

Memorandum 82-49

Subject: Study L-611 - Probate Law (Missing Persons)

At the last meeting, the Commission approved provisions that revised the guardianship-conservatorship law to make clear that a conservator of the estate could be appointed for a missing person. These provisions would supersede the existing procedure for appointing a trustee to protect the property of a person missing more than 90 days.

At the meeting, a representative of the State Bar provided the staff with a copy of a six-page letter from Janet L. Wright containing comments and suggestions concerning the staff draft. A copy of this letter is attached as Exhibit 1. The staff has redrafted the statutory provisions considered at the last meeting in light of the comments and suggestions of Ms. Wright. The revised provisions are attached as Exhibit 2.

The following are the important changes the revised draft makes in the prior draft:

(1) The prior draft required that a person be missing for at least 90 days before a conservator could be appointed. Under the revised draft, this restriction is eliminated. The revised draft will, for example, permit the filing of a petition before the expiration of 90 days for the appointment of a conservator for a person lost at sea. No purpose is served by delaying the filing of the petition in such a case. Also, the elimination of the 90-day restriction permits the appointment of a temporary conservator shortly after a person becomes missing. Under the prior draft, the 90-day limitation presented technical problems in the immediate appointment of a temporary conservator.

(2) The revised draft permits the appointment of a conservator of the estate for a missing person who is an adult. There is no need for special provisions for appointment of a conservator of a minor who is missing, because a guardian of the estate of a minor may be appointed in any case where it is "necessary or convenient."

(3) The revised draft requires that a copy of the petition and notice of the time and place of hearing on the petition for the appointment of a conservator be mailed at least 15 days before the hearing to the proposed conservatee at the last known address of the conservatee. This was not required under the earlier draft. Notice also must be

published in the county in which the proposed conservatee was last known to reside if the proposed conservatee's last known address is in this state. Under the prior draft, notice was published in the county where the hearing on the petition was to be held. These changes--suggested by Ms. Wright--are designed to make it more likely that the proposed conservatee will receive notice of the hearing. As under the prior draft, the court may require further or additional notice.

The other revisions of the prior draft are technical or clarifying.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 82-49

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Fresno, California 93716THOMAS SNEIL JAMISON, RUSSELL
WILLIAMSON & ASPENGERRe LRC/UPC Project - Study L-611
Probate Law (Missing Persons)
Memorandum 82-26

Dear Ken:

I have agreed to review the above referenced LRC memorandum in my capacity as a member of the Charitable Trust and Foundation Subcommittee of the Estate Planning, Trust and Probate Law Section of the State Bar.

The consensus of the members of the bar with whom I have discussed this proposal is that the inclusion of the statutory provisions for the preservation and management of a missing person's estate within the statutory provisions of the new conservatorship procedures is supported by sound policy considerations. As is stated in the Study Report, if a conservatorship with its attendant procedural safeguards is an appropriate mechanism under the circumstances where a person is "substantially unable to manage his or her own financial resources" by reason of mental incapacity, it would also appear to be an appropriate mechanism where the inability to manage one's financial affairs is due to physical absence. Furthermore, it would seem preferable, as a practical matter in light of the similarity of the two situations, to coordinate the procedural and administrative requirements of the two situations as much as possible in order to facilitate counsel's ability to assist in these circumstances without the necessity of mastering two different statutory systems. To some extent, the wisdom of the recommended approach is already reflected by the inclusion of the statutory provisions allowing a conservatorship for one class of missing persons - the "absentee."

Based on the purpose of the proposal, the following is a brief summary of several aspects of the proposed statutory amendments which should be given additional consideration by the Law Revision Commission:

(1) "Missing person" as opposed to "Absentee".

It is assumed that the special provisions (§§1841-1844) applicable to a missing person who is defined as an "absentee" are to be retained based on a policy decision that the additional safeguards therein (e.g. §1842 notice requirement) are necessary under the circumstance. If this assumption is correct, either §1804 or §1845 should be amended in a manner to reflect that Article 5 is not an available procedure if the "missing person" is an "absentee" as defined in §1403.

(2) Showing required.

(a) It is assumed that §1845(a) requires the petitioner to make a showing as to the facts specified in all of subsections (a)(1) through (a)(3). If this assumption is correct, the requirement would be clarified by the addition of a semi-colon at the end of subsection (1), and a semi-colon and the word "and" at the end of subsection (2).

(b) Section 1845(a)(2) requires a showing that the proposed conservatee has been missing for at least 90 days which according to the Study Report is intended to be a continuation of the current requirement in §260. However, unlike §260, the proposed statute does not specify what will constitute a showing in this regard. Former §260 specified that the showing could be made by a representation in a verified petition "that the whereabouts of such person has been, for such time, and still is unknown". If a determination is made to retain this "relatively vague standard" (see subparagraph (c) below), reference to the manner in which the showing is to be made should be retained to assist counsel in the preparation of the petition. In this regard, consideration should be given to amending Judicial Counsel Form 332 (Petition for Appointment of Conservator) by adding the following as item 5 b (3):

"(3) [] unable to manage his or her financial resources by reason of the fact that the whereabouts of the proposed conservatee has been, for at least 90 days,

and still is unknown. Supporting facts [] specified below [] specified in attachment 5 b (3)."*

(c) The Study Report invites the Commission to consider the North Carolina statutory requirements of a "diligent inquiry". Although the North Carolina statute allows the court some discretion in determining the parameters of the required search, it would appear that the minimum requirements of subparagraphs (1) through (4) could be unnecessarily onerous in some situations. For example, if the missing person's estate is nominal and there are minor dependents who are entitled to support, funds necessary for that support could be substantially consumed by the cost, including attorney's and/or investigator's fees, of complying with the "minimum" procedures. It would seem that a preferable approach would be to grant the court discretion (1) as to whether or not to require a further inquiry, and (2) as to the manner of inquiry to require. The Court could be directed to base its determination on the circumstances, including the nature of the disappearance, the character and amount of the estate, and the circumstances of third parties with interests in the proceedings. The minimum requirements of the North Carolina statute could be included to give the court guidance in determining which methods of inquiry it is empowered to order but should include a general category of "any other method deemed reasonable by the court."

(3) Temporary conservator.

Section 1845 (b) allows the court to appoint a temporary conservator for person's missing less than 90 days, which according to the Study Report is a codification of an informal practice which has developed within the courts. It would seem that the need for such a provision is obviated by the fact that the informal practice developed at a time when the statutory procedures for the management of the assets of individuals in this category were outside the conservatorship area, i.e. §260 trusts. It is assumed that this informal practice has developed out of circumstances of extreme necessity involving both the support of dependents and the preservation of the missing person's assets. If this assumption is correct, the statute should be drafted in a manner to assure that this procedure for obtaining authority is available during all periods when authority under a formal

* Some consideration should also be given to other aspects of the Judicial Counsel forms in this area which could be amended to facilitate the preparation by counsel who will be relatively unfamiliar with the new procedures.

conservatorship is not available.

In reference to the above, the following should be considered:

(a) Under §2250 (a) a petition for the appointment of a temporary conservator can be filed "[O]n or after the filing of a petition for appointment of a . . . conservator." Under §1845(a)(2) the petition for appointment of a conservator for a missing person can not be filed until the person has been missing for at least 90 days. Since it is obviously the intention of §1845(b) to allow the appointment of a temporary conservator during the 90 day period in which the petition for appointment of conservator can not be filed, the statute should be amended to assure that there is no ambiguity as to the court's jurisdiction during this 90 day period to appoint a temporary conservator.

(b) Section 1845(b) allows the appointment of a temporary conservator in situations where the "proposed conservatee has not yet been missing for 90 days." One possible interpretation of this language is that the court's jurisdiction to appoint a temporary conservator terminates once the 90 day period has expired. If this is the intended interpretation of the provision, it creates a period of time (the 15 day minimum notice period required by §1822) in which the court will not have jurisdiction to render emergency orders, which is the primary purpose of allowing the temporary proceedings.* Since there does not appear to be any policy supporting a limitation on the period of time in which a temporary conservatorship should be available, the statute should be amended to assure that there is no ambiguity as to the court's jurisdiction in this regard. The statutory safeguards relating to temporary conservatorships would appear to be sufficient protection in this area.

(c) Additional consideration should be given as to whether the limitations on the powers of the temporary conservator specified in §2252 would preclude the court from effectively

* Pursuant to §1462, the Court has the authority to shorten notice (except as required by §1822 and §1511) which allows for a shortening of the notice period to establish a temporary conservatorship if good cause exists. However, since the excepted situation (§1822) contains the notice requirements for a hearing on a petition to appoint a conservator, the court does not have jurisdiction to shorten the 15 day notice requirement, with the result that the court may lack jurisdiction to issue orders to resolve emergencies during this period.

ordering a remedy to alleviate an emergency situation which might arise in the "missing person" situation, such as the need to raise funds for the support of dependants.

(4) Notice requirements.

The comment under §1846 indicates that the notice requirements applicable to the "absentee" situation have been adopted. In addition, the court has discretion to direct any further notice as it deems proper. In the "absentee" situation additional notice is required through the appropriate government agency which assures an additional mechanism for notice to the proposed conservatee. In light of fact that the California residency of the proposed conservatee is no longer a jurisdictional factor, the commission may wish to consider requiring an additional mechanism for notice to the proposed conservatee such as the mailing of notice to the last known address of the proposed conservatee and/or publication of the notice of hearing in a newspaper of general circulation in the county where the proposed conservatee was last known to reside in order to assure at least one mechanism of notice specifically aimed towards notifying the proposed conservatee. Although the court would have the discretion under the statute as now drafted to direct such additional notice, it would appear to be a preferred approach to require such additional notice absent some showing as to why such additional notice can not be made. To the extent that the Commission determines to include only a discretionary requirement of a "diligent search" under §1845, due process might well require an additional mechanism aimed specifically toward giving the proposed conservatee actual notice. At the very least, some mechanism other than publication in the county where the hearing is to be held, should be specified when the proposed conservatee has never been a resident of California.

Although the comment following §1847 indicates that there is no intent to preclude the giving of notice by mail to the missing person's last known address or by publication (with reference to §1846), this section does not assure that such notice will be given. Section 1822 notice, which is required by §1846, does not require notice to be mailed to the last known address of the proposed conservatee.

(5) Notice to heirs.

Section 1849 incorporates (from the old statutory provisions) the notice requirement to "persons who would be

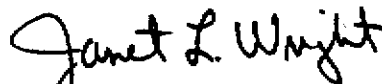
entitled to participate in the distribution of the missing person's estate" when the court is considering an application for "family allowance". Since no one is entitled to a "preview" of the conservatee's testamentary documents, it must be assumed that "persons who would be entitled" is a reference to legal heirs. In a situation where there is a dependent spouse but no descendants, this provision could result in a notice requirement to distant relatives well beyond the second degree. Under the conservatorship provisions now in existence, notice is not required beyond the second degree unless the person so related has appeared in the matter to which the hearing relates. It is not apparent from the Study Report why this additional class of person's should be entitled to notice simply because the conservatee is not physically present as opposed to mentally present. In the situation of a nominal estate and a needy spouse, relatively substantial costs could be incurred in order to comply with this section. Unless there is some independent policy reason supporting a different approach, the procedures for granting child and spousal support in §§2422-2423 would seem sufficient, so long as in the spousal support situation all lineal descendants (especially children of prior marriages) are given notice. At the very least, appropriate language should be included to allow the court for good cause to dispense with the notice required to be given. The retention of the notice requirement to the additional category of individuals would seem to invite the very type of procedural notice errors by counsel which the use of the conservatorship provisions is aimed at precluding.

(6) Nomination and appointment.

Section 1813 precludes a spouse from being appointed as the conservator of the estate of an absentee unless the spouse alleges in the petition that no proceedings has been commenced by the spouse to terminate the marital status. If this prohibition is to apply to the spouse of a "missing" conservatee, an appropriate amendment should be made to §1813.

I was pleased to note in the Study Report that consideration is being made to amending the statutes pertaining to the estates of persons missing seven years.

Very truly yours,



Janet L. Wright

JLW:dm

cc: James C. Opel, Esq.
Yeoryios C. Apallas

EXHIBIT 2

PRELIMINARY PORTION OF RECOMMENDATION

Protection of Property of Missing Person

Probate Code Sections 260-272 provide a procedure for appointing a trustee to protect and manage the property of a person missing for more than 90 days.¹ The Commission recommends that these provisions be replaced by provisions permitting the appointment of a conservator of the estate for a missing person.²

A conservatorship is the mechanism now used where a person is "substantially unable to manage his or her own financial resources" by reason of mental incapacity.³ A conservatorship is an equally appropriate mechanism for use where the inability to manage one's financial affairs is due to physical absence. Furthermore, in light of the similarity of the two situations, it is desirable to coordinate the procedural and administrative requirements of the two situations as much as possible in order to facilitate counsel's ability to assist in these circumstances without the necessity of mastering two different statutory systems.⁴

The wisdom of the recommended approach is already recognized in the

1. These provisions fall into the class of statutes where management of the missing person's property is based on the assumption of the continued life of the missing person. See Jalet, Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees, 54 Iowa L. Rev. 177, 226-27, 231-36 (1968). Such statutes have been upheld against constitutional challenges on the basis of the need to preserve the missing person's property during his or her absence and to protect the interests of the missing person's dependents. See *Day v. Metropolitan Life Ins. Co.*, 11 Cal. App. 681, 54 P.2d 502 (1936).
2. The recommended provisions include special provisions to deal with the unique situation of a proposed conservatee who is a missing person.
3. Prob. Code § 1801.
4. The guardianship-conservatorship law provides detailed provisions governing all aspects of the management of a conservatorship estate. See Prob. Code §§ 2400-2644. By way of contrast, the existing provisions governing the trustee's management of the estate of a missing person are incomplete and inadequate. See Prob. Code §§ 265, 267-269.

existing statutory provisions which allow a conservatorship for one class of missing person--the "absentee."⁵

The existing statute requires that a person be missing for at least 90 days before a trustee may be appointed and permits the appointment of a trustee only if the missing person is a resident of this state.⁶ However, it has been the practice in this state to appoint a temporary conservator in a case where the person has not yet been missing for 90 days or where the missing person is a nonresident.⁷ The recommended legislation permits the filing of a petition for the appointment of a conservator of the estate for a missing person without the requirement that the person have been missing for 90 days or that the missing person be a resident of this state. This permits the use of one procedure--a conservatorship proceeding--where there is an immediate need for the protection and management of the missing person's property and provides a more adequate procedure for the protection and management of the property of a missing nonresident.⁸

5. See Prob. Code § 1803. An "absentee" is a member of the armed forces or a federal employee who is missing. See Prob. Code § 1403. For special provisions applicable where the proposed conservatee is an "absentee," see Prob. Code §§ 1840-1844. See also Prob. Code §§ 1813 and 1864.

6. Prob. Code § 260.

7. See 3 J. Goddard, Probate Court Practice § 1921 (2d ed. 1977); S. Ross, L. Pruett, & M. Levine, California Conservatorships Supplement § 3.24, at 46 (Cal. Cont. Ed. Bar 1981).

8. Under the general provisions of the guardianship-conservatorship law, a temporary conservator may be appointed in an appropriate case pending the appointment of a permanent conservator. See Prob. Code §§ 2250 (petition for appointment of temporary conservator), 2252 (powers and duties of temporary conservator).

REDRAFTED STATUTORY PROVISIONS

Probate Code § 1461.7 (added). Notice of hearing on petition, report, or account where conservatee is a missing person

SEC. . Section 1461.7 is added to the Probate Code, to read:

1461.7. Unless the court for good cause dispenses with such notice, notice of the time and place of the hearing on a petition, report, or account, together with a copy of the petition, report, or account, shall be given to the same persons who are required to be given notice under Section 2581 for the period and in the manner provided in this chapter if both of the following conditions exist:

(a) A conservator of the estate has been appointed under Article 5 (commencing with Section 1845) of Chapter 1 of Part 3 for a person who is missing and whose whereabouts is unknown.

(b) The petition, report, or account is filed in the conservatorship proceeding under any one or more of the following provisions: Section 1861 or 2423; Article 7 (commencing with Section 2540) of Chapter 6 of Part 4; Section 2570, 2571, 2580, 2592, or 2620; Chapter 8 (commencing with Section 2640) of Part 4; Chapter 9.5 (commencing with Section 2670) of Part 4; or Chapter 3 (commencing with Section 3100) of Part 6.

Comment. Section 1461.7 supersedes portions of former Section 268 which provided for giving notice of hearings on certain estate management matters to persons who had an interest in the estate of a missing person for whom a trustee had been appointed. Section 1461.7 adopts by reference Section 2581 (notice to persons known to the petitioner to have a possible interest in the conservatee's estate if the conservatee were dead). The listing of the petitions, reports, and accounts to which Section 1461.7 applies is drawn from Sections 1461 and 1461.5.

Probate Code § 1804 (added). Conservator of estate of missing person

SEC. . Section 1804 is added to the Probate Code, to read:

1804. Subject to Section 1800, a conservator of the estate may be appointed for a person who is missing and whose whereabouts is unknown.

Comment. Section 1804 is a new provision that supersedes the former procedure for appointing a trustee for the property of a missing person. See former Sections 260-272 and the Comments thereto. For special provisions applicable where the proposed conservatee is a missing person, see Article 5 (commencing with Section 1845). See also Section 1461.7 (notice of hearing on petition, report, or account). If a minor is a missing person, a guardianship of the estate may be established for the minor. See Section 1514 (guardian may be appointed if it appears necessary or convenient).

Probate Code §§ 1845-1849 (added). Special provisions applicable where proposed conservatee is a missing person

SEC. . Article 5 (commencing with Section 1845) is added to Chapter 1 of Part 3 of Division 4 of the Probate Code, to read:

Article 5. Special Provisions Applicable Where
Proposed Conservatee is a Missing Person

§ 1845. Appointment of conservator for missing person; procedure

1845. (a) Except as otherwise provided in this article, a conservator of the estate of a person who is missing and whose whereabouts is unknown shall be appointed as provided in Article 3 (commencing with Section 1820).

(b) This article does not apply where the proposed conservatee is an absentee as defined in Section 1403.

Comment. Subdivision (a) of Section 1845 is comparable to Section 1840 (conservatee who is an "absentee"). The appointment of a conservator is governed by other provisions where the proposed conservatee is an absentee as defined in Section 1403. See Article 4 (commencing with Section 1840).

§ 1846. Petition; additional contents

1846. In addition to the other required contents of the petition, if the proposed conservatee is a person who is missing and whose whereabouts is unknown, the petition shall state all of the following:

(a) The proposed conservatee owns or is entitled to the possession of real or personal property situated in this state.

(b) The proposed conservatee is missing and his or her whereabouts is unknown.

(c) The estate of the proposed conservatee requires attention, supervision, and care.

Comment. Section 1846 supersedes a portion of former Section 260 (appointment of trustee of estate of missing person). Section 1846 continues the substance of the standard for appointment of a trustee under former Section 260 with two changes: First, the requirement of former Section 260 that the missing person be a resident of California is not continued. This omission permits the appointment of a conservator of the estate of a missing person who is a nonresident but who has property in California that requires the attention, supervision, and care of a conservator. Second, the requirement of former Section 260 that the person be missing for 90 days is not continued. Under Section 1800, a conservator may be appointed only if the need therefor is established to the satisfaction of the court. This requirement protects against premature establishment of a conservatorship and, at the same time, permits the protection of the property of a person who has been

missing less than 90 days. Under some circumstances, the court may decline to appoint a permanent conservator pending further developments but may appoint a temporary conservator. See Sections 2250 (petition for appointment of temporary conservator pending the final determination of the court upon the petition for the appointment of the conservator). See also Section 2252 (powers and duties of temporary conservator). In other circumstances, the court may determine that a permanent conservator should be appointed without delay.

§ 1847. Notice of hearing

1847. In addition to the persons and entities to whom notice of hearing is required under Section 1822, if the proposed conservatee is a person who is missing and whose whereabouts is unknown:

(a) A copy of the petition for appointment of a conservator and notice of the time and place of the hearing on the petition shall be mailed at least 15 days before the hearing to the proposed conservatee at the last known address of the proposed conservatee.

(b) Notice of the time and place of the hearing shall also be published pursuant to Section 6061 of the Government Code in a newspaper of general circulation in the county in which the proposed conservatee was last known to reside if the proposed conservatee's last known address is in this state.

(c) Pursuant to Section 1462, the court may require that further or additional notice of the hearing be given.

Comment. Section 1847 supersedes former Section 261 and is drawn from Section 1842 (notice of hearing where proposed conservatee is an "absentee"). Unlike Section 1842, which requires notice to be published in the county where the hearing will be held, Section 1847 requires notice to be published in the county where the proposed conservatee was last known to reside if his or her last known address is in this state. Publishing notice in this county is more likely to give actual notice to the proposed conservatee. If the last known address is not in this state, Section 1842 does not require the publication of a notice of the time and place of the hearing; but, in such a case, the court may require publication within or without this state pursuant to the authority given the court under subdivision (c). Subdivision (c) of Section 1847 continues the substance of a portion of former Section 261 and makes clear that the court may require such additional notice as is appropriate under the circumstances of the particular case.

Nothing in this section limits the authority of the court in determining the need to establish a conservatorship to require that a search be made for the missing person before a conservator is appointed. Whether to require such a search and the type of search to be required is left to the court's discretion. In exercising this discretion, the court can take into consideration all the circumstances of the particular case, including the nature of the disappearance, the character and amount of the estate, and the circumstances of the persons who have an interest in the proceeding. For example, the court may dispense with a

search if the missing person's estate is nominal, there are dependents entitled to support, and the funds necessary for support would be significantly reduced by the cost of the search. In other cases, no purpose would be served by a search, as where the proposed conservatee is lost at sea.

§ 1848. Certain general requirements for establishment of conservatorship not applicable

1848. In a proceeding to appoint a conservator of the estate of a person who is missing and whose whereabouts is unknown, the following acts are not required:

(a) Issuance of a citation to the proposed conservatee pursuant to Section 1823.

(b) Service of a citation and petition pursuant to Section 1824.

(c) Production of the proposed conservatee at the hearing pursuant to Section 1825.

(d) Performance of the duties of the court investigator pursuant to Section 1826.

(e) Performance of any other act that depends upon knowledge of the location of the proposed conservatee.

Comment. Section 1848 excuses performance of any duty under the general provisions that depends upon knowledge of the whereabouts of the missing person. This section does not limit the authority of the court to require that an attempt be made to locate the missing person. See the Comment to Section 1847.

§ 1849. Appointment of conservator

1849. A conservator of the estate of a person who is missing and whose whereabouts is unknown may be appointed only if the court finds all of the following:

(a) The proposed conservatee owns or is entitled to the possession of real or personal property situated in this state.

(b) The proposed conservatee remains missing and his or her whereabouts remains unknown.

(c) The estate of the proposed conservatee requires attention, supervision, and care.

Comment. Section 1849 supersedes a portion of former Section 260 (appointment of trustee of estate of missing person). See the Comment to Section 1846. For a special provision relating to notice of hearing on a petition, report, or account, see Section 1461.7.

**CHAPTER 1. TRUSTEES OF ESTATES
OF PERSONS MISSING OVER
90 DAYS**

§ 260. Petition for appointment of trustee; petitioners; filing; date of hearing

Whenever any resident of this state, who owns or is entitled to the possession of any real or personal property situate in this state, is missing, or the whereabouts of such a person is unknown, for 90 days, and a verified petition is presented to the superior court of the county of which such person is a resident by the spouse of such person or any of the family or friends of such person, representing that the whereabouts of such person has been, for such time, and still is, unknown, and that such person's estate requires attention, supervision, and care of ownership, the court must order such petition to be filed, and appoint a day for its hearing, not less than 10 days from the date of the order.

Comment. Former Section 260 is superseded by Sections 1804 and 1846 (conservator for estate of missing person). The trusteeship procedure provided by former Sections 260-272 are replaced by the general conservatorship procedure, as modified by Sections 1845-1849. The requirements of former Section 260 that the missing person be a resident of this state and be missing for not less than 90 days are not continued. See the Comment to Section 1846. See also Section 2202 (venue where proposed conservatee is nonresident). For provisions continuing various aspects of former Section 260, see Sections 1450 (verification of petition), 1820 (persons authorized to petition), 2200 (jurisdiction of superior court), 2201 (venue where proposed conservatee is resident). See also Sections 1451 (clerk to set matters for hearing), 1822 (15 days' notice of hearing on petition).

§ 261. Publication of notice; additional notice

The clerk of the court must, prior to the day so appointed, publish notice pursuant to Section 6063a of the Government Code in some newspaper published in the county, stating that such petition will be heard at the courtroom of the court at the time appointed for the hearing. The court may direct further notice of the application to be given in such manner and to such persons as it may deem proper.

Comment. Former Section 261 is superseded by Section 1847. See the Comment to that section.

§ 262. Hearing; appointment of trustee

At the time so fixed for such hearing, or at any subsequent time to which the hearing may be postponed, the court must hear the petition and the evidence offered in support of or in opposition thereto, and, if satisfied that the allegations thereof are true, and that such person remains missing, and his whereabouts unknown, must appoint some suitable person to take charge and possession of such estate, and manage and control it under the direction of the court.

Comment. Former Section 262 is superseded by Sections 1804 (conservator for estate of missing person), 1827 and 1845 (law and procedure applicable to hearing), and 1849 (showing required for appointment of conservator of estate of missing person). See generally 2400-2595 (powers and duties of conservator of estate).

§ 263. Persons eligible to appointment; preference of wife or nominee

In appointing a trustee, the court must prefer the spouse of the missing person (if any such there is), or the nominee of the spouse of the missing person, and, in the absence of a spouse, some person, if such there is who is willing to act, entitled to participate in the distribution of the missing person's estate were the missing person dead.

Comment. Former Section 263 is superseded by Sections 1811 (nomination of conservator), 1812 (order of preference for appointment as conservator).

§ 264. Trustee's bond

Every person appointed under the provisions of the preceding section must give bond in the amount and as provided for in section 541 of this code.

Comment. The substance of former Section 264 is continued in Section 2320.

§ 265. Trustee's duties; family allowance

The trustee must take possession of the real and personal estate in this State of such missing person, and collect and receive the rents, income, and proceeds thereof, collect all indebtedness owing to him, and pay the expenses thereof out of the trust funds, and pay such indebtedness of the missing person as may be authorized by the court. The court may direct the trustee to pay to the person or persons constituting the family of the missing person such sum or sums of money for family expenses and support from the income or principal of the estate as it may, from time to time, determine.

Comment. Former Section 265 is superseded generally by Sections 2400-2595 (powers and duties of conservator of estate). See, e.g., Sections 2401 (management and control of estate), 2420-2423 (support and maintenance of dependents), 2430-2431 (payment of debts and expenses), 2451 (collection of debts).

§ 266. Trustee; accounting; removal; appointment of another

The trustee must, from time to time, when directed by the court, account to and with it for all his acts as trustee, and the court may, at any time, upon good cause shown, remove any trustee, and appoint another in his place.

Comment. Former Section 266 is superseded by Sections 2600-2633 (inventory and accounts of conservator) and 2650-2654 (removal of conservator).

§ 267. Sale or encumbrance of property; petition; order

The trustee may sell any or all of the personal or real property or mortgage or give a deed of trust upon any of the real property of the missing person when it is considered by the court as being to the best interest of the estate and all parties concerned including the heirs at law or legatees, and for that purpose shall file a petition with the court asking for an order directing and authorizing said sale, mortgage, or deed of trust.

Comment. Former Section 267 is superseded by Sections 2540-2548 (sales of property) and 2550-2552 (mortgage or deed of trust on real property). See also Section 1461.7 (notice of hearing on petition, report, or account where conservatee is a missing person).

§ 268. Sale or encumbrance of property; notice of hearing on petition

This petition shall be set for hearing not sooner than 10 days after the filing of the petition and notice thereof shall be given by the clerk of the court in the manner specified in Section 1200. Notice shall also be given by the petitioner by registered mail to each of the persons who would be heirs at law of the missing person, if he or she were dead, and if it appears that the missing person left a will, then like notice shall be given to each legatee mentioned therein, at his or her respective place of address, a return card being requested with each of the notices so registered in the mail. If the address of any person is unknown the notice shall be mailed as aforesaid to the person at the county seat of the county in which the court is held, and an affidavit of the trustee filed showing that the address is unknown, and stating what efforts he or she has made to determine the address.

Comment. Former Section 268 is superseded by Sections 1451 (clerk to set petition for hearing), 1461.7 (notice to persons known to petitioner to have a possible interest in missing person's estate if missing person were dead), 1460-1469 (general notice provisions).

§ 269. Sale or encumbrance of property; hearing; proof; order; minimum time for sale

On the day of hearing the petition proof shall be offered in behalf thereof showing the reasons for the making of said sale, mortgage, or deed of trust. If the court finds that it will be for the best interests of all persons concerned in the estate of said missing person to have said sale, mortgage, or deed of trust made, it shall order the trustee to sell any or all said property, real, personal or both, or to mortgage or give a deed of trust upon any of said real property, in the manner provided by this code for sales, mortgages, or deeds of trust of property of deceased persons, and all the provisions of law regarding such sale, mortgage or deed of trust shall govern the sale, mortgage or deed of trust of property of missing persons under this section, including the provisions concerning confirmation of the sales by the court; provided, however, that any such sale of real property shall not take place before the expiration of eight months from the date of the appointment and qualification of the trustee.

Comment. Former Section 269 is superseded by Sections 2403 (instructions from or confirmation by court), 2540-2548 (sale of property), 2550-2552 (mortgage or deed of trust). See also Section 1461.7 (notice to persons known to petitioner to have possible interest in missing person's estate if missing person were dead). The eight-month limitation at the end of former Section 269 is not continued.

§ 270. Return of missing persons; accounting

In the event the missing person returns, the court, upon application of said person, or upon its own motion, shall require the trustee to render and file a verified account of the administration of the trust, and the provisions of Article 3 of Chapter 15 of Division 3 of this code¹ shall apply to such accounting.

Comment. Former Section 270 is superseded by Sections 1860 (termination of conservatorship), 1861 (petition for termination of conservatorship), 1863 (hearing and judgment), and 2630 (continuing jurisdiction of court). See also Section 1849 (showing required for appointment of conservator of estate of missing person).

§ 271. Return of missing person; delivery of property

Upon the settling of the account of the trustee the court shall order the property of the missing person remaining in the hands of such trustee to be delivered to the owner thereof.

Comment. Former Section 271 is superseded by Sections 1863 (judgment terminating conservatorship) and 2630 (continuing jurisdiction of court).

§ 272. Administration of estate of missing person; accounting; delivery to administrator or executor

If, during the existence of a trust provided for in this chapter, administration of the estate of such missing person is had, under the provisions of Chapter 2 of this division¹ the court shall require an accounting as provided in section 270 and shall order the property of the missing person remaining in the hands of the trustee to be delivered to the administrator or executor of such estate.

Comment. Former Section 272 is superseded by Sections 1860 (termination of conservatorship upon death of conservatee), 2467 (care of estate pending delivery to personal representative), 2630 (continuing jurisdiction of court), and 2631 (disposition of assets on death of conservatee). See also Section _____ (administration of estate of person missing seven years).