

**SUPPORTED DECISION MAKING – FRIEND OR FOE AND IMPLICATIONS FOR YOUR BUSINESS**

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Conservatorships in California: Navigating the Post-Britney Era

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**AGENDA**

Background

Legislative Changes

Concerns

Conservatorship Implications

Closing

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**BACKGROUND – WHY THE LAW WAS CHANGED**

<p><b>Britney Spear's Case</b></p> <ul style="list-style-type: none"> <li>• Conservatorship began Jan. 2008</li> <li>• #freebritney movement</li> </ul>	<p><b>Paradigm Shift in Conservatorship Law</b></p> <ul style="list-style-type: none"> <li>• ACLU</li> <li>• Augmentation of least restrictive alternative</li> </ul>
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**LEGISLATIVE RESPONSE**

Assembly Bill 1663

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**California Welfare and Institutions Code and the Probate Code**

-  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

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**NEW PROBATE CODE § 1836: CONSERVATORSHIP ALTERNATIVES PROGRAM**



The Judicial Council shall establish a conservatorship alternatives program within each self-help center in every state Superior Court



The purpose of the conservatorship alternatives program is to reduce the number of people who lose their rights under conservatorships

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**SUPPORTED DECISION-MAKING (SDM)**

- Alternative to conservatorships
- Allows individuals with disabilities to make choices about their own lives with support from a team of people they choose
- Instead of having a conservator who makes decisions for the person, SDM allows the person with the disability to make their own decisions

(More on this later)

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**MORE NEW LEGISLATION (CONTINUED)**

**California Probate Code § 1800(e)**

Provides that the period review of the conservatorship by court investigator shall consider the **best interest 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.

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**MORE NEW LEGISLATION (CONTINUED)**

**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





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MORE NEW LEGISLATION (CONTINUED)

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

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MORE NEW LEGISLATION (CONTINUED)

Probate Code § 1812: Order of Preference for Appointment

Former Code

- Spouse/Domestic Partner or Nominee
- Adult Child of Nominee
- A Parent of Nominee
- A Brother or Sister or Nominee
- Any Other Person or Entity Eligible



New Code

- Stated Preference of Conservatee
- Prior Conservator's Preference, if known
- Spouse/Domestic Partner or Nominee
- Adult Child or Nominee
- Sibling or their Nominee
- Any Other Person or Entity Eligible

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MORE NEW LEGISLATION (CONTINUED)

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

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**ALTERNATIVES SET FORTH TO BE CONSIDERED**

**Probate Code § 1821(c)(i)-(iii)**

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

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**NEW CODES AIMED AT PRIVATE PROFESSIONAL FIDUCIARIES**  
**PROBATE CODE § 1821(C)(1)**

If the petitioner or proposed conservator is a professional fiduciary...the petition shall include the following:

<p>1) The petitioner's or proposed conservator's proposed hourly fee schedule or another statement of their proposed compensation</p>	<p>2) A statement of the petitioner's or proposed conservator's license information</p>	<p>3) A statement explaining who engaged the petitioner or proposed conservator or how the petitioner or proposed conservator was engaged</p>
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**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 or the other condition apply:

<p>1) If there hasn't been a termination hearing within the 12 months preceding the communication</p>	<p>2) The court believes there is good cause to set a hearing for termination</p>
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**ADDED PROVISIONS TO CALIFORNIA PROBATE CODE § 2113**

- Accommodate the desires of the conservatee
- Support the conservatee to maximize their autonomy; inform conservatee of decisions made on their behalf
- Preferences expressed by speech, sign language, alternative or augmentative communication, actions, facial expressions, and other spoken or unspoken methods of communication

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**SUPPORTED (AKA "SUPPORTIVE") DECISIONMAKING (SDM):**  
NEW DIVISION 11.5 OF THE WELFARE AND INSTITUTIONS CODE § 21000

**Division 11.5  
Legislative  
Findings:**

- Presumption of Competency unless determined otherwise.
- Adults with disabilities with supports they choose, should be able to be informed and participate in the management of their affairs.
- 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
- Capacity should be assessed with any supports

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**WELFARE AND INSTITUTIONS CODE § 21001(A) DEFINES:**  
**"ADULT WITH A DISABILITY"**

Age-related	Intellectual or developmental disability	Cognitive disability	Communication disability	Psychiatric disability
Physical disability	Sensory disability	Learning disability	Cognitive impairment	Alzheimer's disease
Chronic illness or condition				

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WELFARE AND INSTITUTIONS CODE § 21001(B) DEFINES LIFE DECISIONS AS

Any decision that affects the adult	Medical	Psychological	Financial	Educational
Living arrangement	Assess to home and community-based services	Social	Sexual	Religious
	Occupational			

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WELFARE AND INSTITUTIONS CODE § 21001(C): SUPPORTED DECISIONMAKING (SDM)

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.

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WELFARE AND INSTITUTION CODE § 21001(D)

Supported Decisionmaking Agreement means:

- Voluntary
- Written
- Plain Language
- May be revoked orally or in writing at any time by any party
- May include images, be read aloud, or be video or audio recorded

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**WELFARE AND INSTITUTIONS CODE § 21001(C):SUPPORTER**

A SUPPORTER MUST FOLLOW ALL LAWS AND OBLIGATIONS THAT PROTECT PERSONS WITH DISABILITIES

<p><b>Ineligible Supporters</b></p> <p>The adult with a disability has made an allegation of elder abuse,        Gotten an order of protection from abuse against the supporter,        The supporter is the subject of a civil or criminal order/restraining order,        Supporter has been found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud        Been removed as a conservator</p>	<p><b>Supporters Should</b></p> <p>Support and implement the direction, will and preferences of the adult with a disability        Respect the values, beliefs, and preferences of the adult with a disability        Act honestly, diligently, and in good faith        Act with the scope identified by the adult with a disability        Maintain confidentiality of information        Have no conflict of interest</p>
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**WELFARE AND INSTITUTIONS CODE § 21002(D)**

Supporter shall not coerce adult with disability

Unless Supporter has clear legal authority, the Supporter shall not:

- Make decisions for Adult with Disability
- Sign documents on behalf of Adult with Disability
- Confidentiality: Supporter should not gather or disseminate information outside the scope of that which is narrowly needed for the decision
- Supporter must avoid conflicts of interest

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**WELFARE AND INSTITUTIONS CODE §§ 21003/21004**

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Adult may act independently of the SDM agreement

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A SDM agreement cannot be used by a court as evidence of a lack of capacity

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Adult is entitled to have one or more supports (and other trusted adults) participate in meetings (attorney client implications)

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Third party may only refuse the presence of one or more adults if there is a belief there is fraud, coercion, abuse

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SUPPORTS TO BE PROVIDED, WELFARE AND INSTITUTIONS CODE § 21003(A) AND (B)

Obtain and understand information

Communicate the decision to others

Assist the individual to ensure their preferences and decisions are honored

Use of Supporter is not evidence of incapacity and is strictly voluntary

Horizontal lines for notes

WELFARE AND INSTITUTIONS CODE § 21005: COMPONENTS OF SDM AGREEMENT

Drawn in plain language

A list of areas in which the adult requests support

A list of areas in which the supporter agrees to provide support

Supporters agree they are eligible

Adult told about their right to file an abuse report

Information and copies of what other agreements are in place for the adult

SDM agreement is to be signed by the adult and each supporter

In the presence of two or more attesting and disinterested witnesses over the age of 18 or a Notary

Review should occur every two years and updated as needed

Horizontal lines for notes

WELFARE AND INSTITUTIONS CODE § 21006: TERMINATION OF SDM AGREEMENT

• SDM agreement is effective until it is terminated:

- By the Adult
- By all supporters
- By the terms of the agreement
- By the death of the adult
- All supporters are no longer able or eligible

• Any party may choose to terminate their participation at any time by providing written or oral notice

• Adult may terminate by conduct intended to communicate termination
Includes canceling, defacing, obliterating, burning, tearing, or otherwise destroying the SDM agreement or directing another in the presence of the adult to destroy the SDM

Horizontal lines for notes

### CONCERNS WITH SDM

Practical – Who will create? Who will act as Supporter? How to ensure a Supporter is not disqualified?

Are there concerns about Supporter acting coercively and are there sufficient protections?

Do most family Supporters have a conflict of interest?

Who will act as a neutral Supporter?

Is a SDM enforceable? What level of capacity is need to create the Agreement?

Does it give a path for abuse/undue influence?

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### CONCERNS WITH SDM

Supporter too protective, not allowing for enough autonomy?

Supporter not protective enough – how to protect without guiding decisions

Attorney client confidentiality implications if supporter and others must be allowed to be in the room

Attorneys are not mandatory reporters

How will this protect you if you are a mortgage lender? Annuity Salesperson? Realtor

Any person doing business with a person who needs supported decision making – risk and exposure

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### CONSERVATORSHIP IMPLICATIONS

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

What if there is a Supporter in tandem with a Conservatorship? Conservator should “trump” wishes with “best interests.”

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### CONSERVATORSHIP IMPLICATIONS (CONTINUED)

- Consider the impact of Probate Code § 1800 et seq.
- 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?
- Who can act as Supporters within Conservatorship framework?
  - CACs as Supporters? – lack of training.
  - GALs?
  - Probate Investigators?

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### FRIEND OR FOE

#### Friend

Allows family to be involved in decision making while maintaining autonomy.  
Gives mechanism for elderly person with diminished capacity to participate

#### Foe

May not address adequately cognitive impairment  
Erodes privacy and confidentiality

PRESENTATION TITLE

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### CONTINUED

#### FRIEND

Enhances communication  
Arguably Better risk management through informed decision making

#### FOE

Gives a structure for a bad actor with no supervision  
May increase liability  
Time consuming process – Lengthy discussions and deliberations can delay decision making  
Risk of information overload and analysis  
PARALYSIS!!!  
Potential for missed opportunities in fast paced environments

PRESENTATION TITLE

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**FRIEND OR FOE?**

<p><b>FOE</b></p> <p>Requires significant cultural changes May be conflicts of interest and disagreements uneven participation and dominance</p>	<p><b>FOE</b></p> <p>Shared responsibility may dilute accountability May need to develop hybrids if Also value efficiency and accountability</p>
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PRESENTATION TITLE 34

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**QUESTIONS?**



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**THANK YOU**



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