

An Introduction to California Conservatorship Practice

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For the 349th JA Staff

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Disclaimer

The information presented here is current as of the date of presentation. While the presenter has attempted to give a thorough presentation on the topic of conservatorships in California, given the time and space constraints, some important information has been abbreviated or omitted. The information presented here is intended to aid the attorney recipient in identifying common scenarios triggering conservatorship law and to give a general understanding of the purpose and function of conservatorships. If additional information is needed on a particular point, or if a set of facts arises in practice, please feel free to contact the presenter for additional information or refer to the Continuing Education of the Bar, which was heavily consulted for the creation of this presentation.

Identifying a Need for Conservatorship

- Concerned person notices that a friend, family member, or neighbor is having trouble providing for:
 - Personal Needs
 - Managing Financial Resources
 - Resisting Fraud or Undue Influence
- Developmentally disabled child turns 18 years of age
 - Parents are told they no longer have right to medical information
- Is a conservatorship the answer?
- Who should be named as the conservator?
- Who should be responsible for petitioning the court?

What Is a Conservatorship and Who Is It For?

- General Conservatorships
 - Conservatorship of the Person
 - Conservatorship of the Estate
 - Temporary conservatorship for person or estate
- Limited Conservatorship
 - Developmentally disabled adult
- Lanterman-Petris-Short Act (LPS)
 - Gravely disabled adults
 - Involuntary placement in locked mental health facility
 - Other mental health treatment

Conservatorship of the Person

- Manages personal care of a person who cannot provide for personal needs for (Prob C 1801(a)):
 - Physical health
 - Medical care
 - Food
 - Clothing, or
 - Shelter
- Conservator decides where conservatee lives
 - Least restrictive available alternative necessary to meet individual needs (Prob C 2352)
 - Does not control visitors, telephone calls, mail, or other personal rights (Prob C 2351(a))

Conservatorship of the Estate

- Court-appointed fiduciary manages financial affairs of person who is substantially unable to:
 - Manage own financial resources, or
 - Resist fraud or undue influence (Prob C 1801(b))
- Primary responsibility to conserve, manage, and use conservatee's property in California for both:
 - Benefit of the conservatee, and
 - Those whom he or she is obligated to support
- Must use ordinary care and diligence (Prob C 2401)

Conservatorship of the Estate for Absentee or Missing Person (Prob C 1803)

- “Absentee” defined by Prob C 1403
 - Member of the uniformed armed forces or employee of US Government determined by Secretary to be “in missing status”
- “Missing Person” is a person who is missing and whose whereabouts are unknown
 - May be filed regardless of when the person became missing and for how long
- Procedures for establishing conservatorships for both absentee and missing persons are set forth in Prob C 1840-1844

Alternatives to Conservatorships

- Court authorization for a particular transaction for community property of an incapacitated spouse (Prob C 3000-3154)
 - Authorizing transactions, or
 - Determining capacity to enter transaction for spouse whose capacity is questionable
- Court order authorizing a designated person to consent to medical treatment for an adult who is unable to give informed consent (Prob C 3200 – 3212)
 - For whom a continuing conservatorship is unnecessary
- Court approved compromise or payment of money for person with disability
- Designated Payee for Government Benefits
- Trust and Power of Attorney

Effect of Establishment of Conservatorship

- Shifts the responsibility for making financial and personal care decisions from the conservatee to the conservator
- Fiduciary relationship owed from conservator to conservatee
- Under conservatorship of the estate
 - Conservatee presumed to lack capacity to contract; sell transfer or convey property; make gifts; incur debts (except for necessities); delegate powers
- Under conservatorship of the person
 - Conservator has care custody and control of conservatee
 - Conservatee presumed to have capacity to make medical decisions unless court finds conservatee lacks capacity to give informed consent

Jurisdiction

- California has jurisdiction to appoint conservator if:
 - California is the proposed conservatee's home state
 - California is a significant-connection state and the respondent does not have a home state
 - California is a significant-connection state and a court of the proposed conservatee's home state has expressly declined to exercise jurisdiction because California is a more appropriate forum
 - "home state" means the state in which the proposed conservatee was physically present, including any period of temporary absence, for at least 6 consecutive months immediately before the filing of a petition
 - Special jurisdiction when property located within California

Notice Requirement

- Due Process requires that notice must be given by a method that allows an interested party a reasonable opportunity to be heard
- Must be given 15 days before hearing
- Personal service when significant rights are involved
- Service of citation on proposed conservatee gives court jurisdiction
- Service by mail sufficient for other interested persons
- All relatives within second degree
- All persons with an interest in property affected by petition

Acceptable Conservators

- Confidential Conservator Screening Form filed so that background check may be performed
- Conservators of Estates:
 - No debtor or creditor relationship w/ conservatee
 - No history of fraud
 - No history of property crimes such as theft or embezzlement
 - spouse of the proposed conservatee may not petition or be appointed if he or she is a party to any action or proceeding for legal separation, dissolution, or adjudication of nullity of their marriage
 - Professional fiduciaries
- Conservators of Persons:
 - No history of abuse or violence

Capacity Determination

- All persons presumed to have capacity to make their own decisions and take responsibility for their own actions (Prob C 810)
- Determination that a person is of unsound mind or lacks capacity to do a certain act shall be supported by evidence of a deficit in at least one of the following mental functions and a correlation between the deficit and the decision or acts in question (Prob C 811):
 - (1) Alertness and attention, including but not limited to: (A) level of arousal or consciousness, (B) orientation to time, place, person, and situation, (C) ability to attend and concentrate

Capacity Determination

- (2) Information processing including but not limited to: (A) short and long-term memory, (B) ability to understand and communicate with others, (C) recognition of familiar objects and persons, (D) ability to understand and appreciate quantities, (E) ability to reason using abstract concepts, (F) ability to plan, organize, and carry out actions in one's own rational self-interest, (G) ability to reason logically,
- (3) Thought processes. Deficits may be demonstrated by (A) severely disorganized thinking, (B) hallucinations, (C) Delusions, (D) uncontrollable, repetitive, or intrusive thoughts
- (4) Ability to modulate mood and affect. Demonstrated by pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances

Capacity Determination

- The court may consider a deficit in mental functioning as evidence of a lack of capacity only if the deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act in question (Prob C 811(b))
 - Example: To establish deficit in alertness and attention it is not enough to show the proposed conservatee is drowsy all day and inattentive to surroundings
 - The petition must show that the proposed conservatee fails to bathe and eat for days or wanders the neighborhood due to lack of attention

Capacity Determination

- The court may take into consideration the frequency, severity, or duration
 - Isolated instances not enough
 - Example: Failure to pay utility bill for several months followed by payment when notice is given by utility company is insufficient
 - By contrast, termination of utility service by several companies may be enough to show inability to manage financial resources
- The level of capacity needed to handle one's own financial resources can vary depending in the complexity of the person's finances.

Standard of Proof

- The court may not appoint conservator unless the need for one is established by clear and convincing evidence (Prob C 1801)
- For conservatorship of the person
 - Proposed conservatee cannot provide for own personal needs
- For conservatorship of the estate
 - Cannot manage financial resources, or
 - Resist fraud or undue influence
 - In absence of fraud or undue influence, evidence will be proposed conservatee's own behavior and consequences
 - If allegations include fraud or undue influence, petitioner will have to show the behavior of others and the consequences on proposed conservatee

Doctor's Diagnosis and Opinion

- Doctor's opinion is not required, but is persuasive evidence
 - Especially if petitioner can correlate a particular diagnosis with conservatee's behavior
- For elderly proposed conservatees, it is important to have a doctor who specializes in geriatric medicine
 - In elderly, grief and depression over losing a spouse or a medical crisis may resemble symptoms of dementia, but is reversible
 - Memory loss, disoriented thinking, loss of appetite and inability to sleep may be the result of taking inappropriate medications or medications that should not be combined, or of poor nutrition
 - Often in the course of hospitalization, glasses or hearing aids are lost and the person appears incapacitated, when the problem is that he or she cannot see or hear
 - Gerontologist may diagnose problems that to a non-specialist appear incurable thereby avoiding conservatorship

Capacity Declaration

- Medical opinion of whether proposed conservatee is able to attend hearing
- Opinion of whether proposed conservatee can give informed consent to medical treatment
- Medical professional's opinion of whether proposed conservatee has deficits in four areas of mental function
- If treating physician refuses to complete form, physician may be required to appear under subpoena to answer questions

Dementia Powers

- If proposed conservatee is found to have dementia, conservator may be given powers to place conservatee in a locked or secured-perimeter facility
- Must be least restrictive alternative to protect conservatee
- Cautiously given by court

Inventory and Accounting

- Conservatorship of the Estate only
- All property disclosed so that bond may be fixed
 - Include income from income producing property
 - If retirement account is not accessible to conservator, may be excluded from bond, but still must be disclosed
 - Monthly income including government benefits
- Accounting must be filed one year after commencement of conservatorship
 - Every two years thereafter

Voting Powers

- Statement must be made as to whether proposed conservatee can complete an affidavit of voter registration
- Voting limitations on conservatees is subject of much debate
 - Personal autonomy and dignity
 - Constitutional right
 - Least Restrictive Alternative

Once Order is Granted

- If order is given by court, letters of conservatorship are issued
- Copies of letters may be given to persons who need to confirm the conservatorship exists
 - Financial institutions
 - Medical professionals
- Bank accounts retitled
 - Care must be taken to preserve designated beneficiaries

Management of Estate

- Protect property from disposal without conservatee's knowledge
- Secure real and personal property
- Sale of Real property – Best Interest of conservatee
 - Requires court confirmation of sale
 - The likely resulting benefit or improvement of the conservatee's life;
 - The likelihood that the conservatee would need or benefit from the property in the future;
 - The provisions of the conservatee's estate plan concerning the property;
 - The tax consequences of the transaction;
 - The effect of the transaction on the conservatee's entitlement to public benefits;
 - The condition of the entire estate;
 - Alternatives to disposition of the property;
 - The likelihood that the property will deteriorate or be subject to waste if retained in the estate; and
 - The benefit versus the cost or liability of maintaining the property in the estate.

Temporary Conservatorship

- Urgent situations
 - Medical treatment
 - Secure Conservatee's property
 - Death of conservator
 - Protection from elder abuse
 - Respond to litigation of incapacitated person
- Temporary measure until final determination of conservatorship
 - 30 day order, but may be extended automatically by court
- May be granted ex parte and notice waived for good cause
- Court investigation required
- Temporary conservator's principal duty is to provide for the temporary care, maintenance, and support of the conservatee, and to conserve and protect the conservatee's property from loss or injury

Limited Conservatorships

- 7 Powers at issue: Contract, Confidential Records, Medical, Education, Residence, Social/Sexual, Marriage
- Different from general conservatorship in fundamental way
- Intended to protect conservatee's health, welfare, and safety to extent necessary
- While reserving civil rights that can be managed independently
- Limited Conservatorship may be of the Estate or Person
- Divests the conservatee only of those rights that the protected person is unable to exercise capably
- Underlying mandate that protected persons receive services resulting in more independent, productive and normal lives
- Proposed limited conservatee must be represented by counsel
- Often parents petition for conservatorship when child turns 18 years of age

Major Differences from General Conservatorships

- Limited conservatee is not presumed to be incompetent- Prob C 1801
- Limited Conservatorship is only available for adults who have developmental disabilities- Prob C 1420
- Person with severe developmental disabilities may qualify for general conservatorship
 - Limited conservatorship will be appointed if the court finds that the person lacks capacity to perform some, but not all, of the tasks necessary to provide properly for personal needs or manage financial resources
- Limited conservator has a duty to protect and provide services and opportunities as appropriate to allow self-reliance and independence

Definition of Developmentally Disabled Adult

- Disability that develops before age 18, expected to continue indefinitely, and constitutes a substantial handicap (Prob C 1420)
- Disability is “substantial” if it results in functional limitations in at least three of the following areas of major life activity:
 - Self-care (eating, bathing, toileting, dressing, etc.)
 - Receptive or expressive language
 - Learning
 - Mobility (excludes handicap conditions that are solely physical)
 - Self-direction
 - Capacity for independent living
 - Economic self-sufficiency
- Avoid using a particular disease as qualification to avoid stigmatization

Exclusions or Caveats to Definition of Developmental Disability

- Developmental disability does not include mental illness
 - If the only disability is mental illness, limited conservatorship is not available
 - If the conservatee has developmental disability and mental disorder, an order establishing a probate conservatorship will not give authority to place the conservatee in a locked facility or administer psychotropic medications
- Open question for Traumatic Brain Injury occurring in childhood
 - Resulting from TBI, drug misuse or near drowning
 - If resulting in epilepsy, then may qualify as developmentally disabled
 - Court interpretation can vary

Role of Regional Center

- 21 Regional Centers throughout the state
- Private nonprofit community agencies funded and contracted by CA Department of Developmental Services (DDS)
- Goals
 - To prevent or minimize the institutionalization and dislocation of persons with developmental disabilities from family & community, and
 - To enable such individuals to approximate the pattern of everyday living of nondisabled persons to lead more independent & productive lives
- Before granting limited conservatorship, Regional Center performs assessment of individual and submits a report to the court
- Provides Individual Program Plan

Capacity Declaration

- If proposed conservator is seeking power to make medical decisions, a capacity declaration is required as with general conservatorship
- Should be completed by primary care physician, psychologist, neurologist, or religious healing practitioner
- Analyzes proposed conservatee's mental function
- Some jurisdictions require examination within 12 months
- Regional center psychologist may complete capacity declaration
- If treating physician refuses to complete form, physician may be required to appear under subpoena to answer questions

Powers that may be Requested in Limited Conservatorship of the Person

- To fix the residence of limited conservatee
- Have access to confidential records & papers of limited conservatee
- To consent or withhold consent to marriage
- To control the right of limited conservatee to contract
- To give or withhold consent to medical treatment
- Exercise right to control social or sexual contacts and relationships
- To make decisions concerning education of limited conservatee
- These powers are in addition to those automatically granted by Prob C 2351.5
 - services that will assist limited conservatee in development of maximum self-reliance

Limited Conservatorship of the Estate

- Appointment of limited conservator does not limit conservatee's power to contract
 - Opposite of general conservatorship where appointment of conservator is an adjudication that the conservatee lacks capacity to enter transactions (except for an allowance, wages and necessities of life)
- Authority for limited conservator to control financial resources must be specifically granted
- Court may impose conditions on exercise of power
 - Example: conservatee understands monetary concepts up to \$50
 - Court may authorize conservatee to spend up to that amount in a period of time, and conservator has power for greater amounts

Contact Information

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- Estate Planning
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- Trust Litigation

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