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Fact Sheet **Conservatorships**

Q. What is a probate conservatorship?

A probate conservatorship is a judicial procedure in which someone (a conservator) is appointed to manage another person's (the conservatee's) financial and/or personal affairs. The establishment of a conservatorship restricts the conservatee's powers over financial and personal care decisions.

Q. When is a conservatorship needed?

A conservatorship may be needed when someone is incompetent to manage his or her own financial affairs and/or personal care, and has no viable alternative method of delegating these duties to another (either through a durable power of attorney, living trust or other means).

Q. What is a conservator of the person?

A conservator of the person is responsible for making decisions about personal matters for the conservatee, including decisions about medical care, food, clothing, and residence. Under a probate conservatorship, the conservator may not place the conservatee into a locked mental institution against his or her will.

Q. What is a conservator of the estate?

A conservator of the estate is responsible for handling the financial affairs of the conservatee. The conservator has the power to collect all the conservatee's assets, pay bills, make investments, etc. However, the conservator must seek court supervision for major transactions, such as the purchase or sale of real property, borrowing money and gifting of assets.

Q. How is a conservatorship established?

A relative, friend or a public official may petition the court for the appointment of a conservator of an individual. The petition must contain facts establishing why the individual cannot manage his financial affairs and/or make decisions concerning his personal care.

Once a petition is filed with the court, a court investigator is appointed to interview the proposed conservatee. The investigator reports back to the court with an opinion on whether or not the appointment of a conservator is justified.

The petition is set for hearing and the conservatee must appear in court unless medically unable to do so. The judge determines, based on the petition, the investigator's report, and any evidence taken during the hearing, whether or not the conservatorship is required and what types of special powers may be granted to the conservator.

Q. What are the disadvantages of a conservatorship?

Because a conservatorship is a court supervised proceeding, there may be substantial costs in establishing it, such as court filing fees, legal fees, investigator's fees and conservator's fees.

In addition, a conservatorship is a public proceeding and the conservatee's assets, income and expenses become a matter of public record.

The conservatorship can be a cumbersome method of managing a person's financial affairs, as the conservator must return to court for approval of certain transactions, such as the sale of real property, borrowing money, setting up a trust, etc. These formal court hearings require additional attorney's fees and can create delays in completing these transactions.

Q. What are the advantages of a conservatorship?

While the court supervision makes a conservatorship more costly and time consuming than other methods of management, it offers a higher degree of protection to the conservatee than other management mechanisms. The conservator must file an inventory which lists all the property of the conservatee and must file accountings with the court that reflect all transactions involving the conservatee's assets.

A conservatorship allows for the management of an incapacitated person's affairs when he or she does not have an alternative mechanism in place to do so.

Another advantage to a conservatorship proceeding is that it provides a method to assist an incapacitated individual who may be unwilling to accept such assistance.

Q. How can a conservatorship be used to plan for Medi-Cal benefits for a person who is incapacitated?

A conservator can petition the court for approval of appropriate Medi-Cal planning transactions such as purchasing a home or other real property in order to "spend down" the conservatee's property on exempt assets, or transferring the family home or other assets to the conservatee's spouse or child, where appropriate.

Q. Do I need a conservatorship to place my relative in a nursing home?

It depends—if a person does not object to going into a nursing home, a relative may sign the admission agreement as an agent or as a "responsible party" to place a person in a nursing home. That person may not make medical care decisions on behalf of the individual unless he or she has authority to do so as an agent under a durable power of attorney for health care or as a court-appointed conservator. However, if a person objects or is unwilling to go to a nursing home, a conservatorship is required.

Q. What are the alternatives to a conservatorship?

- **Revocable living trust.** Through the establishment of a revocable living trust the individual can appoint a trustee to manage his or her financial affairs and thus can avoid the need for an appointment of a conservator of the estate. A person must be competent to establish a living trust.

- **Durable Power of Attorney for Asset Management.** A durable power of attorney is a document in which the individual can delegate to an agent the power to make financial transactions on his behalf if he is unable to do so himself. However, the individual must be competent to execute a durable power of attorney and the agent acting under the durable power of attorney is not subject to court review of his or her actions.
- **Durable Power of Attorney for Health Care.** An individual can nominate an agent to make health care decisions on his behalf in a durable power of attorney for health care. These health care decisions can also include the decision to withdraw or continue life support systems. As with a living trust and durable power of attorney for asset management, a person must be competent to execute a durable power of attorney for health care.
- **Joint tenancy property.** While the joint tenant may make decisions regarding the property that is held in joint tenancy, there are significant risks that make this form of ownership a poor choice for the purposes of asset management. In particular, a joint tenancy allows either joint tenant access to the funds and thus one joint tenant can withdraw all the joint tenancy funds. Further, there can be adverse tax and estate planning consequences as a result of creating a joint tenancy.
- **Management of community property by a spouse.** A spouse who is competent may manage the community property on behalf of the spouse who is incompetent without the need of a conservatorship. The well spouse must seek court approval in order to conduct some transactions on behalf of the incapacitated spouse. These transactions include sales, borrowing money, leases, and gifts of property.
- **Establishment of representative payee.**
It is possible to have a substitute payee appointed for an incapacitated person who receives only governmental benefits, i.e., Social Security or SSI. The substituted payee, a trust worthy relative or friend, can manage that person's funds without the need of obtaining a conservatorship.

Q: What is an LPS (Lanterman-Petris-Short Act)

conservatorship?

An LPS conservatorship is a court proceeding in which a conservator is appointed for a person who has been found to be “gravely disabled” and can be used to involuntarily commit an individual to a mental institution.

It is designed for persons with serious mental disorders, or who are impaired by chronic alcoholism. An LPS conservatorship, different from a probate conservatorship, must be initiated by the county government—a spouse or other relative cannot petition for an LPS conservatorship.

Recommended Readings

Handbook for Conservators, Judicial Council of California, 1992. Available in California from any County Superior Court, Clerk’s office. Outside of California, order from: Administrative Office of the Courts, Attn: *Handbook for Conservators*, Probate Counter, 633 Folsom St., Rm. 210, San Francisco, CA 94107, (415) 554-4162 (\$24.80). *Make checks payable to the State of California and include a manila envelope with your order.*

The Conservatorship Book, Lisa Goldoftas and Carolyn Farren, second edition, 1997, Nolo Press, 950 Parker St., Berkeley, CA 94710, (510) 549-1976.

Credits

This fact sheet was written by Harriet P. Prensky, Attorney at Law. Ms. Prensky is a partner at the law firm Prensky & Tobin in Mill Valley, California, and focuses on legal problems of the elderly and disabled, estate planning and probate. She is a certified elder law attorney by the National Elder Law Foundation, Fellow of the National Academy of Elder Law Attorneys, and a frequent lecturer for the State Bar and other legal and community organizations on legal problems of the elderly.

Reviewed by Harriet Prensky, Attorney at Law, Prensky & Tobin, Mill Valley, CA. Prepared by Family Caregiver Alliance in cooperation with California’s Caregiver Resource Centers, a statewide system of resource centers serving families and caregivers of brain-impaired adults. Funded by the Department of Mental Health. Revised and reprinted November 1997. ©All rights reserved.

Resources

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Family Caregiver Alliance supports and assists caregivers of brain-impaired adults through education, research, services and advocacy.

FCA’s information Clearinghouse covers current medical, social, public policy and caregiving issues related to brain impairments.

For residents of the greater San Francisco Bay Area, FCA provides direct family support services for caregivers of those with Alzheimer’s disease, stroke, head injury, Parkinson’s and other debilitating brain disorders that strike adults.

National Academy of Elder Law Attorneys
1604 N. Country Club Rd.
Tucson, AZ 85716
(520) 881-4005

Information on how to choose an elder law attorney.

State Bar of California
555 Franklin Street
San Francisco, CA 94102
(415) 561-8200 (Legal Services Section, Subcommittee on Legal Problems of Aging)

California Advocates for Nursing Home Reform (CANHR)
1610 Bush Street
San Francisco, CA 94109
(415) 474-5171

CANHR provides advocacy, consumer education and legal information throughout California on nursing home-related issues.