter only if the transaction is one that the court would authorize under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 (substituted judgment) in the case of a conservatorship.

(c) If the court determines under subdivision (a) that the transaction should be authorized, the court shall 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.

(d) In an order authorizing a transaction, the court may prescribe such terms and conditions as the court in its discretion determines appropriate, including but not limited to requiring joinder or consent of another person.

Comment. Section 3145 continues the substance of former Section 1435.8 with the addition of subdivision (b) to reflect the expansion of this chapter to cover the type of transactions described in that subdivision and subdivision (d) to make express the court's authority to make appropriate orders. Subdivision (d) supplements authority given the court under Sections 3021 (purchase of another home) and 3022 (protection of homestead exemption). Subdivision (a)(4) continues the effect of former Section 1435.2, which permitted authorization of transactions involving an "incompetent" spouse.

CROSS-REFERENCES

Definitions

Community property, § 3002
Conservator, § 3004
Homestead, § 3010
Legal capacity, § 3012
Transaction, § 3100

999/547

§ 3146. Effect of determination of lack of legal capacity

3146. A court determination pursuant to this chapter that a spouse lacks legal capacity for the proposed transaction affects the legal capacity of the spouse for that transaction alone and has no effect on the legal capacity of the spouse for any other purpose.

Comment. Section 3146 makes clear that a determination of lack of legal capacity under this chapter is limited in scope. See Section 3012 (legal capacity).

31/489

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, in the amount fixed by the court, 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.

§ 3151

(b) Unless the court for good cause fixes the amount of the bond in a lesser amount, if given by an authorized surety company, the bond shall be in an amount not less than the value of the personal property (including cash and any notes) to be received by the petitioner, as determined by the court.

(c) If the sureties on the bond are individual sureties, the bond shall be approved by the court and shall be for twice the amount required for a bond given by an authorized surety company.

(d) Sections 2328, 2330, 2332, 2335, 2336, and 2337 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).

31/490

§ 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 any real property 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 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 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.

CROSS-REFERENCES

Conveyances of real property by conservator, § 2111

§ 3152

31/491

§ 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.

31/492

§ 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 for the transaction and joined in the execution.

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

CROSS-REFERENCES

Definitions

Conservator, § 3004

Legal capacity, § 3012

31/493

§ 3154. Further proceedings if transaction not consummated

3154. (a) If any party to the transaction, other than the petitioner, does not consummate a transaction authorized by the court, the court, on application of the petitioner, after such notice to the parties to the transaction as the court directs, may vacate the order authorizing the transaction.

(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.

§ 3154

The supplemental petition and a notice of the time and place of the 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 a notice of the time and place of the 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 (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.

CONFORMING CHANGES RELATING TO PART 6

SEC. . Section 1242 of the Civil Code is amended to read:

1242. (a) Except as provided in Chapter 2a (commencing with Section 1435-1) of Division 4 of the Probate Code where one or more of the spouses is incompetent Section 1243.5 , and except in the case of a married person's separate homestead, the homestead of a married person cannot be conveyed or encumbered unless :

(1) ~~the~~ The instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife ; or

(2) ~~unless each~~ Each spouse executes and acknowledges a separate instrument so conveying or encumbering the homestead in favor of the same party or ~~his~~ that party's successor in interest ; ~~provided,~~ however, that .

(b) Notwithstanding subdivision (a), a conveyance of the homestead between husband and wife need be executed and acknowledged only by the spouse conveying ; ; and , unless the one conveying expressly reserves his or her homestead rights, the spouse to whom the conveyance is made may convey or encumber the homestead property in the same manner and to the same extent as though no homestead had been declared.

Comment. Section 1242 is amended to substitute a reference to Section 1243.5 in place of the former reference to the provisions of the Probate Code. The other revisions in the section are technical and not substantive.

SEC. . Section 1243 of the Civil Code is amended to read:

1243. Except as provided in Chapter 2A (commencing with Section 1435-1) of Division 4 of the Probate Code where one or both spouses ~~are incompetent~~ Section 1243.5 , a homestead can be abandoned only by:

1. A declaration of abandonment executed and acknowledged by the husband and wife, jointly or by separate instruments, if the claimant is married.

2. A declaration of abandonment or a conveyance by the claimant if unmarried.

Civil Code § 1243.5

3. A declaration of abandonment or a conveyance by the grantee named in a conveyance by which one spouse conveys the homestead to the other spouse without expressly reserving his or her homestead rights.

4. A conveyance or conveyances by both spouses as provided in Section 1242.

5. A declaration of abandonment or a conveyance by the claimant alone in the case of a married person's separate homestead.

Comment. Section 1243 is amended to substitute a reference to Section 1243.5 in place of the former reference to the provisions of the Probate Code.

32461

SEC. . Section 1243.5 is added to the Civil Code, to read:

1243.5. Where one or both spouses either has a conservator of the estate or does not have sufficient legal capacity for a transaction described in Section 1242 or 1243, the procedure for conveying or encumbering or abandoning the homestead of a married person (other than a married person's separate homestead) is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

Comment. Section 1243.5 replaces the former references to provisions of the Probate Code that were contained in Sections 1242 and 1243.

32462

SEC. . Section 5128 of the Civil Code is amended to read:

5128. (a) Where one or both of the spouses are incompetent, the procedure for dealing with and disposing of community property is that prescribed in Chapter 2a (commencing with Section 1435-1) of Division 4 of the Probate Code either has a conservator of the estate or does not have sufficient legal capacity to manage and control community property, the procedure for management and control of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code .

(b) Where one or both spouses either has a conservator of the estate or does not have sufficient legal capacity to give consent to a gift of community personal property or a disposition of community personal property without a valuable consideration as required by Section

Civil Code § 5128

5125 or to a sale, conveyance, or encumbrance of community personal property for which a consent is required by Section 5125, the procedure for such gift, disposition, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

(c) Where one or both spouses either has a conservator of the estate or does not have sufficient legal capacity to join in executing a lease, sale, conveyance, or encumbrance of community real property or any interest therein as required by Section 5127, the procedure for such lease, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

Comment. Subdivision (a) of Section 5128 makes provisions of the Probate Code applicable when one or both spouses has a conservator of the estate or lacks sufficient legal capacity to manage and control community property. See Probate Code § 3051. Subdivisions (b) and (c) make provisions of the Probate Code applicable when one or both spouses has a conservator of the estate or lacks sufficient legal capacity for a transaction requiring joinder or consent under Section 5125 or 5127 of the Civil Code. See Probate Code § 3071.