

RESOLUTION 05-04-2018

DIGEST

Conservatorships: Susceptibility to Undue Influence

Amends Probate Code section 1801 to allow the court to consider evidence of an individual’s susceptibility to undue influence as a factor in deciding whether to establish a conservatorship.

STATEMENT OF REASONS

The Problem: Existing law provides that an inability to resist fraud or undue influence is grounds for the appointment of a conservator of the estate, but not a conservator of the person. This is a problem because undue influence often results in non-economic consequences, including the physical isolation, physical mistreatment, and interference with longstanding relationships of an elder that can result in an inability to provide for one’s personal needs. The modernized definition of undue influence, effective January 1, 2014, under Welfare and Institutions Code section 15610.70, addresses this reality. The current law on conservatorships does not provide for a conservatorship of the person to address undue influence resulting in non-economic consequences, and this must be fixed.

The Solution: The proposed amendment allows consideration of evidence of a proposed conservatee’s susceptibility to undue influence as it pertains to his or her ability to properly provide for his or her personal needs.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1801 to read as follows:

1 § 1801

2 Subject to Section 1800.3:

3 (a) A conservator of the person may be appointed for a person who is unable to provide
4 properly for his or her personal needs for physical health, food, clothing, or shelter except as
5 provided for the person as described in subdivision (b) or (c) Section 1828.5. Evidence of an
6 individual’s susceptibility to undue influence may be considered in determining whether the
7 person is unable to provide for his or her personal needs as provided in this subdivision.

8 (b) A conservator of the estate may be appointed for a person who is substantially unable
9 to manage his or her own financial resources or resist fraud or undue influence, except as
10 provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial
11 inability may not be proved solely by isolated incidents of negligence or improvidence.

12 (c) A conservator of the person and estate may be appointed for a person described in
13 subdivisions (a) and (b).

14 (d) A limited conservator of the person or of the estate, or both, may be appointed for a
15 developmentally disabled adult. A limited conservatorship may be utilized only as necessary to
16 promote and protect the well-being of the individual, shall be designed to encourage the
17 development of maximum self-reliance and independence of the individual and shall be ordered
18 only to the extent necessitated by the individual’s proven mental and adaptive limitations. The
19 conservator shall not be presumed to be incompetent and shall retain all legal and civil rights

20 except those which by court order have been designated as legal disabilities and have been
21 specifically granted to the limited conservator. The intent of the Legislature, as expressed in
22 Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this
23 state receive services resulting in more independent, productive, normal lives is the underlying
24 mandate of this division in its application to adults alleged to be developmentally disabled.

25 (e) The standard of proof for the appointment of a conservator pursuant to this section
26 shall be clear and convincing evidence.

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

PROPONENT: Probate Attorneys of San Diego

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1801 to allow the court to consider evidence of an individual's susceptibility to undue influence as a factor in deciding whether to establish a conservatorship. This resolution should be approved in principle because it adds an important component for the court to consider when evaluating the need for a conservatorship of the person.

Presently, Probate Code section 1801 subdivision (a) allows the court to appoint a conservator of the person for someone who is unable to provide properly for their personal needs for physical health, food, clothing or shelter. A conservator of the person decides where the conservatee lives, whether at home or in an institution, manages the conservatee's medical care, medication, food, and can even have the authority to limit contact between the conservatee with certain family members or others. But the Probate Code does not specifically give the court authority to

consider the person’s susceptibility to undue influence when appointing a conservator of the person. This is in contrast to Probate Code section 1801, subdivision (b) where the court does consider undue influence when determining whether a conservatorship of the estate is needed. Since the court is already evaluating whether the proposed conservatee is vulnerable to undue influence when establishing a conservatorship of the estate, it makes sense for the court to be able to use this evidence when evaluating whether a conservatorship of the person is needed.

Welfare and Institutions Code section 15610.70 defines “undue influence” as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results inequity.” In determining undue influence under Welfare and Institutions Code section 15610.70, the court considers evidence of an influencer who controls necessities of life, medication, the victim’s interaction with others, and isolation. California Adult Protective Services already recognizes the need to consider undue influence regarding a person’s ability to provide for their own health, food, clothing and shelter through their “California Undue Influence Screening Tool (CUIST).” Since these same factors form the basis of determining whether a conservatorship of the person is needed, it makes sense for a court to consider evidence of whether the person is susceptible to undue influence when evaluating whether to grant a conservatorship of the person.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - OPPOSE

This resolution is unnecessary, as evidence of an individual’s susceptibility to undue influence may already be considered by the court—even without the proposed statutory amendment—under Probate Code section 1801, subdivision (a), in determining whether the person is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. Moreover, this resolution would create a new consideration relating to the appointment of a conservator of the person (i.e., the individual’s susceptibility to undue influence) in a way that is inconsistent with the existing undue influence-based requirement applicable to conservatorships of the estate (i.e., substantial inability to resist fraud or undue influence). The basis for the distinction is unclear. Finally, whereas substantial inability to resist fraud or undue influence may not be proved solely by isolated incidents of negligence or improvidence in the context of a conservatorship of the estate under Probate Code section 1801, subdivision (b), the proposed amendment to Probate Code section 1801, subdivision (a), contains no similar limitation; as a result, it does not adequately protect the subject individual’s fundamental liberties.