

RESOLUTION 02-11-2014

DIGEST

Conservatorships: Appointment of Counsel When Dementia Powers Are Requested

Amends Probate Code section 2356.5 to clarify when the representation of court appointed counsel ceases.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2356.5 to clarify when the representation of court appointed counsel ceases. This resolution should be approved in principle because the law is unclear whether or not the representation of the court appointed attorney continues once dementia powers are granted.

Too often the courts appoint counsel to represent a conservatee when dementia powers are requested and, once the powers are granted, leave it unclear whether or not representation continues. When an attorney is appointed by the court, they continue to represent the conservatee until they are relieved by the court. When an attorney is appointed for the specific purpose of representing the conservatee in the request for dementia powers, once the matter has been concluded, it stands to reason that the representation should terminate. However, some attorneys believe that they continue to represent the conservatee until the conservatorship terminates or they are relieved by the court. This can lead to an added expense to the conservatee's estate, or to the county, because the court appointed counsel continues to represent the conservatee in all of the proceedings before the court. By amending section 2356.5, it clarifies that the court shall release court appointed counsel at the conclusion of the matter unless the court specifically orders the attorney to continue in representing the conservatee.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2356.5 to read as follows:

§ 2356.5

(a) The Legislature hereby finds and declares:

(1) That people with dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders," should have a conservatorship to serve their unique and special needs.

(2) That, by adding powers to the probate conservatorship for people with dementia, their unique and special needs can be met. This will reduce costs to the conservatee and the family of the conservatee, reduce costly administration by state and county government, and safeguard the basic dignity and rights of the conservatee.

(3) That it is the intent of the Legislature to recognize that the administration of psychotropic medications has been, and can be, abused by caregivers and, therefore, granting powers to a conservator to authorize these medications for the treatment of dementia requires the protections specified in this section.

13 (b) Notwithstanding any other provision of law, a conservator may authorize the
14 placement of a conservatee in a secured perimeter residential care facility for the elderly operated
15 pursuant to Section 1569.698 of the Health and Safety Code, or a locked and secured nursing
16 facility which specializes in the care and treatment of people with dementia pursuant to
17 subdivision (c) of Section 1569.691 of the Health and Safety Code, and which has a care plan
18 that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations,
19 upon a court's finding, by clear and convincing evidence, of all of the following:

20 (1) The conservatee has dementia, as defined in the last published edition of the
21 "Diagnostic and Statistical Manual of Mental Disorders."

22 (2) The conservatee lacks the capacity to give informed consent to this placement and has
23 at least one mental function deficit pursuant to subdivision (a) of Section 811, and this deficit
24 significantly impairs the person's ability to understand and appreciate the consequences of his or
25 her actions pursuant to subdivision (b) of Section 811.

26 (3) The conservatee needs or would benefit from a restricted and secure environment, as
27 demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3)
28 of subdivision (f).

29 (4) The court finds that the proposed placement in a locked facility is the least restrictive
30 placement appropriate to the needs of the conservatee.

31 (c) Notwithstanding any other provision of law, a conservator of a person may authorize
32 the administration of medications appropriate for the care and treatment of dementia, upon a
33 court's finding, by clear and convincing evidence, of all of the following:

34 (1) The conservatee has dementia, as defined in the last published edition of the
35 "Diagnostic and Statistical Manual of Mental Disorders."

36 (2) The conservatee lacks the capacity to give informed consent to the administration of
37 medications appropriate to the care of dementia, and has at least one mental function deficit
38 pursuant to subdivision (a) of Section 811, and this deficit or deficits significantly impairs the
39 person's ability to understand and appreciate the consequences of his or her actions pursuant to
40 subdivision (b) of Section 811.

41 (3) The conservatee needs or would benefit from appropriate medication as demonstrated
42 by evidence presented by the physician or psychologist referred to in paragraph (3) of
43 subdivision (f).

44 (d) Pursuant to subdivision (b) of Section 2355, in the case of a person who is an adherent
45 of a religion whose tenets and practices call for a reliance on prayer alone for healing, the
46 treatment required by the conservator under subdivision (c) shall be by an accredited practitioner
47 of that religion in lieu of the administration of medications.

48 (e) A conservatee who is to be placed in a facility pursuant to this section shall not be
49 placed in a mental health rehabilitation center as described in Section 5675 of the Welfare and
50 Institutions Code, or in an institution for mental disease as described in Section 5900 of the
51 Welfare and Institutions Code.

52 (f) A petition for authority to act under this section shall be governed by Section 2357,
53 except:

54 (1) The conservatee shall be represented by an attorney pursuant to Chapter 4
55 (commencing with Section 1470) of Part 1. Upon the granting or denial of dementia authority
56 under subdivisions (b) or (c) of this Section, the court shall discharge the attorney or order the
57 continuation of such representation.

58 (2) The conservatee shall be produced at the hearing, unless excused pursuant to Section
59 1893.

60 (3) The petition shall be supported by a declaration of a licensed physician, or a licensed
61 psychologist within the scope of his or her licensure, regarding each of the findings required to
62 be made under this section for any power requested, except that the psychologist has at least two
63 years of experience in diagnosing dementia.

64 (4) The petition may be filed by any of the persons designated in Section 1891.

65 (g) The court investigator shall annually investigate and report to the court every two
66 years pursuant to Sections 1850 and 1851 if the conservator is authorized to act under this
67 section. In addition to the other matters provided in Section 1851, the conservatee shall be
68 specifically advised by the investigator that the conservatee has the right to object to the
69 conservator's powers granted under this section, and the report shall also include whether powers
70 granted under this section are warranted. If the conservatee objects to the conservator's powers
71 granted under this section, or the investigator determines that some change in the powers granted
72 under this section is warranted, the court shall provide a copy of the report to the attorney of
73 record for the conservatee. If no attorney has been appointed for the conservatee, one shall be
74 appointed pursuant to Chapter 4 (commencing with Section 1470) of Part 1. The attorney shall,
75 within 30 days after receiving this report, do one of the following:

76 (1) File a petition with the court regarding the status of the conservatee.

77 (2) File a written report with the court stating that the attorney has met with the
78 conservatee and determined that the petition would be inappropriate.

79 (h) A petition to terminate authority granted under this section shall be governed by
80 Section 2359.

81 (i) Nothing in this section shall be construed to affect a conservatorship of the estate of a
82 person who has dementia.

83 (j) Nothing in this section shall affect the laws that would otherwise apply in emergency
84 situations.

85 (k) Nothing in this section shall affect current law regarding the power of a probate court
86 to fix the residence of a conservatee or to authorize medical treatment for any conservatee who
87 has not been determined to have dementia.

88 (l)(1) Until such time as the conservatorship becomes subject to review pursuant to
89 Section 1850, this section shall not apply to a conservatorship established on or before the
90 effective date of the adoption of Judicial Council forms that reflect the procedures authorized by
91 this section, or January 1, 1998, whichever occurs first.

92 (2) Upon the adoption of Judicial Council forms that reflect the procedures authorized by
93 this section or January 1, 1998, whichever occurs first, this section shall apply to any
94 conservatorships established after that date.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: It is unclear when representation ceases of a court appointed attorney (CAA) under Probate Code section 2356.5. When a proposed conservator seeks authority to administer medication appropriate for the treatment of dementia or to place a proposed conservatee in a secured perimeter residential care facility for the elderly, the proposed conservatee is appointed an attorney under Probate Code section 2356.5, subdivision (f)(1). The law does not indicate if this representation continues indefinitely, or whether it should terminate upon initial appointment of the conservator. Some courts have indicated uncertainty as to the legislative expectation regarding continuation of the appointment after the hearing on dementia authority.

The Solution: This Resolution gives the court discretion to allow the attorney to continue to represent the conservatee in an ongoing fashion, or to discharge upon the conclusion of a particular matter. This discretion is appropriate, as the due process rights of the conservatee would be protected if such ongoing representation were necessary, but it would not run afoul of the legislative intent to limit the role of the CAA to a particular proceeding. Probate Code

Section 2356.5 was enacted by SB 1481 in 1996 in the context of needing an alternative to LPS conservatorships. Accordingly, many of the protections from the LPS system were adopted, including the right to periodic review and court appointed counsel. (Arguments in Support to Bill Analysis of SB 1481.) The legislature tasked the responsibility of periodic review to the court investigator, and the role of the CAA is only discussed within the context of the initial hearing. (Summary to Bill Analysis of SB 1481; Background to the Bill Analysis of SB 1481.) Probate Code Section 2356.5(g) reflects this intent, as it explicitly assigns the post-appointment duty of periodic review to the court investigator and envisions that there may be no concurrently acting CAA, such that one must be appointed to resolve a particular dispute: “If no attorney has been appointed for the conservatee, one shall be appointed pursuant to Chapter 4, (commencing with Section 1470) of Part 1.” The method of appointment under Sections 1470 and 1471 is proceeding specific: “The court may appoint private legal counsel ... in any proceeding under this division ...” (Section 1470.) Section 1471(a) lists such proceeding. CAA fees in such proceedings are to be furnished “upon conclusion of the matter.” (Section 1471(b).) The Code does not indicate how payments would be made in an ongoing fashion. Thus, legislative history and statute suggest that the role of the CAA was not intended to be ongoing. However, due process would be best served if the Court were given the clear discretion to order that an attorney be appointed to represent the conservatee in an ongoing fashion, if the court believes such continued representation would be beneficial, or to discharge the CAA upon conclusion of a particular matter. The Resolution would clarify the role of the CAA under Probate Code Section 2356.5, serving both due process and judicial economy.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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SECTION COMMENTS TO RESOLUTION 02-11-2014

TRUST AND ESTATE SECTION OF THE STATE BAR OF CALIFORNIA

APPROVE.

Disclaimer:

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the TRUSTS and ESTATES SECTION is voluntary and

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