

January 17, 1978

Memorandum 78-5

(By Garrett H. Elmore, Consultant)

Subject: Study 30.300. Guardianship and Conservatorship Revision (Background and Revision of Chapter 2 A (commencing with Section 1435.1) of Division 4 of the Probate Code, relating to homestead and community property).

This memorandum undertakes to analyze and set forth the need for revision of Chapter 2 A, to set forth various policy considerations believed appropriate for Commission decision, to comment upon a proposed new approach which was being considered by a subcommittee of the State Bar, and to submit in tentative form a proposed new text of Chapter 2 A. The discussion is divided as follows:

- I. Background of Chapter 2 A.
- II. Scope of Proposed Revision.
- III. Policy Considerations In Proposed Revision.
- IV. Proposal Being Considered By State Bar Subcommittee.
- V. Proposed Revision (in tentative form).

I

Background of Chapter 2 A

Chapter 2 A provides procedures which may, or must, be

followed when one or both spouses become incompetent and there is need to encumber or dispose of homestead property or community real property. As to homestead property of husband and wife, California law has long required the joinder of both spouses, except as to transfers between themselves (Civ. Code § 1242, see Civ. Code § 1243). Except as to a lease for a period not exceeding one year, a like rule has applied to community real property (Civ. Code § 5127; former Civ. Code § 172(a)). Where one spouse only is incompetent, Chapter 2 A and predecessor statutes have provided a procedure whereby either type of property could be encumbered or disposed of under authority of the court given in the special proceeding, without appointment of a guardian (or conservator) of the estate of the incompetent spouse.

As early as 1873-74, a special proceeding for this purpose could be maintained as to homestead property. The remedy was held exclusive; for example, a wife could not appear in her husband's guardianship and consent to the sale of such property in that proceeding (*Flege v. Garvey*, 47 Cal. 371 (1874)). Between 1905 and 1941, the special proceeding as to homestead property was contained in the homestead sections of the Civil Code (former Civ. Code §§ 1269 a, b, and c; Cal. Stats., 1905, ch. 560).

A similar special proceeding for community real property was added to the Civil Code in 1919 and remained in effect until 1941 (former Civ. Code §§ 172 b, c, and d; Cal. Stats., 1919, ch. 615).

In 1941 the two separate acts were repealed and a single act, covering both homestead property and community real property, was added to the Probate Code in the form of Chapter 2 A (former Prob. Code §§ 1435 and following, Cal. Stats., 1941, ch. 1220.

In 1947 a new text was substituted (former Prob. Code §§ 1435.1-1435.39, Cal Stats., 1947, ch. 412) and in 1959 this text was substantially revised (Cal. Stats., 1959, ch. 125, see Selected 1959 Code Legislation, 34 Cal. State Bar Jnl. 581,744-747 (1959)). Amendments since 1959 have been to particular sections and do not affect the framework of Chapter 2 A.

The history has certain significance. The chapter has been framed and twice revised in the period 1941-1959. It is believed Chapter 2 A and its revisions were sponsored by the California Land Title Association. The so called alternative procedures discussed later were added in 1959. Jurisdiction over community personal property was first added in 1959, creating problems that will be later mentioned.

But as to real property, Chapter 2 A states a long established procedure for court authorization of particular real property transactions. Under it a married couple can dispose of or encumber homestead or community real property when one spouse is incompetent without a guardianship (or conservatorship). If the latter is established, all property is included with accountings required on a periodic basis. Under Chapter 2 A the court retains jurisdiction over the proceeds. For good cause, it may dispense with a bond. It may authorize the purchase of a new home.

Chapter 2 A has other advantages. Since 1959 it has provided rules whereby real or personal community property or homestead property may be dealt with in the estate of one spouse or, in certain cases, in the estates of both spouses. Without such rules there would be uncertainty as to the proper procedure.

The criticism which may be directed to Chapter 2 A is that it does not reflect recent changes made by the Legislature as to the "equal management" rights of the spouses (see Civ. Code §§ 5125, 5127) and, in one instance, changes in the right of a married person to select a homestead (see Civ. Code § 1238) and in another instance, . the 1959 enactment of a special type of homestead which is not involved in the basic concept of Chapter 2 A (see Civ. Code §§ 1300-1304).

In sum, Chapter 2 A represents a long established California procedure which has been refined. Unless there is evidence that the procedure has fallen into disuse or that some preferable procedure can be found, the present task seems to be to modernize Chapter 2 A in the limited respects in which it is archaic and to add provisions of detail. The writer has no knowledge as to possible disuse and suggests informal inquiry might be made of title association representatives. As hereinafter indicated, it is the writer's view that no preferable procedure is available and, further, that in this project the Commission should not undertake a completely new approach to Chapter 2 A.

II

Scope of Proposed Revision

Since Chapter 2 A complements or "follows" California community property concepts, it may be thought that apparent gaps in recent legislation conferring equal management rights upon the spouses should be filled in this project or, at least, provisions added to Chapter 2 A that would clarify the statutory law in respect of areas of uncertainty, in the "incompetency" cases. It is the writer's recommendation this approach not be taken. To a degree, as will be noted, "equal management" concepts are involved in the present project. However, amendments to the community property laws themselves are a separate subject and should be dealt with in a separate study by the Commission or another entity, if it is thought that statutory change is needed. Thus, the following areas have been briefly noted in the writer's somewhat cursory review. Should there be statutory provisions to cover the situation where one spouse disappears with whereabouts unknown or there is a permanent abandonment of one spouse by the other spouse or a permanent separation, as well as in case of incompetency (see Tex. Fam. Code, Tit. 1, Ch. 5, §§ 5.25, 5.85)? Should management rights vary according to whether community property is held in the name of one spouse or in the names of both spouses with designations of "or" or "and" (see N. Mex. Stats. Ann. § 57-4 A-8, 1975 pocket part-personal property)? Should there be specific provisions as to acquisition, encumbrance

and disposition of assets of a business, including real property and good will, jointly managed by the spouses (see Rev. Code of Wash., 26.16.030)? Should the "good faith" standard imposed upon a spouse in dealing with community personal property be amplified (see Weinberg v. Weinberg, 67 Cal. 2d 557, 563 (1967), Williams v. Williams, 14 Cal.App. 3d 560 (1971), Grant, How Much Of A Partnership Is A Marriage, 23 Hastings Law Jnl., 249, 252-253 (1971))?

III

Policy Considerations In Proposed Revision

Preliminarily, the draft of the Commission staff, first, reorganizes the matter in Chapter 2 A for greater clarity, and, second, makes changes to conform to "equal management" amendments.

The draft, in tentative form, submitted by the writer with this memorandum has more provisions, requiring, in the writer's opinion, the use of a "part" (and therefore different "placement"). As to the latter, it may be questioned whether placement in the staff draft under Part 6 (Transactions Not Requiring Guardianship Or Conservatorship) was the ideal placement.

The major policy considerations in the staff draft approach and the writer's draft approach appear to be the following:

Question 1. Should there be a separate treatment of community personal property?

Question 2. Should there be an available procedure to be invoked on an optional basis whereby a competent spouse, conservator or an incompetent spouse may submit personal property transactions to the court under Chapter 2 A?

Question 3. Should the "right to control or manage" personal property of a competent spouse be subject to the right of the competent spouse to consent to control and management in the estate of the incompetent spouse?

Question 4. Should changes be made to reflect the 1976 amendment of Section 1238 and the 1976 repeal of Section 1239 of the Civil Code, permitting either spouse rather than the wife to declare a homestead on the separate property of the other spouse?

Question 5. Should Chapter 2 A be revised to reflect the new trend in California to permit an incompetent to have limited legal capacity to the extent ordered by the court?

Question 6. Should Chapter 2 A be revised to permit a judicial application for and determination of "legal capacity" or of sufficient legal capacity to enter into or consent to the transaction, with the result the proceeding may end in an affirmative judicial declaration and no "authorization" for the transaction?

Question 7. Should homestead property which is community property be classified as community real property, in contrast with present Chapter 2 A which treats it as homestead property?

Question 8. Is the staff draft unduly succinct in contrast with the longer provisions of the writer's draft for the

so called "alternative procedures."

To keep this memorandum within reasonable limits, only limited comment will be made as to the above 8 questions. However, further comment will be made if and as sections of the writer's draft are considered.

Questions 1 and 2. Separate treatment of community personal property; optional procedure to submit transactions to court where joinder is not required (furnishings, gifts, etc.,).

First, for clarity, it is believed community personal property should be separately treated, rather than merely referring to Civil Code requirements for joinder. Second, the question of substantive policy may be stated: Should there be some curb in addition to the "good faith" provisions of Section 5125 of the Civil Code on the power of the competent spouse when joinder is not required in personal property transactions? The principle may be argued both ways. Against such a new curb, it may be argued that legislative policy and case law have recognized the husband's power of management, despite the incompetency of the wife(Pro. Code §§ 1435.1, 1435.17. *Schector v. Superior Court*, 49 Cal. 2d 314 (1957)). It is also possible to draw upon law in the State of Washington (from which California's equal management provisions are said to have been drawn). Earlier Washington cases had declared the rule of "emergency powers" of a competent spouse when the other spouse became incompetent, absconded or was away for a long period of time and joinder was

required(see Cross, Equality For Spouses In Washington Community Property Law, 48 Wash. Law Rev.537, 544 (1972)). In favor of a moderate curb, it may be said that incompetency deprives one spouse of the right to make his or her views known to the other spouse in the management of the community personal property and to take independent action (cf. Estate of Risso, 156 Cal.App. 2d 412 (1958), referring to the protection of Chapter 2 A in the case of real property managed by a competent husband). Moreover, departure from the past rules,declared as to a husband competent and a wife incompetent, seems justified in view of the "equal management" changes. The curb suggested is a light one, simply that if the conservator of the estate of the incompetent spouse or the incompetent spouse brings a proceeding as to community personal property,as would be permitted under revised Chapter 2 A, the management and control powers of the competent spouse would be suspended and subject to court edict.

The writer favors this procedure, at least to the extent it should be tentatively adopted and circulated.

Apart from the above substantive question, Chapter 2 A should be clarified as to when its procedure is mandatory, in the case of community personal property(cf. Flege v. Garvey, 47 Cal. 371 (1874), involving real property).

Question 3-Delegation of management to conservator. Both the staff draft and the writer's draft permit either competent spouse to consent to administration in the estate of the incompetent spouse, subject to joinder requirements. Such a procedure

may afford a solution in cases where the competent spouse is inexperienced in business or in the affairs of a business. Present law permits the delegation only by a competent wife where there is a conservator of the husband's estate (Prob. Code § 1435.17).

Question 4- homestead on separate property of a spouse. Both drafts remove the present requirement that if the homestead was on the husband's separate property, the consent of the wife to management by the husband's conservator was necessary. No similar requirement exists under present law if the homestead was on the wife's separate property. The only possible question in equalizing the two situations arises in connection with a homestead on the husband's separate property declared prior to the 1976 amendments. Though no research has been done, it is believed that removing the requirement for the wife's consent to management of the husband separate estate (subject to homestead) does not deprive the wife of any vested right. The wife's joinder is required in any encumbrance or disposition (Civ. Code § 1242).

Question 5-revision to include provisions as to limited legal capacity. Such provisions are included in the writer's draft. It is the writer's belief that they must eventually be dealt with and that appropriate wording should be tentatively adopted and circulated. Such provisions complicate the statute and may be de minimis and therefore subject to omission on that ground. If it appears, for example, that California courts will only grant very limited legal capacity (as distinguished from "full legal capacity"), or if Chapter 2 A is amended to put in narrow limits,

the writer would favor deletion from even the tentative draft.

Question 6-new provisions for judgment of "legal capacity" in the single transaction procedure of Chapter 2 A. The staff draft does not contain similar provisions. There was no reason, in the writer's belief, for non inclusion of such provisions in Chapter 2 A and predecessor statutes, except the concept of the statute as an "authorization" statute. If distinction between guardians and conservators is to be largely removed, under the proposed legislation, the proceeding might well result in a finding of legal capacity, absent any previous adjudication on the point. However, the concept is new. It is suggested that views of title association representatives be sought as to the workability of the proposed provisions.

Question 7-treatment of homestead property as community property. Both drafts take this approach in contrast with present law which deals with community property subject to a homestead as homestead property (Pro. C.S 1435.16). One effect of the proposed change may be noted. California's homestead laws do not provide for management or control of such property. The contrary is true as to community real property (Civ.Code § 5127). Also, a lease for up to one year is permitted without joinder in the case of community real property (ibid.). On principle, it seems community homestead property should be treated the same as other community real property, subject to the special requirements as to homestead property. Again, the views of title association representatives would be relevant.

Question 8- differences in drafting "alternative procedures." Apart from the separate treatment suggested above of community personal property, the difference between the two drafts appears to be succinctness versus length, i. e., a matter of style. The writer prefers the longer version. The subject matter of Chapter 2, even with reorganization, is not easily followed by the uninitiated; cross references in a "master section" though adequate seem less desirable.

The foregoing list is not all-inclusive of policy considerations. It may be noted, for example, that the writer's draft includes, tentatively, provisions modeled upon, but not identical with, the "court advisement" provisions upon petitions for appointment of conservators, and provisions taking away the representation of the alleged incompetent by the public guardian or public administrator where incompetency without full legal capacity is alleged. Comment will be made on these and other policy issues if and as the writer's draft is considered.

IV

Proposal Being Considered By State Bar Subcommittee.

In 1976-1977 a subcommittee of the (then) State Bar Committee on Probate and Trust Law reviewed Chapter 2 A, to make changes to reflect recent "equal management" amendments and, as later determined, to draft a new chapter. Its efforts were not complete when the Commission's project came to attention. However, a draft as then developed and copies of correspondence

were forwarded to the Commission. The views of the writer have been requested.

In brief, the subcommittee draft appears to do two things:

First, it would substitute for the present Chapter 2 A with its "single transaction" authorization procedure and the "alternative procedures" where one or both of the spouses has a fiduciary, a comparatively short chapter. Second, both as to community real and personal property, and as to homestead property, it would place the fiduciary of an incompetent spouse in the same legal position that the incompetent spouse would have had ("substituted spouse" concept); mainly through a "petition for instructions" procedure if the competent spouse and the fiduciary cannot agree upon a transaction as to management, control or disposition of community property, or as to a matter involving homestead property, the superior court would make the decision; the fiduciary could obtain authority for a transaction by petition in the incompetent's estate with or without notice, as the court required. Where there were fiduciaries for both spouses, the procedure would apply. If there was no fiduciary for an incompetent spouse, the competent spouse or the fiduciary for an incompetent spouse could file a "petition for instructions." See Draft SS 1435.4(A), (B), 1435.5(A), (B), 1435.6.

Though the writer has not had the benefit of discussion with a subcommittee member, it is believed

First, because of incompleteness and other reasons, the subcommittee proposal would not be an adequate substitute for Chapter 2 A.

Second, the idea of "joint management" where there is a competent spouse and a fiduciary for the incompetent spouse has potential when considered for addition to the so called "alternative procedures," i. e., such an arrangement would be on a consensual basis, the fiduciary being given authority to act in the arrangement by the court appointing the fiduciary.

Third, the subcommittee proposal calls attention to the danger of requiring too much "notice" in the administration of conservatorships, i. e., the subcommittee procedure is extremely streamlined in an effort to provide the desired protection without requiring frequent court applications upon notice to the spouse of the incompetent and the incompetent.

In essence, the writer finds a limited scope for the subcommittee proposal and one which requires further study, to work out procedural details under "Second" above and test the workability of even further alternative procedures in Chapter 2 A.

Viewed as a substitute for Chapter 2 A, the proposal is believed to be subject to these defects:

First, the proposal is extremely incomplete. When a "petition for instructions" is filed by a competent spouse

and the other spouse has not previously been adjudged to be incompetent, there is an absence of provisions to safeguard the interests of the alleged incompetent spouse. This was pointed out by the assistant supervising probate attorney, Los Angeles superior court. Present provisions not carried forward include provisions for a later petition by a spouse for restoration to legal capacity, the "alternative procedures" which presently permit a competent spouse to consent to administration in a fiduciary estate, provisions for purchase of a new home, if the homestead property is disposed of, provisions which designate the specific estates in which a petition for instructions is to be filed, and provisions which expressly state the liability of a conservator when obligations are incurred under Chapter 2 A.

Second, the basic concept appears that of "joint management" when one spouse is incompetent. Joint management is a different concept from "equal management" and the approach taken in this and other states that the competent spouse may act in case of the incompetency of the other spouse, with court authority and, under some views, without court authority in most matters. Thus, California law requires "joinder" in encumbrances or dispositions of real property and, as to personal property, where furniture and other items are involved or personal property is to be given away. Community personal property transactions are many and varied. If either "agreement" or a petition for instruc-

is to be required for personal property transactions, a large potential for increased court business is created. In turn, In addition to the potential for increased burden upon the superior courts, the time and expense involved in going to court where there is no "agreement" are to be considered. Again, in the interests of streamlining, the proposal appears to contemplate ex parte orders authorizing the fiduciary to act, presumably to carry out an "agreement." Thus, the imprimatur of court authorization is placed upon a transaction without an adequate hearing. Finally, it is suggested that in requiring what may be called "joint management" between a competent spouse and the fiduciary of the other spouse, the incompetent spouse appears to be receiving greater protection, particularly as to dealings in community personal property, than he or she would have had if competent.

It is to be noted that the subcommittee originally directed its attention to changing Chapter 2 A to conform to the "equal management" amendments (a change deemed necessary by all). These earlier amendments appear to be consistent generally with the staff draft and the writer's draft, although a complete check has not been made. One subcommittee text permitted the competent spouse to consent to the inclusion of "one half" of the community property in the fiduciary estate of the other spouse. Present law refers to "community property." The purpose of the subcommittee's limitation is not clear.

Proposed Revision (In Tentative Form)

There is submitted with this memorandum a draft text of Chapter 2 A with draft comments (which include draft comments previously prepared by the staff in some instances).

The principal respects in which the writer's draft differs from the staff draft are indicated in the discussion under III (Policy Considerations In Proposed Revision), *supra*, under Questions 1,2,4,6 and 8.

Perhaps the most important policy issues are those involving the proposed separate treatment of community personal property, provisions stating the procedures are mandatory as to real property and optional and cumulative as to community personal property, and the provisions restricting the authority of a competent spouse as to a transaction brought before the court by a "single transaction" petition under Chapter 2 A.

Respectfully submitted,

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Consultant

Jan. 1978, G. E. Draft

PART 7. COMMUNITY OR HOMESTEAD PROPERTY
OF INCOMPETENT SPOUSE

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

§ 3600. Definitions

3600. As used in this part

- (a) "Community property" includes quasi-community property.
- (b) "Competent spouse" means a spouse having full legal capacity.
- (c) "Full legal capacity" means legal capacity without limitation.
- (d) "Homestead property" does not include property which is subject only to a married person's separate homestead.
- (e) "Incompetent" means a legal, and not a medical disability and is measured by functional inabilities; it means or refers to a person who is substantially unable to manage his or her own financial resources; "substantial inability" shall not be evidenced solely by isolated instances of negligence or improvidence.
- (f) "Real property" includes an estate, right, title, interest, or claim in or to real property, and any interest therein by way of lien or encumbrance.
- (g) "Separately managed community personal property" means the business or business interest described in subdivision (d) of Section 5125 of the Civil Code but does not include real property.
- (h) "Trust property" means homestead or community property in a revocable trust of the spouses described or referred to in Section 5113.5 of the Civil Code.

Comment. Subdivisions (a), (b), and (c) are added for clarity. Subdivision (d) excludes a married person's separate homestead (Civil Code §§ 1300-1304) which involves property rights of one spouse only. Subdivision (e) continues provisions of former Section 1435.2 relevant to conservatorship of the estate. Subdivision (f) continues the substance of provisions in former Section 1435.1. Subdivisions (g) and (h) are added for clarity and reflect special types of community property described in the cited Civil Code sections.

12750

§ 3601. Mandatory or permissive nature of procedures

3601. Except as otherwise specifically provided by statute, whenever one spouse is incompetent and the act, joinder, concurrence, or

consent of such spouse would be required by Section 1242, 1243, 5125, 5127 of the Civil Code or other statute in a transaction involving homestead property or community property if such spouse were competent, and there is no conservator of the estate of such spouse, the provisions of this part are mandatory. As to other transactions, the provisions of this part are permissive and are in addition to any and all other remedies.

Comment. Section 3601 is new. Its purpose is to make clear that, where joint action of the spouses is required, the procedure of Chapter 2A is to be followed and that, in other transactions, Chapter 2A provides a permissible and nonexclusive remedy (cf. *Flege v. Garvey*, 37 Cal. 371 (1874)). For example, as to real property and certain transactions in community personal property (see Civil Code § 5125(b)) joinder is normally required and the procedure of Chapter 2A is exclusive. In the exercise of management and disposition powers of community personal property where joinder is not required (see Sections 3650-3652, infra) the competent spouse may wish to bring a proceeding under Chapter 2A or to take advantage of provisions permitting all or part of community property to be included in and dealt with as part of the estate of the incompetent spouse (see Sections 4100, 4150, infra). The conservator of the estate of an incompetent spouse or, as permitted by Section 3750, infra, the incompetent spouse, may wish to bring a special proceeding for court authorization or other action as to a particular transaction. In nonjoinder transactions, recourse to the statutory procedure is neither required nor exclusive of other remedies which may exist under the law generally.

12751

§ 3602. Transactions which may be authorized

3602. (a) Notwithstanding Section 1242, 1243, 5125, or 5127 of the Civil Code, where property is owned by husband and wife as community property, or as community or separate property subject to a homestead, and one or both of the spouses is incompetent, the property may be sold, conveyed, transferred, encumbered, and otherwise disposed of or dealt with as provided in this part.

(b) The transactions which may be authorized and consummated as provided in this part include, but are not limited to:

(1) Sale, conveyance, assignment, transfer, exchange, conveyance pursuant to any 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.

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

(3) Dedication or conveyance of the property, with or without consideration, for any purpose, to the United States of America or any agency or instrumentality thereof or to the state or to any county or municipal corporation.

(4) Dedication or conveyance of an easement in or over the property, with or without consideration, to the United States of America or any agency or instrumentality thereof, or to the state or any county or municipal corporation or any district or to any person, firm, association, or public or private corporation.

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

Comment. Section 3602 continues relevant provisions in former Section 1435.1, with the addition of (1) a reference to Civil Code § 5125, (ii) wording in subdivisions (3), (4), and (5) to make the section conform to provisions applicable to guardians in former Section 1515 which is continued in Section 2531, infra, (iii) "security interest" for "pledge" and (iv) provisions making the enumeration of specific matters nonexhaustive.

12752

CHAPTER 2. COMMUNITY PROPERTY-EFFECT OF INCOMPETENCY OF ONE SPOUSE

§ 3650. Right of management and disposition of competent spouse

3650. Except as otherwise provided by statute, if one spouse is incompetent and the other spouse is competent with full legal capacity, the competent spouse, acting in good faith, is entitled to manage, control, encumber, and otherwise dispose of community real and personal property, including separately managed community personal property, subject to

(a) The provisions of Sections 1242, 1243, 5125, and 5127 of the Civil Code or of other statute and of this part as to joinder, concurrence, or consent by or on behalf of the incompetent spouse in certain dealings or dispositions.

(b) The limitations upon the authority of the competent spouse set forth in Section 3651.

Comment. Sections 3650-3652 are new. They are based upon the principle that one spouse, if competent, should have the right of management, control, and disposition of community real and personal property when the other spouse becomes incompetent, subject to limitations. Provisions of former Sections 1435.1 and 1435.17 distinguishing between the incompetency of the husband and of the wife are inconsistent with recent "equal management" amendments to Civil Code Sections 5125 and 5127 and are not continued. Section 3650 preserves requirements for joinder which would exist if both spouses were competent and refers to other limitations set forth in Section 3651. The management and other authority of the competent spouse applies to a competent spouse who has full legal capacity. Reference to the competent spouse "acting in good faith" is taken from Civil Code Section 5125(e) and is extended to transactions involving community real property. There is no reason why the requirement should not apply, even though joinder is required in the case of most real property dispositions. Under Section 3650, the authority of the competent spouse extends to community personal property in the form of a business or business interest which was being operated or managed by the incompetent spouse (see Civil Code § 5125(d)). However, if community real property is used in the business, it is considered to be the same as other community real property.

12753

§ 3651. Particular exclusions

3651. The authority of the competent spouse set forth in Section 3650 does not extend to:

(a) A transaction which is the subject of a proceeding under Chapter 3 (commencing with Section 3700).

(b) Community property which, with the consent of the competent spouse, is included, and is subject to being dealt with or disposed of in the conservatorship estate of the incompetent spouse, as provided in Chapter 4 (commencing with Section 4000).

(c) A transaction as to which the incompetent spouse has sufficient legal capacity.

(d) Trust property unless the terms of the trust prohibit the trustee from acting because of the incompetency of a trustor-spouse.

Comment. Section 3651 sets forth limitations on the authority of the competent spouse, in addition to the joinder requirements as to real property and certain personal property transactions. The principal limitation is stated in subdivision (a). In effect, the authority of the competent spouse is suspended as to any transaction which is the subject of a special proceeding authorized by Chapter 3. The nature of the special proceeding is enlarged (see Sections 3700, 3701, 3750, 3751, 3800, 3853, and 3854, infra). The special proceeding may be brought by an incompetent spouse, even in the absence of action by his or her conservator, if one exists. One permissible purpose of the proceeding

is to obtain an affirmative judicial determination of legal capacity or of sufficient legal capacity for the proposed transaction. Existing provisions permitting a conservator to bring the special proceeding are retained. The expanded nature of the special proceeding will afford greater opportunity to bring proposed transactions before the court, particularly those involving community personal property. Subdivision (b) makes express what is implied, namely, that the authority of the competent spouse does not exist where such spouse expressly consents that community property or part thereof may be included in and dealt with as part of the conservatorship of the incompetent spouse (see Sections 4100, 4150, infra). Subdivision (c) excludes transactions as to which the incompetent spouse has sufficient legal capacity. This exception has particular application in the case of smaller transactions involving community personal property, though not limited to these cases. Subdivision (d) excludes community property held in a revocable trust described or referred to in Section 5113.5 of the Civil Code when the trustee is able to act.

12754

§ 3652. Effect of limitations upon third persons-community personal property

3652. Failure of the competent spouse to comply with one or more of the limitations stated in Section 3651 does not affect the validity of the action taken in the case of community personal property, or the title to any such property transferred to bona fide purchasers, as to third persons dealing in good faith with the competent spouse who changed their position in reliance upon the action or transfer without actual notice of the failure of the competent spouse to comply with such limitation.

Comment. Section 3652 includes necessary provisions for the protection of third persons who deal with the competent spouse in personal property transactions (cf. Prob. Code § 595.1).

12755

CHAPTER 3. PROCEEDING FOR AUTHORIZATION FOR PARTICULAR TRANSACTION OR FOR FINDING OF LEGAL CAPACITY

Article 1. General

§ 3700. Nature of proceeding

3700. When one or both of the spouses is incompetent, a proceeding may be maintained in the superior court for either or both of the following purposes:

(a) To obtain court authorization for and supervision of a proposed transaction which involves the encumbrance or other disposition of

homestead property or real or personal community property and for continuing court supervision over any proceeds received from the transaction.

(b) For a judicial finding that one or both of the incompetent spouses has sufficient legal capacity to enter into and consummate, or to join or concur in or consent to the transaction.

Comment. Section 3700 is new. Subdivision (a) states the general nature of the proceeding in the form in which it existed under former law. Subdivision (b) reflects the expanded nature of the proceeding.

405/433

§ 3701. Allegations in alternative

3701. (a) The petition may contain inconsistent allegations and may request relief in the alternative.

(b) The court is not limited by the request for relief in the petition and may grant either form of relief set forth in Section 3700. If appropriate, notice of additional issue shall be given and the proceeding continued.

Comment. Section 3701 implements the change made by subdivision (b) of Section 3700.

405/410

Article 2. Who May Petition-Venue

§ 3750. Petitioners

3750. Any of the following may maintain or join in the proceeding:

(a) A competent spouse having full legal capacity.

(b) The conservator of the estate of an incompetent spouse or the conservators of the estates of both spouses.

(c) An incompetent spouse, whether lacking in or having limited legal capacity.

(d) A trustee of trust property.

Comment. Under former Section 1435.3, a spouse not incompetent or the guardian (or conservator) of the estate of either incompetent spouse could bring the proceeding. In substance, Section 3750 continues these provisions, with the addition of provisions permitting an incompetent spouse and a trustee to do so.

§ 3751. Petitioning spouse incompetent-representation

3751. If an incompetent spouse, including a spouse having or claiming limited legal capacity, is a petitioner, the court may permit such spouse to appear without a representative or appoint a guardian ad litem or require the spouse to be represented by the conservator of the spouse's estate if one exists, as the circumstances may warrant.

Comment. As the facts will vary, Section 3751 leaves to the court the question of presentation of a petitioner who is incompetent.

§ 3752. Venue

3752. (a) If the proceeding affects real property (including therein any lien or encumbrance thereon), the petition shall be filed in the county in which the real property, or some part, is situated.

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

Comment. Section 3752 continues the substance of provisions of former Section 1435.4, with the addition of wording now included in Sections 2201 and 2202, supra.

Article 3. Petition-Notice of Hearing

§ 3800. Contents of petition

3800. The petition shall set forth:

(a) The name, age, and residence of both spouses.

(b) If one or both of the nonpetitioning spouses has been adjudged incompetent, the fact of such adjudication and its effect, if any, upon the spouse's legal capacity; otherwise, the facts alleged in support of the alleged incompetency and lack of legal capacity or in support of the alleged incompetency with limited legal capacity.

(c) If there is an existing conservator for either or both of the spouses, the name of the conservator, the county in which the conservatorship proceeding is pending, and the court number of the proceeding.

(d) If the proceeding is instituted by a spouse who has been adjudged incompetent or who is incompetent, but who alleges sufficient legal capacity to enter into and consummate the transaction or join or concur therein or consent thereto, facts relevant to such issue and, if available, the position of the conservator of the estate of such spouse on such issue.

(e) The names and addresses of the adult relatives of the nonpetitioning spouse, other than a spouse, so far as such names and addresses are known to the petitioner.

(f) Whether the property described in the petition is community property or homestead property, or both.

(g) The estimated value of the property.

(h) A sufficient description of the property which shall include a legal description of real property.

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

(j) If the petition seeks court authorization, facts, in addition to the incompetency of the nonpetitioning spouse or spouses, that show the order 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 of them may be legally obligated to support.

(3) To pay taxes, interest, or other encumbrances or charges for the protection and preservation of the homestead or the community property.

Comment. Section 3800 continues the substance of the relevant provisions of former Section 1435.5, with changes in subdivision (b) to refer to lack of legal capacity or limited legal capacity, instead of merely to incompetency and with the addition of a new paragraph (subdivision (d)) to reflect the expanded nature of the special procedure.

100/971

§ 3801. Citation to nonpetitioning spouse

3801. (a) Except as provided in subdivision (b), the clerk shall issue a citation to the nonpetitioning spouse or spouses, setting forth the time and place of the hearing. The citation and a copy of the petition shall be served upon such spouse or spouses, whether within or

without the state, as provided for service of summons in a civil action, other than by publication, at least 10 days before the hearing, if service is made within this state, otherwise three weeks before the hearing. If such service cannot be made with reasonable diligence, the citation may be served by publication in the manner provided in Section 415.50 of the Code of Civil Procedure. No copy of the petition need then be served.

(b) If a nonpetitioning spouse has a conservator of the estate, no citation to such spouse need be issued if

(1) The issues are such that the conservator can adequately represent the spouse.

(2) A copy of the notice of hearing and a copy of the petition are served upon the conservator pursuant to Section 415.10, 415.20, or 415.40 of the Code of Civil Procedure, or in such other manner as may be authorized by the court, at least 10 days before the hearing.

Comment. Section 3801 continues the substance of the relevant provisions of former Section 1435.5 except (i) wording is added that service may be made on the conservator of the estate of the incompetent (nonpetitioning) spouse only when the issues are such that the conservator can adequately represent the spouse, (ii) service may also be made on the conservator pursuant to Section 415.40 of the Code of Civil Procedure (person out of state).

406/180

§ 3802. Notice of hearing

3802. (a) The notice of hearing on the petition shall give the name or names of the incompetent persons, the name of the petitioner, and the purpose or purposes for which the order is sought, and shall in other respects conform to Section 1463.

(b) The petitioner shall cause a copy of the notice and of the petition to be mailed, first-class mail, postage prepaid, at least 10 days before the hearing, to the adult relatives named in the petition at the addresses therein set forth.

(c) If there is no conservator of the estate of a nonpetitioning spouse, or if the conservator cannot be served as provided in subdivision (b) of Section 3801, the petitioner shall cause a copy of the notice and petition to be served upon the public guardian or, if none, upon the public administrator of the county in which the petition was

filed, or upon the deputy or assistant of such officer, pursuant to Section 415.10, 415.20(a), or 415.30 of the Code of Civil Procedure, at least 10 days prior to the hearing.

Comment. Section 3802 continues the substance of the relevant provisions of former Section 1435.5 except that, instead of providing for service upon the public guardian or public administrator, in the contingency stated, Section 3802 requires service upon the public guardian. The public administrator is to be served only if there is no public guardian.

101/136

Article 4. Hearing and Order

§ 3850. Presence of spouse at hearing

3850. (a) If the petition alleges that a nonpetitioning spouse is incompetent and lacks legal capacity and such spouse has not previously been so adjudged in a proceeding under this part or, if previously so adjudged, has been restored to legal capacity as provided in this code, such spouse, if able to attend, shall be produced at the hearing.

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

Comment. Section 3850 continues the substance of the relevant provisions of former Section except (i) in subdivision (a) reference is added to lack of legal capacity, (ii) in subdivision (b), provision is made for an affidavit by a licensed healing practitioner and as to the effect of emotional or psychological instability (cf. former Section 1754, continued in Section 1826, supra).

§ 3851. Right to counsel and jury trial

3851. (a) In the circumstances set forth in subdivision (a) of Section 3850, the court, before commencement of the hearing on the merits, shall inform the spouse alleged to be incompetent and lacking in legal capacity or, if the spouse is not present, the person representing the spouse, of the legal standards by which such issue is determined and shall state that a determination adverse to the spouse may result in approval of the proposed transaction and will affect the spouse's right to contract, manage and control the spouse's property, that the spouse has the right to appear and oppose the petition, that the spouse has the right to legal counsel of the spouse's own choosing, including the right to have legal counsel appointed by the court, if the spouse is not satisfied with representation by the public guardian, public administrator, or a guardian ad litem, and that the spouse has the right to jury trial on the issue of alleged incompetency and lack of legal capacity. Upon request, the court shall appoint the public defender or, if none or if the public defender is unable to act, private counsel to represent the spouse.

(b) Except as provided in subdivision (a), a conservator who is served as provided in subdivision (b) of Section 3801, or a public guardian or public administrator who is served as provided in subdivision (c) of Section 3802 shall appear at the hearing and represent the interests of such spouse.

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

Comment. Subdivision (a) is new. It is directed to proceedings in which the alleged incompetent spouse lacks legal capacity and has not previously been so adjudged, or, if so adjudged, has later been restored to legal capacity. In this situation, it is made the duty of the court to advise the alleged incompetent or, in his or her absence, the representative who appears on his or her behalf, of various matters and, upon request to appoint the public defender to represent the alleged incompetent or, if the public defender is unable to act, private counsel. Subdivision (a) is adapted from, but is not identical with, provisions relating to the information to be contained in a citation to a proposed conservatee under former Section 1754 which is continued in Section 1824, supra. Subdivision (b) continues the substance of relevant provisions of former Section 1435.7, except for the addition of provisions

mentioned above as to representation by the public defender or appointed private counsel. Subdivision (c) continues the relevant provisions of former Section 1435.7, except that the reference to representation by the State Director of Mental health or the State Director of Developmental Services has been omitted.

404/301

§ 3852. Compensation of representatives and counsel

3852. 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 or court-appointed counsel, the public guardian, public administrator, or guardian ad litem or by counsel for such persons.

Comment. Section 3851 continues the substance of the relevant provisions of former Section 1435.7, with the addition of provisions in case of representation by privately engaged counsel, court-appointed counsel, or the public defender. Section 3852 also provides expressly for compensation to counsel for the public guardian or public administrator. Former Section 1435.7 was unclear on this point.

32275

§ 3853. Order-issue of legal capacity

3853. (a) If it appears that the property is homestead or community property and that the petitioning spouse or the nonpetitioning spouse, as the case may be, has legal capacity sufficient to enter into and consummate the proposed transaction or to give any required consent or concurrence or to make any required joinder, the court shall so adjudge and take no action upon allegations, if any, in the petition seeking court authorization for the transaction.

(b) When final, an order finding sufficient legal capacity as provided in subdivision (a) is binding upon the respective spouses, their representatives, and upon all persons claiming by or through the respective spouses.

Comment. Section 3853 is new and reflects the expanded nature of the special proceeding.

32276

§ 3854. Order-other cases

3854. (a) In cases other than those described in subdivision (a) of Section 3853, if it appears to the court that the property is homestead or community property of the spouses, and that one or both of the

spouses is then incompetent or has been so found under this part and has not been restored to legal capacity, the court shall so adjudge.

(b) If it further appears to the court that the petition for authorization for the transaction should be granted, the court may then so order and may authorize the petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order.

Comment. Section 3854 continues the substance of former Section 1435.8.

32277

§ 3855. Transaction not consummated-further proceedings

3855. (a) If any party to the transaction other than petitioner neglects or refuses to consummate a transaction which has been authorized by the court under this chapter, the court may vacate the order authorizing the transaction after such notice to the parties to the transaction as the court on application of the petitioner shall direct.

(b) If the original order provided for 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 to the advantage, benefit, or best interests of the spouses or their estates. The supplemental petition and notice of hearing shall be served and mailed as provided in Article 3 (commencing with Section 3800) except that no further citation shall be issued and, except as the court may otherwise direct, a copy of the supplemental petition and notice of hearing shall be served upon the persons who have appeared as representatives of one or both of the nonpetitioning spouses or upon counsel of record for such persons. If it appears to the court that such other sale or encumbrance is to the advantage, benefit, or best interests of the spouses and that the supplemental petition 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 3855 continues the substance of former Section 1435.13, except that wording as to the service of copies of the supplemental petition has been changed to recognize that the incompetent spouse has been represented in the proceeding and that service upon such representative or counsel should be sufficient. However, the court may order otherwise.

Article 5. Bond§ 3900. Requirement for bond

3900. Unless the court for good cause dispenses with a bond, the court shall require the petitioner to give a bond conditioned on the duty of the petitioner to account for and apply the proceeds of the transaction to be received by the petitioner only as the court may by its original or any subsequent order direct.

Comment. Sections 3900-3902 continue the substance of former Section 1435.9, with the addition of provisions (enacted after revision of Chapter 2A in 1959) which permit deposits in a control account (Section 2328) or the filing of a "cash bond" (Section 1232).

§ 3901. Sureties-amount of bond

3901. (a) Unless given by an authorized surety company, the bond shall have two or more individual sureties approved by the court.

(b) Unless the court for good cause determines that it may be for a lesser amount, the bond shall be in an amount not less than the following:

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

(2) If given by individual sureties, twice the amount determinable by the court under subdivision (a).

§ 3902. Application of certain provisions

3902. The provisions of Sections 2328, 2330, 2332, 2335, 2336, and 2337 shall be applicable, as nearly as may be.

Article 6. Consummation and Effect of Transaction§ 3950. Execution, delivery, and recording of documents

3950. (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 land affected by the order or upon which there is a lien or encumbrance affected by the order.

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

Comment. Subdivision (a) continues the substance of relevant provisions of former Section 1435.10. Subdivision (c) continues the substance of relevant provisions of former Section 1435.12.

32282

§ 3951. Validity of conveyance or other disposition

3951. Any 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 was the sole and absolute property of the person making it.

Comment. Section 3951 continues the relevant provisions of former Section 1435.10.

32283

§ 3952. Liability of conservator

3952. Notes, encumbrances, security interests, mortgages, leases, or deeds of trust, executed as provided in this chapter by a petitioning conservator as such, 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 been competent and joined in the execution.

Comment. Section 3952 continues the relevant provisions of former Section 1435.11.

§ 3953. Character of proceeds and new property

3953. (a) The proceeds, rents, issues, and profits of community property dealt with or disposed of under the provisions of this chapter and any property taken in exchange therefor or acquired with such proceeds, is community property.

(b) The proceeds of homestead property sold under the provisions of this chapter, and any property taken in exchange for homestead property under the provisions of this chapter, or acquired with such proceeds, shall enjoy the exemptions prescribed in Sections 1265 and 1265a of the Civil Code, provided that in case of property so taken or acquired the petitioner with leave of court makes the declaration required by Section 1265a of the Civil Code.

Comment. Subdivision (a) and subdivision (b) continue the substance of relevant provisions of former Section 1535.12, except that the words "with court approval" which appeared in connection with new property acquired after disposition of homestead property have been omitted. There was no similar wording in comparable sections (see former Section 1413.12 (community property) and former Section 1435.16 (homestead property)).

10014

§ 3954. Retention of jurisdiction to restore capacity

3954. Notwithstanding an adjudication of incompetency without legal capacity or with limited legal capacity, the court has jurisdiction to hear and determine any petition for restoration of full legal capacity as hereinafter provided.

Comment. Sections 3954-3959 continue the substance of former Section 1435.14 with the addition of provisions extending the sections to a spouse who has been adjudged to have limited legal capacity and who desires restoration to full legal capacity.

10015

§ 3955. Petition for restoration to capacity

3955. (a) Any person who has been found to be incompetent in a proceeding under this chapter and is not then the subject of a pending proceeding under Part 3 (commencing with Section 1800), or any relative or friend of such person, may at any time apply by petition to have the fact of such person's restoration to full legal capacity judicially determined.

(b) The petition shall be filed in the proceeding brought under this chapter and shall allege that the person is then competent and has full legal capacity.

10016

§ 3956. Rules for proceeding for restoration to capacity

3956. Proceedings on the petition shall be as prescribed in Chapter 3 (commencing with Section 1860 of Part 3).

10017

§ 3957. Acts done under prior order

3957. Any adjudication of restoration to full legal capacity shall not prejudice or affect anything theretofore lawfully done pursuant to and in accordance with any prior order made under this chapter.

10018

§ 3958. Petition for restoration to limited legal capacity

3958. A proceeding for restoration to limited legal capacity may be brought in accordance with the procedure of this article, as nearly as it is applicable.

32285

CHAPTER 4. ALTERNATIVE PROCEDURE-EXISTING CONSERVATORSHIP

Article 1. Definition and General Provisions

§ 4000. Definition

4000. As used in this chapter, "competent spouse" means a spouse having full legal capacity.

Comment. The provisions of Chapter 4, as to a competent spouse, are appropriate only for a spouse having full legal capacity.

32286

§ 4001. Alternative nature of procedure

4001. (a) The procedures of this chapter are alternative to the procedure provided in Chapter 3 (commencing with Section 3650).

(b) Notwithstanding subdivision (a), when the necessary agreements, joinders, concurrences, or consents for a particular transaction have not been obtained as a result of a proceeding under this chapter or

otherwise, a competent spouse or either or both of the conservators of the estate or estates may maintain a proceeding under such Chapter 3 with respect to such particular transaction.

Comment. Subdivision (a) is based on provisions stating the alternative nature of the procedure in former Section 1435.15. Subdivision (b) makes explicit the right of a competent spouse or a conservator to bring an impasse as to a transaction before the court by a special proceeding under Chapter 2, notwithstanding Chapter 4 generally is alternative to Chapter 3.

32287

§ 4002. Power of court to make certain determinations

4002. In a proceeding pursuant to this chapter, the court having jurisdiction of the conservatorship estate is empowered to determine

(a) The validity of the homestead and whether the property subject to the homestead is the separate property of one or both of the spouses.

(b) Whether specific property is in fact community property or the separate property of one or both of the spouses.

Comment. Section 4002 continues the relevant provisions of former Section 1435.15. As to the authority of the court to make the determinations specified in subdivision (b) in the absence of statute, see *Stratton v. Superior Court*, 87 Cal. App.2d 809 (1948).

32288

§ 4003. Power of court to authorize transaction or consents or joinders

4003. After making any determinations required by Section 4002, the court may authorize the conservator to deal with and dispose of such homestead or community property or consent to, or join in, or concur such dealing therewith or disposition thereof, in the manner provided in this chapter.

Comment. Section 4003 continues the substance of the relevant provisions in former Section 1435.15.

32289

Article 2. Homestead Property

§ 4050. Homestead on separate property of spouse

4050. Where the homestead property is the separate property of one spouse

(a) Such spouse, being competent, may deal with and dispose of such property, but the conservator of the estate of the other spouse must

join therein, being first thereunto duly authorized by an order of court under Section 2504.

(b) If a conservator has been appointed for such spouse, such property may be included in and dealt with and disposed of as part of the conservatorship estate of such spouse, but the other spouse, being competent, must join in any such dealing therewith or disposition thereof or, if a conservator has been appointed for the estate of the other spouse, such conservator must join in any such dealing therewith or disposition thereof, being first thereunto duly authorized by an order of court under Section 2504.

Comment. Section 4050 is new. It treats a homestead on the separate property of either spouse equally, for purposes of Chapter 4, and follows the pattern of former Section 1435.16, subdivision (b), relating to a homestead on the separate property of the wife. Under former law, a homestead on the separate property of the husband was treated in the same manner as community property (see former Section 1435.16, subdivision (a)). In 1976, the Legislature changed the homestead laws by eliminating the requirement that the wife consent to the declaration of a homestead on her separate property. See Cal. Stats. 1976, Ch. 463, amending Civil Code § 1238 and repealing Civil Code § 1239. In view of this policy declaration, it seems proper to treat the spouses equally, for purposes of Chapter 4. Since real property is involved, the joinder of the other spouse is necessary for the disposition or encumbrance of the property. As to a particular form of separate property, see Section 4051, infra.

32290

§ 4051. Homestead on separate property of both spouses

4051. Where the homestead property is the separate property of both spouses as joint tenants, tenants in common, or otherwise, and there are conservators of the estates of both spouses, the respective interests of each may be included in and dealt with or disposed of as a part of their respective estates but both conservators must concur therein under appropriate orders of court.

Comment. Section 4051 continues the relevant provisions of former Section 1435.16.

32291

§ 4052. Homestead on community property

4052. Where the homestead is on community property, the provisions of Article 3 (commencing with Section 4100) govern.

Comment. This is a technical section.

§ 4053. Investment in another home

4053. The court, on petition of the conservator of either estate or of the competent spouse, with such notice to the other as the court shall prescribe, may authorize the investment of the proceeds in another home for the spouses, to be held by the same tenure as the homestead property sold or exchanged.

Comment. Section 4053 continues the relevant provisions of former Section 1435.16.

Article 3. Community Real Property

§ 4100. Incompetency of one or both spouses

4100. (a) As used in this section, community real property includes (i) homestead property, and (ii) interests in real property consisting of liens and encumbrances on real property.

(b) If a conservator has been appointed for the estate of one spouse, the other spouse, being competent, may deal with and dispose of such community real property, but the conservator of the estate of the incompetent spouse must join therein, being first duly authorized by an order of court under Section 2504, or, alternatively, all or part of such property may, with the written consent of the competent spouse, be included in and dealt with or disposed of as part of the estate of the incompetent spouse, but the competent spouse must join in any such dealing with or disposition of such property.

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

Comment. Subdivision (a) of Section 4100 is new, as to provisions in subparagraph (i). Former Section 1435.16 classified community property subject to a homestead as homestead property and provided for management by the husband, if competent, or, with the consent of a competent wife, in the estate of the incompetent husband. No comparable provision was made for the converse situation. The concept no longer expresses the policy of the state. Community property subject to a homestead therefore seems more appropriately treated as community real property generally. Subdivision (b) reflects the "equal management"

amendments (see Civil Code § 5127), rather than the earlier concept of the husband's management powers incorporated in former Section 1435.17. Also, if the competent spouse consents to administration as part of the estate of the other spouse, the consent may be as to all or part of the community real property. The former statute was ambiguous in this respect. Subdivision (c) continues relevant provisions of former Section 1435.17.

32294

Article 4. Community Personal Property

§ 4150. Incompetency of one or both spouses

4150. (a) As used in this section, community personal property does not include interests in real property consisting of liens or encumbrances.

(b) If a conservator has been appointed for the estate of one spouse, the other spouse, being competent, may deal with and dispose of community personal property subject to the following:

(1) When the consent of both spouses is required by Section 5125 of the Civil Code or other statute, the conservator of the estate of the incompetent spouse must give such consent, being first duly authorized by an order of court under Section 2504.

(2) The limitations upon the authority of the competent spouse provided in Section 3651.

(c) Alternatively, all or part of such property may, with the written consent of the competent spouse, be included in and dealt with or disposed of as part of the estate of the incompetent spouse, but the competent spouse must give the consent described in paragraph (1) of subdivision (b), above.

(d) Where there are conservators of the respective estates of both spouses, an undivided interest in such property may be included in and dealt with and disposed of as a part of the conservatorship estate of each spouse, but both conservators must concur under appropriate orders of court in any transaction requiring the consent of both spouses.

Comment. Subdivisions (a) and (b) repeat prior provisions for clarity. Subdivision (c) replaces the concept of former Section 1435.1 and former Section 1435.17 that the husband was the manager, and had the sole right to dispose of community personal property. See also Comments to subdivision (b) of Section 4100. Subdivision (d) continues relevant provisions of former Section 1435.17.

Article 5. Preservation of Property Interests

§ 4200. Property interests and homestead rights

4200. (a) Proceedings under this chapter shall not alter the character of the property or the proceeds, rents, issues, or profits thereof, or the rights of the respective spouse therein save as herein expressly provided with respect to the procedure for the management and disposition thereof.

(b) The provisions of subdivisions (a) and (b) of Section 3953 apply to transactions under this chapter.

Comment. Section 4200 is based on relevant provisions of former Section 1435.16 (homestead property) and Section 1435.17 (community property).

§ 4201. Investment in another home

4201. When homestead on community property is sold, or exchanged, the provisions of Section 4053 apply.

Comment. Section 4201 continues the substance of the relevant provisions of former Section 1435.16.