



*Navigating the legal
system for our clients*

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SUPPORTED DECISION MAKING, FRIEND OR FOE AND IMPLICATIONS FOR YOUR BUSINESS

I. INTRODUCTION:

In response to the highly publicized case of Britney Spears, California's conservatorship laws have undergone significant changes. This presentation will begin with a background of the perceived need for legal change, followed by a concise overview of the recent amendments and their implications for future conservatorship petitions, including new allegations and findings. The session will also address the evolving challenges and considerations for professional fiduciaries under these new laws. If time permits, the speaker will conclude with insights into national trends in conservatorship laws, offering a broader context for California's reforms.

A. BACKGROUND – THE PERCEIVED NEED FOR LEGAL CHANGE

The conservatorship of Britney Spears turned national attention towards the need for conservatorship and guardianship reform. Britney was under a conservatorship beginning in January of 2008 when she was placed on a 5150 hold after police were called to her home over a child custody dispute. There were allegations she was under the influence of a substance, and she was taken to UCLA Medical Center.

Britney's father (Jaime Spears) ("Jaime") immediately petitioned to be named as her conservator, and the court granted him temporary conservatorship of the person and temporary co-conservator of Britney's estate with attorney Andrew M. Wallet. The court appointed Samuel D. Ingham III as counsel for Britney. Jaime was given power to restrict visitors, including all other attorneys, other than her court appointed counsel.

Britney was unable to meet with her private counsel, Adam Streisand, Esquire, and the court made a finding that Britney lacked the capacity to hire not only Streisand but any counsel.

Britney was not given notice of the hearings due to it possibly upsetting her care, as well as alerting a purported bad actor. Her court appointed counsel indicated he would speak for her.

Britney alleged on more than one occasion that her father loved to control and "hurt her" and that she was medicated against her will, forced to work, and punished if she did not do so. She was forced to remain on birth control. Her conservators took control of her estate, while she was still working and earning millions of dollars. It is widely believed that her fortune fed the flames for the continuation of the conservatorship and was the reason it remained in place for 14 years.

Britney's high-profile case and the #freebritney movement brought to light many deficiencies of existing conservatorship law. Heavy hitters, like the ACLU, joined the battle to limit conservatorships as an assault against a person's civil rights and liberties, taking away where a person wants to live, how to support and feed themselves, and putting someone else in charge of making those decisions. ACLU documents remind us "it's really supposed to be a last resort."

B. LEGISLATIVE RESPONSE: ASSEMBLY BILL 1663

September 30, 2022, Governor Newsom signed Assembly Bill 1663 into law to reform California's probate conservatorship system in response to Britney's high-profile case. The laws which were implemented as part of this bill reformed the California Welfare and Institutions Code and the Probate Code. The Bill amended the following:

- ▶ Amends §§ 416.7 and 416.19 of the Health and Safety Code
- ▶ Amends Probate Code §§ 1456, 1800, 1800.3, 1812, 1821, 1835, 1850, 1860.5, 1863, 2113
- ▶ Adds Probate Code §§ 1835.5, 1836, 1861.5
- ▶ Adds a Division 11.5, commencing with § 21000 to the Welfare and Institutions Code

C. New Probate Code § 1836: Conservatorship Alternatives Program

- (a) The Judicial Council shall establish a conservatorship alternatives program within each self-help center in every state Superior Court
- (b) The purposes of the conservatorship alternatives program are:

To reduce the number of people who lose their rights under conservatorships.

D. Supported Decisionmaking (SDM) is established as an alternative to conservatorships. Supported Decisionmaking (SDM) allows individuals with disabilities to make choices about their own lives with support from a team of people they choose. Individuals with disabilities choose people they know and trust to be part of a support network with decisionmaking. It is considered an alternative to conservatorships: instead of having a conservator who makes decisions for the person, SDM allows the person with the disability to make their own decisions.

E. New Section – California Probate Code § 1800(e) Provides that the period review of the conservatorship by the court investigator shall consider **the best interests and expressed wishes** of the conservatee; whether the conservatee has regained or could regain abilities and capacity with or without supports; and whether the conservatee needs a conservatorship.

F. New Section - California Probate Code § 1800(h): Ensure, to the greatest possible extent, that the conservatee is able to understand, make, and communicate their own, informed, choices while under conservatorship.

G. New Section – California Probate Code §§ 1800.3 (c) and (d): In determining whether a conservatorship is the least restrictive alternative available, and whether to grant or deny a conservatorship petition, the court shall consider the person's abilities and capacities with current and possible supports, including, but not limited to, supported decisionmaking agreements, as defined in Section 21001 of the Welfare and Institutions Code, powers of

attorney, designation of a health care surrogate as set forth in Section 4711, and advance health care directives.

H. New Section - Probate Code § 1812: Order of Preference for Appointment:

Former Code	New Code
▶ Spouse/Domestic Partner or Nominee	Stated Preference of Conservatee
▶ Adult Child or Nominee	Prior Conservator's Preference, if known
▶ A Parent or Nominee	Spouse/Domestic Partner or Nominee
▶ A Brother or Sister or Nominee	Adult Child or Nominee
▶ Any Other Person or Entity Eligible	Sibling or their Nominee
	Any Other Person or Entity Eligible

I. New Section - California Probate Code § 1821 (a)(1)(c) Contents of Petition: Alternatives to conservatorship considered by the petitioner or proposed conservator and reasons why those alternatives are not suitable, alternatives tried by the petitioner or proposed conservatee, if any, including details as to the length and duration of attempted alternatives and the reasons why those alternatives do not meet the conservatee's needs.

(1) Alternatives Set Forth to Be Considered:

- a. Probate Code § 1821(c)(i) – (iii)
 - i. (i) Supported decisionmaking agreements, as defined in Section 21001 of the Welfare and Institutions Code.
 - ii. (ii) Powers of Attorney set forth in Division 4.5
 - iii. (iii) Advanced Health Care Directives set forth in Chapter 1
 - iv. (iv) Designations of a health care surrogate as set forth in Section 4711

J. New Codes Aimed Toward Private Professional Fiduciaries

- a. New California Probate Code § 1821(c)(1)
 - i. If the petitioner or proposed conservator is a professional fiduciary, as described in Section 2340, who is required to be licensed under the Professional Fiduciaries Act...the petition shall include the following:

The petitioner's or proposed conservator's proposed hourly fee schedule or another statement of their proposed compensation from the estate of the proposed conservatee for services performed as a conservator. The petitioners or proposed conservator's provision of a proposed hourly fee schedule or another statement of their proposed conservator's compensation, as required by this paragraph, shall not preclude a court from later reducing the petitioner's or proposed conservator's fees or other compensation.

- b. 2) Unless a petition for appointment of a temporary conservator that contains the statements required by this paragraph is filed together with a petition for appointment of a conservator, both of the following
- c. (A) A statement of the petitioner's or proposed conservator's license information.

- d. (B) A statement explaining who engaged the petitioner or proposed conservator or how the petitioner or proposed conservator was engaged to file the petition for appointment of a conservator or to agree to accept the appointment as conservator and what prior relationship the petitioner or proposed conservator had with the proposed conservatee or the proposed conservatee’s family or friends.

K. New Section – California Probate Code § 1861.5: Termination:

If a court receives a communication from a conservatee that they wish to terminate the conservatorship, counsel shall be appointed and a termination hearing set only when one of the either condition apply:

- a. If there hasn’t been a termination hearing with the 12 months preceding the communication
- b. The court believes there is good cause to set a hearing for termination.

L. Added Provisions to California Probate Code §2113: A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator’s fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate. To the greatest extent possible, the conservator shall support the conservatee to maximize their autonomy, support the conservatee in making decisions, and, on a regular basis, inform the conservatee of decisions made on their behalf. In determining the desires of the conservatee, the conservator shall consider stated or previously express preferences, including preferences express by **speech, sign language, alternative or augmentative communication, actions, facial expressions, and other spoken or unspoken methods of communication.**

M. Supported (aka “Supportive”) Decision Making: New Division 11.5 of the Welfare and Institutions Code § 21000:

This new Division 11.5 of the W & I Code starts with legislative findings:

- a. Presumption of Competency unless determined otherwise.
- b. Adults with disabilities with supports they choose, should be able to be informed and participate in the management of their affairs.
- c. Adults with disabilities may use wide variety of voluntary supports, encouraged to use them, and such use of supports will strengthen their capacity and maintain autonomy.
- d. Capacity should be assessed with any supports.
- e. SDM is a way for an adult with a disability to express preferences as well as traditional means, powers of attorney, authorized representative forms, health care directives, release of information forms and representative payees.

N. Welfare and Institutions Code § 21001(a) Defines:

“Adult with a Disability”

- a. Age-related

- b. Intellectual or developmental disability
- c. Cognitive disability
- d. Communication disability
- e. Psychiatric disability
- f. Physical disability
- g. Sensory disability
- h. Learning disability
- i. Cognitive impairment
- j. Alzheimer's disease
- k. Chronic illness or condition

O. Welfare and Institutions Code § 21001(b) Defines Life Decisions as:

- a. Any decision that affects the adult:
- b. Medical
- c. Psychological
- d. Financial
- e. Educational
- f. Living arrangement
- g. Access to home and community-based services
- h. Social
- i. Sexual
- j. Religious
- k. Occupational

P. Welfare and Institutions Code § 21001(c): Supported Decisionmaking

SDM means an individualized process of supporting and accommodating an adult with a disability to enable them to make life decisions without impeding the self-determination of the adult.

Q. Welfare and Institutions Code § 21001(c): Supported Decisionmaking Agreement:

- a. Voluntary
- b. Written
- c. Plain Language
- d. May be revoked orally or in writing at any time by any party.
- e. Agreement may include images, be read aloud, or be video or audio recorded.

R. Welfare and Institutions Code § 21002: Supporter:

A supporter must follow all laws and obligations that protect persons with disabilities.

Ineligible supporters:

- a. the adult with a disability has made an allegation of elder abuse,
- b. gotten an order of protection from abuse against the supporter,
- c. the supporter is the subject of a civil or criminal order/restraining order,

- d. supporter has been found criminally, civilly, or administratively liable for abuse neglect, mistreatment, coercion, or fraud,
- e. been removed as a conservator

Supporters Should:

- a. Support and implement the direction, will, and preferences of the adult with a disability.
- b. Respect the values, beliefs, and preferences of the adult with a disability.
- c. Act honestly, diligently, and in good faith.
- d. Act with the scope identified by the adult with a disability.
- e. Maintain confidentiality of information.
- f. Have no conflict of interest.

[Comments, if Supporter is helping Adult with Disability to make their own decisions, where could liability attach]

S. Welfare and Institutions Code § 21002(d)

- a. Supporter shall not coerce adult with disability.
- b. Unless Supporter has clear legal authority the Supporter shall not:
 - i. Make decisions for Adult with Disability
 - ii. Sign documents on behalf of Adult with Disability
 - iii. Confidentiality: Supporter should not gather or disseminate information outside the scope of that which is narrowly needed for the decision
 - iv. Supporter must avoid conflicts of interest.

T. Welfare and Institutions Code §§ 21003/21004:

- a. Adult may act independently of the SDM agreement.
- b. A SDM agreement cannot be used by a court as evidence of a lack of capacity.
- c. Adult is entitled to have one or more supporters (and other trusted adults!) participate in meetings. [Attorney client Implications.]
- d. Third party may only refuse the presence of one or more adults if there is a belief there is fraud, coercion, abuse.

Language: "A third party may only refuse the presence of one or more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse or other action by the individuals request to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part C of Division 9)."

U. Supports to be provided, Welfare and Institutions Code § 21003(a) and (b)

- a. Obtain and understand information.
- b. Communicate the decision to others.
- c. Assist the individual to ensure their preferences and decisions are honored.
- d. Use of Supporter is not evidence of incapacity and is strictly voluntary

V. Welfare and Institutions Code § 21005: Components of SDM Agreement:

- a. Drawn in plain language.

- b. A List of areas in which the adult requests support.
- c. A list of areas in which the supporter agrees to provide support.
- d. Supporters agree they are eligible.
- e. Adult told about their right to file an abuse report.
- f. Information and copies of what other agreements are in place for the adult.
- g. SDM agreement is to be signed by the adult and each supporter.
- h. In the presence of two or more attesting and disinterested witnesses over the age of 18 or a Notary
- i. Review should occur every two years and updated as needed.

W. Welfare and Institutions Code § 21006: Termination of SDM Agreement

- a. SDM agreement is effective until it is terminated:
- b. By the Adult
- c. By all supporters
- d. By the terms of the agreement
- e. By the death of the adult
- f. All supporters are no longer able eligible.
- g. Any party may choose to terminate their participation at any time by providing written or oral notice.
- h. Adult may terminate by conduct intended to communicate termination.
- i. Includes canceling, defacing, obliterating, burning, tearing, or otherwise destroying the SDM agreement or directing another in the presence of the adult to destroy the SMD.

X. Concerns with SDM

- a. Practical – Who will create? Attorney? Social Worker? Other? Who will Act as Supporter? How to Ensure a Supporter is Not Disqualified?
- b. Are there concerns about Supporter acting coercively and are there sufficient protections?
- c. Do most family supporters have a conflict of interest? Need for neutral Supporters.
- d. Who will act as a neutral Supporter?
- e. Is a SDM Enforceable? What level of capacity is needed to create the Agreement?
- f. Does it Give a Path for Abuse/Undue Influence?
- g. Supporter too protective, not allowing for enough autonomy?
- h. Supporter not protective enough, how to protect without guiding decisions.
Rhetoric: NOT supposed to influence at all. But is this realistic? Is all influence “undue.”
- i. Attorney client confidentiality implications if supporter and others must be allowed to be in the room (attorney not mandatory reporter).

Y. Implications of the CARE court, Welfare and Institutions Code § 21007

- a. Off topic, but read when you can.

Z. Conservatorship implications:

- a. Conservators of Person have an obligation to honor the wishes of the Conservatee unless not in best interest of Conservatee. Conservators of the estate are to always act in best interest of Conservatee.
- b. What if there is a Supporter in tandem with a Conservatorship. Conservator should “trump” wishes with “best Interests.”
- c. Consider the impact of Probate Code § 1800 et seq.
- d. What if undue influencer is the Supporter. Can the SDM Agreement be negated by the court? How is the Adult with Disabilities going to be interviewed alone when they can require a Supporter in the room.
- e. Who can act as Supporters within Conservatorship framework?
 - i. CACs as Supporters – lack of training.
 - ii. GALs?
 - iii. Probate Investigators?

AA. Implications for every business

- a. Friend: Allows family to be involved in decision making while maintaining autonomy.
- b. Gives mechanism for elderly person with diminished capacity to participate
- c. Enhances communication
- d. Arguably Better risk management through informed decision making
- e. Foe: May not address adequately cognitive impairment
- f. Erodes privacy and confidentiality
- g. Gives a structure for a bad actor with no supervision
- h. May increase liability
- i. Time consuming process – Lengthy discussions and deliberations can delay decision making
- j. Risk of information overload and analysis paralysis.
- k. Potential for missed opportunities in fast paced environments.
- l. Requires significant cultural changes and changes and training within organizations.
- m. May be conflicts of interest and disagreements
- n. May be uneven participation and dominance by assertive team members which skew the decision making process
- o. Shared responsibility may dilute accountability – difficult to pinpoint who is responsible for poor decisions
- p. May need to develop hybrids to incorporate elements of SDM while maintaining efficiency and accountability