

Review of Conservatorships

This is a brief examination of the basic concepts and procedures involved in starting and maintaining a conservatorship for someone who lacks sufficient capacity to act for themselves.

What is a conservatorship?

The word “*conserve*” means to protect and preserve, which is the underlying purpose of conservatorship proceedings in the probate court. A conservatorship is a protective court proceeding in which the court determines whether the subject of the proposed conservatorship (the **Conservatee**) is sufficiently incapacitated to warrant the appointment of a proxy (the **Conservator**) to take over his (or her) finances and/or personal care. The Conservator becomes a surrogate actor and decision-maker for the Conservatee and must keep the court informed of his acts and transactions by means of regular reports and accountings that must be presented for the judge’s review and approval.

Establishment of the conservatorship shifts the authority and responsibility for financial and/or personal care from the incapacitated individual to his or her Conservator. At the same time, the appointment significantly curtails the conservatee’s rights and ability to act autonomously. Actions by the Conservatee after the appointment are not enforceable because the Conservatee has lost the power to contract, to give or withhold informed consent to medical care, etc. Oversight of the Conservator is provided by an independent Court Investigator or Public Guardian, and financial oversight is done by means of regular accountings the Conservator must present to the court for approval. Significant rights that may be retained by a Conservatee with limited capacity may be the right to vote, to marry, etc.

I have been describing what is called a “general conservatorship” whereby a surrogate is given broad or “general” powers over the conservatee’s affairs. Where the Conservatee is a person who has one or more developmental disabilities that are incapacitating, the court may establish a limited conservatorship for him to provide surrogate care in the areas where the Conservatee cannot or should not act alone. The Conservator’s authority in these proceedings is limited to what the court concludes will provide the least restriction necessary. A third type of conservatorship, called an “LPS” conservatorship is a very specialized procedure for adults who have serious mental illnesses, meaning those listed in the Diagnostic and Statistical Manual of Mental Disorders and not impairment simply due to injury or disease.

Determination of Capacity

A person requesting a conservatorship for another must provide clear and convincing evidence of the subject’s incapacity, including statements about the person’s behavior and the medical opinion of a the subject’s physician, a psychiatrist or similar medical professional.

Establishment of the conservatorship shifts the authority and responsibility for making financial and personal care decisions from the Conservatee to the Conservator, and limits the conservatee’s ability to act on his her own behalf. Because the conservatee’s rights become significantly curtailed, the court requires adequate evidence of the need and suitability of the proposed Conservator(s) before deciding to appoint a Conservator. As a safeguard, the court will send out its own, independent investigator to look into the situation and provide an independent report on what is found.

Medical proof of incapacity follows from an examining the conservatee’s mental functions. The Probate Code sets out the types of deficits that are relevant to mental impairment and the relative affects of those deficits portray the persons ability or inability to safely and prudently act for himself. By contrast, anecdotal evidence of isolated incidents of negligence or improvidence is not sufficient to support a

finding of impairment. However, the impairment may not be total. For example, a person may be able to pay his or her bills and keep a check register, but be unable to make financial decisions that are in his or her best interests.

Although a doctor's opinion is not necessary to establish incapacity, it usually is the best evidence of a lack of capacity. A physician's opinion is treated as an "expert" opinion, having more persuasive weight than the opinion of someone who is not medically trained. A significant advantage to the physician's opinion is that it can more clearly and reliably identify and explain the mental health issues and how they affect the proposed conservatee's capacity. This better understanding of the conservatee's limitations helps the court to appreciate how the impaired individual cannot function for himself, how he may be influenced by others, and ways in which he can still function appropriately.

The Proposed Conservator.

The person proposed for this role must be responsible and capable of performing the duties of a Conservator. The proposed financial Conservator must provide a surety bond (insurance) unless the bond requirement is waived and the court agrees that is appropriate.

The Conservator of the person is given the care, custody and control of the conservatee; that is, the Conservator assumes responsibility for the conservatee's health and general welfare to ensure the Conservatee remains safe and well fed, clothed and sheltered, and receives care for his or her health and medical needs. This includes the responsibility to ensure the conservatee's living situation (at home or in a group or care setting) is appropriate and the least restrictive means of meeting the conservatee's personal needs.

The Conservator of the estate is given sole authority to manage the conservatee's income, resources and financial affairs because the Conservatee is found to substantially unable to manage his or her own financial resources or to resist fraud or undue influence.

The court may appoint a Conservator of the person or the estate, or both. The same person may serve the Conservatee in both of these capacities, or the Conservator's personal and financial duties may be allocated to a separate fiduciary. An unmarried or widowed Conservatee may express a preference to have his children serve as co-Conservators because he wishes to treat them equally. It rarely works to have more than one person serving as a Conservator of the person and/or estate at any time: a conservatorship managed by a committee is unwieldy, inefficient and potentially harmful to the conservatee.

What Alternatives Are Available?

Often there are reasonable alternatives to a conservatorship that are available to the proposed conservatee. The initiating papers will ask about alternatives and why they are not available in this case.

If planning was done before the lack of capacity evolved to the point where a Conservator would be appropriate, those plans can be useful. For example, if there is a trust or power of attorney in place that is satisfactory for the particular situation, then a conservatorship of the estate may not be necessary. However, it may be desirable for tasks that have not been planned for, such as the preparation, signing and filing of tax returns on the conservatee's behalf.

If the proposed Conservatee has a spouse who has sufficient capacity to act for both, then the spouse with capacity can manage the couple's community property without the need of a conservatorship. However, if the incapacitated person has one or more retirement plans, a conservatorship may be needed to exercise his or her rights in those plans. Under the laws and regulations applicable to retirement plans, trusts and trustees cannot manage the individual's retirement arrangements, even when the proposed Conservatee is married to a capable spouse.

Finally, the Probate Code provides for abbreviated procedures for matters having limited scope. For example, if the matter involves a single financial transaction, such as consent on behalf of the

incapacitated owner to the sale of the home, the court can supply that consent to the transaction for the incapacitated individual. Similarly, absent a spouse or *Advance Health Care Directive* appointing a health care decision maker, the court can be asked to approve medical treatment, such as consent to surgery, placement into skilled care, etc.

The Petition Procedure.

The petition to establish a conservatorship is quite thorough. Therefore, the amount of factual information that the client and/or family can provide will be an important factor in the success of the petition. Most of this information is treated as confidential and is not open for public viewing like ordinary civil cases. This is intended to protect the Conservatee and to encourage full disclosure of the information the judge will require to make a decision.

Is the proposed Conservatee willing to accept the conservatorship? If so, and if the Conservatee is able to make a reasonable decision on this issue, then he can nominate the person proposed in the petition to be appointed as his Conservator. If there is no nominee, there will be a determination of who has priority to appointment and whether that person is able and willing to act as the Conservator. The proposed Conservatee also can be the petitioner, which can streamline the process of the Conservator's appointment.

Where the estate is large or complex, it may be appropriate to suggest a professional fiduciary or the trust department of a financial institution to serve as Conservator of the estate, instead of a well-meaning family member. If no one is nominated to serve, then the Conservatee of the estate can expect to be required to post a surety bond. It should be determined in advance whether that individual can be bonded.

Notice of the petition and hearing date, time and place must be given to certain relatives of the proposed conservatee. This satisfies due process requirements and assures the court that other family members who might be opposed to the proposed conservatorship will have the opportunity to have their concerns heard and considered.

The Court Investigator will submit a report to the judge before the schedule hearing. Usually the court requires the proposed Conservatee to appear at the hearing to allow the judge the opportunity to see and interview the subject, and to allow anyone who objects to the conservatorship or person proposed as the Conservator to present those objections. After the hearing, the person appointed as Conservator will submit written acknowledgment that they have been advised of their duties and responsibilities as Conservator. If bond is required, an affidavit of the issuance of the bond must be filed in the case. Then the clerk will issue *Letters of conservatorship* to the appointee. This is a one-page court form that serves as evidence of the Conservator's appointment and the general nature of his or her authority as Conservator.

What to bring to our meeting.

We will need to review information about the proposed conservatee's health, living situation, personal needs and his or her finances: income, resources, the conservatee's standard of living and financial needs, etc. If the proposed Conservatee has a will or other estate plan documents, please bring the originals or copies for me to review. A good estate plan often can stand in place of a conservatorship of the estate. Finally, we will need to collect family information to provide with the petition as the law requires: whether the person is married, the names, addresses, relationship to the proposed conservatee, and the birthdates for any minors.

What will we do?

My initial goal will be to identify what legal services you need or may be recommended, and what the cost is likely to be. Then it will be your decision whether to hire me to do this work or not. In order to make this decision, you will need some familiarity with estate planning which you should acquire from this memo and our conversation.

Who is the client?

This is a very important question that we will discuss at our initial meeting. When a son or daughter come in to discuss a conservatorship for their parent, it is important to determine their expectation of whom I will represent if the conservatorship is pursued. As an attorney, I can represent only one client at a time, and I owe that client a duty of loyalty and confidentiality.

For example, if I will be representing the person petitioning for the conservatorship, I cannot represent the proposed conservatee. If Mom or Dad does not have their own lawyer, it is most likely that the court will appoint one to represent them in the proceeding. This is advisable because the number of occurrences of elder abuse (both financial and personal) continues to rise, and you can expect that the court will be very sensitive to these issues. Therefore, Mom or Dad ought to be independently represented to avoid even the appearance of impropriety in proposing the conservatorship.

Conservatorship Information Checklist

Checklists are helpful to elicit information needed to provide the services we decide are wanted for the task at hand. However, no checklist addresses every situation. Some lawyers resolve this shortcoming by making their checklists as comprehensive as possible. After all, we don't know every question to ask a client and don't want to miss anything important. But the outcome of this thinking is that the client is given pages and pages of questions and requests for information, most of which have no relation to the task they are asking the lawyer to undertake. Therefore, view checklists with some skepticism, do not feel intimidated by the volume of information that might be important to the typical client, and do not attempt to answer irrelevant questions or second-guess what information the lawyer considers important.

With that in mind, simply take inspiration from this list as a tool to assemble information specific to you. Your subsequent conversations will fill in the blanks. Note that all information is prospective or "proposed".

1. Who is the petitioner and whom are you asking to be appointed Conservator? For each we need name, address and phone number.
2. Who is the conservatee? (full name, date of birth, address, Social Security number)
3. Is there a written nomination by the conservatee? If so, does the nomination waive bond?
4. What orders are you seeking the court to make? This is a discussion with the lawyer who will recommend what is appropriate.
5. Is the Conservatee a resident of the county or a nonresident with ties to California?
6. What is the relationship of the petitioner to the conservatee? Is the petitioner a debtor or creditor of the conservatee?
7. The character and estimated value of the conservatee's estate. (*Ask the lawyer about the information needed here!*)
8. Is the Conservatee a patient in or on leave of absence from a state institution under the CA Department of Mental Health or Department of Developmental Service?
9. Does the Conservatee receive benefits from the Veterans Administration?
10. Can the Conservatee complete an affidavit of voter registration?
11. Assemble the story you will tell about the conservatee's inability to provide for his or her personal needs for health, food, clothing and shelter, and the facts you think support this.
12. Assemble the story you will tell in relation to your assertion that the Conservatee is substantially unable to manage his or her financial resources or to resist fraud or undue influence., and the facts you think support this

13. Medical treatment: any limitations on the conservatee's capacity to give informed consent? The lawyer will prepare a *Capacity Declaration* for you to give to the medical opinion about the conservatee's mental capacity.

14. Relatives: List the names, addresses and relationships of the conservatee's spouse or registered domestic partner and relatives within the second degree of kinship (parents, grandparents, children, grandchildren, and siblings). Include birth dates for each minor relative.

15. Will the Conservatee continue to live at home or need to be moved?

16. Why are the following alternatives not suitable: voluntary acceptance of assistance, use of a power of attorney, use of power of attorney for health care, use of a trust, other alternatives considered.

17. What health services were provided (or were needed and not provided) during the year before the petition will be filed?

18. What social services were provided (or were needed and not provided) during the year before the petition will be filed?

Note any information that is not in your personal knowledge but is supplied by another person.