RESOLUTION 06-01-2016

DIGEST

Conservatorships: Replacement of Dementia with Major Neurocognitive Disorder

Amends Health and Safety Code sections 1569.698, 1569.699 and 1569.7 and Probate Code sections 1981 and 2356.5 to replace "Dementia" with "Major Neurocognitive Disorder."

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code sections 1569.698, 1569.699 and 1569.7 and Probate Code sections 1981 and 2356.5 to read as follows:

§1569.698

(a) The State Fire Marshal has proposed that the State Building Standards Commission adopt building standards to provide for locked and secured perimeters in residential care facilities for the elderly that care for persons with ~~dementia~~ major neurocognitive disorder:

(1) It is acknowledged that these building standards will not become effective until October 1, 1996.

(2) It is the policy of the State Building Standards Commission that building standards be adopted exclusively into the California Building Standards Code and not into state statute.

(3) However, in recognition of the immediate need of residential care facilities for the elderly caring for persons with ~~dementia~~ major neurocognitive disorder to provide a secured environment, it is the intent of the Legislature that the building standards for locked and secured perimeters proposed by the State Fire Marshal for adoption in the 1994 California Building Standards Code, as set forth in Section 1569.699, be effective upon the date this article becomes operative.

(b)(1) Upon the filing of emergency regulations with the Secretary of State pursuant to subdivision (c), a residential care facility for the elderly that cares for people with dementia may utilize secured perimeter fences or locked exit doors, if it meets the requirements for additional safeguards required by those regulations.

(2) For the purposes of this article, ~~dementia~~ major neurocognitive disorder includes Alzheimer's disease and related disorders, diagnosed by a physician, that increase the tendency to wander and that decrease hazard awareness and the ability to communicate.

(3) It is the intent of the Legislature in enacting this article that residential care facilities for the elderly have options for the security of persons with ~~dementia~~ major neurocognitive disorder who are residents of those facilities that are in addition to existing security exceptions made for individual residents. It is the further intent of the Legislature that these additional options shall include the use of waivers of certain building standards relating to fire safety, to be issued by the state department with the approval of the State Fire Marshal, to permit the care of a target group of persons with ~~dementia~~ major neurocognitive disorder by means of secured perimeter fences, or the use of locked exterior doors. Each waiver request shall include a facility plan of operation that addresses elements of care to be identified by the department in regulations and demonstrates the facility's ability to meet the safety needs of persons with ~~dementia~~ major neurocognitive disorder.

(4) The department shall adopt regulations that ensure that staff for secured perimeter facilities receive appropriate and adequate training in the care of residents with ~~dementia~~ major neurocognitive disorder.

(5) Nothing in this section is intended to prohibit residential care facilities for the elderly from accepting or retaining persons with ~~dementia~~ major neurocognitive disorder whose needs can be fully met using care options permitted by existing law and regulations.

(6) It is not the intent of the Legislature to authorize an increase in the level of care provided in a residential care facility for the elderly or to establish a supplemental rate structure based on the services provided in the facility.

(7) All admissions to residential care facilities for the elderly shall continue to be voluntary on the part of the resident or with the lawful consent of the resident's legal conservator.

(c) The department shall adopt regulations to implement subdivision (b) in accordance with those provisions of the Administrative Procedure Act contained in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The initial adoption of any emergency regulations following the effective date of the act amending this section during the 1995-96 Regular Legislative Session shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare. Emergency regulations adopted pursuant to this subdivision shall remain in effect for no more than 180 days.

(d) In addition to the security options authorized by subdivision (b), residential care facilities for the elderly that accept or retain as residents persons with ~~dementia~~ major neurocognitive disorder, and that choose to utilize the security options of egress-control devices of the time-delay type in addition to secured perimeter fences or locked exit doors, shall comply with Section 1569.699, or regulations adopted by the State Building Standards Commission, whichever is operative.

(e) A residential care facility for the elderly shall not utilize special egress-control devices of the time-delay type, secured perimeter fences, or locked exit doors unless the facility meets the requirements of Section 1569.699 or the Building Standards Commission adopts building standards to implement this section.

(f) Any person who is not a conservatee and is entering a locked or secured perimeter facility pursuant to this section, shall sign a statement of voluntary entry. The facility shall retain the original statement and shall send a copy of the statement to the department.

§1569.699

(a) When approved by the person responsible for enforcement as described in Section 13146, exit doors in facilities classified as Group R, Division 2 facilities under the California Building Standards Code, licensed as residential care facilities for the elderly, and housing clients with Alzheimer's disease or ~~dementia~~ major neurocognitive disorder, may be equipped with approved listed special egress-control devices of the time-delay type, provided the building is protected throughout by an approved automatic sprinkler system and an approved automatic smoke-detection system. The devices shall conform to all of the following requirements:

(1) Automatic deactivation of the egress-control device upon activation of either the sprinkler system or the detection system.

(2) Automatic deactivation of the egress-control device upon loss of electrical power to any one of the following: The egress-control device; the smoke-detection system; exit illumination as required by Section 1012 of the California Building Code.

(3) Be capable of being deactivated by a signal from a switch located in an approved location.

(4) Initiate an irreversible process that will deactivate the egress-control device whenever a manual force of not more than 15 pounds (66.72 N) is applied for two seconds to the panic bar or other door-latching hardware. The egress-control device shall deactivate within an approved time period not to exceed a total of 15 seconds, except that the person responsible for enforcement as described in Section 13146 may approve a delay not to exceed 30 seconds in residential care facilities for the elderly serving patients with Alzheimer's disease. The time delay established for each egress-control device shall not be field adjustable.

(5) Actuation of the panic bar or other door-latching hardware shall activate an audible signal at the door.

(6) The unlatching shall not require more than one operation.

(7) A sign shall be provided on the door located above and within 12 inches (305mm) of the panic bar or other door-latching hardware reading:
KEEP PUSHING. THIS DOOR WILL OPEN IN ___ SECONDS. ALARM WILL SOUND.
Sign letter shall be at least one inch (25mm) in height and shall have a stroke of not less than 1/8 inch (3.3mm).

(8) Regardless of the means of deactivation, relocking of the egress-control device shall be by manual means only at the door.

(b) Grounds of residential care facilities for the elderly serving persons with Alzheimer's disease or ~~dementia~~ major neurocognitive disorder may be fenced, and gates therein equipped with locks, provided safe dispersal areas are located not less than 50 feet (15240mm) from the buildings. Dispersal areas shall be sized to provide an area of not less than threesquare feet (0.28 2) per occupant. Gates shall not be installed across corridors or passageways leading to the dispersal areas unless they comply with the exit requirements of Section 1021 of the California Building Standards Code.

(c) Exit doors may be locked in residential care facilities for the elderly that meet the requirements for Group I, Division 3 occupancies under the California Building Standards Code and that care for people with ~~dementia~~ major neurocognitive disorder.

(d) This section shall become inoperative on the date the State Building Standards Commission adopts regulations regarding secured perimeters in residential care facilities for the elderly, and, as of the January 1 next following that date, is repealed, unless a later enacted statute, that becomes operative on or before that January 1, deletes or extends the dates on which it becomes inoperative and is repealed.

§1569.7

Residential care facilities for the elderly that serve residents with Alzheimer's disease and other forms of ~~dementia~~ major neurocognitive disorder should include information on sundowning as part of the training for direct care staff, and should include in the plan of operation a brief narrative description explaining activities available for residents to decrease the effects of sundowning, including, but not limited to, increasing outdoor activities in appropriate weather conditions.

§1981

(a) (1) This chapter does not apply to a minor, regardless of whether the minor is or was married.

(2) This chapter does not apply to any proceeding in which a person is appointed to provide personal care or property administration for a minor, including, but not limited to, a guardianship under Part 2 (commencing with Section 1500).

(b) This chapter does not apply to any proceeding in which a person is involuntarily committed to a mental health facility or subjected to other involuntary mental health care, including, but not limited to, any of the following proceedings or any proceeding that is similar in substance:

(1) A proceeding under Sections 1026 to 1027, inclusive, of the Penal Code.

(2) A proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code.

(3) A proceeding under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

(4) A proceeding under Article 6 (commencing with Section 1800) of Chapter 1 of Division 2.5 of the Welfare and Institutions Code.

(5) A proceeding under Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(6) A proceeding under Article 3 (commencing with Section 3100) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(7) A proceeding under Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, which is also known as the Lanterman-Petris-Short Act.

(8) A proceeding under Article 2 (commencing with Section 6500) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(9) A proceeding under Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(c) Article 3 (commencing with Section 2001) does not apply to an adult with a developmental disability, or to any proceeding in which a person is appointed to provide personal care or property administration for an adult with a developmental disability, including, but not limited to, the following types of proceedings:

(1) A proceeding under Article 7.5 (commencing with Section 416) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code.

(2) A limited conservatorship under subdivision (d) of Section 1801.

(3) A proceeding under Section 4825 of the Welfare and Institutions Code.

(4) A proceeding under Article 2 (commencing with Section 6500) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(d) Application of this chapter to a conservatee with ~~dementia~~ major neurocognitive disorder is subject to the express limitations of Sections 2002 and 2016, as well as the other requirements of this chapter.

§2356.5

(a) The Legislature hereby finds and declares:

(1) That people with ~~dementia~~ major neurocognitive disorder, 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~~ major neurocognitive disorder, 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~~ major neurocognitive disorder requires the protections specified in this section.

(b) Notwithstanding any other law, a conservator may authorize the placement of a conservatee in a secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87705 of Title 22 of the California Code of Regulations, upon a court's finding, by clear and convincing evidence, of all of the following:

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

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

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

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

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

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

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

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

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

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

(f) A petition for authority to act under this section is governed by Section 2357, except:

(1) The conservatee shall be represented by an attorney pursuant to Chapter 4 (commencing with Section 1470) of Part 1. Upon granting or denying authority to a conservator under this section, the court shall discharge the attorney or order the continuation of the legal representation, consistent with the standard set forth in subdivision (a) of Section 1470.

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

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

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

(g) The court investigator shall annually investigate and report to the court every two years pursuant to Sections 1850 and 1851 if the conservator is authorized to act under this section. In addition to the other matters provided in Section 1851, the conservatee shall be specifically advised by the investigator that the conservatee has the right to object to the conservator's powers granted under this section, and the report shall also include whether powers granted under this section are warranted. If the conservatee objects to the conservator's powers granted under this section, or the investigator determines that some change in the powers granted under this section is warranted, the court shall provide a copy of the report to the attorney of record for the conservatee. 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 attorney shall, within 30 days after receiving this report, do one of the following:

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

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

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

(i) Nothing in this section shall be construed to affect a conservatorship of the estate of a person who has ~~dementia~~ major neurocognitive disorder.

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

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

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under Probate Code section 2356.5, a conservator may authorize the placement of a conservatee in a secured perimeter facility pursuant to Section 1569.698 of the Health and Safety Code upon clear and convincing evidence that "[t]he conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders." (Probate Code section 2356.5(b)(1).) Also under Probate Code section 2356.5, "…a conservator of a

person may authorize the administration of medications appropriate for the care and treatment of a dementia." (Probate Code section 2356.5(c).) Related statutes reference *dementia*, including Probate Code section 1981, which concerns interstate jurisdiction, transfer, and recognition of conservatorships, and Health and Safety Code sections 1569.699, and 1569.7, which concern the requirements for secured perimeter facilities. The use of the term *dementia* is a problem because the last published edition of the Diagnostic and Statistical Manual of Mental Disorders, or "DSM-5," has replaced the term *dementia* with *major neurocognitive disorder:* "Dementia is subsumed under the newly named entity *major neurocognitive disorder*…" (American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders: DSM-5*. Washington, D.C: American Psychiatric Association, 591.)

The Solution: This Resolution addresses the problem by replacing *dementia* with the updated term *major neurocognitive disorder*.

The authors of the DSM-5 explain that the use of "*major neurocognitive disorder* is widely used and often preferred for conditions affecting younger individuals, such as secondary impairment to traumatic brain injury or HIV infection." (*Ibid.*) The Neurocognitive Disorders Work Group of the American Psychiatric Association's DSM-5 Task Force explained that while the term *dementia* is most often used with Alzheimer's and Lewy Body diseases, other common types of diseases previously categorized as subtypes of dementia are now categorized differently: "Expert groups in cerebrovascular disease are moving away from "Vascular Dementia" and towards "Vascular Cognitive Impairment", encompassing all levels of severity; experts in frontotemporal lobar degeneration also eschew the term dementia…" (Ganguli, M., Blacker, D., Blazer, D. G., Grant, I., Jeste, D. V., Paulsen, J. S., … The Neurocognitive Disorders Work Group of the American Psychiatric Association's (APA) DSM5 Task Force. (2011). Classification of Neurocognitive Disorders in DSM-5: A Work in Progress. *The American Journal of Geriatric Psychiatry : Official Journal of the American Association for Geriatric Psychiatry*, *19*(3), 205–210.)

Since the current DSM-5 has substituted the term *dementia* with *major neurocognitive disorder*, those turning to DSM-5 will not find the clear diagnostic support when seeking to interpret the statutes at issue. The clear and obvious solution would be to substitute the new term *major neurocognitive disorder* wherever *dementia* now appears.

IMPACT STATEMENT
This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

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RESPONSIBLE FLOOR DELEGATE: D. Robert Dieringer

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code sections 1569.698, 1569.699 and 1569.7 and Probate Code sections 1981 and 2356.5 to Replace "Dementia" with "Major Neurocognitive Disorder." This resolution should be approved in principle because it brings this code section in line with the most recent version of the DSM 5, which has replaced the term "dementia" with "major neurocognitive disorder."

This proposal updates the relevant statutes to ensure they are consistent with the current language used by professionals in making a diagnosis. If the statutes are not amended, those professionals would be required to make separate findings using the superseded clinical definitions for purposes of complying with the statutory language.

COUNTERARGUMENTS

TEXCOM

SUPPORT as to Probate Code section 2356.5, no position on other sections

RATIONALE
TEXCOM has been aware of the problems posed by DSM V change of terminology. "Dementia authority," as per Probate Code section 2356, requires a finding of fact of "dementia" as defined in latest edition of the DSM. With the change of DSM terminology away from "dementia" in favor of "major neurocognitive disorder," this amendment is needed given the specific definitional reference in Probate Code section 2356.5 to DSM. TEXCOM agrees with proponents that this is not purely a technical amendment, and that Major Neurocognitive Disorder will have a slightly broader application than the term dementia. However TEXCOM also concurs that the extension of the protections of Section 2356.5 for individuals with "dementia-like" symptoms secondary to traumatic brain injury and various disease processes is appropriate, and notes that petitioners will still need to plead and prove the functional impairment required by Probate Code section 811, and the need, by clear and convincing evidence, for the proposed secure placement or administration of psychotropic medications.

DISCLAIMER:

This position is only that of the TRUSTS & 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.

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