SUPPORTED DECISION MAKING — FRIEND OR FOE AND IMPLICATIONS FOR YOUR BUSINESS  Cynthia R. Cox, Esq.  Conservational Conference Resignation (Inc.) (Inc	
AGENDA	
Background	
Legislative Changes	
Concerns	
Conservatorship Implications	
Closing	
Conservationship in Collibration Non-Igazining the Parts-Britishup Stra	
BACKGROUND - WHY THE LAW WAS CHANGED	
Paradigm Shift in	
Britney Spear's Case Conservatorship Law  • Conservatorship began Jan. 2008  • ACLU	
#freebritney movement     Augmentation of least restrictive alternative	

LEGISLATIVE RESPONSE  Assembly Bill 1663  Consentantian in California language the Part Solving Co.	
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	
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	

# SUPPORTED DECISION-MAKING (SDM) Alternative to conservatorships Allows individuals with disabilities to make choices about their own lives with support form 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 they own decisions (More on this later)

#### 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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#### 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)

#### 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)

- 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

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

PROBATE CODE § 1821(C)(1)

 The petitioner's or proposed conservator's proposed hourly fee schedule or another statement of their proposed compensation 2) A statement of the petitioner's or proposed conservator's license information

3) A statement explaining who engaged the petitioner or proposed conservator or how the petitioner or proposed conservator was engaged

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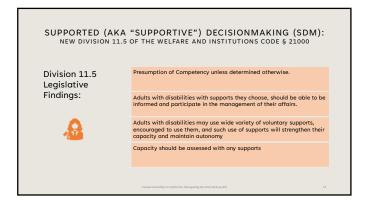
#### CALIFORNIA PROBATE CODE § 1861.5: TERMINATION

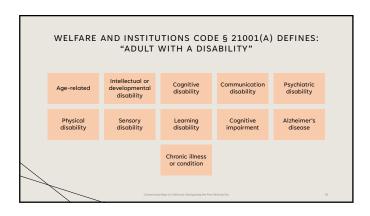
If a court receives a communication from a conservatee that they wish to terminate the conservatorship, counsel shall be appointed and a termination hearing set only when one or the other condition apply:

 I) If there hasn't been a termination hearing within the 12 months preceding the communication 2) The court believes there is good cause to set a hearing for termination

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ADDE	D PROVISIONS TO CALIFORNIA PROBATE CODE § 2113	
煮	Accommodate the desires of the conservatee	
o <sup>o</sup>	Support the conservatee to maximize their autonomy; inform conservatee of decisions made on their behalf	
<b>②</b>	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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WELFARE	AND INSTIT	UTIONS COD	E § 21001(E	B) DEFINES		
LIFE DECISIONS AS						
Any decision that affects the adult	Medical	Psychological	Financial	Educational		
Living arrangement	Assess to home and community-	Social	Sexual	Religious		
	based services					
		Occupational		1		
	Conservot	torships in California: Navigating the Past-B	ritney Era			
WELEARE AL	ND INSTITUT	CIONG CODE	5.01001(0)	CURRORTER		
WELFARE AI	DECIS	IONMAKING	(SDM)	SUPPORTED		
SDM means o	SDM means an individualized process of supporting and					
accommodat life decisions	accommodating an adult with a disability to enable them to make life decisions without impeding the self-determination of the adult.					
Conservationals delibrate handwise for their delibrate for						
					_	
WFI	WELFARE AND INSTITUTION CODE § 21001(D)					
****	METLYKE WAD INSTITUTION CODE & STOOT(D)					
Supported Decisionmaking Agreement means:  • Voluntary						
Plain Langue     May be revo	Written Plain Language May be revoked orally or in writing at any time by any party					
May include	May include images, be read aloud, or be video or audio recorded					
1						

WELFARE AND INSTITUTIONS CODE § 21001(C):SUPPORTER			
A SUPPORTER MUST FOLLOW ALL LAWS AND OBLIGATION PROTECT PERSONS WITH DISABILITIES	ONS THAT		
Ineligible Supporters Supporters Should			
The adult with a disability has made an allegation of sider abuse, preferences of the adult with a disability disability.  Gotten an order of protection from abuse against the supporter, adult with a disability approximately approximately approximately approximately approximately adult with a disability and adult and adult approximately adult with a disability and adult			
The supporter is the subject of a civil or criminal Act honestly, diligently, and in good failtd order/restraining order,  Act with the scope identified by the adult.			
as desired to the control of the con			
Conservation dept in Californian Novingating the Peak-Bitthey Dro	22		
WELFARE AND INSTITUTIONS CODE § 2100.	2(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			
<ul> <li>Confidentiality: Supporter should not gather or disseminate information outsi scope of that which is narrowly needed for the decision</li> </ul>	de the		
Supporter must avoid conflicts of interest			
Conversation floja in California: Novigating the Peak-Britishy for	23		

WELFARE AND INSTITUTIONS CODE §§ 21003/21004

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

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

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

Adult may act independently of the SDM agreement

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CURRORTO TO BE BROWINED WELFARE AND INSTITUTIONS	
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	
ose of supporter is not evidence of incupacity and is strictly voluntary	
Conservatorships in California: Nasigating the Post-Britisey Era 25	
WELFARE AND INSTITUTIONS CODE § 21005: COMPONENTS	
OF SDM AGREEMENT	
OF SDIN 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	
Keview should occur every two years and appared as needed	
Conservatorships in California: Navigating the Post-Britisney Era 26	
WELFARE AND INSTITUTIONS CODE § 21006: TERMINATION	
OF SDM AGREEMENT	
<ul> <li>SDM agreement is effective until it is terminated:</li> </ul>	
By the Adult	
By all supporters	
By the terms of the agreement     By the death of the adult	
By the death of the adult     All supporters are no longer able or eligible	
<ul> <li>Any party may choose to terminate their participation at any time by providing written or oral notice</li> </ul>	
Adult may terminate by conduct intended to communicate termination     Includes canceling defacing obliterating burning tearing or otherwise.	
<ul> <li>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</li> </ul>	
to destroy the SDM	
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CONCERNS WITH SDM	
CONCERNS WITH SDW	
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  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?

## FRIEND OR FOE Allows family to be involved in decision making while maintaining autonomy. May not address adequately cognitive impairment Erodes privacy and confidentiality Gives mechanism for elderly person with diminished capacity to participate

