

Second Supplement to Memorandum 78-39

Subject: Study F-30.300 - Guardianship-Conservatorship Revision
(Management or Disposition of Community or Homestead Property Where Spouse Lacks Legal Capacity)

BACKGROUND

The Supplemental Materials (June 1978) include a draft (green pages) of Part 6 relating to management or disposition of community or homestead property where one or both spouses lacks or is believed to lack legal capacity. This material has been substantially redrafted and reorganized from the material considered at the last meeting. This redrafting was necessary in part because of the Commission's decision not to permit a special proceeding under Chapter 3 to contest a proposed disposition of community personal property in a case where joinder or consent of both spouses is not required for the disposition. The Commission decided to leave this area to the same body of law that applies when both spouses have legal capacity and one disposes of community personal property.

The redraft of Chapter 6 is the result of a substantially full-time effort by the Executive Secretary and Assistant Executive Secretary during much of the period since the last meeting. The drafting of this material proved to be the most complex and difficult job we have attempted during the period of time we have served on the staff of the Commission.

GENERAL EXPLANATION OF DRAFT

Where one or both spouses lacks legal capacity (or has a conservator), two questions may arise:

First, who has the management and control of the community real and personal property (including the right to dispose of the community personal property that under the Civil Code can be disposed of without the consent of the other spouse)?

Second, what requirements are to be substituted for the Civil Code requirements of joinder or consent for the disposition of community real

property, homestead property, and certain community personal property? We elected to treat these problems separately in the revised draft.

Management and Control

Civil Code provisions. Section 5125 of the Civil Code provides that "either spouse has the management and control of the community personal property" and Section 5127 of the Civil Code provides that "either spouse has the management and control of community real property." (We deal with the problem of disposition later in our discussion in this supplement.

Proposed Section 3050. What is the effect, if any, on the right of management and control if a conservator is appointed for one of the spouses, if one of the spouses lacks legal capacity but does not have a conservator, if both spouses have conservators, and so on? One section of the proposed legislation--Section 3050--covers this matter in a comprehensive way. (Section 3050 does not deal with the problem of joinder or consent for disposition--note the references in Section 3050 to Section 3070 which covers joinder or consent.)

Note that subdivision (a) of Section 3050 gives to the spouse having legal capacity and no conservator the sole right of management and control if the other spouse has a conservator even though there is no court order determining that the spouse having the conservator lacks legal capacity. This rule greatly simplifies the drafting because it reduces the number of variables that must be dealt with in the section. The rule also eliminates any uncertainty by making clear the conservator has no rights of management and control. Note, however, that under subdivision (b), the spouse having legal capacity can consent that all or part of the community property be included as a part of the conservatorship estate. The combination of subdivisions (a) and (b) permits the spouse having legal capacity to work out any desired arrangement with the conservator of the other spouse, thus providing needed flexibility.

Where both spouses have conservators (whether or not there has been a determination that either or both of the spouses lack legal capacity), the management and control of the community property is governed by subdivisions (c) and (d) (half in each conservatorship unless otherwise agreed by the conservators with court approval). Here again, the proposed section permits the two conservators to work out any suitable

arrangement for the management and control of the community property as a part of either or both of the conservatorship estates.

Proposed Section 3052. Section 3052 is a comparable provision relating to separate property subject to a homestead that is owned by both spouses as joint tenants, tenants in common, or otherwise. (A community property homestead is treated, for management and control purposes, like other community property.)

Disposition

Civil Code provisions. Section 5125 of the Civil Code provides that either spouse has the same power of disposition of community personal property, other than testamentary, as the spouse has of the separate property of the spouse but requires written consent of the other spouse to:

- (1) "make a gift of community personal property";
- (2) "dispose of community personal property without a valuable consideration"; or
- (3) "sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property."

Civil Code Section 5127 requires that "both spouses either personally or by duly authorized agent, must join in executing any instrument by which . . . community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."

Proposed Section 3070. Here again, the question arises--how is the consent requirement of Section 5125 and the joinder requirement of Section 5127 to be satisfied if one or both spouses lack legal capacity or have a conservator? One section of the proposed legislation--Section 3070--covers this matter in a comprehensive way.

It should be noted at the outset that the appointment of a conservator makes Section 3070 applicable even though the conservatee is not determined in the conservatorship proceeding to lack legal capacity. We are here concerned with those transactions that are considered so important that the joinder or consent of both spouses is required. If a conservator has been appointed for one of the spouses, the staff believes that the conservator should join or consent to the transaction in

lieu of the joinder or consent of the conservatee, even where the conservatee has not been determined to lack legal capacity. If this principle is not adopted, the drafting of the proposed legislation becomes much more complex. Adoption of this principle also gives required certainty to real property transactions. We discuss this same point at greater length later in this supplement.

Avoiding the Need to Appoint a Conservator

Chapter 3 (commencing with Section 3100) provides a special proceeding for approval of a transaction that avoids the need to appoint a conservator for a spouse lacking legal capacity if the other spouse either (1) has legal capacity and no conservator or (2) has a conservator. The reason why one spouse either must have legal capacity or a conservator is that it is necessary that there be a legally competent person to present the petition to the court and to carry out the court's orders in connection with the transaction if it is approved.

Chapter 3 provides a means for satisfying the consent or joinder requirement where consent or joinder is required.

Chapter 3 also permits a determination that a spouse has the legal capacity for the proposed transaction. This expands the scope of the proceeding under existing law but provides needed flexibility to the proceeding. Take an example. An elderly husband and wife need to sell their home so they can move into a retirement home. There is a question concerning the legal capacity of both spouses, but it seems fairly clear that the wife has legal capacity. Under Chapter 3, a proceeding can be brought for the following alternative forms of relief:

(1) A declaration that both spouses have legal capacity (if the court so determines, the court order finding that both have legal capacity will dispose of the matter and the spouses can sell the house in the same manner as anyone having legal capacity); or

(2) A declaration that the husband lacks legal capacity, that the wife has legal capacity, and an order approving the proposed transaction.

Chapter 3 also permits a proceeding to be brought to approve a transaction where joinder or consent is not required under the Civil

Code sections or some other statute. As previously noted, such a proceeding can be brought by a spouse having legal capacity and no conservator or by a conservator; the other spouse must be one who is alleged to lack legal capacity but has no conservator. Take an example. A wife having legal capacity or the conservator of the wife desires to sell the community personal property interest in a closely-held family business formerly managed by the husband who is now believed to lack legal capacity. The husband is willing to consent to the transaction, but the lack of legal capacity of the husband causes the wife (or the conservator) to bring a proceeding under Chapter 3 for court approval of the transaction so that it cannot later be rescinded by someone acting on behalf of the husband. Under Chapter 3, a proceeding can be brought for the following alternative forms of relief:

(1) A declaration that both spouses have legal capacity (if the court so determines, the court order finding that both have legal capacity will dispose of the matter and the spouses can dispose of the business in the same manner as anyone having legal capacity); or

(2) A declaration that the husband lacks legal capacity, that the wife has legal capacity (unless the wife has a conservator), and an order approving the proposed transaction.

GENERAL COMMENTS OF GARRETT H. ELMORE

Attached to this supplement as Exhibit 1 is a memorandum from Mr. Elmore commenting on the revised draft of Part 6. He makes two general objections.

Organization of Part 6. Mr. Elmore suggests a different organization for Part 6. The present organization is the result of much staff thought and discussion. Although there is no perfect organization for the material in Part 6, the staff does not agree with Mr. Elmore's suggestions for a different organization. (In this connection, we plan to revise the discussion in the preliminary portion of the recommendation concerning this area of the proposed legislation to reflect the greater insight we have obtained as a result of our additional work on this project.)

Who joins or consents where spouse has conservator? Mr. Elmore appears to object to the staff decision that, if a spouse has a conservator, whether or not the spouse has been adjudged to lack legal capacity in the conservatorship proceeding, the joinder or consent of the spouse having the conservator is not required and the joinder or consent of the conservator is required. The staff believes that it is important that the rules governing real property transactions be clear and certain. We gave quite a bit of thought as to how to treat a situation where a conservator is appointed for a spouse, but the spouse is not determined to lack legal capacity in the conservatorship proceeding. We doubt that it would be sufficient to have the joinder of the spouse having the conservator to the conveyance in such a situation. We could have required the joinder of both the spouse and the conservator, but we elected to require joinder of the conservator (acting on court instructions) alone. The conservatee will receive a notice of the hearing on the petition of the conservator for instructions as to the transaction and can object or otherwise present his or her views on the transaction to the court, and the court can take those views into consideration in determining whether to authorize the transaction. We believe that the certainty this scheme provides justifies disregarding the fact that the conservatee may not have been adjudicated to lack legal capacity.

COMMENTS OF MR. ELMORE CONCERNING SPECIFIC SECTIONS

Definitions

Mr. Elmore "favors a definition of 'legal capacity' which will be disconnected with the presence or absence of a conservator." The term "legal capacity" as used in the statute is not defined and will be determined in the same manner as the court determines whether a person has legal capacity for a particular transaction under the sections of the Civil Code relating to the capacity to make contracts.

Mr. Elmore's suggestion appears to be based on his objection to the staff decision that, if a spouse has a conservator, whether or not the spouse has been adjudged to lack legal capacity in the conservatorship proceeding, the joinder or consent of the spouse having the conservator is not required, and the joinder or consent of the conservator is required, for transactions requiring the joinder or consent of both spouses. This point has been discussed supra.

Section 3053

Mr. Elmore raises the question whether subdivision (a) of Section 3053 applies only when the property is being administered in a conservatorship and as a part of such administration. Subdivision (a) is not intended to be so limited.

Subdivision (a) is drawn from existing Section 1435.15 which in combination with existing Sections 1435.16 and 1435.17 states the rules that govern the administration and disposition of community and homestead property. These provisions are superseded by Sections 3050-3053 and 3070 of the proposed legislation.

The staff does not believe that subdivision (a) should be limited to property being administered in a conservatorship and as a part of such administration. The issue whether property is community or separate property or whether property is homestead property can arise in connection with a petition under Section 3070 for authorization of a conservator to join in or consent to a transaction or under Chapter 3 (authorization of proposed transaction; see Section 3121(g)). If there is a dispute concerning the nature of the property, that issue should be determined in the proceeding to obtain court authorization for the conservator to join in or consent to the transaction or the proceeding to authorize the transaction. The authority to determine the nature of the property should not be limited to a case where it is proposed to have property administered in the conservatorship estate of one of the spouses.

The staff suggests a technical correction in subdivision (b) of Section 3053: Substitute "homestead property defined in Section 3052" for "separate property subject to a homestead" in the introductory portion of subdivision (b) and substitute "homestead property" for "property subject to a homestead" in paragraphs (1) and (3) of subdivision (b). It would not be appropriate to exclude separate property exclusively owned by the conservatee from the conservatorship estate.

Additional Provisions

Mr. Elmore points out that the proposed legislation does not contain provisions dealing with how the community property or separate property subject to a homestead is to be administered if it is included

in the conservatorship estate of one of the spouses by consent of the other spouse or the conservator of the other spouse. He suggests that provisions be added to "explain the functioning of estates when by consent property of another is made a part thereof." He asks: "Should wording require an accounting to the owner of such interest? Also, it is suggested that the income aspects of this (expanded) procedure be checked. What form is used by the conservator?"

Although the proposed legislation continues all the provisions of existing law governing the administration of community or separate property subject to a homestead in a conservatorship estate, the staff believes that Mr. Elmore has identified a matter that is worthy of consideration. Perhaps the matter is adequately covered by the provisions of Sections 3050, 3051, and 3052, which provide in substance that the property shall "be included in and, subject to Section 3070, be dealt with and disposed of as a part of the conservatorship estate." We could add a statement to the Comments to these sections, that this means that the property is, subject to the requirement of consent or joinder for certain transactions, to be managed, dealt with, and disposed of in the same manner and subject to the same requirements as other property of the conservatorship estate. An alternative would be to add another section that so provides to the proposed legislation. What provision, if any, relating to accounting should be made in the statute? In this connection, see Sections 3020 (community property interests not affected), 3021 (purchase of another home).

Section 3070

Mr. Elmore makes a number of suggestions concerning this section.

(1) Mr. Elmore objects that the section does not provide necessary flexibility and makes for added expense:

Note that as written Sec. 3070 makes substantial changes in wording from present law. It is believed the Comment references are inadequate and perhaps misleading. The Comment does not explain that Section 3070 (apparently) takes away the flexibility of the special proceeding and changes the now "permissive" consent procedure into a mandatory procedure, reversing present provisions, and making for added expense.

This objection appears to go to paragraph (3) of subdivision (a), which requires that, where there are conservators for each of the spouses,

each conservator obtain authority to join in or consent to the transaction from the court in the conservatorship proceeding. This matter is discussed under Section 3100 infra.

(2) Mr. Elmore questions whether the phrase "the transaction shall be authorized" in the introductory portion of subdivision (a) is appropriate language. The staff recognizes, as Mr. Elmore points out, that "most of the wording relates to the execution of the instrument or consent," but after considerable discussion of the specific wording, the staff was unable to find anything more appropriate.

(3) Mr. Elmore asks: "to what extent does Section 3070 stand alone, so that the spouse having legal capacity must 'personally' join in a community property transfer, though CC 5127 permits a spouse to act by 'duly authority agent'?" Mr. Elmore further points out: "as to conveyance of a homestead or abandonment thereof, there are requirements for formal acts by both spouses, e.g., an acknowledged consent may not be the proper form."

The staff believes that Mr. Elmore has a good point and the proposed legislation should be clarified. Accordingly, we suggest that subdivision (b) be deleted from Section 3070 and two new sections be added following Section 3070, to read:

§ 3071. Form of joinder or consent; requirements where conservator joins in or consents to transfer

3071. (a) The joinder or consent under Section 3070 of a spouse having legal capacity and no conservator 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 3070 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 authorizing the conservator to join in or consent to the transaction.

(c) Where a conservator joins in a transfer of real property under Section 3070, the conveyance shall refer to the court order authorizing the transfer, and a certified copy of the order shall be recorded in the office of the recorder of each county in which the real property or any portion thereof lies. Conveyances so made convey all the right, title, interest, and estate of the conservatee so conveyed in the property at the time of conveyance.

Comment. Section 3071 is new. Subdivisions (a) and (b) require 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 3071, a spouse having legal capacity and no conservator must satisfy the requirements of the statute that applies to the transaction just as if both spouses had legal capacity and no conservator. 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 3071 requires that the joinder or consent refer to the court order authorizing the conservator to join in or consent to the transaction. Subdivision (c), which is similar to Section 2508, provides for the recording of the court order in case of a conveyance of real property.

§ 3072. Joinder or consent requirements deemed satisfied

3072. If the requirements of this article are satisfied with respect to a transaction described in Section 3070, the transaction is deemed to satisfy the joinder or consent requirements of the statute referred to in that section.

Comment. Section 3072 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 3070.

(4) Mr. Elmore notes that the language in paragraphs (2) and (3) of subdivision (a) of Section 3070 requires that the authorization of the conservator to join in or consent to a transaction be obtained in the conservatorship proceeding "upon a petition filed pursuant to Section 2403." He points out that this limits the authorization to a petition for instructions but that the authorization might be obtained under the provisions relating to sales of property of the conservatorship estate if the property is being administered in the conservatorship estate and not pursuant to a petition for instructions. This is a good point. The

staff proposes to deal with this problem by revising paragraphs (2) and (3) to read ". . . upon a petition filed pursuant to Section 2403 or under Article 6 (commencing with Section 2540) of Chapter 6 of Part 4."

§ 3100. Nature of proceeding

Mr. Elmore objects to this section because he believes that as redrafted it does not permit the use of a special proceeding as a vehicle for obtaining court review and authorization of a community personal property transaction that does not require joinder or consent. A reading of subdivision (a) will reveal that the section does permit this type of transaction to be submitted for court review and authorization if the conditions set forth in paragraphs (1) and (2) are satisfied. Hence, a competent spouse (or a conservator) can file a petition for authorization of a transaction that does not require the joinder or consent of the other spouse. The staff will expand the Comment to Section 3100 (along the lines set out in the preliminary portion of this supplement) to make this clear.

Mr. Elmore also objects to this section because it does not permit a proceeding under this chapter where there are conservators for each spouse. This is correct. In this type of case, each conservator must obtain court approval from the court in which the conservatorship proceeding is pending. Mr. Elmore believes that will involve greater expense than a proceeding under Chapter 3. The staff doubts this. In most cases, we suspect that both conservatorship proceedings will be pending in the same court and that court can consider the petitions of both conservators at the same time. We think the court where the conservatorship proceeding is pending is a more appropriate court to consider the matter than, for example, the court in the county where the real property is located since that court may have little information concerning the conservatorship estates.

ADDITIONAL POLICY ISSUES

§§ 3140-3143. Rights of spouse alleged to lack legal capacity

The staff wishes the Commission to reconsider whether the various rights given the spouse alleged to lack legal capacity under Sections 3140-3143 should be retained in the proposed legislation. We are particularly concerned with Section 3143 (right to jury trial), but other

sections--Section 3140 (appointment of counsel to represent spouse), 3141 (required presence of spouse at hearing), and 3142 (court advising spouse of rights before hearing on merits)--also cause us concern. None of these provisions are in the existing law relating to the special procedure for court approval of a particular transaction involving community or homestead property.

It should be noted first that the proceeding results in a determination not that the spouse lacks legal capacity generally but rather that the spouse lacks legal capacity for a particular transaction. The proceeding involves basically the same issue that would be involved where a transaction is sought to be rescinded by a party on the ground of lack of legal capacity for the transaction. In an action for rescission, the right to a jury trial depends on whether the relief sought in the action is legal or equitable.

While the determination that a spouse lacks legal capacity for a particular transaction will no doubt cast doubt on the legal capacity of the spouse generally, the determination made is quite different and much more limited than the determination made when a conservatorship is established. The conservatorship gives the conservator the right to take possession and include in the conservatorship estate all of the property of the conservatee whereas the special proceeding results only in the elimination of the joinder or consent requirement to a transaction involving community or homestead property.

The staff recommends that the provision giving the right to a jury trial on the issue of alleged lack of legal capacity for the proposed transaction be deleted and that consideration be given to deleting the other provisions referred to above. The staff believes that the benefit of these provisions is offset by the fact that a demand for a jury trial in a special proceeding to avoid the joinder or consent requirement will for all practical purposes preclude the use of the special procedure under Chapter 3. The other party to the proposed transaction will not be willing to wait until the special proceeding (with the required jury trial) is completed.

Additional Policy Issue

Consideration should be given to allowing the conservator to consent without prior court approval to:

(1) A transaction involving community personal property which constitutes furniture or furnishings.

(2) A transaction involving community personal property to the extent that the conservator could sell or transfer such property under the conservatorship statute without the need for prior court approval.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

SECOND SUPPLEMENT TO MEMORANDUM 78-39

June 26, 1978

MEMORANDUM TO MR. DEMOULLY

FROM: GARRETT H. ELMORE, Consultant

RE: Study F. 30.300. June 23, 1978 DRAFT of Part 6.

The following comments are submitted subject to qualifications, first, because of my absence I do not have the benefit of discussion with you and your staff; second, an effort is made to avoid repeating points previously made and not adopted; third, by reason of the re-arrangement of certain chapters and chapter headings, and the omission of sections in prior drafts, I feel constrained to make a short General Comment at the outset.

GENERAL COMMENT. It appears the thrust of the current draft indicates a retreat from the prior tentative concept that the special proceeding (now Ch. 3) could be used as a vehicle for putting community personal property transactions (i. e., those which do not require joint action) before the court, in addition to its function to provide a "joint consent" in the few instances where such is required. Reference is made to omission of §3050 (b) and §§ 3051, 3052 from the preceding draft; also the clarifying § 3053. It may be this concept was not workable, but with the omissions, there is no "exposure" to obtain views. It is believed arguments can be made for greater protection when one spouse is incapacitated than when both spouses have legal capacity.

Also, the remedy might be desirable for a spouse having

legal capacity who desires protection of a court order.

If the concept is to be retained, it is suggested that omitted former draft sections cited above should be reviewed, and the wording of new § 3100 (d) (This chapter (3) is permissive and cumulative for the transactions to which it applies) should be reviewed. Unlike former drafts, no distinction is there made between transactions where joinder is required by other statute and transactions where by other statute and this Act the spouse having legal capacity has generally the right to manage, control and dispose of community personal property.

A second general comment deals with the new arrangement that fails to make three separate "chapters" for the three methods described in the Preliminary Part (see p. 39 thereof, referring to a separate "chapter" for "each procedure.").

For example, Article 1 of Ch.2 (§§ 3050-3053) covers many subject matters and includes within it 2 of the 3 procedures. Only the third procedure, the special proceeding, is separate.

It is not necessary to have three "chapters" to avoid what appears to be prolixity similar to present Prob. C. §§ 1435.15, 1435.16, 1435.17.

It is recommended that Article 1 consist only of Subd. (a) of Sec. 3050 with heading: Right of One Spouse to Manage, Control and Dispose of Community Property; that Article 2 consist of the remainder and be headed: Management, Control

and Disposition in Conservatorship Estate or Estates; that the provisions under such heading be consolidated and simplified. Duolictive wording can be avoided, and the number of "If" situations materially reduced by combining "likes" (whether community or homestead) and substituting "managed, controlled and disposed of" for "dealt with and disposed of" as that expression appears in present law in connection with homestead property. The writer sees no logical reason to continue the sharp classification of present law (i. e., one section for community property and another section for homestead property).

Thus, it is submitted draft Article 1 should be re-written.

The third general comment concerns the form of a "key" section, i. e., Draft Sec. 3070- "Authorization Required In Lieu of Joinder Or Consent." First, the new wording and structure seem to have little wording basis in the several code sections cited in the Comment, first sentence. Second, the draft wording seems to give rise to various uncertainties, e. g., In subd. (a), is it correct to say "the transaction shall be authorized" when most of the wording relates to execution of the instrument or consent; to what extent does Sec. 3070 stand alone, so that the spouse having legal capacity must "personally" join in a community property transfer, though CC 5127 permits a spouse to act by "duly authorized agent"; as to conveyance of a homestead or abandonment thereof, there are requirements for formal acts by both spouses, e. g., a n acknowledged consent may not be the proper form; subdivision (b) of Sec. 3070 seems directed

to this problem but the Comment does not explain its purpose; Subpar. (1) implies a limited use for the special proceeding by referring to the particular situation (competent spouse and other spouse with no conservator) whereas a conservator of either spouse is expressly authorized to bring the proceeding; Subpar. (2) and (3) seem to take wording from particular statutory provisions and "generalize" it, with the result that undue emphasis is given the "petition for instructions procedure" (example: normally if property is being administered in a conservatorship estate it might be sold under general statutory provisions as to sales in conservatorships, and not pursuant to a petition for instructions (new Sec. 2403). Yet the order authorizing sale by the conservator would not meet the literal requirement of Subpar. (2) or (3) because it was not an order under the cited section (new Sec. 2403).

In sum, it is recommended that Section 3070 and the Comment be further studied and be re-written to preserve the availability of the special proceeding in more situations.

The fourth general comment relates to the new for added wording to explain the functioning of estates when by consent property of another is made a part thereof. Should wording require an accounting to the owner of such interest? Also, it is suggested that the income tax aspects of this (expanded) procedure be checked. What form is used by the conservator?

The fifth general comment relates to the format of referring to "lack of legal capacity" and at the same time to the presence or absence of a conservator. If primacy is to be given to the conservator and to some type of special procedure in one or both conservatorship estates, to the exclusion of the special proceeding, it is submitted newly drafted provision permitting pro per appearance by a spouse in the special proceeding should be re-examined. More importantly, it does violence to the concept of "legal capacity" to say or imply that even though a spouse has legal capacity, if there is a conservator, the conservator must act. The distinction followed by the writer has been, first, that the "consent" procedure was permissive, and if there was a conservatorship it could be used, with the consent of the other spouse; and second, even if there was a conservator, the spouse could proceed independently of the conservator under the special proceeding. Proposed Sec. 3070 changes all this by "forcing" the conservator to act and to use existing conservatorships, no matter how much this might cost in attorney's fees and regardless of the "precedent" of permitting action by "instructions" rather than usual sale procedures.

COMMENTS ON SECTIONS.

Sec. 3000 et seq. Definitions. The writer favors a definition of "legal capacity" which will be disconnected with the presence or absence of a conservator.

Sec. 3050-3052. See under General Comments.

Sec. 3053. It is a question whether subd. (a) merely carries forward prior law, since the provisions (responsive to a court decision) were limited to the "alternative" procedure. This new placement is not so limited. Literally it may apply when there is a special proceeding. If, however, the intent is clear that subd. (a) applies only when the property is being administered in a conservatorship and as part of such administration, there is no objection.

Sec. 3070. See under General Comment. Note that as written Sec. 3070 makes substantial changes in wording from present law. It is believed the Comment references are inadequate and perhaps misleading. The Comment does not explain that Section 3070 (apparently) takes away the flexibility of the special proceeding and changes the now "permissive" consent procedure into a mandatory procedure, reversing present provisions, and making for added expense.

Sec. 3100. It is believed subd. (a) in restricting the special proceeding to a case where one spouse has not conservator changes present law, and is undesirable in forcing matters into conservatorships, when a single proceeding would be efficacious. Example: Different courts have jurisdiction of the estates. There is an impasse between courts and conservators. The special proceeding has been said to offer a remedy in this situation. Another example. There is a dispute re community personal property transaction between the conservator and a competent spouse. Sec. 3100

takes away a convenient and expeditious forum.

Is the dispute to be resolved by plenary civil action brought by the conservator. The competent spouse is not bound by adjudications in the estate, if it is not administering the property by consent. Again, subd.(d) is unclear in its purpose, in view of the new limitations imposed on the scope of the special proceeding.

As to the remaining sections in the current draft, they seem to the writer to be in order.

Garrett H. Elmore