JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS

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Report

TO: Members of the Judicial Council

FROM: Probate and Mental Health Advisory Committee
Hon. Don Edward Green, Chair
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DATE: August 10, 2007

SUBJECT: Probate: Standards for the Good Cause Exception to Notice of Hearing of a Petition for Appointment of a Temporary Guardian or Conservator (adopt rules 7.1012 and 7.1062 of the California Rules of Court) (Action Required)

Issue Statement

Probate Code section 2250 governs petitions for the appointment of a temporary guardian or conservator. Section 2250(c), as amended by the Omnibus Conservatorship and Guardianship Reform Act of 2006, effective on July 1, 2007, requires at least five days' notice of the hearing on a petition for appointment of a temporary conservator or guardian to be given to the proposed conservatee or ward (if at least 12 years of age), and certain other persons "[u]nless the court for good cause otherwise orders . . . ."[1]

There are currently no standards for the guidance of petitioners, proposed temporary guardians or conservators, practicing attorneys, and courts concerning the good-cause exception to the notice required under amended section 2250(c).

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2008, adopt rules 7.1012 and 7.1062 of the California Rules of Court to establish uniform standards for the good cause

[1] Stats. 2006, ch. 490–493 (respectively, Senate Bill 1116, Senate Bill 1550, Senate Bill 1716, and Assembly Bill 1363), referred to collectively in this report as the Omnibus Act. The amendments to section 2250 were made by sections 15 and 36 of chapter 493 (AB 1363).

exception to the notice of hearing of a petition for appointment of a temporary guardian or temporary conservator required by Probate Code section 2250(c).

The text of the proposed rules is attached at pages 6–9.

Rationale for Recommendation

Probate Code section 2250(j), added by the Omnibus Act, requires the Judicial Council to adopt a rule of court effective on or before January 1, 2008, that establishes uniform standards for the good cause exception to the notice required by section 2250(c).[2] The standards must limit the exception to cases where waiver of notice is essential to protect the proposed temporary conservatee or ward from substantial harm.

The Probate and Mental Health Advisory Committee proposes two rules in response to the statutory directive. Rule 7.1012 would apply to temporary guardianships. Rule 7.1062 would apply to temporary conservatorships. The two rules are substantially the same.

Subdivision (b) of both rules would restate the limitation on the scope of the notice exception required by section 2250(j). Subdivision (c) of the rules is intended to advise persons considering a request for a complete waiver of notice that the court may grant a complete waiver, may instead require a different period of notice than the five days required by section 2250(c), or may permit notice to be given by means other than the personal service required by that section for guardianships or the mailed notice provided for persons other than the proposed conservatee in conservatorships.

Subdivision (d) of both rules would provide a nonexclusive list of the most common expected types of good cause exceptions to notice and would establish limitations on each of them. For example, facts supporting an exception to giving notice based on harm caused by the passage of time must demonstrate that the time involved is the five-day notice period, not the period of the temporary appointment (rules 7.1012(d)(1) and 7.1062(d)(1)). Similarly, facts supporting an exception to giving notice based on harm that a person entitled to notice might cause do not support waiver of notice to another person unless the showing demonstrates that notice cannot be given to the other person without also giving

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[2] Section 2250(j) provides in full as follows:

> (j) On or before January 1, 2008, the Judicial Council shall adopt a rule of court that establishes uniform standards for good cause exceptions to the notice required by subdivision (c), limiting those exceptions to only cases when waiver of the notice is essential to protect the proposed conservatee or ward, or the estate of the proposed conservatee or ward, from substantial harm."

notice to the potentially harmful person. (See rules 7.1012(d)(2) and 7.1062(d)(2)). Two types of emergencies, medical and financial, are provided for identically under both rules (rules 7.1012(d)(4) and (5) and 7.1062 (d)(3)and (4).[3] Rule 7.1012(d)(3), however, presents a situation unique to a guardianship: the death or incapacity of a child's custodial parent and the petitioner for appointment as a temporary guardian is that parent's nominee. That ground for an exception to the notice requirement of section 2250(c) is expressly provided in the last sentence of section 2250(c)(1).

Subdivision (e) of both rules would require that a request for an exception to the notice required by Probate Code section 2250(c) must be separate from the petition for appointment of a temporary guardian or conservator. The required contents of the request are also specified. These are modeled after the requirements for an ex parte application in a civil case under rule 3.1201.[4]

Rules 3.1201 and 3.1204, concerning required notice of an ex parte application, arguably already apply to probate matters under rules 3.10 and 3.1200. The advisory committee has concluded, however, that a restatement of the requirements of rule 3.1201 as applied specifically to requests for relief under section 2250(c) is appropriate because the committee believes that (1) many probate practitioners are not familiar with civil action law and motion practice and procedure and would look to the rules in title 7 of the rules of court for guidance and (2) greater statewide uniformity of practice in connection with temporary guardianships and conservatorships is desirable, in light of the substantial changes in this area made by the Omnibus Act.

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[3] Under both rules, a medical emergency must be immediate and substantial, treatment must be reasonably unavailable unless a temporary guardian is appointed, and treatment cannot be deferred for the notice period because of the ward's or conservatee's pain or discomfort or a significant risk of harm. A financial emergency under both rules must also be immediate and substantial, and other means must be shown likely to be ineffective to prevent loss or further loss to the ward's estate or support or the conservatee's estate during the notice period.

[4] The additional requirements for the request are that it be in writing and must include (1) an application containing a statement of the relief requested; (2) an affirmative factual showing in support of the request presented in a declaration under penalty of perjury containing competent testimony based on personal knowledge; (3) a supplemental declaration under penalty of perjury showing the information required for an ex parte application under rule 3.1204(b)—notice given of the application, efforts made to give notice if notice was not given, or reasons why notice of the application should not be given; (4) a memorandum; and (5) a proposed order. (See proposed rules 7.1012(e)(1)–(5) and 7.1062(e)(1)–(5).)

Alternative Actions Considered

No alternative to the adoption of rules of court in response to the directive of Probate Code section 2250(j) was considered. The proposed rules as originally drafted and as circulated for public comment did not prescribe the contents of an application for an exception to the notice requirement. These provisions were added in response to a commentator's recommendation. (See following discussion.)

Comments From Interested Parties

This proposal was circulated for comment in a special cycle to a list of judicial officers, probate examiners and attorneys, other court staff interested in probate matters, and probate-interest sections of the State Bar and local bar associations, in addition to court executives, presiding judges, individuals, and organizations with a more generalized interest in the trial courts.

Sixteen comments concerning the proposal were received. A chart containing the comments and the committee's responses follows the text of the proposed rules, beginning at page 10.

Fifteen commentators approved of the rules or approved of them if modified. The one comment that disapproved of the proposal recommended that court investigators be "rotated" to prevent them from becoming too friendly with practicing attorneys but had no recommendations concerning the text of the proposed rules.

Two commentators, Judge William H. Kronberger, the presiding judge of the probate department of the Superior Court of San Diego County and a member of the Probate Conservatorship Task Force; and Ms. Mary Malk, the Probate/Mental Health Unit Manager of the Superior Court of Orange County, proposed changes in the rules. The committee supports these recommendations and has changed the rules accordingly.

Judge Kronberger recommends that the rules be amended to require that the showing of good cause for waiver of notice be made in a separate declaration that qualifies under rule 3.1201, concerning applications for ex parte relief in civil actions, in that the declaration must present competent testimony based on personal knowledge.

Ms. Malk similarly recommends that the showing in support of the waiver of notice be separate from the showing in support of the temporary guardianship or conservatorship.

Ms. Donna R. Bashaw, on behalf of the National Academy of Elder Law Attorneys, recommends that a form be developed for a showing of due diligence to locate persons entitled to notice under section 2250(c) who cannot be found. The committee supports this recommendation in principle and will consider development of a due-diligence declaration form for use in all situations covered by existing rule 7.52, concerning service on persons whose address is unknown in all proceedings under the Probate Code. The changes in these proposed rules made by the committee in response to Judge Kronberger's comments include incorporation of the procedure for ex parte applications under rules 3.1201 and 3.1204, including the requirement of a supplemental declaration showing the notice given of the application or the efforts made to give notice if it was not given. These changes should satisfy the immediate concerns about the proposed rules expressed by Ms. Bashaw.

Implementation Requirements and Costs

Adoption of these proposed rules will result in the normal costs associated with the adoption of new Judicial Council rules. The additional costs that will be incurred by parties seeking waivers of the notice requirements of section 2250(c) and the courts in considering their applications are attributable to the statute mandating these rules, not to the rules themselves.

Rules 7.1012 and 7.1062 of the California Rules of Court are adopted, effective January 1, 2008, to read:

Rule 7.1012. The good cause exception to notice of the hearing on a petition for appointment of a temporary guardian

(a) Purpose

The purpose of this rule is to establish uniform standards for the good cause exception to the notice of the hearing required on a petition for appointment of a temporary guardian under Probate Code section 2250(c).

(b) Good cause for exceptions to notice limited

Good cause for an exception to the notice required by section 2250(c) must be based on a showing that the exception is necessary to protect the proposed ward or his or her estate from immediate and substantial harm.

(c) Court may waive or change the time or manner of giving notice

An exception to the notice requirement of section 2250(c) may include one or any combination of the following:

(1) Waiving notice to one, more than one, or all persons entitled to notice;

(2) Requiring a different period of notice; and

(3) Changing the required manner of giving notice, including requiring notice by telephone, fax, e-mail, or a combination of these methods, instead of notice by personal delivery to the proposed ward's parents or to a person with a visitation order.

(d) Good cause exceptions to notice

Good cause for an exception to the notice requirement of section 2250(c) may include a showing of:

(1) Harm caused by the passage of time. The showing must demonstrate the immediate and substantial harm to the ward or the ward's estate that could occur during the notice period.

(2) Harm that one or more persons entitled to notice might do to the proposed ward, including abduction; or harm to the proposed ward's

estate if notice to those persons is given. Such a showing would not support an exception to the requirement to give notice to any other person entitled to notice unless it also demonstrates that notice cannot reasonably be given to the other person without also giving notice to the persons who might cause harm.

(3) The death or incapacity of the proposed ward's custodial parent and the petitioner's status as the custodial parent's nominee.

(4) Medical emergency. The emergency must be immediate and substantial and treatment (1) must be reasonably unavailable unless a temporary guardian is appointed and (2) cannot be deferred for the notice period because of the proposed ward's pain or extreme discomfort or a significant risk of harm.

(5) Financial emergency. The emergency must be immediate and substantial and other means shown likely to be ineffective to prevent loss or further loss to the proposed ward's estate or loss of support for the proposed ward during the notice period.

(e) Contents of request for good cause exception to notice

A request for a good cause exception to the notice requirement of section 2250(c) must be in writing, separate from the petition for appointment of a temporary guardian, and must include:

(1) An application containing the case caption and stating the relief requested;

(2) An affirmative factual showing in support of the application in a declaration under penalty of perjury containing competent testimony based on personal knowledge;

(3) A declaration under penalty of perjury based on personal knowledge containing the information required for an ex parte application under rule 3.1204(b);

(4) A memorandum; and

(5) A proposed order.

Rule 7.1062. The good cause exception to notice of the hearing on a petition for appointment of a temporary conservator

(a) Purpose

The purpose of this rule is to establish uniform standards for the good cause exception to the notice of the hearing required on a petition for appointment of a temporary conservator under Probate Code section 2250(c).

(b) Good cause for exceptions to notice limited

Good cause for an exception to the notice required by section 2250(c) must be based on a showing that the exception is necessary to protect the proposed conservatee or his or her estate from immediate and substantial harm.

(c) Court may change the time or manner of giving notice

An exception to the notice requirement of section 2250(c) may include one or any combination of the following:

(1) Waiving notice to one, more than one, or all persons entitled to notice;

(2) Requiring a different period of notice; and

(3) Changing the required manner of giving notice, including requiring notice by telephone, fax, e-mail, or personal delivery, or a combination of these methods, instead of or in addition to notice by mail to the proposed conservatee's spouse or registered domestic partner and relatives.

(d) Good cause exceptions to notice

Good cause for an exception to the notice requirement of section 2250(c) may include a showing of:

(1) Harm caused by the passage of time. The showing must demonstrate the immediate and substantial harm to the conservatee or the conservatee's estate that could occur during the notice period.

(2) Harm that one or more persons entitled to notice might do to the proposed conservatee or the proposed conservatee's estate if notice is given. Such a showing would not support an exception to the requirement to give notice to any other person entitled to notice unless

it also demonstrates that notice cannot reasonably be given to the other person without also giving notice to the persons who might cause harm.

(3) Medical emergency. The emergency must be immediate and substantial and treatment (1) must be reasonably unavailable unless a temporary conservator is appointed and (2) cannot be deferred for the notice period because of the proposed conservatee's pain or extreme discomfort or a significant risk of harm.

(4) Financial emergency. The emergency must be immediate and substantial and other means shown likely to be ineffective to prevent loss or further loss to the proposed conservatee's estate during the notice period.

(e) Contents of request for good cause exception to notice

A request for a good cause exception to the notice requirement of section 2250(c) must be in writing, separate from the petition for appointment of a temporary conservator, and must include:

(1) An application containing the case caption and stating the relief requested;

(2) An affirmative factual showing in support of the application in a declaration under penalty of perjury containing competent testimony based on personal knowledge;

(3) A declaration under penalty of perjury based on personal knowledge containing the information required for an ex parte application under rule 3.1204(b);

(4) A memorandum; and

(5) A proposed order.

SP07-11

Probate: Standards for the Good Cause Exception to Notice of Hearing of a Petition for Appointment of a Temporary Guardian or Conservator (adopt rules 7.1012 and 7.1062 of the California Rules of Court).

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms. Therese F. Alvillar Occidental, California	AM	N	Agree with proposed changes if modified. There should be no exception to notice. In December 2000, Stephen Charles Laughton was conserved without notice (Marin County). He was 37 years old, a financial professional and was only conserved because he was going through a divorce and someone in the family wanted his $4 million estate protected. A few months later this man committed suicide. Please NO exceptions for notice. There should be no exception to personal appearance by the proposed conservatee unless all family members have been notified and have commented on the hearing and the proposed conservatee's personal physician of record (prior to conservatorship proceedings were initiated) gives a written report acceptable to the family and to the court.	The committee cannot agree with this comment. The statute provides for waiver of notice. A proposed temporary conservatee must attend the hearing unless unable or unwilling to do so, as ascertained by the court investigator and reported to the court. A proposed conservatee should be permitted to decline to appear, and if he or she is unwilling or unable to appear, the court must be able to hear an application for appointment of a temporary conservator.
2.	Ms. Donna R. Bashaw	AM	Y	Agree with proposed changes if modified.	

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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	Immediate past president of the National Academy of Elder Law Attorneys (NAELA) Laguna Hills, California			As elder law attorneys committed to the safety and preservation of the dignity of all dependent and older adults, we applaud the efforts of the committee to transform the Omnibus Conservatorship and Guardianship Reform Act of 2006 into practical reality. It is clear that such a task required a great deal of dedication, creativity and just plain hard work. Thus, our comments are made not in the spirit of criticism bur in the spirit of appreciation of the enormity of the task to which you were commissioned. While most of our comments address specific issues or suggestions for enhancing the effectiveness of various individual provisions, our overarching concern about this entire enterprise is that in our zeal to prevent the deplorable abuses of a few unscrupulous fiduciaries, we will render the conservatorship/guardianship process inaccessible to middle-class families who will be unable to afford the increased expense that the new law now mandates. It is also our fear that the complexity of the new requirements and the sophistication of understanding necessary to perform the additional duties and tasks will preclude conscientious, but non professional, family members from serving on behalf of their vulnerable loved ones. We, therefore, urge you	

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				to keep these concerns in mind as you incorporate the various suggestions you receive during this comment period into your final work product. We suggest a form to be signed under penalty of perjury concerning the inability to contact someone requiring notice. For example, in a guardianship when the father of the minor is unknown.	The committee will consider development of such a form, perhaps to be used to comply with the diligent-search requirements in all probate proceedings under rule 7.52. In the meantime, the proposed rules' incorporation of the requirements of rule 3.1204(b) concerning the notice given of the application for the exception to notice of the petition for appointment of a temporary guardian or conservator will often include a showing of why notice of the application cannot be given.
3.	Mr. Joseph L. Chairez President Orange County Bar Association Irvine, California	A	Y	Agree with proposed changes.	No response necessary.
4.	Ms. Malea Chavez	A	Y	Agree with proposed changes.	No response necessary.

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	Staff Attorney, Superior Court of San Francisco County, San Francisco, California				
5.	Hon. William H. Kronberger, Jr., Judge of the Superior Court of San Diego County, San Diego, California	A	N	Agree with proposed changes A provision should be added to the rule requiring that good cause be established by a separate, verified declaration making the same factual showing required under current rule 3.1201. I recognize that the requirement of "competent testimony based on personal knowledge" is implied by the rule defining good cause, but the rule is mostly honored in the breach. The requirement of a declaration, based on competent testimony and personal knowledge, cannot be overemphasized.	The committee agrees with this recommendation. It has amended both proposed rules to require an application for a good cause exception to notice under Probate Code section 2250(c) to be separate from the petition for appointment of a temporary guardian or conservator and based on a declaration in support consisting of competent testimony based on personal knowledge. The amended rules also require a showing of notice given of the application consistent with the requirements for notice of ex parte applications in civil litigation under rule 3.1204(b). The rules in title 3 of the rules of court apply in all civil cases, specifically including "probate cases, unless otherwise provided by a statute or rule in the California

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					Rules of Court" (rule 3.10). The requirement of a showing based on competent testimony is consistent with the requirements for the showing in support of a petition for appointment of a general conservator. The supplemental declaration in support of such a petition must be based on facts within the personal knowledge of the declarant. (See Prob. Code, § 1821(a).)
6.	Ms. Jamie Lamborn Retired Sacramento, California	N	N	Do not agree with proposed changes. I have been following one particular attorney for the past four years and I have found the proposed conservatee does not stand much of a chance to object to having a conservator. The attorney controlling the proposed conservator goes to court and says there are no relatives and no party to contact. What do the judges do? They rubber stamp the temporary conservatorship and the elder is doomed and all assets are gone! It is the conservators and their attorneys who are the culprits and need to be reprimanded for their false court filings. Every law I have read so far has exceptions and that gives the greedy attorney and conservator room to rip off assets with no questions. Please stop	The increased notice requirements for temporary conservatorships made by the Omnibus Conservatorship and Guardianship Reform Act of 2006 should reduce the harm of which this commentator complains.

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				with the "exception" rule. Get some honest people involved that aren't self serving! I suggest rotating the probate investigators to eliminate close relationships between investigators and the attorneys who seem to be in court on a daily basis. The ex parte application is an easy way to take control of a person's assets and bank accounts. The judge has no way to verify the honesty of the attorney in front of him or her who has filed the request. By rotating the positions of investigators and judges, maybe it would stop forced conservatorships by ex parte hearings.	There is no evidence that improper results occur in temporary conservatorship hearings because of close relationships between court investigators and petitioners' attorneys. Until July 1, 2007, court investigators had no role in temporary conservatorships unless the proposed temporary conservatee's personal residence was to be changed.
7.	Ms. Keeley C. Luhnow Associate Attorney Albence & Associates La Jolla, California	A	N	Agree with proposed changes.	No response necessary.
8.	Ms. Mary Malk Probate/Mental Health Unit Manager Superior Court of California County of Orange Orange, California	AM	Y	Agree with proposed changes if modified. Comments: I propose adding "separate" to define the showing required in both 7.1012(b) and 7.1062(b): "Good cause for an exception to the notice required by section 2250(c) must be based on a separate showing that the exception is essential to protect the proposed ward/conservatee or his or her estate from	The committee supports this recommendation. It has amended both proposed rules to require that the application for a good cause exception to notice must be separate from the petition for appointment of a temporary guardian or

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				immediate and substantial harm." Currently attorneys present a showing for good cause relative to the temporary appointment and consider that sufficient for both the request for temporary appointment and the request for an order shortening time. There should be a separate declaration specifically required for the order shortening time for notice showing the "immediate and substantial harm." Requiring a specific and separate declaration will avoid delays and additional work for both the courts and the attorneys and their staff.	conservator. See the committee's response to the comment of Judge William Kronberger, above.
9.	Ms. Jackie A. Miller Executive Director Professional Fiduciary Association of California (PFAC) Sacramento, California	A	Y	Agree with proposed changes. PFAC appreciates the clarification provided in this rule.	No response necessary.
10.	Ms. Carol A. Peters Law Office of Carol A. Peters Pasadena, California	AM	N	Agree with proposed changes if modified. Financial abuse is rampant here in Southern California and the legal remedies require us "white hats" to telegraph our plays. I understand that notice is necessary. So, since the people given notice may include nefarious persons unknown to us who are giving notice, I would very much like to see an automatic stay effective the date of the notice on	This proposed change would require legislation and is beyond the scope of this proposal.

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				all persons given notice, akin to the automatic stay of the bankruptcy court or the automatic temporary restraining orders in dissolutions under our state's Family Code. The remedy for its violation would be a rebuttable presumption that the outbound conveyance is void, not voidable. We have a lot of highly appreciated real property here in Southern California that is ripe for the picking.	
11.	Ms. Mary Joy Quinn Director, Probate Superior Court San Francisco County San Francisco, California	A	Y, N	Agree with proposed changes.	No response necessary.
12.	Ms. Dominique Sanz-David Access Center San Francisco, California	A	N	Agree with proposed changes if modified. What about if the petitioner has submitted a request to dispense with notice to one of the parents? Does this request apply to the temporary guardianship? We also recently had a conservatorship where	The standards for an exception to the requirement of notice of a petition for a temporary appointment apply to both guardianships and conservatorships. There may be reasons to dispense with notice to a proposed ward's parent, such as concern about harm to or flight with the child. One could certainly apply for an

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				the conservatee was in a coma and had been for five years. It is pointless to serve a petition for temporary conservatorship in that situation. When does the court change the manner or time for giving notice if it chooses to do so? At the hearing? If the court changes the service required at the hearing, does it set a new hearing date on the temporary petition?	order dispensing with notice in the coma situation or simply complete the meaningless delivery of notice. The investigator's report will confirm the proposed conservatee's incapacity. An adjustment in the time and manner of giving notice would occur at the time of an application for an order prescribing notice, not at the hearing on the petition for temporary conservatorship.
13.	Mr. Peter S. Stern Vice-Chair State Bar Trusts and Estates Section Executive Committee Palo Alto, California	A	Y	Agree with proposed changes. The Executive Committee unanimously approves this proposed rule setting forth conditions for waiver of notice in temporary conservatorships.	No response necessary.
14.	Superior Court of Los Angeles County Los Angeles, California	A	Y	Agree with proposed changes.	No response necessary.
15.	Ms. Michelle Uzeta	A	Y	Agree with proposed changes.	No response necessary.

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	Associate Managing Attorney Protection and Advocacy, Inc. Los Angeles, California				
16.	Ms. Robin C. Westmiller, J.D. President National Association to Stop Guardian Abuse Thousand Oaks, California	AM	Y	Agree with proposed changes if modified. In order to waive notice, "good cause" must be specifically detailed and documented for a specific person who would not be notified, and that person must also be notified of that decision so that they may be able to appear at a separate hearing on their own behalf in order to repute any allegations. "Essential to protect the conservatee from immediate substantial harm" is not enough without documented proof and evidence that this is the case and not someone's opinion in order to expedite the conservatorship.	The person to whom the court dispenses with notice of a petition for appointment of a temporary guardian or conservator because of possible harm to the proposed ward or conservatee would also be a candidate for waiver of notice of the application, at least until after the appointment of a temporary guardian or conservator and stabilization of the situation leading to the application. The court will evaluate the showing in support of the waiver application, just as it does with all other evidence offered. The proposed rules have been amended to clarify that a showing of good cause for an exception to the notice requirement be based on competent evidence based on personal knowledge. Mere speculation or lay opinion

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					evidence would not be sufficient.

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