Disability and Guardianship Project

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December 8, 2020

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Conservatorship of the Person of O.B.* (2d Civil No. B290805)
Request to Depublish Opinion - Rule 8.1125

To the Court:

By this letter, we request this Court to issue an order depublishing the opinion of the Court of Appeal in the above entitled case. As explained below, allowing this opinion to remain published will cause harm to thousands of adults with developmental disabilities involved in probate conservatorship cases in the future. The opinion undermines the statutory requirement that less restrictive alternatives be explored and that an order of conservatorship should be entered only if such alternatives are not feasible.

Statement of Interest

Spectrum Institute is a nonprofit organization advocating for access to justice for people with developmental disabilities in probate conservatorship proceedings. Although we advance the interests of an entire class of individuals affected by these proceedings, we also have an interest in this specific case. We filed an amicus curiae brief in this Court after the Court granted appellant's petition for review. An excerpt from that brief is attached.

Legal Requirements

A limited conservator may be appointed "for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." (Cal. Prob. Code § 1801(a), (d).) However, "[n]o conservatorship of the person … shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee." (Prob. Code § 1800.3(b).) The necessary elements required for a conservatorship must be established by clear and convincing evidence. (Prob. Code § 1801(e).)

The Facts

A few excerpts from the opinion of the Court of Appeal summarize the basic substantive and procedural facts of this case:

- "O.B. is a person with autism spectrum disorder (autism)." (Slip Opinion, p. 2.)
- " A person with autism is not automatically a candidate for a limited conservatorship. Each case requires a fact-specific inquiry by the probate court." (Slip Opinion, p. 2.)
- "In August 2017 respondents filed a verified petition requesting that they be appointed limited conservators of appellant's person. The petition alleged that appellant had been diagnosed with autism and 'is unable to properly provide for . . . her personal needs for physical health, food, clothing, or shelter.' When the petition was filed, appellant was 18 years old." (Slip Opinion, p. 4.)

The opinion summarizes the testimony and documentary evidence presented at trial. The testimonial evidence came from the appellant's mother and grandmother, a psychologist, a court investigator, and a guardian ad litem. The regional center report was also referred to, indirectly, through the testimony of an expert witnesses.

There is no mention in the Court of Appeal opinion regarding testimony from any of these witnesses that less restrictive alternatives were ever considered or to anything in the regional center report on this issue. Thus, the evidentiary record as summarized by the Court of Appeal is devoid of *any* evidence about less restrictive alternatives. Since there was no indication that any alternatives were considered, there is no evidence as to why possible alternatives to conservatorship would not have been feasible to protect appellant.

A Harmful Precedent

Because it was certified for publication, this opinion sets a harmful precedent that could aversely affect thousands of adults with developmental disabilities. There are more than 47,000 adults with developmental disabilities currently living under an order of conservatorship in California. (See excerpts from an *amicus curiae* brief, attached hereto, that was submitted to this Court when it granted review in this case.) It is estimated that as many as 4,000 new limited conservatorship petitions are filed annually in California. (Ibid.)

The published opinion in this case gives short shrift to the statutory requirement, grounded in due process concerns,[1] that even though an adult with a developmental disability may not be able to provide properly for his or her personal needs (without assistance), a conservatorship may not be imposed unless there is clear and convincing evidence that "the granting of a conservatorship is the least restrictive alternative needed for the protection of the conservatee." (Prob. Code § 1800.3(b).)

The least restrictive alternative requirement is so important to conservatorship proceedings

[1] Government actions that infringe fundamental constitutional rights must not only serve a compelling state interest, they must use the least restrictive means to achieve the intended goal. (*R.A.V. v. St. Paul* (1992) 505 U.S.377.)

that the Legislature has required a petitioner to supply the court with facts showing the "[a]lternatives to conservatorship considered by the petitioner or proposed conservatee and reasons why those alternatives are not available." (Prob. Code § 1821(a)(3).)

According to the Court of Appeal opinion, "Appellant argues that the probate court 'failed to consider the clear availability of less restrictive alternatives to a conservatorship.'" (Slip Opinion, p. 14.) Thus, it is clear that the issue of less restrictive alternatives was a central feature to appellant's defense, both in the trial court and on appeal.

The Court of Appeal gave this issue short shrift, just as the trial court did. The published opinion states: "'No conservatorship of the person . . . shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.' (§ 1800.3, subd. (b).) The probate court expressly made this exact finding. Appellant does not cite authority requiring the court to set forth on the record the less restrictive alternatives to a conservatorship that it considered. 'Because such express findings are not required, we presume the court followed the law in making its determination [citation], including a consideration of [less restrictive alternatives].'" (Slip Opinion, p. 14.)

The opinion does not cite where in the record the trial court made an express finding that the granting of the conservatorship was the least restrictive alternative needed for the protection of the conservatee. However, it can reasonably be assumed that such a finding was made when the court signed the order granting the conservatorship. That finding is preprinted on form GC-340. The issue has been given such minimal attention by the Judicial Council that a judge does not even have to check a box on the form to make this essential finding – a finding that the Legislature determined is foundational to the granting of a conservatorship. (See form GC-340 attached.)

Thus, under this published opinion – one that will provide guidance to judges and attorneys in thousands of probate conservatorship cases in the future – the mere signing of a preprinted form is sufficient to make an express finding that no less restrictive alternatives are available.

There is nothing in the published opinion to indicate that any evidence on this issue was ever presented to the trial court, and there is no suggestion that any testimonial explanation was provided as to why less restrictive alternatives were not considered or were not feasible. Therefore, the opinion sends a message to the bench and the bar that this issue may be disposed of in the trial court by a judge merely signing a preprinted form. It also sends a signal that appellate courts consider this issue so insignificant – notwithstanding the directive from this Court that appellate courts must use the clear and convincing evidence standard to review sufficiency of evidence on the elements required for a conservatorship – that an appellate opinion can dispose of the matter without making reference to even one shred of evidence on less restrictive alternatives.

Complaints regarding the probate conservatorship system, and its systemic flaws, have been receiving considerable attention in recent years. More than 20 commentaries about these

flaws have been published in the Daily Journal legal newspaper since the year 2016. (https://spectruminstitute.org/daily-journal-compendium.pdf) And yet, the Court of Appeal has seen fit to publish an opinion that diminishes the importance of a central feature of the conservatorship process, namely, a serious exploration of less restrictive alternatives.

Criteria for Publication

The opinion in this case does not meet the criteria required for publication under Rule 8.1105. It does not establish a new rule of law. It does not modify an existing rule of law. It does not advance a new interpretation of "clear and convincing evidence" but instead undermines that standard. It does not address a conflict in the law. It does not invoke a previously overlooked rule of law. Although it does involve a "legal issue of continuing public interest," the opinion is misleading. There is no public interest in publishing an opinion that does not correctly address a legal issue. Also, the opinion does not make "significant contribution to the literature" because it disrespects legislative policy that a serious consideration of less restrictive alternatives is essential. On the issue of less restrictive alternatives, it does apply the clear and convincing evidence standard to a new or different set of facts because it makes absolutely no reference to any facts on this issue.

Because of the way the less restrictive alternative issue was handled in such a perfunctory manner, the opinion makes a *detrimental* contribution to legal literature. The opinion will mislead judges and attorneys into believing that the issue of less restrictive alternatives is a nuisance that can be disposed of lightly. Petitioners can flout the requirements of Probate Code Section 1821 by not submitting evidence on this issue. Trial courts can perform their role on this issue by merely signing a preprinted form that has the finding baked into it. Worst of all, appellate courts can reject an appellant's arguments of insufficiency of evidence on this issue by referencing the trial court's signature on the preprinted form. According to this published opinion, nothing more is required.

This Court should use its authority under Rule 8.1125 to order this opinion depublished. Such an order will prevent the harm described above from occurring to thousands of adults with developmental disabilities who are entitled to have the issue of less restrictive alternatives considered thoughtfully and thoroughly by trial and appellate courts.

Former Supreme Court Justice Joseph Grodin once explained that depublication may occur when "a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent," but the issue presented is not of sufficient societal importance to justify the grant of review.[2]

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[2] (Grodin, *The Depublication Practice of the California Supreme Court,* 72 CAL. L. REV. 514, 515, 520 (1984).)

As one legal commentator so aptly explained:[3]

> "Depublication serves an important institutional role in such circumstances. Depublication permits the supreme court to reserve the review process—which involves an enormous expenditure of its resources—to only the most important cases, while at the same time limiting the potential damage which might result from the fact that trial courts are bound to follow published opinions, even if they are wrong.
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> "Indeed, if the choice is between no supreme court review and leaving the misleading opinion on the books, or no review and elimination of the misleading opinion as precedent, the latter option seems clearly preferable. The alternative is to permit the opinion to stand until it does such widespread injustice that the supreme court has no choice but to grant review somewhere down the line."

Conclusion

The Court of Appeal issued a flawed opinion, certified for publication, when it first decided this appeal. That opinion concluded that the statutory requirement of clear and convincing evidence – a mandate emanating from due process principles – disappeared on appeal. This Court granted review to correct that error and to make it clear to the bench and bar that clear and convincing evidence is an essential part of the appellate process.

Now, on remand from this Court's decision, the Court of Appeal has issued another published opinion. Although it does not make the issue of less restrictive alternatives disappear on appeal, it does severely minimize the importance of this issue – one that is also grounded in due process principles. In doing so, the opinion of the Court of Appeal may do immeasurable harm to thousands of adults with developmental disabilities who must rely on judges and attorneys to treat this issue with the importance and respect that it deserves.

For the foregoing reasons, we urge this Court to issue an order depublishing the opinion of the Court of Appeal in this case.

Respectfully submitted:

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[3] Kent L. Richland, "DEPUBLISH OR PERISH: WHY DEPUBLICATION IS GOOD FOR THE CALIFORNIA JUDICIAL SYSTEM," Los Angeles Lawyer (August-September 1990)