

Limited Conservatorships: A Delicate Balance

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An admonition frequently imparted to a pending new parent is that “Parenthood never ends.” However, the law, when considering the legal rights, responsibilities, and obligations a parent has over one’s child, limits “parenthood” to a finite period, ending when that child reaches 18 years of age. Regardless of legal limitations, most parents endorse the sentiment of never-ending parenthood, although it is a prospect much more realistic for the parent of a developmentally disabled individual.

Developmentally disabled individuals, however, are not, and should not, be viewed or treated as “eternal children.” A delicate balance must be struck between respecting the developmentally disabled individual’s adult status, and the implicit legal rights granted by that status, with the parents’ interest and understandable desire to continue to protect and assist their developmentally disabled child. Such a balance is found in limited conservatorships, which provide a protective proceeding that is uniquely tailored and specifically applied to the developmentally disabled individual in the least restrictive manner possible.

Limited vs. General Conservatorships

Conservatorships are court actions that grant legal authority to individuals who seek to aid an incapacitated adult. Both general and limited conservatorships are supervised by the probate courts and are governed by the same statutory provisions, unless a more specific provision exists which applies to a limited conservatorship. General conservatorships are typically utilized for incapacitated adults when there are no valid documents for incapacity, and issues of a personal, medical, or financial nature need to be addressed, or the incapacitated adult needs to be protected from himself or a third party. Such an incapacitated adult, for general conservatorships, lacks the capacity to perform all of the necessary tasks to provide properly for his personal needs or manage his financial affairs. A less rigid standard applies to limited conservatorships, where the incapacitated adult has some impairment to his ability to care for himself or his property.

Although age is not a factor in determining between a general and limited conservatorship, the conservatee (the protected or conserved individual) in a general conservatorship is commonly a senior citizen, while the conservatee in a limited conservatorship is usually conserved as a young adult. Due to the circumstances of age and situation, the limited conservator is frequently, but not required to be, a parent of the limited conservatee, as any interested person may petition for a limited conservatorship. Through limited conservatorships, the parents are legally able to continue in modified and court-supervised parental roles.

Limited conservatorships also exist to meet a statutory mandate and subsequently have specific goals and objectives for the limited conservatee. These include encouraging maximum self-reliance and independence by providing services resulting in more independent, productive, and normal lives. Cal. Prob. Code § 1801(d).

Developmental Disability

The primary distinction between a general and limited conservatorship, however, is that the incapacitated person in a limited conservatorship is developmentally disabled. A developmental disability is a disability that: (1) originates before the individual is 18 years old; (2) continues, or can be expected to continue, indefinitely; and (3) is impacting enough to constitute a substantial handicap to the individual. Cal. Prob. Code § 1420. A substantial handicap is present when the individual has significant functional limitations in three or more of the following areas of major life activity: self-care, learning, mobility, receptive and expressive language, self-direction, economic self-sufficiency, or capacity for independent living. Cal. Welf. & Inst. Code § 4512(l). The term developmental disability has been determined to include autism, mental retardation, epilepsy, and cerebral palsy, and to exclude “mental illness” or “mental disorders”, and other handicapping conditions which are solely physical in nature. Cal. Prob. Code § 1420.

Limited Conservator’s Responsibilities and Powers

When a limited conservator is appointed they are given the “care, custody and control” of the limited conservatee and are charged with the responsibility to “secure for the limited conservatee those habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate and as will assist the limited conservatee in the development of maximum self-reliance and independence.” Cal. Prob. Code § 2351.5(a)(1)-(2). However, unless the limited conservator seeks and is granted specific powers the limited conservator will lack legal authority to fulfill those responsibilities.

In keeping with the objective for limited conservatorships to be the least restrictive, a limited conservator is only awarded those powers that have been specifically requested in the petition and granted by the court. Cal. Prob. Code § 2351.5(b). Any powers granted to the limited conservator are taken from the limited conservatee, therefore limiting the civil and legal rights of the limited conservatee. The limited conservatee retains any powers that are not requested by or granted to the limited conservator. Each power requested should be individually assessed for appropriateness, with supporting facts and documentation to justify granting the requested power. The powers granted should correspond only with respect to those activities in which the limited conservatee is unable to engage capably. Cal. Prob. Code § 1801(d). The types of powers requested by the proposed conservator are dependent on whether the proposed conservator is seeking a conservatorship over the proposed limited conservatee’s person, estate, or both.

Limited Conservatorship of the Person

The specific powers that may be granted to the limited conservator of the person are to: fix the residence or specific dwelling of the limited conservatee; have access to the confidential records and papers; control the right of the limited conservatee to contract; give or withhold medical consent; make decisions concerning education; consent or withhold consent to the marriage of, or entrance into a registered domestic partnership by, the limited conservatee; and control the limited conservatee’s social and sexual contacts and relationships. Cal. Prob. Code § 2351.5(b)(1)-(7).

Although all of the above listed powers are statutorily available to limited conservators, the powers controlling marriage and sexual and social relationships are rarely granted. In some courts the

request for these powers is categorically denied, from the perspective that divesting limited conservatees of these powers would violate their fundamental constitutional rights. In special extreme circumstances, the limited conservator may be granted these powers upon a showing of sexually inappropriate relationships, or instances of sexual abuse or molestation.

Limited Conservatorship of the Estate

Limited conservatorships of the estate are less common than limited conservatorships of the person due to the limited conservatee, who is likely on some form of public benefits, having minimal assets and income. Even if a limited conservatee has significant assets, these assets are frequently held and administered through a special needs trust, which would eliminate the need for a limited conservatorship of the estate.

Should a limited conservatee have assets that are not being properly managed, a limited conservatorship of the estate may be pursued and the limited conservator may request powers regarding: the properties of the limited conservatee to which the limited conservator is entitled to possession and management; the rentals, debts, wages, or other claims that are due the limited conservatee and the limited conservator is entitled to collect and manage; the contractual or other obligations that the limited conservator may incur on behalf of the limited conservatee; the claims against the limited conservatee which the limited conservator may pay, compromise, or defend, if necessary; and any other powers, duties, or limitations that the court shall expressly and specifically grant. Cal. Prob. Code § 1830(b). If a limited conservator of the estate is appointed, then the limited conservator must be bonded, unless the limited conservatee's assets are deposited in a blocked account or other court-supervised account. Cal. Prob. Code §§ 2320-2329.

Any powers granted to a limited conservator either of the person or estate must be specifically designated in the order and attached to the Letters.

Regional Center

Before a petition for a limited conservatorship is heard, the proposed limited conservatee is assessed by a regional center. Regional centers, although funded and regulated by the state, are private, nonprofit corporations, which a private board of directors supervises. Cal. Welf. & Inst. Code § 4620. The mission of regional centers is to teach developmentally disabled persons individual community living skills and to encourage independence. The function of regional centers is to provide diagnosis, program planning, counseling, case management, referrals, and residential placement to developmentally disabled persons. Cal. Welf. & Inst. Code §§ 4642, 4643, 4646, 4648. It is not the regional center's role to monitor the client's care on a daily basis, nor to provide services itself, but through a case manager, coordinate the delivery of services by appropriate private and public agencies and service providers to assist the client in achieving maximum independence. Cal. Welf. & Inst. Code § 4620.

A proposed limited conservatee must be a client of the regional center for the regional center to complete the required assessment. When a developmentally disabled individual is already involved with a regional center before a limited conservatorship is applied for, which many are, it greatly facilitates and accelerates the meeting of the regional center's assessment requirement. However, if a

proposed limited conservatee has not been involved with a regional center before that time, either intentionally or unintentionally, it is strongly recommended that the process be initiated while the limited conservatorship petition is being prepared, as the process of becoming a regional center client will likely delay the court proceedings.

After assessing the proposed limited conservatee, the regional center will file with the probate court a confidential report with the regional center's findings and recommendations. Cal. Prob. Code § 1827.5(a), (e). The report includes the regional center's description of the proposed limited conservatee's specific areas, nature, and degree of disability, as well as the regional center's recommendations as to the specific powers requested by the petitioner. Cal. Prob. Code § 1827.5(c). Although the regional center's findings and recommendations might be given significant weight by the court, they are not binding upon the court. Cal. Prob. Code § 1827.5(c).

The requirement of a regional center assessment and report does not obviate the need for a court investigator's report, which investigation is independent of the regional center. Cal. Prob. Code § 1826. In addition to making assessments and recommendations regarding the petition for limited conservatorship and the powers requested, court investigators personally interview the proposed conservatee. Cal. Prob. Code § 1826(a). Court investigators must also interview the petitioners and proposed conservators, the proposed conservatee's spouse or registered domestic partner, and the proposed conservatee's relatives within the first degree, or, if none, then relatives within the second degree. Cal. Prob. Code § 1826(a). When practical, and the proposed conservatee does not object, court investigators may also interview other relative, neighbors, and close friends of the proposed conservatee. Cal. Prob. Code § 1826(a).

Duties of the Probate Court

In determining the appropriateness of powers requested and appointing a limited conservator, the probate court has a special responsibility to protect the independence and self-reliance of the proposed conservatee. One requirement, if the proposed conservatee has not retained legal counsel, is the mandatory appointment of either private counsel or the public defender as legal representation for the proposed limited conservatee. Cal Prob. Code § 1471. There are no exceptions to this requirement, and the courts have no discretion in this area. Cal Prob. Code § 1471.

Specific information must also be communicated by the court to the proposed limited conservatee. The information provided must include: the nature and purpose of the limited conservatorship, the identity of the person petitioning or nominated to act as limited conservator, that appointment of a limited conservator will result in a transfer of certain rights and how that transfer will affect the conservatee, and the proposed limited conservatee's right to oppose the proceeding and right to a jury trial. Cal. Prob. Code § 1828(f). After this information has been communicated, the court must then consult the proposed limited conservatee to determine his opinion concerning the appointment. Cal. Prob. Code § 1828(f).

Additionally, the probate court must evaluate, ascertain, and inquire regarding the extent and nature of the proposed conservatee's general intellectual functioning, the proposed conservatee's capacity to care for himself and his property, the qualifications, capabilities, and abilities of the

person seeking appointment as limited conservator, and the extent of the impairment of the proposed conservatee's adaptive behavior. Cal. Prob. Code § 1828.5(a)(1)-(4).

After all of the above inquiries, evaluations, and communications are made, the court may only grant the limited conservatorship petition if it finds that the proposed limited conservatee "lacks the capacity to perform some, but not all, of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing or shelter, or to manage his or her own financial resources." Cal. Prob. Code § 1828.5(c).

Modification and Termination of Limited Conservatorships

To ensure the continued appropriateness of an established limited conservatorship, the court must review the limited conservatorship one year after the conservator's appointment, and biennially thereafter. Cal. Prob. Code § 1850.5(a). As part of the periodic reviews, a recommendation by the court investigator must be made regarding the continuation or termination of the limited conservatorship. Cal. Prob. Code § 1851(c).

Although a developmentally disabled person is generally not going to recover from the disability, if the individual becomes sufficiently able to independently care for himself, then a court order may be sought to either further limit the conservator's powers, or to eliminate the limited conservatorship altogether upon a finding that the limited conservatorship is no longer necessary. Cal. Prob. Code § 1860.5(a). Likewise, if after a limited conservator is appointed, it becomes apparent that the powers granted are insufficient, a court order may be sought to expand the limited conservator's powers. Cal. Prob. Code § 2351.5(c). It is also possible that the limited conservatee's function declines to the point that it becomes necessary to appoint a general conservator, which appointment would terminate the limited conservatorship. Cal. Prob. Code § 1860.5(a).

Absent the modifications and terminations discussed above, a limited conservatorship will continue until the conservator's authority is terminated by either the death of the limited conservator (unlike a general conservatorship) or the death of the limited conservatee. Cal. Prob. Code § 1860.5(a). In some circumstances, a limited conservatorship of the estate may continue beyond the death of the limited conservatee if it is necessary to protect the estate pending delivery of estate assets to the limited conservatee's personal representative. If the limited conservatorship is terminated by the death of the limited conservator, but the need for a limited conservatorship continues, a new "initial" petition for limited conservatorship, as opposed to a petition to appoint a successor conservator, must be filed. Due to the obstacles this scenario creates, some courts encourage naming a sibling of the limited conservatee as a co-conservator with a parent, so that in the event of the parent's death a termination of the limited conservatorship is avoided and continuous protection is provided to the limited conservatee.

Conclusion

Limited conservatorships provide the delicate balance that is needed in the lives of developmentally disabled individuals. Parents or interested persons may continue, with legal authority, to make decisions in areas where limited conservatees are unable to protect or promote themselves, whilst simultaneously and actively working to increase the conservatee's function and

independence. This legal authority is not granted without a comprehensive and meticulous evaluation of the limited conservatee's abilities and needs, and the limited conservator is only given power over those areas in which the limited conservatee is unable to engage capably, being therefore less intrusive on the conservatee's civil and legal rights. Through the balance of limited conservatorships, developmentally disabled individuals may receive simultaneous protection and promotion, achieve maximum self-reliance and independence, and live more independent, productive, and normal lives.