

Memorandum 79-6

Subject: Study F-100 - Guardianship-Conservatorship Revision (Application of Provisions Concerning Administrators to Certain Property Transactions)

At present, the sections of the Commission's proposed guardianship-conservatorship legislation concerning borrowing money and giving security therefor (Section 2551) and orders authorizing leases (Section 2553) incorporate by reference the procedural provisions applicable to similar proceedings by administrators. After some discussion between the Executive Secretary and Mr. Arne Lindgren, Chairman of the State Bar Subcommittee on Guardianship-Conservatorship Revision, the staff is of the view that it would be preferable to make these two sections self-contained. To do this also requires conforming revisions to Section 2111, a general provision relating to the transfer or conveyance of property pursuant to court order.

The revised sections and Comments are attached to this memorandum as Exhibit 1. If the revisions are approved, the staff will prepare amendments to the bill (AB 261, introduced January 11, 1979).

Respectfully submitted,

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Staff Counsel

EXHIBIT 1

§ 2111. Property transactions pursuant to court order

2111. (a) As used in this section, "transaction" means any one or more of the following:

(1) A conveyance or lease of real property of the guardianship or conservatorship estate.

(2) The creation of a mortgage or deed of trust on real property of the guardianship or conservatorship estate.

(3) A transfer of personal property of the guardianship or conservatorship estate.

(4) The creation of a security interest or other lien in personal property of the guardianship or conservatorship estate.

~~(a)~~ (b) Whenever the court authorizes or directs the conveyance of real property or the transfer of personal property of the guardianship or conservatorship estate, the conveyance shall be executed or the transfer made a transaction, the transaction shall be carried out by the guardian or conservator of the estate in accordance with the terms of the order.

~~(b)~~ (c) A conveyance, lease, or mortgage of, or deed of trust on, real property executed by a guardian or conservator shall refer to set forth therein that it is made by authority of the order authorizing or directing the conveyance to be executed transaction and shall give the date of the order. A certified copy of the order shall be recorded in the office of the county recorder in each county in which any portion of the real property is located.

~~(c)~~ (d) A conveyance or transfer of real or personal property, made transaction carried out by a guardian or conservator in accordance with an order authorizing or directing the conveyance or transfer, passes the title, right or interest conveyed or transferred as fully transaction has the same effect as if the ward or conservatee had executed the conveyance or made the transfer carried out the transaction while having legal capacity to execute the conveyance or make the transfer do so.

Comment. Section 2111 generalizes provisions applicable to executors or administrators that were incorporated by reference and made applicable to guardianship and conservatorship proceedings under prior

law. Subdivisions (a) , and (b) , and (c) of Section 2444 are drawn from the first sentence of Section portions of Sections 786 (sales of real property by executors or administrators) , 832-833 (borrowing money), and 843 (leases) . Former Sections 1534 and 1852 made this provision applicable to sales of real property by guardians and conservators. See also former Section 1530a (transfer of real property by guardian pursuant to compromise). These provisions were made applicable to guardianship and conservatorship proceedings by former Sections 1534 (sales), 1538 (borrowing money, leases), and 1852 (conservatorship). A similar provision was also found in former Section 1530a (compromises).

Subdivision ~~(e)~~ (d) is drawn from the last sentence of Section 853 portions of Sections 786 (sales of real property), 834 (borrowing money), 843 (leases), and 853 (conveyance to complete contract or to satisfy adverse claim). ~~Unlike~~ Like Section 853, but unlike Section 786 (conveyance passes all estate of decedent prior to sale) or former Section 1530a (guardian's conveyance pursuant to compromise passes ward's estate at time of conveyance), subdivision ~~(e)~~ (d) permits the guardian or conservator to convey or transfer the title, right, or interest to the same extent as it might have been conveyed or transferred by a person having legal capacity for the transaction. Thus, for example, in a proceeding under Sections 2520-2528, the court might order the guardian or conservator to execute a quitclaim deed to remove a cloud on the petitioner's property or the court might direct a conveyance of real property to complete a contract and order the guardian or conservator to execute a grant deed which will pass after-acquired title. See generally 3 B. Witkin, Summary of California Law Real Property § 86, at 1840, § 160, at 1900-01 (8th ed. 1973).

§ 2551. Borrowing money and giving security therefor

2551. (a) In any case described in Section 2541 or Section 2552, the guardian or conservator, after authorization by order of the court, may borrow money upon a note or notes, either unsecured or to be secured by a security interest or other lien on the personal property of the estate or any part thereof or to be secured by a mortgage or deed of trust on the real property of the estate or any part thereof. ~~Subject to Section 1469, the proceedings to obtain such an order shall conform, as nearly as may be, to the provisions of this code concerning similar proceedings by administrators.~~

(b) To obtain an order under this section, the guardian or conservator, the ward or conservatee, or any other interested person may file a petition with the court. The petition shall state the purpose for which the order is sought, the necessity for or advantage to accrue from the order, the amount of money proposed to be raised, the rate of interest to be paid, the length of time the note or notes are to run, and a

general description of the property proposed to be mortgaged or subjected to a deed of trust or other lien. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) The court shall hear the petition and any objection thereto and may require such additional proof of the fairness and feasibility of the transaction as the court determines is necessary. If the required showing is made, the court may make an order authorizing the transaction and may prescribe in the order the terms and conditions upon which the transaction shall be made, including but not limited to the following:

(1) Ordering that a lesser amount than that specified in the petition be borrowed.

(2) Prescribing the maximum rate of interest and the period of the loan.

(3) Requiring that the interest and the whole or any part of the principal be paid from time to time out of the estate or any part thereof.

(4) Requiring that the personal property used as security or any buildings on real property to be mortgaged or subjected to the deed of trust be insured for the further security of the lender and that the premiums be paid out of the estate.

(d) The note or notes and the mortgage or deed of trust, if any, shall be signed by the guardian or conservator as such and shall create no personal liability against the person so signing.

(e) Jurisdiction of the court to administer the estate of the ward or conservatee shall be effectual to vest the court with jurisdiction to make the order for the note or notes and for the security interest, lien, mortgage, or deed of trust, and such jurisdiction shall conclusively inure to the benefit of the owner of the security interest or lien, mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the proceedings or the note or notes, security interest, lien, mortgage, or deed of trust given in pursuance thereof.

~~(b)~~ (f) Upon any foreclosure or sale under a security interest, lien, mortgage, or deed of trust described in subdivision (a), if the

proceeds of the sale of the encumbered property are insufficient to pay the note or notes, the security interest, lien, mortgage, or deed of trust, and the costs or expenses of sale, no judgment or claim for any deficiency shall be had or allowed against the ward or conservatee or the estate.

Comment. The first sentence of subdivision Subdivision (a) of Section 2551 continues the substance of the first portion of former Section 1533, but a reference to Sections 2541 and 2552 has been substituted for "will benefit his ward" which appeared in former Section 1533 and the types of security that may be given have been made more specific. The second sentence of subdivision (a) continues the substance of a portion of former Section 1538 with the addition of the reference to Section 1469 (Sections 1200 and 1201 not applicable to proceedings under this division). Subdivision (b) continues the last sentence of former Section 1533. Subdivisions (b), (c), (d), and (e) are drawn from portions of Sections 831, 832, 833, and 834, respectively. Sections 831-834 relate to borrowing money by executors or administrators, and were incorporated by reference and made applicable to guardianship and conservatorship proceedings by former Sections 1538 and 1852. Subdivision (f) continues the last sentence of former Section 1533.

§ 2553. Order authorizing lease required

2553. (a) Except as provided in Section 2555, leases may be executed by the guardian or conservator with respect to the property of the estate only after authorization by order of the court. Subject to Section 1469, the proceedings to obtain such an order shall conform, as nearly as may be, to the provisions of this code concerning similar proceedings by administrators.

(b) To obtain an order under this section, the guardian or conservator or any interested person may file a petition with the court. The petition shall state (1) a general description of the property proposed to be leased, (2) the term, rental, and general conditions of the proposed lease, and (3) the advantage to the estate to accrue from giving the lease. If the lease is proposed to be for a term longer than 10 years, the petition shall state additional facts showing the need for the longer lease and its advantage to the estate. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) The court shall hear the petition and any objection thereto and may require such additional proof of the fairness and feasibility of the

transaction as the court determines is necessary. The court also shall entertain and consider any other offer made in good faith at the hearing to lease the same property on more favorable terms. If the court is satisfied that it will be to the advantage of the estate, the court shall make an order authorizing the guardian or conservator to make the lease to the person and on the terms stated in the order. The court shall not make an order authorizing the guardian or conservator to make the lease to any person other than the lessee named in the petition unless the offer made at the hearing is acceptable to the guardian or conservator.

(d) Jurisdiction of the court to administer the estate of the ward or conservatee shall be effectual to vest the court with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee and the lessee's heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the proceedings or the lease made in pursuance thereof.

Comment. Subdivision (a) of Section 2553 continues the substance of a portion of the first sentence of former Section 1538 with the addition of the reference to Section 1469 (Sections 1200 and 1201 not applicable to proceedings under this division). Subdivisions (b), (c), and (d) are drawn from portions of Sections 841, 842, 842.1, and 843 (leases by executors or administrators) which were incorporated by reference and made applicable to guardianship and conservatorship proceedings by former Sections 1538 and 1852.

[Note. If the revisions to Sections 2111, 2551, and 2553 as proposed by the staff are approved for inclusion in AB 261, corresponding revisions to the Comments to the repealed sections will have to be made.]