F. 30-300 7-11-78

THIRD SUPPLEMENT TO MEMORANDUM 78-39

Subject: Study F-30.300-Guardianship- Conservatorship Revision (Part 6- Management or Disposition of Community or Homestead Property When Spouse Lacks Legal Capacity)

REVISED COMMENTS OF GARRETT H. ELMORE ON POLICY ISSUES-STAFF DRAFT AND COMMENTS OF JUNE, 1978

After further review, the writer respectfully submits the following revised comments on the subject matter above. The comments are not intended to cover drafting or technical matters.

1- Organization (Article 1 of Ch. 2- Sec.3030-3052).

The current draft has the advantage of brevity and a functional approach, i. e., methods of dealing with community property and various types of homestead property are respectively stated, according to type of property.

On the other hand, the writer favors dividing the"methods" (authority of competent spouse re community property, inclusion in conservatorship estate or estates, and special proceeding) and following more closely the format of present Chapter 2 A.The writer's January, 1978 draft treated the three "methods" separately, so that the Act would be clearer to the average practitioner. Sec. 3020 of the May draft (which states what the "part"does and which is based on present Sec.1435.1 and 1435.15),in the writer's view, should be inserted as Sec. 3020 in the current draft.

2-Concept that the conservator alone may consent or join.

The point is one belatedly raised by the writer and may be stated: Should there be added provisions requiring more assurance of notice to the spouse having a conservator before the conservator

disposes of property for which "joinder" is required, or "joins" under court order, or other added safeguard?

Staff correctly points out that real estate transactions are involved and should be governed by clear rules (Second Supplement to Memorandum 78-39, p.6).

On the other hand, the writer is troubled by the potential argument that the affected spouse may be competent, or sufficiently competent for that transaction; the transaction may involve the principal asset such as a home, and, if the "special proceeding" route were followed, the spouse would have an opportunity to be heard.

It is suggested for consideration there be added to the "joinder" requirement, provisions that (i) proof that notice of hearing has been given to the other spouse may be required; and (ii) the court may require the attendance of the spouse, if able to attend, and may examine the spouse concerning his or her wishes. (The exact form of added wording would have to be worked out, to minimize the effect on regularity of the proceedings and consummation of the transaction.) The question is one of balancing considerations and no clear answer seems possible. An alternate suggestion is that such provisions apply where a home is sold or exchanged or the transaction involves the principal asset of the estate.*

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* The problem is caused by uncertainty as to how far the Davis case may be extended and the format of new Sec. 1821 and 1851.

3. Section 3053.

Subd. (a) permits the court in either a conservatorship or in a "special proceeding" to determine the validity of the homestead and whether property is community property or the separate property of a spouse.There is no case on the effect of similar provisions in present Sec. 1435.15 but the authority given the court by Sec. 1435.15 seems clearly limited to the "alternative procdure" of having administration in a conservatorship, In Stratton v. Superior Court, 87 C. A. 2d 809 (1948) a court of appeal decision indicated that wording relating to the "special proceeding" did not permit the court (sitting in probate) to determine whether the the property in fact did not come within the class of property described by the statute, i.e., the other party (a guardian), denied that the property was community and alleged that it was the separate property of his ward. Thus, under the then law a probate court could try title only in limited circumstances. Cf. present Sec.851.5.

The writer is unable to discover why the title association committee in 1959 did not deal with the Stratton decision.

The writer (i) withdraws his prior objection to application to both types of proceedings but suggests the Comment should refer to the Stratton case; (ii) suggests consideration of an addition to Subd. (a) to permit the court in its discretion to abate the proceeding and require the issue of whether the property is that of one or both spouses as separate property be tried in accord with the procedure of Sec.851.5.Otherwise, in a special proceeding(in which there is no express right of appeal),

complicated civil issues could be adjudicated. The public defender should not be required to get involved in such issues.Admittedly, the possibility suggested may be remote; however, with the change made, someone might take advantage of it.

Finally, an alternative is to follow the present wording more closely and let the courts deal with the problem if it should arise.

4. Sec. 3100. Nature of proceeding.

There are omissions in the current draft of provisions in former drafts "freezing" the ability of a petitioner in a"special proceeding"to dispose of the community personal property which is the subject of the proceeding, with provisions to protect bona fide purchasers.E. g., Sec. 3030 (b) and 3031, May Draft.

Upon further review,the writer believes that these provisions are cumbersome; however, it is suggested for consideration than in a special proceeding, the court be authorized to enjoin disposition of community personal property which is the subject of the suit pendente lite. It is recognized that such provisions might deter use of the procedure on the "permissive" basis.

The objection discussed by staff that the current text does not apply where both spouses have conservators (Second Supplement to Memorandum 78-30, p. 11) is adhered to.There is no reported case, but present Sec.1435.3 permits the spouse not incompetent "or the guardian of the estate of either incompetent spouse as such guardian" to bring the "special proceeding." It sometimes occurs that there are conflicts between the spouses where both

have conservators. Absent consent, or statutory procedure, there is no authority for a court in one conservatorship proceeding to determine disputes between conservators.The "special proceeding" provides a forum and suitable procedures.

The point that venue may be inconvenient is a good one. However, this can be eliminated or helped by adding wording that permits the conservators to stipulate to adjudication of the differences in a particular conservatorship.

5. Sec.3140-3143. Right to jury trial and court statements. (Second Supplement to Memorandum 78-39, p. 11-12).

Right to jury trial. The writer believes that careful consideration should be given before deleting the right to demand a jury trial, principally upon the ground it would delay and deter use of the "special proceeding." First, it is not clear whether if demanded a jury trial would not be granted under present statutes. See Budde v. Superior Court, 97 C. A. 2d 619 (1950), analyzing the applicable statutes and prior decisions and holding a jury trial was a matter of right, if demanded, on a petition for appointment of a guardian of the person and estate; see also statement by Chief Justice Gibson on the effect of a guardianship of property, in Guardianship of Waite, 14 Cal. 2d 727 (1939). It is true, as pointed out, that in a "special proceeding" only one asset or several assets may be involved, and analogy can be drawn to a civil case. Yet the asset involved may be a home and the effect may be the same as a conservatorship in reality.Second, with the changes

in the present text, there appears an equal protection issue, in that the right to jury trial is granted in "appointment" and "termination" proceedings in conservatorships (no matter how small) and (unless amended) in the "special proceeding" when the affected spouse petitions for "restoration of capacity" (see Sec. 8146, incorporating Sec. 1863 granting such right). Third, the writer believes the decision could go either way, if as is now suggested the new statute provide, in effect, for no right of jury trial. As a matter of individual preference, the writer believes the present jury trial right in this context should be retained; however, the issue is one of policy.

Other sections. The "right to counsel" issue as here applied seems to present an important legal problem. By reason of its antiquity, present Ch. 2 A has provided less modern concepts of representation of alleged incompetents, e.g., by providing for representation by the guardian (conservator), State Department of Health, public administrator, and public guardian.The writer has questioned the adequacy of these provisions under modern decisional law, for none is an attorney (except by chance).Hence, the drafts to date have provided for services of the public defender or private counsel, if requested. The loss of control over one's property, as pointed out, can be serious; the alleged incompetent has never had a prior hearing at which he or she was given the opportunity to have counsel. The only suggestion that now occurs to the writer is that the present provisions might be replaced by simpler provisions and with

some emphasis on appointment of a guardian ad litem (who must be an attorney). At the July meeting, the question of appointment of counsel in the new Act generally was under consideration; the amendments there will have a bearing in Part 6.

Provisions on attendance at the hearing in current Sec. 3131 do not follow the form of my January, 1978 draft which was based on present Sec. 1435.7 (with some minor added wording).Again, decisions at the July meeting on other provisions will have a bearing in Part 6.

Provisions as to advise of the alleged incompetent's rights and of the nature of the proceeding were added by the writer, as modification of the general provisions (eliminating use of court investigators). These provisions should be reviewed for possible simplification, but the writer believes that they should not be entirely eliminated.

6. Additional Policy Issue(Staff).

The writer would favor (i) on page 13-no court order of authorization to conservator required to consent to disposition of community property furniture and furnishings, if limited in value, for example, $1.000.

The writer does not believe (ii) on page 13 is entirely clear, since "joinder" is sales of community personal property is not required generally. Comment is withheld.

7. Additional Policy Issue (Consultant)

The writer respectfully requests reconsideration of action at the June, 1978, meeting which deleted a draft section defining management and ownership rights in separately owned

property subject to homestead (Draft Sec. 3060) and a draft section permitting the owning spouse, if competent, to consent it be administered in the conservatoship estate of the other spouse (Draft Sec.3061). The first deleted section was based on existing law (except for equal treatment between husband and wife). It clarified rights. Its omission as "unnecessary" is probably sufficient, but it is felt the section was relevant. The second deleted section was new, but simply expressed what has been done in other settings, i. e., provided for a "consent" procedure to give greater flexibility.

Respectfully submitted,

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Consultant