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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 29, 2011

Title	Agenda Item Type
Probate Conservatorship: Determining the Conservatee's Appropriate Level of Care	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt form GC-355	July 1, 2011
Recommended by	Date of Report
Probate and Mental Health Advisory Committee	February 24, 2011
Hon. Mitchell L. Beckloff, Chair	Contact
	Douglas C. Miller, 818-558-4178 douglas.miller@jud.ca.gov

Executive Summary

Recent legislation requires a newly-appointed conservator to determine the appropriate level of care the conservatee will require, including an evaluation of the care received by the conservatee before the conservator's appointment. The determination must be prepared in writing and filed with the court soon after the conservator's appointment. The Probate and Mental Health Advisory Committee proposes a new Judicial Council form for the writing required by the law.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective July 1, 2011, adopt *Determination of Conservatee's Appropriate Level of Care* (form GC-355). The form is proposed to help conservators satisfy the requirement of Probate Code section 2352.5, enacted in 2006 and amended in 2007,¹ that a newly-appointed conservator make and file a written determination of the appropriate level of care his or her conservatee will require.

¹ See Stats. 2006, ch. 490 (Sen. Bill 1116), § 2; Stats. 2007, ch. 130 (Assem. Bill 299), § 195. Unless otherwise stated, all code references are to the Probate Code.

A copy of the proposed new form GC-355 follows this report at pages 9–12

Previous Council Action

In October 2007, effective January 1, 2008, the council adopted Cal. Rules of Court, rule 7.1063 and form GC-079. Neither the rule nor the form directly concerns the subject of the proposed new form, the care determination required of conservators by Probate Code section 2352.5, but rule 7.1063 defines the conservatee’s “personal residence,” a term from sections 2352 and 2352.5 that is applied in form GC-079 and would also be applied in the new form.²

Rationale for Recommendation

The proposed new form would help newly-appointed conservators inform their appointing courts of the appropriate level of care that the conservators have determined that their conservatees will require. This assistance is proposed in response to recent legislation that requires conservators to make this determination and provide this information.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment as part of the winter 2011 invitation-to-comment cycle. Eleven individuals or organizations submitted comments. Three commentators approved the proposed form without recommending changes and one acknowledged receipt of the proposal but declined to approve, disapprove, or recommend changes to the form. One commentator, the Superior Court of Los Angeles County, disapproved the form. That court’s principal objection is to adoption of the form as a mandatory form rather than approval of it as an optional form; the court also made several recommendations for the form’s improvement. Seven commentators approved the form if their recommended modifications are made.

The recommendations for changes were numerous. The advisory committee has reviewed the proposed modifications and recommends that many be adopted. The draft of the form that follows this report features many changes recommended by the commentators.

Mandatory or optional

As noted above, the Superior Court of Los Angeles County objects to the new form as a mandatory form. The Professional Fiduciary Association of California (PFAC), which otherwise approves the form with modifications, also requests that the form be made optional. The

² See rule 7.1063(b). Prob. Code, § 2352.5 creates a presumption that the conservatee’s personal residence—generally, subject to exceptions provided in the rule, the conservatee’s residence at the commencement of the conservatorship proceeding—is the least restrictive appropriate residence that meets the needs and is in the best interests of the conservatee. Under section 2352, unless this presumption is overcome the conservator must select this residence for the conservatee. Form GC-079, the *Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward*, is the form used by conservators to give prior notice to the conservatee, other interested persons, and the court of a proposed move of the conservatee from his or her personal residence. Moves from other residences require only a post-move notice to the court and others that the move has occurred. See Prob. Code, § 2352(e)(1) and (2), and the *Post-Move Notice of Change of Residence of Conservatee or Ward* (form GC-080).

comment of the court on this point is as follows (comment chart at page 22 (¶1), Comment No. 7):

Rather than adopt the form as mandatory, it is suggested that GC-355 be an optional form. Many courts have developed form Care Plans, which require extensive information concerning a conservatee's level of care at the time of commencement of the proceeding. These courts could continue to utilize a single form for purposes of complying with Probate Code section 2352.5.

Several courts do require written and filed care plans in all cases and some courts have adopted local forms for them. Some other courts have adopted local forms to address the new requirements of section 2352.5. However, most courts do not require written care plans, or require them in individual cases only at the discretion of the court.

The advisory committee decided to retain form GC-355's proposed status as a mandatory form because section 2352.5 requires the information requested by the form from all conservators, including those appointed by courts that do not require care plans or have not adopted placement forms.³ Courts that do require these plans or forms are likely to modify their requirements to complement rather than duplicate the requirements of this form. This form would request information that is different from that requested by many local rules and forms, including the identification of conservatees' personal residences and the steps necessary to maintain or return them there. The statutory requirements would not necessarily be satisfied by filing care or placement plans under current local rules.

Requiring reevaluations to be written and filed

The Superior Court of Los Angeles County correctly points out that Probate Code section 2352.5 does not explicitly require reevaluations to be either in writing or filed with the court. The court requests that the form be modified to delete its references to written reevaluations and their filing (see comment chart, page 23 (¶2), Comment No. 7).

Section 2352.5(d) provides:

The conservator shall evaluate⁴ the conservatee's placement and level of care if there is a material change in circumstances affecting the conservatee's needs for placement and care.

³ The comment from PFAC on this point refers to local "placement forms" in addition to local care plans. The advice in bold text in the Notice to Conservators on page 1 of the form that the form is in addition to, not a replacement for, local requirements has been modified to refer to local placement forms as well as local care plans.

⁴ The form circulated for comment referred to a reevaluation because the evaluation required by section 2352.5(d) always follows the conservator's initial level-of-care determination, which includes an evaluation of the conservatee's level of care before commencement of the conservatorship. See Prob. Code, § 2352.5(b)(1).

This provision immediately follows the portion of the statute that requires the initial determination of the appropriate level of care to be in writing and filed with the court within 60 days of the conservator's appointment. The advisory committee's Elder Law and Incapacity Subcommittee initially concluded that the statute impliedly requires reevaluations to be in writing and filed, in part because of its concern that courts would be unable to ensure compliance with the reevaluation requirement unless reevaluations are in writing and filed. But there are clearly contrary arguments based on ordinary principles of statutory interpretation;⁵ the statute provides no guidance concerning whether and when reevaluations must be reduced to writing and filed; and there are many ways other than this form available to courts to enable them to enforce the reevaluation requirement.⁶ The committee decided to eliminate the form's references to reevaluations.

This change eliminated item 4, which pertained only to reevaluations, from the form circulated for comment. Item 5, discussed in the comments and below, is item 4 in the revised form.

Modifications to items 2, 3, and 5

Most of the changes in the form in response to comments consist of modifications to items 2, 3, and 5 of the form that was circulated for comment.

Items 2 and 3. Item 2 of the form, concerning the current residence of the conservatee, has been modified by switching items 2b, residence types; and 2c, the length of time in the current residence. This change permits the list of residence types to start at the top of a fresh page, necessary because the size of the list has been increased.

That list is augmented, primarily based on recommendations of commentator Anthony Chicotel, a staff attorney with California Advocates for Nursing Home Reform (comment chart, pages 13–14, Comment No. 1). Mr. Chicotel first recommends that the form permit selection of more than one option in the list of residence types because many residences have more than one listed

⁵ See, e.g., Code of Civ. Proc., § 1858; *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118, quoting two earlier California Supreme Court decisions and a treatise: “ ‘[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.’ ”

⁶ The court investigator must conduct regular review investigations, in which he or she must examine the conservatee's placement and quality of care, including physical and mental treatment. The investigator must interview the conservator and may require him or her to produce all books and records of the conservatorship for inspection and copying (Prob. Code, §§ 1851(a), 1826(a)). If the conservatee's circumstances require a change of residence, the conservator must notify the court in writing, before the move if it is away from the conservatee's personal residence or after the move if it is not. See Prob. Code, § 2352, forms GC-079 and GC-080, and footnote 2 above. If the conservatee loses mental capacity to the extent that he or she can no longer make medical care decisions, the conservator must petition the court for exclusive authority to do so (Prob. Code, §§ 1880–1898). If the conservatee suffers from dementia, the conservator must petition the court for authority to place the conservatee in a secured-perimeter facility or consent to the administration of psychotropic medicines without the conservatee's consent (Prob. Code, § 2356.5). Reports to the court filed with conservators' accountings usually describe the conservatee's current situation and changes in that situation since the conservator's appointment or a prior accounting. These events give courts opportunities to inquire into a conservator's reevaluations under section 2352.5.

characteristic. An example of this is “secured perimeter,” in the revised form merely an additional feature of one of the other residence types rather than a specific type. (See Mr. Chicotel’s comment on this point at page 13 of the comment chart.) In response to this recommendation, an instruction to select all residence-type descriptions that apply has been added at the top of page 2 of the form.

Other changes to item 2c include the addition of “assisted living facility,” and defining it as consisting of seven or more beds and limiting “board and care home” to a residence with six or fewer beds. Mr. Chicotel’s comment on hospice care, on page 13 of the chart, has also been adopted by adding a dedicated hospice-care facility and referring to it by the term used in the Health and Safety Code to define that facility as a type of “congregate living health facility,”⁷ and by adding in-home hospice services to the list of care requirements in item 3a on page 2 of the form. “Acute psychiatric hospital” has also been added to the list of residence types, in light of the statistics provided by Mr. Chicotel on page 14 of the comment chart.

The list of care requirements contained in item 3a on page 2 of the form has also been modified. Based on comments from the Executive Committee of the California State Bar’s Trusts and Estates Section (TEXCOM) and the Superior Court of Los Angeles County, the category of “assistance with daily living skills” has been added (see comment chart at pages 17 (¶4) and 25 (¶9a), Comment Nos. 2 and 7). At the request of the Professional Fiduciary Association of California (PFAC), 24-hour and part-time care options have been added under “personal care givers required;” “assistance with medication” is further defined by providing options for dispensing and set-up only; and “assistance with ambulation, maximum and standby,” have been added. (See comment chart at page 20, Comment No. 4.)

An instruction has also been added at the beginning of item 3a of the form advising that additional information concerning types of care selected in the item may be provided under “other assistance required” at the end of the item. This change was made to enable professional fiduciaries to add additional details about time to be spent on assistance required by a conservatee or any other aspect of that assistance instead of adopting the recommendation of PFAC to divide assistance descriptions and time spent into separate categories and calling for the time element to be expressed in a narrative. This change requires less space in the form than the PFAC alternative, and would be easier for nonprofessional conservators. (See the comment chart at pages 19 and 20, Comment No. 4.)

The last entry in item 3 is a paragraph advising that a professional care assessment has been made and is attached. In the revised form, this entry is designated as item 3b. In response to the comments of PFAC and the Superior Court of Los Angeles County (comment chart, pages 20–21, and 24 (¶6), Comment Nos. 4 and 7), an instruction has been added advising that a professional assessment is not required but is recommended in an appropriate case if the

⁷ See Health and Safety Code, § 1250(i)(2)(B).

conservatee's finances permit, and asking that a care assessment by a professional fiduciary appointed or proposed for appointment as conservator be included.

The court's comment raises the issue of confidentiality of care assessments, particularly in-house assessments by residence or acute care facilities. The committee's response to the court's comment is as follows (comment chart at page 24):

The conservator's filed care determination is not confidential under current law. A change of that law would be required to provide some privacy protection for professional care assessments that are filed with the court, and indeed for the care determination as a whole. Conservators are not required to attach care assessments they receive to the form if they are concerned about anything disclosed in them and residential facilities concerned about the confidentiality of their internal professional care assessments are not required to deliver copies to conservators for attachment to the form.

Conservatorship cases have only a limited degree of confidentiality. Investigators' reports are confidential from the general public but are accessible to parties and certain other persons interested in the proceedings (Prob. Code, §§ 1826(n), 1851(e)). The petition for the appointment of a conservator is not confidential but the supplemental information statement (form GC-312) that must be filed with the petition has the same degree of confidentiality as investigators' reports (Prob. Code, § 1821(a)). Conservatorship case files are closed to remote electronic access but are open to the public at the courthouse (Cal. Rules of Court, rule 2.503(c)(3)). Conservatorship court proceedings are open to the public, and medical declarations by physicians that must be filed to support requests for dementia powers or exclusive medical consent authority become part of the case file open to the public at the courthouse. (See Prob. Code, §§ 1890(c), 2356.5(f)(3), and forms GC-335 and GC-335A.) The committee does not at this time support an effort to expand some degree of confidentiality to professional care assessments.

Item 5. Item 5 (item 4 of the revised form) contains, in sub items 4a and 4b respectively, the responses required by section 2352.5 for a determination of care if the conservatee's current residence is and is not his or her personal residence. In response to the comments of the Superior Courts of Los Angeles, this item has been revised to add a detailed instruction at the top of page 3 of the form and appropriate headings to sub items 4a and 4b, indicating when each applies. (See comment chart at page 23 (¶4), Comment No. 7.)

Item 5c of the form circulated for comment concerned reevaluations when the conservatee is not living in his or her personal residence. This item has been deleted from the form. (See the comments of the Superior Courts of Los Angeles, Orange, and Riverside Counties on item 5c, comment chart, pages 26 (¶11), 26–27, and 27 Comment Nos. 7, 9, and 10.)

Modified notice to conservators of the person

TEXCOM recommends a change in the first sentence of the Notice to Conservators on the first page of the form, to avoid the logically impossible statement that the conservator must make a written determination (see comment chart at page 15(¶2), Comment No. 2). The sentence has been changed to read as follows:

You must prepare a written determination of the conservatee's appropriate level of care, sign it under penalty of perjury, and file it with the court within 60 days of the court's order appointing you as conservator.

However, TEXCOM's first recommendation was not accepted (see comment chart at page 14(¶1)). TEXCOM urged a statement in the Notice advising that the conservator must select the least restrictive appropriate residence for the conservatee, and that residence will be presumed to be the conservatee's personal residence. This is the exact reverse of the law, which is that the personal residence where the conservatee lived at the beginning of the case is presumed to be his or her least restrictive appropriate residence, which in turn is presumed to be the residence the conservator must select unless the latter presumption is overcome (see Prob. Code, §§ 2352(b), 2352.5(a)).⁸

TEXCOM also prefers the determination of the appropriate level of care to be made as of the date the case is commenced rather than the date of the conservator's appointment. The committee recommends against this proposal for the reasons stated at the top of page 16(¶3) of the comment chart.

Limited conservatorships

A recommendation was made by the chair of the East Bay Trust and Estate Lawyers in Oakland concerning limited conservatorships. She proposed the following (comment chart at page 21, Comment No. 5):

Question [Item] 5a should be added as an alternative:

“In the case of a limited conservatorship, what measures are necessary to assist the conservatee in achieving more independence and is there a plan to move the conservatee to a more independent living environment?”

The advisory committee opposes this recommendation because it is not authorized by section 2352.5, which exempts from the requirements of the section only those limited conservatorships

⁸ To account for temporary living arrangements made before the filing of a conservatorship, the council adopted rule 7.1063(b) to further define the term “personal residence” in section 2352.5 to refer to the residence the conservatee *understood* or *appeared to understand*, to be his or her permanent residence on the date the conservatorship case was filed, whether or not he or she was living there on that date.

in which the Director of Developmental Services or a regional center for the developmentally disabled acts as conservator (see section 2352.5(e)(1)). Section 2352(b) requires the conservator to select the least restrictive appropriate residence that is available and necessary to meet the needs and is in the best interests of the conservatee. The committee believes that this provision is sufficient to address the unique residence requirements of limited conservatees.

Increase of form from three to four pages

The revised form would increase the length of the form from three to four pages. This increase is necessary to provide space for (1) additional residence types and care alternatives in items 2c and 3a on page 2; (2) instructions to be added at the beginning of items 2, 3b (concerning professional care assessments), and 4; and (3) enlargement of the space available for responses to items 2 and 4.

Although the form is increased in length, the additional space provided for responses should decrease the need for attachment pages, making the overall submissions shorter. The form itself still requires only two pieces of paper in the court file; it is only increased from three to four sides on those two pages.

Implementation Requirements, Costs, and Operational Impacts

The proposed form will incur ordinary costs associated with the creation and distribution of any new statewide form. These costs are not expected to be significant, and should be outweighed over time by net savings created by having a common template in all courts for the care determination now required by the law from all conservators. It is anticipated that the amount of court staff time that will be necessary to review determinations filed by conservators on the proposed form should be significantly reduced below that necessary to review determinations filed by attorneys or self-represented conservators, particularly the latter.

Relevant Strategic Plan Goals and Operational Plan Objectives

The proposed new form supports Goal III, Modernization of Management and Administration, specifically, Goal IIIB2, to ensure that statewide policies, rules of court, standards of judicial administration, and court forms promote the fair, timely, effective, and efficient processing of cases and make court procedures easier to understand. Adoption of the form would also support the council's Operational Plan Objective 1bf, to foster excellence in public service to ensure that all court users receive satisfactory services and outcomes by implementation of improved practices and procedures and administration of probate conservatorship cases.

Attachments

1. Form GC-355, at pages 9–12
2. Chart of comments, at pages 13–28.

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY Draft 10 March 8, 2011 Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
CONSERVATORSHIP OF THE PERSON <input type="checkbox"/> AND ESTATE OF (<i>Name</i>): _____ CONSERVATEE	
DETERMINATION OF CONSERVATEE'S APPROPRIATE LEVEL OF CARE	

Notice to Conservator of the Person

You must prepare a written determination of the conservatee's appropriate level of care, sign it under penalty of perjury, and file it with the court within 60 days of the date of the court's order appointing you as conservator. You must use this form for that purpose. Your determination must include an evaluation of the conservatee's level of care on the date the conservatorship proceeding was started (the date the petition for the appointment of a conservator was filed with the court or, if more than one petition was filed, the date the first petition was filed), and the measures that would be necessary to keep the conservatee in his or her **personal residence**. If the conservatee was not living in that residence on the date the proceeding was started, your determination must include either a plan to return the conservatee to that residence or an explanation of the reasons why the conservatee cannot return to that residence in the foreseeable future. **This determination is in addition to, not a replacement for, any written care or placement plan the court may require. Check the court's local rules to see if a care or placement plan must also be filed.**

The conservatee's **personal residence** is the residence he or she understood or believed, or appeared to understand or believe, was his or her permanent residence on the date the conservatorship proceeding was started, whether or not he or she was living there on that date. If the conservatee could not then form or communicate an understanding or belief about his or her permanent residence, the conservatee's personal residence is the residence he or she last previously understood or appeared to understand was his or her permanent residence. (See Cal. Rules of Court, rule 7.1063.)

(*Name*): _____, declares as follows:

1. I am conservator of the person of the above-named conservatee. I am determining the conservatee's appropriate level of care as of (*date*): _____, the date of the order appointing me as conservator.
2. a. On the date stated in item 1, the conservatee was living at the following residence or facility (*address and name of facility, if any*):

Telephone:

- b. The conservatee has been living in the above residence or facility since (*date*): _____.

CONSERVATORSHIP OF _____ (Name): CONSERVATEE	CASE NUMBER:
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2. c. The residence or facility identified in item 2a is described as follows (*select all that apply*):

- Conservatee's single family home, condominium, or apartment
 Relative's or friend's single family home, condominium, or apartment
 Acute care hospital Acute psychiatric hospital Intermediate-care facility Skilled nursing facility
 Licensed residential care facility Assisted living facility (7 or more beds)
 Board and care home (6 or fewer beds) Continuing-care retirement community Secured perimeter
 Congregate living health facility—terminal or life-threatening illness type (hospice)
 Other (*describe*):

3. a. The conservatee's care requirements as of the date given in item 1 are as follows (*select all that apply; you may provide additional information concerning any items selected below under "other assistance required"*):

- No assistance is needed at this time. Light housekeeping help required, _____ hours per week.
 Personal caregivers required, _____ hours per week: 24-hour care Part-time, _____ hours per day.
 Assistance with daily living skills, _____ hours per week.
 Nursing care required, _____ hours per week. Meal preparation assistance required, _____ hours per week.
 Assistance with medication required, _____ hours per week: Dispensing Set-up only
 Assistance with ambulation: Maximum Standby In-home hospice services.
 Other assistance required, _____ hours per week (*describe*):

Continued on Attachment 3a.

- b. A professional assessment of the conservatee's care needs has been made. A copy of the assessment, including a statement of the professional's qualifications, is provided on Attachment 3b. (*A professional assessment of the conservatee's care needs is not required, but is recommended if the conservatee's circumstances and condition warrant it and the conservatee can afford the expense. Include any written assessment performed by a professional fiduciary proposed for appointment or appointed as conservator.*)

CONSERVATORSHIP OF _____ (Name): <div style="text-align: right;">CONSERVATEE</div>	CASE NUMBER:
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4. (Complete item 4a if the residence identified in item 2 is the conservatee's personal residence as defined in Cal. Rules of Court, rule 7.1063. Complete item 4b if the residence identified in item 2 is not the conservatee's personal residence.)

a. **Conservatee living in personal residence**

The residence or facility described in item 2 is the conservatee's **personal residence** within the meaning of Cal. Rules of Court, rule 7.1063. The following measures are necessary to keep the conservatee in that residence:

Continued on Attachment 4a.

b. **Conservatee not living in personal residence**

The residence or facility described in item 2 **is not** the conservatee's **personal residence** within the meaning of Cal. Rules of Court, rule 7.1063. The conservatee's **personal residence** is (address and name of facility, if any):

(Complete either item 4b(1) below or item 4b(2) on page 4. Complete item 4b(1) if you believe the conservatee can be returned to his or her personal residence in the foreseeable future. Complete item 4b(2) if you believe the conservatee cannot be returned to his or her personal residence in the foreseeable future.)

(1) The conservator's plan to restore the conservatee to his or her **personal residence** is as follows:

Continued on Attachment 4b(1).

CONSERVATORSHIP OF _____ (Name): CONSERVATEE	CASE NUMBER:
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4. b. (2) The limitations or restrictions on the conservatee's return to his or her **personal residence** in the foreseeable future are as follows:

Continued on Attachment 4b(2).

5. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

 (TYPE OR PRINT NAME OF CONSERVATOR OF THE PERSON)

 _____
 (SIGNATURE OF CONSERVATOR OF THE PERSON)

W11-08

Probate Conservatorships: Determination of Conservatee’s Appropriate Level of Care (adopt form GC-355)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Anthony Chicotel, Staff Attorney California Advocates for Nursing Home Reform San Francisco	AM	<p>Thank you for the opportunity to review and comment on the new proposed form GC 355. Generally, I believe the form makes a good addition to the conservatorship process and will better ensure conservatees reside in the least restrictive environment possible. I have only one concern.</p> <p>My concern is with Section 2(b) of the form, which lists a number of possible residential options. The choices are a bit confusing.</p> <p>One choice is "licensed residential care facility" while another is "board and care home." In California, board and care homes ARE usually licensed residential care facilities.</p> <p>In addition many residential care facilities have "secured perimeters" meaning that some facilities could simultaneously qualify for three of the residential options. I have two suggestions to alleviate this problem:</p> <ol style="list-style-type: none"> 1. Have the form instruct that more than one selection can be made; or 2. Make the options more specific - e.g., remove "licensed residential care facility" and replace with "assisted living facility (7 or more beds)" and add "(6 or fewer beds)" to the "board and care home" option. 	<p>This apparently duplicative listing is intended to identify unlicensed as well as licensed residential care facilities, the former referred to as board and care homes. But the board and care home category has been modified in the revised form to refer specifically to facilities with room for six or fewer residents (expressed in terms of the number of beds). Larger facilities (7 or more beds) of the same general type are identified as assisted living facilities.</p> <ol style="list-style-type: none"> 1. The advisory committee agrees with this recommendation, and has added an instruction to item 2b (item 2c in the revised form) to select all descriptions that apply. 2. The committee has added the suggested specific bed-number alternatives, but believes a separate listing for the licensed care facility remains appropriate for the reason given above.

W11-08

Probate Conservatorships: Determination of Conservatee’s Appropriate Level of Care (adopt form GC-355)

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	Commentator	Position	Comment	Committee Response
			<p>The choice of "hospice" as a location is also confusing. Hospice is defined by services that can be provided in a variety of places, not a particular facility. Hospice specialty centers exist and my understanding is that they are "congregate living health facilities" as defined in Health and Safety Code Sec. 1250(i).</p> <p>CANHR completed a review of 265 conservatorship files from throughout the state and found that, at the time of the petition, 48% of conservatees lived in a private residence, 25% in a nursing home, 13% in residential care, 4% in a psychiatric facility, 2% in a congregate living health facility, and 8% other.</p> <p>Thank you again for the opportunity to comment to proposed form GC 355.</p>	<p>The committee has added “congregate living health facility—terminal or life-threatening illness type (hospice),” a term derived from the description of a dedicated hospice facility in Health and Safety Code section 1250(i)(2)((B), and has also added in-home hospice services to the list of care alternatives.</p> <p>The advisory committee appreciates this very important and useful information. It has added “acute psychiatric facility” to the residence types listed in item 2c.</p>
2.	<p>Executive Committee of the Trusts and Estates Section, California State Bar (TEXCOM) Jennifer L. Wilkerson Grass Valley, Saul Bercovitch/ State Bar Legislative Counsel San Francisco</p>	AM	<p>The Executive Committee of the Trusts & Estates Section of the California State Bar (TEXCOM) submits the following comments:</p> <p>1. To clarify the duty of the Conservator and the purpose of the form, we propose that the following be added as the first sentence in the Box, page 1, titled Notice to Conservator of the Person (hereafter “Notice”):</p> <p>“The Conservator is required to select the least restrictive appropriate residence that is available and necessary to meet the needs of the conservatee, and that is in the best interests of the</p>	<p>1. The advisory committee respectfully disagrees with TEXCOM’s proposed revision of the first sentence of the Notice to Conservator on page 1 of the form. The presumption stated in the proposed sentence is not an accurate statement of the presumption provided in Probate Code section 2352.5(a). The sentence is the reverse or opposite of the correct presumption. The code section says that the conservatee’s personal residence at the commencement of the case is presumed to be the least restrictive appropriate residence that is</p>

W11-08

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	Commentator	Position	Comment	Committee Response
			<p>conservatee. This is presumed to be the conservatee’s personal residence (as defined below) at the time of commencement of the conservatorship.”</p> <p>2. The first sentence in the Notice should also be revised because one does not determine a level of care in writing. Rather, one determines the level of care and then puts the determination in writing. Further, since the form is mandatory and includes a declaration under penalty of perjury, no instruction as to penalty of perjury is needed. We therefore propose that the first sentence in the Notice be modified to read as follows:</p> <p>“You must file with the court your written determination of the conservatee’s appropriate level of care in writing, under penalty of perjury, and must file your determination with the court within 60 days of the court’s order appointing you as conservator.”</p>	<p>available and necessary to meet the needs of the conservatee and is in his or her best interests—the residence the conservator must select for the conservatee under section 2352(a). The conservator’s <i>selection</i> of a residence for the conservatee that the conservator believes is the least restrictive appropriate residence does not establish that residence as the conservatee’s personal residence under the statute or Cal. Rules of Court, rule 7.1063. In effect, the presumption provided in section 2352.5(a) must be overcome for the conservator to select a residence other than the conservatee’s personal residence.</p> <p>2. The advisory committee partially agrees with this recommendation and has revised the first sentence of the Notice to read as follows:</p> <p>“You must prepare a written determination of the conservatee’s appropriate level of care, sign it under penalty of perjury, and file it with the court within 60 days of the court’s order appointing you as conservator.”</p>

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			<p>3. Page 1, item 1 should be modified for consistency with both Probate Code §2352.5(b)(1) and the instruction in sentence 3 of the Notice to replace the reference to the “date of appointment” of the conservator with the “date the conservatorship proceeding was started.” As revised, Item 1 would read as follows:</p> <p>“1. I am the conservator of the person of the above-named conservatee. I am determining the conservatee’s appropriate level of care as of <i>(date)</i>: _____, <input type="checkbox"/> the date the conservatorship proceeding was started. <input type="checkbox"/> following a material change of circumstances affecting the conservatee’s need for placement and care described in item 4 on page 2.</p>	<p>3. The advisory committee does not support this proposed modification. The determination of the appropriate level of care is to be made as of the date of appointment: Probate Code section 2352.5(b) says that the conservator shall determine the appropriate level of care “[u]pon appointment.” As part of that determination, the conservator must evaluate the level of care that was in place at the time the conservatorship was started (expressed in the statute as “commencement of the proceeding”), which is the date the petition for appointment of a conservator was filed (or the date the first petition was filed if there is more than one). (See Prob. Code, § 1820.) In other words, the evaluation is of the level of care that existed before the conservator’s appointment. The determination of the appropriate level of care, on the other hand, is the level of care to be provided by the conservator going forward from the date of the conservator’s appointment, not from the date the case was started, which might be 45 or more days earlier.</p> <p>The committee also concludes that using the date of appointment rather than the date the proceeding started as the determination date would be easier for the conservator, and provides greater clarity. Every conservator or his or her counsel will know the date of the order appointing him or her as conservator, or will have a copy of the order. The date of commencement of the case may be less clear, for example, where there have been competing petitions for appointment and the appointed conservator’s petition was not the first</p>

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			4. In response to the question on page 4, item 3 of the Invitation to Comment re: “should there be an additional option for ‘assistance with daily living’ ”, we respond that, if this option is included it should instead read “assistance with <i>activities of daily living</i> .”	petition filed or where the conservator is a successor. 4. The advisory committee has added the category of “assistance with daily living skills” in item 3 in response to the recommendation of the Superior Court of Los Angeles County (Comment No. 7 below).
3.	Orange County Public Defender’s Office Frank Ospino, Senior Assistant Deputy Public Defender Santa Ana	A	The Orange County Public Defender’s Office supports the Probate and Mental Health Advisory Committee’s proposed recommendation to adopt a new mandatory Judicial Council form, the “Determination of Conservatee’s Appropriate Level of Care.” The proposed form mirrors the actual statutory provisions and reflects the findings necessitated by changes in state law. The form and the instructions are clear and easy to follow.	No response necessary.
4.	Professional Fiduciary Association of California Jackie Miller, Executive Director Sacramento	AM	Make the use of form GC-355 optional rather than mandatory. The Professional Fiduciary Association of California (PFAC) emphasizes that more paper creates an administrative burden which becomes costly to the estate or other resources of the conservatee. PFAC believes that much of the information required by the form could be included in the care plan in the counties where care plans are mandatory, and in the placement forms in the counties where those forms are used.	The advisory committee does not recommend making this form optional. Probate Code section 2352.5 requires the information requested by the form from all conservators, including conservators appointed by courts that do not require care or placement plans. The committee expects that courts that do require these plans will modify their forms or requirements so they do not call for the same information requested in this form.

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			<p>Further specific comments on the Form include:</p> <p>Item 2.b.: Remove "Acute Care Hospital" and "Hospice" (both of which are, by definition, temporary placements) and could be noted under "Other" if necessary.</p> <p>Add another category, "Assisted Living Facility."</p> <p>PFAC is also concerned about the inclusion of "Secured-Perimeter Facility," as this connotes a scenario which typically falls in the category of confidential information, inappropriately referenced in a public document. We ask the Council to be sensitive to this issue in the handling of the designation.</p>	<p>Item 2b: A purpose of item 2b (item 2c in the revised form) is to identify the type of residence or facility where the conservatee was living on the date of the order appointing the conservator as required by the statute, whether or not it was a temporary placement. The temporary nature of the conservatee’s residence on that date would be disclosed not only in the description of the type of facility in item 2c, but also in item 4b of the revised form, where the conservator would state that this residence is not the conservatee’s personal residence, and would then state the plan to restore the conservatee to that residence or why that cannot be done for the foreseeable future.</p> <p>The advisory committee supports this recommendation and has made this change, further defining it as a facility with seven or more beds (see response to comment of Anthony Chicotel, above).</p> <p>The advisory committee does not support removing the secured-perimeter facility from the list of residence types in item 2c, although the designation has been modified simply to "secured perimeter," indicating that a secured perimeter may be a feature of several kinds of facilities, not the defining characteristic of a distinct type. The advisory committee supports requiring the conservator to advise the court that the conservatee was living in a facility with a secured</p>

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			<p>Item 3: “The conservatee’s care requirements...” This is really two questions; one is the type of assistance needed, and the second is the overall time necessary to provide the assistance. Care providers may spend limited time with each of the duties, but the conservatee requires a 24-hour live-in companion because he/she is not safe to be left alone. Therefore, PFAC recommends dividing this particular section into two categories:</p>	<p>perimeter on the date the conservator was appointed; the reason for his or her residence there might help explain why the conservatee cannot be returned to his or her personal residence in the foreseeable future if the facility with a secured perimeter is not that residence.</p> <p>The committee has concluded that a conservatee’s residence in a secured-perimeter facility designed for patients with dementia is not confidential information. For example, if the conservator seeks authority to place the conservatee in such a facility, he or she must request the court for express authority to do so and must offer evidence of the conservatee’s dementia in the form of a physician’s declaration. The allegations supporting this request, whether contained in a petition for the appointment of a conservator or in a separate post-appointment petition, and the supporting physician’s declaration, are not confidential. (See Prob. Code, § 2356.5 and Judicial Council form GC-335A.)</p> <p>Item 3 (redesignated as item 3a in the revised form): The advisory committee has revised item 3a in response to these comments, but has decided against separating the assistance description from the time necessary. Time details beyond hours per week or day and 24-hour or part time care-giving services may be amplified in the “other assistance required” space.</p>

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			<p>Category 1: “Type of Assistance Needed.”</p> <p>Add the following boxes to “Type of Assistance Needed”: “Medication Set-Up”; “Dispensing Medication”; “Standby Assistance with Ambulation”; “Maximum Assistance with Ambulation.” Additionally, all types of assistance could be included under “Other Assistance.” “Other Assistance” could include, but would not be limited to “Transportation,” “Emergency Pendant,” etc.</p> <p>Category 2: “Overall Time Necessary to Provide Assistance.”</p> <p>This category might be better left to a narrative, e.g.; “How many hours of care are needed daily, and why?” This could be anything on the spectrum: “24-hour live-in care,” “24-hour care in shifts” (conservatee is waking at night), “8-hour care,” “4 hours of attendant care.” (We do realize that the narrative approach works well with professionals, but may not with family conservators.) If more space is necessary for a more descriptive recitation of the actual care to be given throughout a typical day, the form may require an additional page.</p> <p>Next box: “A professional assessment” This might include an outside assessment by another professional or could be one performed by the conservator and/or his/her staff, if qualified. PFAC must emphasize that many appointed conservators are quite capable of</p>	<p>The committee has added the recommended care descriptions to the list in item 3a.</p> <p>Any desired narrative concerning time spent beyond hours per week or per day requested in the form may be placed in the “other assistance required” space at the end of item 3a. A general instruction to add additional material in that space has been added at the beginning of item 3a.</p> <p>Next box (designated as item 3b in the revised form): The advisory committee agrees with this comment. It has added an instruction to item 3b advising that a professional assessment is not required but is recommended if the conservatee’s circumstances and condition call for it and he or</p>

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			<p>making a proper assessment without the need to hire a professional care manager or other professional to make an assessment. It is important to avoid an unnecessary expense to a conservatee if the conservator is capable of doing the assessment him- or herself. This should be optional and not mandatory unless it is truly warranted. The form should be clarified in some manner to address this issue.</p> <p>PFAC further wishes to state its appreciation of the Judicial Council's provision of a definition for the term "personal residence of the conservatee" in the adoption of California Rules of Court, Rule 7.1063 (b)(1) and (2).</p>	<p>she can afford the expense. This instruction also requests that written care assessments made by professional conservators proposed or appointed as conservators be included.</p>
5.	<p>Srinoi G. Rousseau Chair, Elder Law Conservatorship Guardianship Committee East Bay Trusts and Estate Lawyers Oakland</p>	AM	<p>My comment concerns limited conservatorships. The presumption that it is necessary to keep the conservatee in his/her residence does not necessarily apply in a limited conservatorship. For example, in many cases a limited conservatee is living in the parent's house and the goal is not to keep him/her there but to have the conservatee move into a more independent living environment.</p> <p>Question 5a should be added as an alternative:</p> <p>“In the case of a limited conservatorship, what measures are necessary to assist the conservatee in achieving more independence and is there a plan to move the conservatee to a more independent living environment?”</p>	<p>The presumption in favor of the conservatee’s personal residence at commencement of the proceeding as his or her least restrictive appropriate residence in Probate Code section 2352.5(a) applies to limited conservatees, except as specifically exempted under section 2352.5(e)(1). The exemption applies only to limited conservatees for whom the Director of Developmental Services or a regional center for the developmentally disabled acts as the conservator. These exempt conservators need not complete the form at all. All other limited conservators are subject to the provisions of section 2352.5. The proposed new alternative item 5a presents a standard not present in the statute. Moreover, section 2352(b), which requires a conservator, including a limited conservator, to select the least restrictive appropriate residence for the conservatee that is</p>

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				available and necessary to meet the needs of and is in the best interests of the conservatee, appears broad enough to cover the special requirements for the residences of limited conservatees, including greater independence when appropriate.
6.	Michael M. Roddy Executive Officer Superior Court of San Diego County San Diego	A	No specific comment.	No response necessary.
7.	Superior Court of Los Angeles County Los Angeles	N	<p>1. Rather than adopt the form as mandatory, it is suggested that GC-355 be an optional form. Many courts have developed form Care Plans, which require extensive information concerning a conservatee’s level of care at the time of commencement of the proceeding. These courts could continue to utilize a single form for purposes of complying with Probate Code 2352.5.</p> <p>Proposed form GC-355 may be helpful (to parties and courts) when courts have not developed form Care Plans or when the Care Plans do not contain information concerning the assessment required by Probate Code section 2352.5.</p> <p>If the form is made optional, the first paragraph of the section entitled “Notice to Conservator of the Person” should delete reference to local</p>	<p>1. The advisory committee does not recommend making this form optional for the reasons stated in response to the comment of the Professional Fiduciary Association of California (Comment No. 4.) All conservators, including those whose appointing courts do not require care plans, must comply with the requirements of the statute; a form for all courts is necessary. The new requirements of the statute are in some key respects different from local care plan requirements. These new requirements would not be satisfied by filing a care plan under current local rules.</p> <p>Even if the form were optional, its completion and filing would not necessarily comply with courts’ current care plan requirements. The Notice to</p>

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			<p>courts’ care plans.</p> <p>2. Probate Code section 2352.5(c) requires conservators to submit written reports to the court within 60 days of appointment. Written reports are not required under subsection (d) when there are material changes in circumstances. Why should form GC-355 require a written re-evaluation when the statute does not?</p> <p>3. If conservators will be required to submit form GC-355 upon a material change in circumstances, definitions or examples of what constitutes material changes would be helpful. Without a frame of reference, non-professional conservators will not understand when the form is to be submitted.</p> <p>4. The form should be reformatted, to give directions to the preparer, re completion of sections that apply under all circumstances, those that apply at commencement of the proceeding, and sections that are applicable to a reevaluation due to material changes in circumstance. Reformatting, with prompts, will promote ease in filling out the form which will be very beneficial to non-professional</p>	<p>Conservators advises that completion of the form is not a replacement for these requirements, and asks conservators to check the court’s local rules to see if a local plan must also be filed.</p> <p>2. The advisory committee has revised the form to delete any provision, requirements for, or mention of a written and filed reevaluation.</p> <p>3. See paragraph 2 above. The revised form no longer makes any provision for a reevaluation. Reevaluations remain required by Probate Code section 2352.5(d), when there has been a “material change of circumstances affecting the conservatee’s needs for placement and care,” but the statute provides no guidance concerning the meaning of the phrase, and does not require reevaluations to be in writing or filed with the court.</p> <p>4. The advisory committee agrees with this recommendation. The form has been substantially revised to provide instructions as to which items are to be completed in varying circumstances. However, as noted above, all references to reevaluations have been removed.</p>

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			<p>conservators.</p> <p>5. It appears that a more appropriate title for the form would be “Determination of Conservatee’s Appropriate Placement.” The two factors considered in determining proper placement are: the conservatee’s level of care and measures necessary to keep the conservatee in his or her personal residence.</p> <p>6. Item 3 requires attachment of a professional assessment of the conservatee’s care needs when one has been performed. Often care assessments include information of a very personal nature which should not be part of the public case file. In addition, when assessments are performed by facilities, they are often confidential.</p>	<p>5. The advisory committee does not support this recommendation. The recommended title does not accurately summarize what the form requests: information not only about placements, but also about the kinds of care necessary in any placement, including maintaining the conservatee in his or her personal residence.</p> <p>6. The item concerning professional care assessments at the end of item 3 has been redesignated as item 3b in the revised form. It has been modified to clarify that provision of a professional care assessment is not mandatory. The advisory committee considers a professional assessment to be useful information for the court whenever it is available.</p> <p>The conservator’s filed care determination is not confidential under current law. A change of that law would be required to provide some privacy protection for professional care assessments that are filed with the court, and indeed for the care determination as a whole. Conservators are not required to attach care assessments they receive to the form if they are concerned about anything disclosed in them, and residential facilities concerned about the confidentiality of their internal professional care assessments are not required under current law to deliver copies to the conservator for attachment to the form.</p>

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			<p>7. The caption of the form should be consistent with other Judicial Council forms. A box is needed to designate each [] Person and [] Estate.</p> <p>8. Paragraph c appearing at the end of page 3 of 3, should be numbered 5.c. to be consistent with numbering elsewhere in the form.</p> <p>9. The form should include the following additional information:</p> <p>a. Page two of the form, question 3: a box for “Assistance with daily living skills” and space to specify the number of hours per day or week required should be added.</p> <p>b. When a conservatee is residing in his or her personal residence, it should be appropriately equipped, e.g. handrails in tub/shower, wheelchair ramps, hospital bed, etc. Appears this information should be stated.</p> <p>c. The form should distinguish between required levels of care when the conservatee resides in a single family home from information that is</p>	<p>7. The level-of-care determination must be prepared and filed by all conservators of the person. There is no reason to require a checkbox for “Person” if everyone who must file the form is a conservator of the person. Some, but not all of them, will also be conservators of estates, so the single check box for “Estate” remains appropriate. Conservators of estates only are not required to file the form.</p> <p>8. A numbered item is identified at its first entry on each page containing a part of that item. Sub-items with lower case letter designations underneath each numbered item do not carry the number of the paragraph on the same page.</p> <p>9a. The advisory committee agrees with this recommendation and has added this item to the list of assistance types in item 3a..</p> <p>9b. Special fixtures or equipment that is recommended for installation in a private residence would be a proper subject for discussion under item 4a of the revised form, the measures necessary to keep the conservatee in his or her personal residence.</p> <p>9c. The advisory committee does not support this recommendation. Wherever the conservatee lives, he or she will have care needs that should be</p>

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			<p>required when a conservatee resides in a facility/group home.</p> <p>d. The last box appearing in paragraph 3 should be modified to include medical assessment. Most changes in placement occur because of medical necessity.</p> <p>10. Paragraph 3 of the form appears to focus on level of care requirements when conservatees reside in their personal residences. Levels of care required in acute care hospitals, skilled nursing facilities, and hospice could include: conservatee is on a feeding tube, is ventilator dependent, etc.</p> <p>11. It appears that the conservator should complete paragraph 5c., appearing on page 3 of 3, upon reevaluation only and the form should so indicate.</p>	<p>specified in the form.</p> <p>9d. Probate Code section 2352.5 does not refer to or require a medical assessment as part of a care determination, although it is clear that the conservatee’s medical condition would impact his or her needs for care. Medical issues that do so can be described in items 4a, 4b1, or 4b2.</p> <p>10. Detailed information of this kind could be described in the “other assistance required” space in item 3a.</p> <p>11. Reevaluations are no longer required by the form. Item 5c has been deleted from the revised form.</p>
8.	Superior Court of Monterey County Diana Valenzuela Operations Manager Salinas	A	No specific comment.	No response necessary.
9.	Superior Court of Orange County Hon. Randall Sherman, Judge Santa Ana	AM	A Judicial Council Level of Care form is an excellent idea, especially for self-represented parties. The only issue I have with the proposed form is that in my opinion, item 5c should be	Item 5c of the draft of the form circulated for public comment, applicable to reevaluations

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			<p>deleted. It is somewhat redundant of item 5b because even if the conservator previously filed a Level of Care form they probably will fill in item 5b because they will go down the form in order, but then they will see that item 5c applies to them, making item 5b inapplicable after they have completed it.</p> <p>Perhaps it is better to have conservators provide a new answer in item 5b concerning any restrictions on moving the conservatee to his or her personal residence, as time will have passed since they filed their first Level of Care form. Giving them the opportunity in item 5c to say that the plan is the same as last time might encourage them to just check that box, rather than have to use an extra page as an attachment to provide new information, especially because there is no more room at the bottom of the form to provide the information. Thus, item 5b should be used whether or not the conservator previously filed a Level of Care form.</p>	<p>under section 2352.5(d) , has been deleted in response to the comment of the Superior Court of Los Angeles County, Comment No. 7 above. Item 5b of that draft is item 4b of the revised form.</p> <p>Because reevaluations have been deleted from the form, the form will be filed only once, at the beginning of the case.</p>
10.	Superior Court of Riverside County Michael Cappelli, General Counsel Riverside	AM	The structure of paragraph 5 of the new form is confusing, particularly for self-represented parties. It would appear that the conservator would either be checking item 5b or 5c, not both. As the form is drafted, the mutually-exclusive nature of items 5(b) and 5(c) is not intuitive. I would add that 5(c) would be more intuitive if it were renumbered as option 5(b)(3).	The form has been revised. Item 5 is now item 4. It now includes detailed instructions about its preparation that should reduce confusion. Item 5c has been deleted.

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11.	Superior Court of Sacramento County Robert Turner, ASO II Finance Division Sacramento	NI	No specific comment	No response necessary.