

## AB 1663 – SUPPORTIVE DECISIONMAKING

Kimberly R. McGhee, CELA

Black & McGhee, A Professional Law Corporation

William C. Sias, Principal Deputy County Counsel

County of Los Angeles, Office of County Counsel –  
Probate Division

Presented July 24, 2024

## Supported Decision Making - AB 1663

1. AB 1663 brings Supported Decision Making to California Probate Law.
  - a. Conservatorships are more difficult to establish because additional less restrictive alternative need to be pursued.
  - b. Revised Judicial Form GC-312 includes:
    - i. Item 6. Alternatives to Conservatorship –
      - (a). Based on WIC 21000(g) – POA; Health Care Directives....
2. AB 1663 addresses specific sections regarding Regional Center, the Department of Developmental Services, and Probate Code provisions.
  - a. The new law brings changes to Probate and Limited conservatorships.
3. Historical development emerges from advocacy and policy development for the people with disabilities (as more traditionally viewed.)
  - a. SDM has been enacted in 31 states.
    - i. 10 States – less restrictive alternative in context of existing guardianship/conservatorship law.
    - ii. 19 States focus on traditional "persons with disabilities"
    - iii. 3 States – organ transplants and other anatomical gifts involving persons with disabilities.
4. Health and Safety Code § 416.17
  - a. Amended to have director and regional centers develop and implement less restrictive alternatives to conservatorship.
  - b. H & S Code - Article 7.5 Conservatorship and Guardianship for Developmentally Persons.

5. Health and Safety Code § 416.19(a)
  - a. Director of Developmental Services to develop guidelines to mitigate conflicts that may arise with the regional center is acting as designee of the director for the conservatee.
6. Probate Code § 1456 – Court-appointed attorneys; examiners and investigators; educational requirements.
  - a. training requirements amended to include less restrictive alternatives to conservatorship set forth in Probate Code § 1800.3
7. Probate Code § 1800 – Purpose of chapter.
  - a. Court investigator shall provide periodic review of the conservatorship and the expressed wishes of the conservatee.
  - b. Should the conservatorship continue.
  - c. Ensure the conservatee is able to understand, make, and communicate their choices while under conservatorship.
8. Probate Code § 1800.3 – Conservatorship for adults and married minors.
  - a. The court must treat a petition as seeking a limited conservatorship if the court becomes aware that the proposed conservatee has a developmental disability AND the proposed conservator is not seeking authority under Section 2356.5.
    - (i) Probate Code § 2356.5 – Major Neurocognitive disorder.
9. Probate Code § 1812 – Order of preference for appointment as conservator; regional centers as designee of Director of Developmental Services.
  - a. Amendments to assert the needs to embrace a person's stated preference for conservator and take into account the manner of expression.
    - (1) "....including preferences expressed by speech, sign

language, alternative or augmentative communications, actions, facial expressions, and other spoken and nonspoken methods of communication."

b. The prior conservator's preference should be considered unless the prior conservator was removed for cause or the prior conservator or the prior conservator's preference has been found liable for abuse, neglect, mistreatment ....of any elder or dependent adult.

c. Regional Center employees or their agents cannot act as a conservator, but can be the designee of the Director of Developmental Services.

10. Probate Code § 1821 – Contents of petition; supplemental information: form.

a. additions to add specific reference to SDM issues, including the less restrictive alternatives, whether they were attempted, the results, or reasons the alternatives were not pursued.

11. Probate Code § 1835 – Conservator's rights, duties, limitations and responsibilities; dissemination of information by superior court; failure to provide information.

a. Minor changes – adding reference to procedures to terminate or modify the conservatorship.

b. Conservator's obligations under Probate Code § 2113 (Balance of conflicting interests; preferences of conservatee.)

12. Probate Code § 1835.5 – Conservatee's rights; dissemination of information by superior court.

a. This is a new section.

b. Court to provide list of conservatee's rights to the conservatee within 30 days of the establishment of conservatorship.

13. Probate Code § 1836 -Conservatorship alternatives program; establishment; purpose; staff; operation.
  - a. The newly created duties for the court will not be implemented unless the Legislature appropriates the funding.
    - (i) The list of unfunded programs and services is impressive.
14. Probate Code § 1850 - Review of conservatorship; application.
  - a. No changes. There is a 6-month review after the initial appointment.
  - b. There is a 1-year review which now includes consideration of less restrictive alternatives under Section 1880.3 as well as consideration of modification or termination.
15. Probate Code § 1860.5 – Limited conservatorship.
  - a. Discusses review of petitions for termination and review of whether the limited conservatorship is no longer the least restrictive alternative for the limited conservatee's protect.
    - (i) The court may terminate the limited conservatorship without an evidentiary hearing.
16. Probate Code § 1861.5 – Conditions for appointment of counsel and setting of hearing.
  - a. This is a brand new section.
  - b. The court shall set a hearing for termination of the conservatorship if the conservatee communicates this wish to the court.
17. Probate Code § 1863 – Hearing and Judgment.
  - a. Subsection (h) is added to provide for termination of conservatorship without an evidentiary hearing.
    - (i) Both the conservator and conservatee agree and the conservatorship is no longer the least restrictive alternative.

18. Probate Code § 2113 – Balance of conflicting interests; preferences of conservatee.
  - a. Amendments directly incorporate aim to empower conservatee, maximize autonomy, support the conservatee in making decisions. The additional guidance re expanded mode of communication and expression is included.
19. Division 11.5 Supported Decisionmaking.
  - a. Enacted in WIC 21000 through 21008.
20. WIC 21000 – Findings and Declarations.
  - a. Adults with disabilities, older adults with disabilities, are presumed competent and retain capacity to make decisions regarding their daily activities.
    - (i) Adults should be able to be informed – to the best of their ability and with supports they choose.
    - (ii) Voluntary supports help adults understand, make and communicate their own decisions.
      - (a) These voluntary arrangements should be encouraged and recognized as a valid way for people to "strengthen their capacity and maintain their autonomy."
21. WIC 21001 – Definitions.
  - a. "Adult with disability" is defined with an exhaustive list.
  - b. "Life decision" means any decision that affects the adult with a disability. The statute embraces the term "including" before listing an the list of enumerated components of "life decision".
  - c. "Supported decisionmaking" – 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.

d. "Supported decision making agreement" – (1) voluntary, written agreement; (2) written in plain language accessible to an adult with a disability, and (3) signed in conformity with Section 21005.

(i) "This agreement can be a multimedia product with images, sections to be read aloud, video or audio recording, and written."

e. "Supporter" – an adult who meets the requirements under Section 21002 and enters into a supported decisionmaking agreement to help an adult with a disability.

22. WIC 21002 – Supporters, disqualifying circumstances; duties and responsibilities.

a. All existing law and protections for adults with disabilities and the elderly re fraud, abuse, neglect, coercion, or mistreatment apply to the "Supporter."

(i) "This division does not limit the supporter's civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder and Abuse and Dependent Adult Civil Protection Act (commencing with Section 15600) of Part 3 of Division (9), including but not limited to, Section 15656 and 15657."

b. Persons who have subject to allegation of prior abuse against elders, or subject to protective orders or similar demonstrated "bad acts" with respect to an adult with the disability are excluded as a possible supporter or permitted to continue as a supporter.

c. Supporters cannot coerce decisionmaking.

23. WIC 21003 – Supported Decisionmaking Agreement.

a. The person can choose one or more supporters.

b. The adult with a disability can act independently of the supported decisionmaking agreement.

(1) The existence of the agreement shall not be used by a court or other entity as evidence of incapacity.

24. WIC 21004 - Additional adults or supporters.
- a. There is no limit.
  - b. An adult with a disability is entitled to have present one or more adults, including supporters, in any meeting or discussion, or to participate in any written communication.
    - (i) The scope of such meetings is not limited.
  - c. The discussion or participation in written communication can include oral statement, gesture, or any augmentative or alternative communication method used by the adult with a disability.
  - d. A third party can refuse the presence of one or more adults if there is a reasonable belief that there is fraud, coercion, abuse or other action that may be require reporting under Elder Abuse and Dependent Adult civil Protection Act.
25. WIC 21005 – Supported decisionmaking agreements requirements.
- (a) Written in plain English with language accessible to the adult with a disability.
    - (i) Needs to list the areas in which support is requested.
    - (ii) Needs to list the areas in which the supporter agrees to provide support.
  - (b) Signed in the presence of the adult with a disability and each supporter, in the presence of two mor more attesting and disinterested witnesses at least 18 years of age. A notary public can also be used.
  - (c) The agreement should be reviewed, updated, as needed, and re-executed as described above.
25. WIC 21006 – Supported decisionmaking agreement termination.
- (a) Termination can be effected liberally.
  - (b) Any party may choose to terminate by providing written or oral notice of termination to all parties to the agreement. The adult with a disability may terminate the agreement by communicating

such intent or cancelling, defacing or by directing another in the presence of the adult with a disability to destroy the document.

26. WIC 21007 – Division applicability to CARE court proceedings or CARE supporter.

(a) The SDM division does not apply to CARE court proceedings.

27. WIC 21008- Development of educational information or training materials.

(a) The California Health and Human Services Agency or any departments under its jurisdiction shall develop educational information or training materials on supported decisionmaking or supported decisionmaking agreements.

(i) Stakeholders must be provide input about the materials being developed.