



Providing Professional & Quality Legal Services

CONSERVATORSHIPS 101

A Guide to Basic Conservatorship Proceedings

WHAT ARE CONSERVATORSHIPS?

- ❖ A conservatorship is a court proceeding that is meant to protect a person who cannot care for their own person or property.

TYPES OF CONSERVATORSHIPS

- General Conservatorship
- Limited Conservatorship
- Lanterman-Petris-Short Act (LPS)
Conservatorship

GENERAL CONSERVATORSHIP

- The establishment of a conservatorship shifts the responsibility for making financial and personal care decisions from the conservatee to the conservator, acting as fiduciary. Prob C §2101
- Applicable to individuals with major neurocognitive disorders such as Alzheimer's disease or dementia
- Conservatorships must be the least restrictive means of providing assistance, and the court must make an express finding that a conservatorship is the least restrictive alternative needed for the protection of the conservatee. Prob C § 1800.3

GENERAL CONSERVATORSHIP

CONSERVATORSHIP OF THE PERSON

- In a conservatorship of the person, the conservator manages the personal care of another (the conservatee) who cannot properly provide for their personal needs for physical health, medical care, food, clothing, or shelter. See Prob C §1801(a).
- In a proceeding for a conservatorship of the person, the conservator has the “care, custody and control” of the conservatee, including the power to determine where the conservatee will live. Prob C §§2351–2352. The conservatee, however, is presumed to have the capacity to make medical decisions. Prob C §2354. That presumption is rebuttable, and the court may find that the conservatee lacks the capacity to give informed consent to any form of health care, on a petition requesting that the conservator have exclusive medical powers under Prob C §2355.

GENERAL CONSERVATORSHIP

CONSERVATORSHIP OF THE ESTATE

- In a conservatorship of the estate, the conservator manages the financial affairs of another person who is substantially unable to manage their own financial resources or to resist fraud or undue influence. See Prob C §1801(b)
- In a proceeding for a conservatorship of the estate, the conservatee is presumed to lack capacity to contract; to sell, transfer, or convey property; to make gifts; to incur debts (except in limited circumstances); to delegate powers; to waive any rights; or to serve as a fiduciary. Prob C §§1870, 1872.

GENERAL CONSERVATORSHIP

- Once established, the conservatorship remains within the court's continuing jurisdiction for the remainder of the conservatee's life, or until the conservatorship is otherwise terminated.
- The court must review the conservatorship periodically to protect the conservatee and determine if the conservatorship continues to be necessary, appropriate, and in the conservatee's best interests.
- The court investigator makes an initial report, and reviews and further reports 6 months and 1 year after the conservator's appointment, and then annually or biannually thereafter, depending on the court. Prob C §§1800(e), 1826, 1850.

LIMITED CONSERVATORSHIPS

- A limited conservator of the person, of the estate, or both may be appointed for a developmentally disabled person.
- A limited conservatorship provides a protective proceeding for individuals whose developmental disability impairs their ability to care for themselves or their property in some way but is not so severe as to meet the standards of Prob C §1801(a)–(b) for creation of a general conservatorship.
- A limited conservatorship encourages the limited conservatee's maximum use of self-reliance and independence. The law of limited conservatorships divests the limited conservatee only of those rights, and grants the limited conservator only those powers, that the limited conservatee is unable to exercise capably. Prob C §1801(d)

LIMITED CONSERVATORSHIPS

- A developmental disability is a disability that originates before the age of 18, is expected to continue indefinitely, and constitutes a substantial handicap. Prob C §1420. The disability is “substantial” if it results in significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the person’s age (Welf & I C §4512(l)):
 - Self-care, • Receptive and expressive language Learning, • Mobility, • Self-direction, •Capacity for independent living, or •Economic self-sufficiency.

- The term “developmental disability” does not include what is commonly referred to as “mental illness,” because mental illness is not closely related to intellectual disability and does not require treatment similar to that required for a person with intellectual disability. Prob C §1420. If the only disability is a mental illness, a limited conservatorship is not available

LIMITED CONSERVATORSHIPS

- In a limited conservatorship, the court must immediately appoint the public defender or private counsel if the proposed limited conservatee has not retained and does not plan to retain legal counsel. This requirement differs for general conservatorships, in which the court must appoint counsel “at or before the time of the hearing.” Prob C §1471(a)–(b)
- The standard of proof in a limited conservatorship is clear and convincing evidence that it's necessary to promote and protect the person's well-being, while encouraging maximum self-reliance and independence.

LPS CONSERVATORSHIPS

- The provisions of the LPS Act cover services to individuals who are gravely disabled; that is, persons
 - Who are in need of treatment but are unwilling or incapable of accepting it voluntarily (Welf & I C §5352), and
 - Who are recommended for conservatorship by the professional in charge of an LPS evaluation or treatment facility designated by the county or at a county jail (Welf & I C §5352).
- The LPS Act provides for involuntary treatment of persons who are a danger to either others or themselves. Welf & I C §5150.

LPS CONSERVATORSHIPS

- “Gravely disabled,” as defined in Welf & I C §5008(h), is a condition in which a person, as a result of (1) a mental health disorder, (2) a severe substance abuse disorder, or (3) a co-occurring mental health disorder and severe substance use disorder is unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care.
- Under Welf & I C §5350(e)(1), a person is not gravely disabled if they can survive safely with the assistance of a third party. See *Conservatorship of Early* (1983) 35 C3d 244; *Conservatorship of Neal* (1987) 190 CA3d 685 (conservatee was not gravely disabled because he could provide for his basic needs with the help of his “common-law” wife).
- With certain exceptions, LPS conservatorships do not extend to “mentally disordered sex offenders, persons with an intellectual disability, and mentally disordered criminal offenders.” Welf & I C §5002(d).

LPS CONSERVATORSHIPS

- LPS conservatorships are initiated by public officials, not by private individuals. See §§23.45–23.46. LPS conservators have extensive powers, including placement powers authorized by the court under Welf & I C §§5358 and 5358.6.
- The purpose of establishing an LPS conservatorship is to provide individualized treatment, supervision, and placement. Welf & I C §5350.1.
- Proof beyond a reasonable doubt is required. *People v Karriker* (2007) 149 CA4th 763; *Waltz v Zumwalt* (1985) 167 CA3d 835.

LPS CONSERVATORSHIPS

- An LPS conservatorship may be recommended for persons whether or not they are involuntarily detained as inpatients in LPS evaluation or treatment facilities. Welf & I C §5352. The recommendation may be made for a person who has left the inpatient facility but is still in need of treatment and supervision. However, whether inpatient or outpatient treatment is required, conservatorship is not appropriate if the person is willing and capable of volunteering for treatment. Welf & I C §5352.
- There is no provision in the statutes for the initial recommendation of a conservatorship to come from a family member, friend, personal physician, or from a previously appointed Probate Code conservator or guardian. The family physician or probate conservator or guardian must follow the procedures described in Welf & I C §§5150–5344 (i.e., by bringing the proposed LPS conservatee to the attention of a professional person in charge of the 72-hour or 14-day facility or by petitioning the court for an evaluation order (see §23.34))

LPS CONSERVATORSHIPS

- A person comes to the attention of law enforcement, attending staff or a professional person in charge of an evaluation facility designated by the county, or other professional person designated by the county (Welf & I C §5150; 72-hour hold);
- A person appears in criminal court unable to understand or participate in the proceedings and the judge has reason to believe the person may be appropriate for an LPS conservatorship, in which case the judge can order an evaluation at the local facility (Pen C §1370(c)(3)(felonies), §1370.01(b)(1)(D)(iii) (misdemeanors));
- A criminal defendant appears, as a result of chronic alcoholism or the use of narcotics or restricted dangerous drugs, to be a danger to themselves or others or gravely disabled, in which case the judge may order an evaluation (Welf & I C §5225);

LPS CONSERVATORSHIPS

- A court in a probate proceeding is authorized to refer a conservatee for assessment by a local mental health system to determine if the conservatee has a “treatable mental illness.” The assessment referral must be preceded by an evidentiary hearing attended by the counsel for the conservatee and the conservatee, unless the conservatee waives presence. It is the obligation of the mental health system or plan to file the assessment with the court in the probate proceeding (Welf & I C §5350.5);
- A family member or a friend brings the person to an authorized psychiatric “5150” facility for evaluation and thus brings the proposed LPS conservatee to the attention of a “professional person in charge of the facility” as defined in 9 Cal Code Regs §§623–627 (psychiatrist, psychologist, social worker, marriage, family or child counselor, or nurse) (see Welf & I C §5150; 9 Cal Code Regs §822 (see also §23.36)); or

LPS CONSERVATORSHIPS

- A family member, friend, or any other person completes an application for a court-ordered evaluation and presents it to the court, which orders the proposed conservatee to submit to an evaluation (Welf & I C §§5201–5213).
- The recommendation for an LPS conservatorship will still come from the professional person in charge of the evaluation facility (i.e., the judge cannot make an LPS referral).

LPS CONSERVATORSHIPS

- An investigator must investigate all available alternatives, and recommend for or against conservatorship. Welf & I C §5354. See §§23.40–23.44.
- The conservatorship investigator is often part of the public guardian's office. In most counties, the designated agency is the public guardian or public conservator.

LPS CONSERVATORSHIPS

- A court may establish a temporary conservatorship for a period not to exceed 30 days. At the expiration of the 30-day period, the temporary conservatorship expires automatically unless the court has held a hearing on whether the proposed conservatee is gravely disabled.
- Only the investigating officer or another county officer or employee designated by the county can act as a temporary LPS conservator. Welf & I C §5352. A family member may be named as conservator for a 1-year LPS conservatorship, but cannot act as a temporary conservator.

LPS CONSERVATORSHIPS

- An LPS conservatorship automatically terminates 1 year after appointment of the conservator (Welf & I C §5361(a)), unless terminated sooner by the conservatee's death (Prob C §1860, made applicable by Welf & I C §5350) or by the court on petition for rehearing by the conservatee (Welf & I C §5364; see §§23.134–23.135) or on the conservator's petition for termination (Welf & I C §5352.6).
- For the conservatorship to continue, the conservator must petition for reappointment for a succeeding 1-year period, including in the petition the opinion of two physicians or qualified licensed psychologists that the conservatee is still gravely disabled. Welf & I C §5361(b). See §§23.136–23.140.
- The conservatee is entitled to petition the court every 6 months for a rehearing as to their status as a conservatee. See §23.96.

CARE ACT

- In 2022, the legislature enacted the Community Assistance, Recovery and Empowerment (CARE) Act, authorizing a new proceeding in civil court for voluntary or involuntary treatment. SB 1338 (Stats 2022, ch 319).
- The CARE Act relies on mental health criteria similar to those required for Assisted Outpatient Treatment but is specifically targeted to individuals with a diagnosed disorder on the schizophrenia spectrum in deteriorating condition, but who are not necessarily yet a danger to self or others.
- The stated aim of the legislation is to “provide a new process for earlier action, support and accountability” for individuals with “untreated severe mental illnesses” and “local governments with the responsibility to provide behavioral health services.” SB 1338, §1(c).

CARE ACT

- Implementation took effect October 1, 2023 (Glenn, Orange, Riverside, San Diego, Stanislaus, Tuolumne, the City and County of San Francisco, and Los Angeles County indicated intent to voluntarily implement the program in 2023).
- The second cohort of counties, representing the remaining population of the state, shall begin no later than December 1, 2024, unless the counties are provided additional time under Welf & I C §5970.5(c)(2).

CARE ACT

The criteria for eligibility of a respondent in a CARE Act petition are that (Welf & I C §5972(a)–(f))

- The respondent is over the age of 18 years;
- The respondent is currently experiencing a “serious mental disorder” as defined in Welf & I C §5600.3(b)(3)(A), with a diagnosis of a schizophrenia spectrum disorder or another psychotic disorder in the same class, as defined in the current Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR);
- The respondent is not clinically stabilized in ongoing voluntary treatment;
- The respondent is either (a) unlikely to survive safely in the community without supervision and in substantially deteriorating condition, or (b) in need of services and supports to prevent relapse or deterioration that be “likely to result in grave disability or serious harm to the person or others, as defined in section 5150” (Welf & I C §5150);

CARE ACT

- A CARE plan or CARE agreement is the least restrictive alternative necessary to ensure the person's recovery and stability; and
- It is likely the person would benefit from participation in a CARE plan or CARE agreement.

CARE ACT

A petition may be filed in the county where the respondent resides, is found, or is facing criminal or civil proceedings (Welf & I C §5973; Cal Rules of Ct 7.2223(a)) by

- Any of many acquaintances of the respondent, including someone living with them, their family members, or quasi-parent;
- Medical facility directors and behavioral health professionals who have treated or tried to treat the respondent;
- First responders (including police, fire, paramedic, EMT, mobile crisis response worker, or homeless outreach team members) with repeated interactions with respondent;

CARE ACT

- A county's public guardian or public administrator, the director of a county health behavioral agency or its designee, or the director of a county adult protective services agency or its designee;
- Director of the California Indian Health Services program or of the California tribal behavioral health department who has provided behavioral health services to the respondent within the previous 30 days, or their designee;
- A judge of a tribal court before which the respondent has appeared within the previous 30 days, or their designee; or
- CARE respondents themselves (Welf & I C §5974; Cal Rules of Ct 7.2225).

CARE ACT

- No matter who initiates the proceeding as petitioner, the court will appoint the county behavioral health agency to carry forward the proceedings if all prima facie requirements are met, and the original petitioner (such as a family member who filed the petition) is entitled to participate in the initial hearing of the case. Welf & I C §5977(b).
- A respondent may also be referred to a CARE court proceeding from an LPS conservatorship, misdemeanor criminal proceedings, or assisted outpatient treatment proceedings. Welf & I C §5978.

CARE ACT

- Every petitioner must use the mandatory form with a sworn verification of the facts showing a CARE respondent meets the CARE criteria. Welf & I C §5975; Cal Rules of Ct 7.2221(a).
- In addition to the petition form, the petitioner must also submit evidence that is either
 - (1) an affidavit from a behavioral health professional who has either examined or tried to examine the CARE respondent and has determined that or believes that the respondent meets the CARE diagnostic criteria or
 - (2) evidence of detention for a minimum of two intensive treatments under Welf & I C §5250 with the latest one having occurred within the previous 60 days (i.e., the 14-day or longer holds that can follow a §5150 hold under the LPS Act). Welf & I C §5975(d); see §§23.17, 23.22.

CARE ACT

- The CARE court must promptly review each filed petition and dismiss without prejudice any petition that fails on its face to show the respondent is eligible under the CARE criteria. Welf & I C §5977(a).
- The court may determine a person is a vexatious litigant for the purposes of CCP §§391–391.8 if someone pursues multiple, non-meritorious petitions for the purposes of harassment. Welf & I C §5975.1.
- It may be cause for suspension, disbarment, or other discipline if a member of the State Bar is found to have filed the petition or assisted in the filing of the petition with knowledge that the filing was made to gain that advantage. Welf & I C §5975.1(b).

CARE ACT

- If the petition passes the initial court review, an initial appearance must be scheduled, the timing of which depends on who petitioned: (a) If the county is already named as the petitioner, then the court must schedule an initial appearance on the petition within 14 court days (Welf & I C §5977(a)(3)(A)(i)); (b) if the county is not yet the petitioner, then the court must order the county to provide a report to the court within 14 days, subject to a possible extension. The report must address the county's determination as to whether the respondent meets, or is likely to meet, the criteria for the CARE process; the outcome of efforts made to voluntarily engage the respondent; and conclusions and recommendations about the respondent's ability to voluntarily engage in services. After the court receives the report, the court must either (a) dismiss the matter if it finds voluntary engagement effective or the CARE criteria not met or (b) set an initial appearance on the petition within 14 days. Welf & I C §5977(a)(3)(B).

CARE ACT

- The court shall set a clinical evaluation hearing to review the evaluation within 21 days (Welf & I C §5977)
- At the clinical evaluation review hearing, the court shall review the evaluation and other evidence from the county behavioral health agency and the respondent. The county behavioral health agency and the respondent may present evidence and call witnesses, including the person who conducted the evaluation. Only relevant and admissible evidence that fully complies with the rules of evidence may be considered by the court. (Welf & I C §5977)

CARE ACT

- At the conclusion of the hearing, the court shall determine whether the respondent, by clear and convincing evidence, meets the CARE criteria in Section 5972 and make orders as follows:
- (A) If the court finds that the respondent meets the CARE criteria, the court shall order the county behavioral health agency, the respondent, and the respondent's counsel and supporter to jointly develop a CARE plan within 14 days.
- (B) If the court does not find that clear and convincing evidence establishes that the respondent meets the CARE criteria, the court shall dismiss the petition.

CARE ACT

- The CARE Act limits services that may be included in a CARE agreement or plan to:
- Behavioral health services;
- Medically necessary stabilization medications (Welf & I C §5971(q));
- Housing resources (which may entail adding local housing agencies as a party to the proceeding); and
- Social services funded through Supplemental Security Income/State Supplementary Payment (SSI/SSP) and state-funded programs such as CalFresh, and services provided through county general assistance programs, including health care. Welf & I C §5982(a). Under the Act, the court may order medication if it finds, on review of the court-ordered evaluation and hearing from the parties, that, by clear and convincing evidence, the respondent lacks the capacity to give informed consent to the administration of medically necessary stabilization medication. Welf & I C §5977.1(d)(3).

CARE ACT

- • The CARE plan order begins a 1-year additional process. Welf & I C §5977.1(e).
- The court is required to hold regular status review hearings to review the progress of the respondent and the county behavioral health agency with the plan. Welf & I C §5977.2.
- Before the year ends, the county must submit a report of progress, services, supports, and recommendations.
- At the 1-year status hearing, the court will determine whether to graduate the respondent from the program, permit the respondent's voluntary participation for up to an additional year, or order the respondent involuntarily reappointed to the program. Welf & I C §5977.3.



Providing Professional & Quality Legal Services

www.vdglaw.com

510-479-0768

vgreen@vdglaw.com

Facebook- VDG Law Group, A Professional Corporation

Instagram-vdglawyer