



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 adversely 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 depublishation 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

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.

“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:



Thomas F. Coleman
(State Bar No. 56767)
Attorney for Spectrum Institute

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

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF (name):	
ORDER APPOINTING <input type="checkbox"/> SUCCESSOR PROBATE CONSERVATOR OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE <input type="checkbox"/> Limited Conservatorship	CASE NUMBER:
WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED.	

1. The petition for appointment of ☐ successor conservator came on for hearing as follows
 (check boxes c, d, e, and f or g to indicate personal presence):
- a. Judicial officer (name):
- b. Hearing date: Time: ☐ Dept.: ☐ Room:
- c. ☐ Petitioner (name):
- d. ☐ Attorney for petitioner (name):
- e. ☐ Attorney for ☐ person cited ☐ the conservatee on petition to appoint successor conservator:
 (Name): (Telephone):
 (Address):
- f. ☐ Person cited was ☐ present. ☐ unable to attend. ☐ able but unwilling to attend. ☐ out of state.
- g. ☐ The conservatee on petition to appoint successor conservator was ☐ present. ☐ not present.

THE COURT FINDS

2. All notices required by law have been given.
3. Granting the conservatorship is the least restrictive alternative needed for the protection of the conservatee.
4. (Name):
- a. ☐ is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter.
- b. ☐ is substantially unable to manage his or her financial resources or to resist fraud or undue influence.
- c. ☐ has voluntarily requested appointment of a conservator and good cause has been shown for the appointment.
5. The conservatee
- a. ☐ is an adult.
- b. ☐ will be an adult on the effective date of this order.
- c. ☐ is a married minor.
- d. ☐ is a minor whose marriage has been dissolved.
6. ☐ There is no form of medical treatment for which the conservatee has the capacity to give an informed consent.
☐ The conservatee is an adherent of a religion defined in Probate Code section 2355(b).
7. ☐ Granting the ☐ successor conservator powers to be exercised independently under Probate Code section 2590 is to the advantage and benefit and in the best interest of the conservatorship estate.
8. ☐ The conservatee cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.

Do NOT use this form for a temporary conservatorship.

annually in Los Angeles.²²

Because of systemic flaws and funding deficiencies, very few of these cases ever make it to trial. Since appeals by probate conservatees are unusual, there is almost no appellate oversight of the general conservatorship system by the Court of Appeal or by this Court. As explained in a subsequent section of this brief that focuses on accountability, there is no administrative oversight within the judicial branch or involvement by the executive branch.

The general conservatorship system *does* run efficiently, that much is true. However, access to justice for general conservatees and oversight of the judges and attorneys who operate the system are sorely lacking.

2. Limited Conservatorships: Proceedings for Adults with Intellectual and Developmental Disabilities

Limited conservatorship proceedings were created by the California Legislature in 1980. They may only be used for adults who have developmental disabilities. Because many limited conservatorships are established when a young person turns 18 or shortly thereafter, many limited conservatorships may remain active on the court's dockets for decades.

The judicial branch has no statewide data on the number of active limited conservatorship cases. There also is no data from the judicial branch on the number of new limited conservatorship petitions that are filed annually in California. Estimates, therefore, come from other sources.

The Department of Developmental Services has reported that 47,246

²²

“Searching for Clues: Putting Together Pieces of the Limited Conservatorship Puzzle by Examining Court Records,” Spectrum Institute (2014) – See attached letter from the Los Angeles Superior Court dated April 14, 2014, indicating that about 2,000 new probate conservatorship petitions are filed annually with the court.

<http://spectruminstitute.org/amicus/searching-court-records.pdf>

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adults with developmental disabilities were probate conservatees in 2018. That number is up from 45,645 in 2017.²³

Surprisingly, not all of these adults are *limited* conservatees. That is because some petitioners who seek a conservatorship over an adult with a developmental disability file a petition for a general conservatorship rather than a limited conservatorship.²⁴

The judicial branch does not have statewide data for the number of petitions filed annually for limited conservatorships. That information, therefore, is estimated by extrapolating data from other sources. Spectrum Institute has estimated that 1,200 limited conservatorship petitions are filed each year in Los Angeles.²⁵ It is also estimated that Los Angeles accounts for

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This data was obtained by Spectrum Institute pursuant to a public records request made to DDS in 2019. The number of active conservatorship cases is calculated by subtracting the category “no conservator/guardian” and subtracting the category “court/dependent child” from the category “total” (representing all adult regional center clients throughout the state whether they are conserved or not).

<http://spectruminstitute.org/amicus/2017-2018-dds-data-on-conservatees.pdf>

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When a petition is filed for a limited conservatorship, the petitioner must notify the regional center, which then has a duty to evaluate the proposed conservatee and file a report to the court with its findings and recommendations. This takes time, causes delay, and may result in recommendations not to the liking of the petitioner. Also, when a limited conservatorship proceeding is initiated, the court *must* appoint counsel for the person who is the target of the proceeding. When petitioners file for a general conservatorship for an adult with a developmental disability, judges in some counties are not appointing counsel for the proposed conservatee.

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This information was obtained from a presentation made by Bet Tzedek which
(continued...)

about 30% of conservatorships of adults with developmental disabilities statewide.²⁶ Therefore, it is possible that as many as 4,000 limited conservatorship petitions are filed in California each year.

Limited conservatorship proceedings are initiated in a similar manner as general conservatorships. A petition is filed by a relative or interested party. Close relatives are given notice. The proposed conservatee is cited with notice of the hearing and served with a copy of the petition. The case is set for a hearing. A court investigator *should* interview petitioners, the proposed conservatee, proposed conservators, close relatives and then submit a report.

The same findings must be made by the court before a petition can be granted. Prior to establishing a limited conservatorship of the person, the court must find that the proposed limited conservatee is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. For a limited conservatorship of the estate, a finding must be made that the

²⁵(...continued)

operates a self-help clinic assisting petitioners seeking conservatorships. <http://spectruminstitute.org/amicus/self-help-presentation.pdf> Reviews of court files in Los Angeles by Spectrum Institute revealed that a considerable number of petitions were filed without the assistance of Bet Tzedek. As a result, the estimate of new petitions filed annually was rounded up to 1,200 to account for these non-assisted petitions. “Searching for Clues: Putting Together Pieces of the Limited Conservatorship Puzzle by Examining Court Records” (Spectrum Institute, 2014) <http://disabilityandabuse.org/conferences/searching-court-records.pdf>

²⁶

This information was provided by DDS in response to a public records request made by Spectrum Institute in December 2014. See: “Justice and Equality: Improving the Functions of the Department of Developmental Services in Limited Conservatorship Proceedings,” p. 13, a Report from Spectrum Institute to DDS (January 16, 2017) <http://spectruminstitute.org/amicus/dds-report-1.pdf>

PROOF OF SERVICE

I am over the age of 18 years of age, and am not a party to the within action; my current business address is 1717 E. Vista Chino A7-384, Palm Springs, CA 92262.

On December 8, 2020, I served a **Request to Depublish Opinion** on the interested parties in this action and on the Court of Appeal by placing true copies thereof in sealed envelopes, with postage fully prepaid, depositing them in the United States mail at Palm Springs, CA:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 8, 2020, at Palm Springs, CA.



THOMAS F. COLEMAN