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TESTIMONY
BEFORE THE PROBATE CONSERVATORSHIP TASK FORCE
JUDICIAL COUNCIL OF CALIFORNIA

PUBLIC HEARING
IMPROVING THE MANGAGEMENT AND OVERSIGHT OF PROBATE CONSERVATORSHIP CASES IN CALIFORNIA TRIAL COURTS:
A FRESH LOOK AT TEMPORARY CONSERVATORSHIPS

RONALD REAGAN STATE BUILDING
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On behalf of the County Counsels' Association of California, I would like to thank Justice Boren, Chair, and the other distinguished members of the Probate Conservatorship Task Force for giving us this opportunity to submit testimony as part of a hearing to consider how probate conservatorships might be improved in California.

Introduction to the County Counsels' Association

The County Counsels' Association is a Nonprofit Mutual Benefit Corporation. The County Counsels from each of the 58 counties are members, along with their

assistant and deputy county counsels. The purposes of the organization are to provide continuing education for its membership, provide for improvement in governmental law, facilitate cooperation and communication among members, maintain the highest ethical standards, and promote specialization in local governmental law.

The County Counsels are the legal representatives of the State's Public Guardians. As such, we provide representation in court and provide Public Guardians with the legal support needed to manage the person and estates of the many thousands of California residents presently under the care of Public Guardians.

The County Counsels' Association generally does not take a position on legislation. We are not legislative advocates. Instead, we use our collective expertise to provide assistance and guidance to County policy-makers and their chosen legislative advocates, including the California State Association of Counties. The Association has a Probate and Mental Health Study Section consisting of over 175 attorney members of County Counsel's offices, many of whom have dedicated a good deal of their legal careers to this area of the law. We are pleased to bring that experience and expertise to the Judicial Council's Probate Conservatorship Task Force.

General Comments on Temporary Conservatorships

I have been in contact with County Counsel's offices around that State, and there are a few general comments that I would like to offer for the Task Force's consideration.

First, we believe that by and large, the temporary conservatorship statutory scheme works. Based on our experiences, most of the concerns surrounding the temporary conservatorship process come not from lapses in the statutory scheme, but in lax application of the existing standards.

Second, funding is and will continue to be a concern in Public Guardian conservatorships. Many, if not most, of the temporary conservatees under the care of Public Guardians survive on very limited incomes. As such, fees and costs of the Public Guardian and County Counsel are routinely deferred or waived. When the temporary conservatee cannot pay the costs of services, those costs are borne by the County general fund, where they compete with other very worthy and important public expenditures. Simply adding additional requirements to the temporary conservatorship process without addressing the funding issue will not meet any desired objectives of this Task Force.

Third, we would caution this Task Force from basing any reforms on anecdotal stories. No system will operate without its flaws, and any system that relies on the independent action and judgment of so many individuals will always, unfortunately, produce at least some examples of failure. While this fact should not deter a thorough review and efforts to improve the system, any changes to the process should be based on sound policy. As such, we applaud this Task Force's efforts to seek input from a broad range of interested and affected stakeholders and to review the overall system of conservatorship administration.

Finally, we would like to offer the Task Force our continued input and support during this process. County Counsels and their clients, the Public Guardians, have vast first hand experience at balancing the two main competing interests in temporary conservatorships—providing immediate, effective assistance to vulnerable adults who are at significant risk of injury or financial abuse, while allowing individuals to retain as much of their personal autonomy and dignity as possible.

With those general comments in mind, I would like to offer some specific observations regarding several of the questions before this Task Force today.

> *Are the standards for establishing temporary conservatorships appropriate?*

One of the issues before this Task Force is whether the standards for establishing temporary conservatorships should be more stringent. Under Probate Code section 2250,[1] a petition for temporary conservatorship may be filed on or after the petition for conservatorship is filed. Therefore, before the Temporary Conservatorship is filed, the petitioner has made a determination that the proposed conservatee meets the standards set forth in Section 1801.[2] A judge ruling on a temporary conservatorship petition will have before him or her the information supporting the conservatorship petition, including the character and estimated value of the property of the estate, facts supporting the determination that the proposed conservatee meets the standard for conservatorship, and alternatives to conservatorship that have been considered and rejected.[3] This information is

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[1] All further statutory references are to the Probate Code unless otherwise specified.

[2] To establish a conservatorship of the person, the proposed conservatee must, with certain exceptions, be "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." (Prob. Code § 1801(a).) To establish a conservatorship of the estate, the proposed conservatee must, with certain exceptions, be "unable to manage his or her own financial resources or resist fraud or undue influence," and "isolated incidents of negligence or improvidence" will not suffice. (Prob. Code § 1801(b).)

[3] See Form of the Judicial Council of California, GC-310 and GC 312.

submitted under penalty of perjury, and is based upon personal knowledge of the petitioner or supporting affidavit.

Under Section 2250, a petition for temporary conservatorship may be granted for good cause. The mandatory Judicial Council form elaborates on the "good cause" requirement by requiring a factual statement supporting the request for temporary conservatorship, and precise reasons, if applicable, that a proposed conservatee requires a change of residence.

As a general rule, we believe the appropriate standards exist under the present system when properly applied. It provides for sufficient flexibility to remove a person from a potentially dangerous or harmful situation, but still allows for a neutral arbitrator to independently review the justifications for the request.

As with any statutory scheme, this system depends upon each party faithfully executing their duties. The petitioner must be rigorous in its investigation, make efforts in determining facts used in support of the petition, and seek temporary conservatorships only where good cause exists. The courts must undertake a careful review of the petition, raise questions to the petitioner where there are doubts, and enforce the good cause standard.

In instances where this is not occurring, perhaps the reform efforts should focus on improving the behaviors of the individuals responsible for carrying out the conservatorship process rather than changing existing standards. Training, education, monitoring and evaluation of the participants in the system would be one avenue for reform that would build upon a system that, by and large, meets the dual needs of protection and personal autonomy.

Who Should Receive Notice?

Under the current system, the proposed conservatee is required to receive five-days notice of a temporary conservatorship.[4] Though not required, in our experience, Public Guardian conservatorship officers often make efforts to advise relatives of the temporary conservatorship petition. We see merit in expanding the notice requirement to include close family, as is already required for the permanent conservatorship hearing.[5] However, as will be explained more fully below, waiver should be permitted for good cause.

[4] Prob. Code § 2250(c).

[5] See Prob. Code §§ 1821, 1822.

Should the courts be able to waive the notice requirement?

In the experience of the County Counsels, there is no question that some circumstances warrant immediate action and require waiver of the five-day notice requirement. Under Section 2250(c), the court can waive notice for good cause. This vests discretion with the court to weigh the circumstances of any given case in deciding whether waiver of notice is appropriate. Our concern is that trying to define this in too great a detail will inevitably leave out situations where waiver is appropriate and necessary. If the code were amended to require notice to family members, waiver of notice to a particular family member should also be permitted where such notice would not be appropriate (i.e., where the family member is a financial abuser and notice would permit financial assets to be moved prior to establishment of the conservatorship). The temporary conservatorship petition form should be amended to permit the reasons for the request to waive notice to be provided to the judge in a confidential document where appropriate (i.e., financial abuse).

As discussed above, the current system of allowing the courts to waive notice for good cause requires the courts to apply Section 2250(c) in a prudent manner. Waiver is not necessary or appropriate in every circumstance, and a thorough evaluation of the reasons stated for good cause should be made.[6] In instances where this is not occurring, reform efforts should focus on obtaining compliance with current standards rather than changing those standards.

What role, if any, should court investigators play in the temporary conservatorship process?

County Counsels understand that the court investigators play a critical role in the probate conservatorship process. We would offer a few comments, however, about their inclusion in the temporary conservatorship process. First, the funding issue must be addressed. In many counties, the court investigators have a difficult time meeting current caseloads. Adding considerably more work by including a court investigator requirement in the temporary conservatorship process should not be done unless there is adequate funding for the staff necessary to meet these needs.

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[6] *See, e.g. Conservatorship of Edward W.* (2002) 99 Cal.App.4th 516. In this case, the First District Court of Appeal held that waiving the five-day notice requirement on every conservatorship as a matter of practice violates Due Process, as each proposed conservatee is entitled to an independent evaluation of the facts of his or her situation. Though the case was decided in the context of conservatorships created under the Lanterman-Petris-Short Act (LPS)(Welf. & Inst. Code §§ 5000 et seq.), many of the arguments provide a good policy basis for why good cause must be determined by a judge on a case-by-case basis in probate conservatorships.

Second, there must be flexibility in any requirement to have a court investigator report prior to obtaining a temporary conservatorship. Timing is sometimes of the essence, and it may take more time to have a court investigator report prepared than is available to remove a person from a dangerous situation. There should be provisions, therefore, to either waive the report or allow it to be submitted after the temporary conservatorship letters are issued in certain circumstances.

Finally, we think it would be helpful for court investigators to have access to the confidential information that is submitted with the conservatorship petitions. The more information they have at the beginning of their investigation, the better.

Are the current powers and duties of temporary conservators appropriate?

Under the current Probate Code, temporary conservators have only those powers that are necessary to provide temporary care for the conservatee and/or that are necessary to conserve and protect the property of the conservatee from loss or injury.[7] These can include medical treatment, the ability to marshal assets, and the ability to move a temporary conservatee from his or her place of residence if an emergency exists.[8] Significant restrictions exist on the ability to move a temporary conservatee absent an emergency, and on selling a temporary conservatee's real or personal property.[9]

In general, we would caution against attempts to further limit the powers of the temporary conservator. In fact, particularly in the area of financial abuse, the existing powers may not be sufficient to prevent further fraud from occurring. For example, banks will frequently not deal with a conservator until permanent conservatorship letters are issued.

A full range of powers should be available, with the petitioner requesting only those powers that are necessary to address the present needs of the proposed conservatee (as the Code presently requires). An explanation to the court should be provided as to why a particular power is necessary, with any specific financial information submitted on a confidential form. To ensure that the system protects the personal liberty interests of conservatees, it is incumbent upon the court to carefully review the petitions and make an independent judgment as to whether the powers requested are necessary. As long as that is occurring on a consistent basis, the present system works to protect proposed conservatees.

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7 Prob. Code § 2252.

8 Prob. Code §§ 2252, 2254.

9 Prob. Code §§ 2252(e), 2253.

Should alternative models of emergency intervention be explored?

We believe that generally, the existing temporary conservatorship process contains the elements necessary to meet the needs of emergency intervention, while protecting the rights of proposed conservatees. To the extent that problems have been identified, our experience is that the problems relate to not strictly enforcing the existing statute rather than with the statute itself.

However, if the Task Force is considering making establishment of temporary conservatorships more difficult, or extending the notice or hearing provisions for obtaining a temporary conservatorship, we would urge that some type of mechanism be developed that still permits timely emergency intervention where it is warranted.

For example, the State of Florida has implemented a system of emergency versus nonemergency protective services interventions.[10] Florida's system basically provides for emergency intervention where a vulnerable adult is at risk of death or serious physical injury[11] and lacks the capacity to consent to emergency protective services. Under the emergency powers, the vulnerable adult can be removed from the dangerous situation and given medical treatment. A hearing must be held (with 24-hours notice to the vulnerable adult and next of kin) within four days to establish reasonable grounds to continue emergency services.

Though this system does not meet all the needs of California's Probate Code, it does plant the seeds of a possible alternative for emergency intervention. The first level would be a type of emergency conservatorship that would allow for short-term emergency powers where the situation warrants such action. The second level would be a temporary conservatorship, which might provide for additional hearings and investigation by the court, but would provide the temporary conservator with some power to care for the conservatee while additional work is performed to determine the necessity of a permanent conservatorship. The final level would be the permanent conservatorship.

Again, while we believe that the current system works well in most circumstances, we would encourage some type of emergency powers be made available if the temporary conservatorship process is altered to be more restrictive. Our concern is that, in taking efforts to ensure that the personal liberties of our vulnerable adults are protected, an amended statute may result in delaying a needed temporary conservatorship, or worse, not appointing a necessary temporary conservator, causing measurable harm to the incapacitated person.

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10 Fla. Stat. § 415.1051.

11 We would recommend that serious risk of financial abuse be included as well.

Conclusion

No one knows better that the County Counsels and their clients, the Public Guardians, how important temporary conservatorships are in providing timely and effective intervention. We also know, however, how personally difficult it can be for the individuals involved. Our system, when properly implemented, provides a balance between two undesirable results: (1) approval of a conservatorship when one is not warranted, and (2) failure to appoint a conservator when one is needed. We urge this Task Force to be mindful that any attempts to further limit the first problem do not result in an increase in the second.

The County Counsels' Association is grateful for the opportunity to provide testimony to the Judicial Council's Probate Conservatorship Task Force. We are committed to providing any assistance this Task Force may need in its comprehensive review of the probate conservatorship system.

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