

Creditor Rights in California Probate Conservatorship Cases: Confusing and Complicated

BHBA Elder Law Section

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1. Review of General Judgment Enforcement and Debt Collection Principles
 - a. What do we mean by the phrase "creditor's rights"?
 - i. The legal means and procedures by which money or property is collected to satisfy debt or judgment.
 - ii. Debt is incurred generally and regularly on a daily basis.
 - (1) "Debt" is something, typically money, that is owed or due to another.
 - (2) Consumer transactions:
 - (a) Usual practices:
 - (i) Pay for goods/services contemporaneously
 - (ii) Pay on credit
 - (iii) Barter
 - (b) Sources of voluntary unsecured debt:
 - (i) Credit cards
 - (ii) Retail transactions
 - 1) Food
 - 2) Clothing
 - 3) Shelter

- (iii) Education
- (iv) Insurance
- (v) Regulatory fees (cars, boats)
- (vi) Luxury items
- (c) Sources of involuntary unsecured debt:
 - (i) Accidents/injuries/torts
 - (ii) Medical/doctors/dentists
 - (iii) Taxes
 - (iv) Family debts (dependents, spouses, and other support)

QUESTION: Which types of transactions might be deemed to be "necessaries of life"? This may be an important issue later.

- (3) Commercial transactions:
 - (a) Business debts (sole proprietorships/partnerships).
 - (b) Guarantee/surety (promise to answer for the debt of another person or entity).
- iii. Complicating factors:
 - (1) Secured debts
 - (2) Non-money judgments
 - (3) Taxes
 - (4) Priority/support obligations in family law etc.
- b. Creditor methods, strategies and tools for collections:
 - i. Secured debt collection:
 - (1) Foreclosure on valid and enforceable liens (non-judicial versus judicial) (recourse versus non-recourse).
 - ii. Unsecured debt pre-lawsuit debt collection:
 - (1) Regular invoicing and other written demands for payment.
 - (2) "Dunning" letters (from the verb "dun," meaning to "make persistent demands upon another for payment of a debt").

- (3) Regulated by the various Federal and State consumer debt collection laws and regulations.

NOTE: Automatic withdraws and electronic payments have become an integral part of every day consumer financial affairs and transactions.

iii. Basic overview of civil remedies for debt collection:

- (1) Lawsuit (civil).
 - (a) Formal action filed in a court of competent subject matter jurisdiction, with personal jurisdiction over the debtor-defendant, seeking to validate the debt and convert it to an enforceable judgment.
- (2) Pre-judgment (Attachment).
 - (a) Pre-judgment remedies enable creditors to preserve the value of potential judgments after a lawsuit is filed but before it has been concluded by preventing a debt from transferring, encumbering, dissipating, or concealing assets which would otherwise be available to satisfy a later judgment.
 - (b) The attachment remedy allows certain types of creditors holding fixed or ascertainable unsecured non-consumer claims, or claims secured only by personal property, to create judicial liens encumbering a debtor's property.
 - (c) Resulting judgment and execution relates back in time to the date of the creation of an attachment judicial lien.
 - (d) See Code of Civ. Proc. §§481.010-493.060
- (3) Judgment (Money Judgment).
 - (a) A "judgment" is a decree or decision of a court or judge. See Code of Civ. Proc. 680.230. Note that this section defines "judgment" for purposes of California's Enforcement of Judgments Law (EJL) as only a judgment, order, or decree entered in a court of the State of California.
 - (b) "Money judgment" means that part of a judgment that "requires the payment of money." Code of Civ. Proc. §680.270.
- (4) Payment and Satisfaction – creditor obligated to extinguish the judgment through formal process (usually an affidavit filed with the court which entered judgment, i.e., "Satisfaction") when a money judgment is paid.

- (5) Enforcement of Money Judgments (Execution) – if not paid.
 - (a) General principles:
 - (i) Locating the judgment debtor.
 - (ii) Determining the debtor's assets.
 - 1) Investigations
 - 2) Court examinations (a.k.a. '**OR**'der for '**AP**'pearance and Examination, or 'ORAP')
 - (iii) Obtain legal authority to seize money or property.
 - 1) Writ of Execution
 - (iv) Create and perfect judicial liens.
 - (v) Collect the money using permitted methods:
 - 1) Levy under Writ of Execution
 - 2) Wage Garnishments
 - 3) Till Tap (Keeper)
 - 4) Suspension of license
 - 5) Assignment Order
 - (vi) Resolve or litigate exemptions.
 - (6) California's Enforcement of Judgments Law.
 - (a) California's Enforcement of Judgments Law is Title 9, Part 2 of the Code of Civil Procedure, enacted at Code of Civ. Proc. §§680.010-724.260. See Code of Civ. Proc. §680.010 ("This title shall be known and may be cited as the Enforcement of Judgments Law.").
 - (b) "Execution" is the process by which money judgments are enforced. Code of Civ. Proc. §699.010. Generally, the execution process provides for the "levy" (seizure) of assets by delivery of Writ of Execution by court-appointed levying officers, whether in the hands of a judgment debtor or someone else, and for selling or disposing of the same, so as to apply the money or proceeds towards payment and satisfaction of the balance due on the judgment. See Code of Civ. Proc. §§699.010-701.830.

- (c) "Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment." Code of Civ. Proc. §695.010(a).
- (d) "Except as otherwise provided by law, all property that is subject to enforcement of a money judgment pursuant to [Code of Civ. §695.010, above] is subject to levy under a writ of execution to satisfy a money judgment." Code of Civ. Proc. §699.710.
- (e) However, *certain types of property are not subject to execution*, including alcoholic beverages, interests in a partnership or membership in an LLC, franchises granted by public entities, certain interests held in trust, etc. See Code of Civ. Proc. §699.720. *Rather than being subject to execution, other legal procedures are available* to the creditor to obtain appropriate relief and apply some or all of that interest or property towards satisfaction of a judgment, i.e., charging order(s), appointment of receiver, etc.
 - (i) For example, interest of a judgment debtor-beneficiary in a trust may be subject to enforcement of a money judgment through the procedures set forth in Code of Civ. Proc. §709.010.
- (f) **Property in a Conservatorship Estate:**
 - (i) "Property in a...conservatorship estate" is not subject to execution. Code of Civ. Proc. §699.720(b)(10).
 - (ii) Property in a conservatorship estate is not subject to enforcement of a money judgment by execution, but the judgment creditor may apply to the court in which the conservatorship proceeding is pending under for an order requiring payment of the judgment. Code of Civ. Proc. §709.030.
 - (iii) **The use of levies, judicial liens, ORAPs, creditor's suits, charging orders, assignment orders, turnover orders, wage garnishments, etc. is barred.**

2. Review of General Conservatorship Principles (Probate Conservatorships)

a. Source of Law - California Probate Code.

- i. Except to the extent otherwise expressly provided by statute, conservatorships are governed by Division 3 of the Probate Code, enacted at Prob. Code §§1000 et seq.. However, the provisions of the Probate Code applicable to administration of decedents's estate governs so far as they are applicable to like situations. See Code of Civ. Proc. §2100.
- ii. "The relationship of...conservator and conservatee is a fiduciary relationship that is governed by the law of trusts, except as provided in this division." Prob. Code §2101.
- iii. A conservator is "subject to the regulation and control of the court in the performance of the duties of the office." Prob. Code §2102.

b. Conservatorship for "Lack of Capacity":

- i. Pursuant to California's conservatorship laws, a probate court may appoint a conservator of the "person" or the "estate," or both, for an adult who "lacks capacity." See Prob. Code §§1800.3(a)(1) & 1801(c).
- ii. The position of a conservator is a fiduciary and must undertake all actions in the best interests of the conservatee. Prob Code §§1800(e), 1850(a). See Prob. Code §2101 (discussed above).
- iii. A rebuttable presumption exists that all persons are presumed to have the capacity to make their own decisions and be responsible for their actions. Prob. Code §810. However, this presumption simply affects the burden of proof. Prob. Code §810(a).
- iv. The purpose of a conservatorship is to provide a competent person to act, under judicial guidance, for the benefit of the conservatee. Thus, by appointing a conservator, the conservatee is provided care and protection from harm, and the conservatee's estate is protected and preserved from loss or misuse. See Prob. Code §1800.
- v. However, no conservator may be appointed unless the court "makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee." See Prob. Code §1800.3(b).
- vi. The conservator has no authority to act until the court enters an order of appointment formally appointing the conservator(s) and the Clerk of the Court thereafter issues the required "Letters of Conservatorship."

NOTE: The Court may include additional conditions, powers, or instructions in the order of appointment which would not otherwise be required. Check and confirm the order and letters.

c. The Two Distinct Types of Probate Conservators:

i. Conservatorship of the "Person":

- (1) Subject to modifications by court order, the Conservator of the Person has the "care, custody, and control of, and has charge of the education of" the conservatee. See Prob. Code §§2351(b) & 2358.
- (2) The Conservator of the Person is a fiduciary who is appointed by court order to manage the personal care of a person who is "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." See Prob. Code §1801(a).
- (3) To overcome the presumption and obtain an order establishing a conservatorship of the person, the petitioner must prove by **clear and convincing evidence** that the proposed conservatee **cannot provide for his or her personal needs**. See Prob. Code §§1801(a) & 1801(e).
- (4) The Conservator of the Person should provide for the "health and psychosocial needs" of the conservatee, and act to ensure that the conservatee's person needs are being met. See Prob. §1800.
- (5) In so doing, the Conservator of the Person must do what is best for the conservatee. Prob. Code §1800(e). Further, the conservator of the person must 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." Prob. Code §2113.

ii. Conservatorship of the "Estate":

- (1) The Conservator of the Estate is a fiduciary who is appointed by court order to manage the financial affairs of a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Prob. Code §1801(b).
- (2) To overcome the Prob. Code §1801 presumption, the petitioner must prove by clear and convincing evidence that, as provided in Prob. Code §§1801(b) & (e), the proposed conservatee ***either***:
 - (a) **Cannot manage his or her financial resources; *or***
 - (b) **Resist fraud or undue influence.**
- (3) The required substantial inability may not be proved solely by isolated incidents of negligence or improvidence. Prob. Code §1801(b) (last sentence).

- (4) The Conservator of the Estate is charged with the duty to protect the rights of the conservatee, and to "provide for the proper management and protection of the conservatee's real and personal property." Prob. Code §§1800(a) & 1800(g).
- (5) Once the Conservator of the Estate is appointed and letters are issued, the powers and duties of the Conservator of an Estate are set forth in Prob. Code §§2400–2595.
- (6) As provided in Prob. Code §2420, the conservatee's income and property "shall" be used "as necessary" for the "comfortable and suitable support, maintenance, and education" of the conservatee and the conservatee's dependents. This may done by the Conservator of the Estate, without the requirement to obtain prior court order, so long as the expenditures are reasonable.
 - (a) Reasonable means "taking into account the value of the estate and the condition of life of the persons required to be furnished such support, maintenance, or education." Prob. Code §2420(a).
 - (b) A conservator of the estate must use "ordinary care and diligence in managing and controlling the estate." Prob Code §2401(a). What constitutes the "use of ordinary care and diligence is determined by all the circumstances of the particular estate." Prob C §2401(a).

NOTE: The relationship between a conservator and conservatee is a fiduciary relationship that is generally governed by the law of trusts, except as provided otherwise in the conservatorship statutes. Prob. Code §2101. Contrast the express standard of care set forth in Prob. Code §2401 with a trustee's standard of care defined in California's Trust Law, Prob. Code §16040(a), which is to use "reasonable care, skill, and caution under the circumstances then prevailing that a prudent person in like capacity would use in the conduct of an enterprise of like character and with like aims."

- (7) General duties in conservatorship estate management:
 - (a) The Conservator of the Estate is responsible for the "management and control" of the conservatee's personal and real property so as "to protect the conservatorship estate for the benefit of the conservatee" and those who will ultimately inherit it. *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 89.
 - (b) The conservator may generally manage the estate of the conservatee as authorized by Prob. Code §§2450 et seq. This includes: binding the estate to contract and performing outstanding contracts; purchasing tangible personal

property; employing [but not paying] attorneys and similar professionals; and *employing and paying accountants, investment advisers, agents, depositaries, and employees*; and operating for no longer than 45 days, at the risk of the estate, a business, farm, or enterprise constituting an asset of the estate. See, E.g, Prob. Code §2451.5.

- (c) As directed by Prob C §2410, the Judicial Council adopted Rules of Ct. Rule 7.1059, which establishes uniform standards of conduct for actions that conservators may take on behalf of conservatees to ensure that the estates of conservatees are maintained and conserved as appropriate and to prevent risk of loss or harm to the conservatees.
 - (d) The rule directs that, except as otherwise required by statute, in the exercise of ordinary care and diligence in managing and controlling the estate of the conservatee, the conservator of the estate is to be guided by the principles enumerated in Rules of Ct. Rule 7.1059 (copy attached).
- (8) The Court grants two types of powers to the conservator: general and independent.
- (a) **General powers** are those a conservator inherently has as a result of becoming a conservator; **independent powers** are those expressly listed in Prob. Code §2591. Unless so ordered, the independent powers may not be exercised without court approval.
 - (i) The court may, in its discretion, make an order granting the conservator any one or more or all of the additional, independent powers specified in Prob. Code §2591 if it would be to the advantage, benefit, and best interest of the estate to do so. Once ordered, the conservator may exercise the granted power or powers without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as the conservatee could do if possessed of legal capacity.
 - (ii) As described in Prob. Code §2591, such additional, "independent" powers include the following:
 - 1) The power to operate, for a period longer than 45 days, at the risk of the estate, a business, farm, or enterprise constituting an asset of the estate. See Prob. Code §2591.

- 2) The "power to pay, collect, compromise, or otherwise adjust claims, debts, or demands upon the...conservatorship [which are] described in [Prob. Code §§2501(a), 2502, or 2504]". See Prob. Code §2591(p).
 - a) Prob. Code §2501 – compromises and transactions involving title to, interests in, and options to purchase real property.
 - b) Prob. Code §2502 – compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of \$25,000.
 - c) Prob. Code §2504 – compromise or settlement of matters involving support of a conservatee's dependent or spouse, or regarding claims by the conservatee for physical harm or wrongful death.

IMPORTANT: There is no statute or rule which mandates that a Conservator of the Estate owes duties to creditors as persons interested in the administration of a conservatee's estate, or act in their best interests, or even act to protect and preserve assets for their collective interests along with the conservatee's interests. Rather, the duty of a Conservator of the Estate is to "[m]anage the estate for the benefit of the conservatee." Rules of Ct. Rule 7.1059(4).

- (b) Generally, all advice given to our conservators is to the contrary...see the California state-mandated Handbook for Conservators: "A judge will not automatically approve expenditures that you believe are in the conservatee's interest. Other people involved in the conservatorship may have a legal right to object to particular expenditures as well..." (See Chpt. 5, §5.10, p. 5-69).

LINK: www.courts.ca.gov/documents/handbook.pdf

iii. Who should be the Conservator?

- (1) Finding that a conservator should be appointed is different than deciding whom should be a conservator. Although a probate court

must appoint a proposed conservatee's nominee as long as the proposed conservatee has sufficient capacity to make the nomination, it need not do so if it finds the nominee's appointment is "not in the best interests of the proposed conservatee." Prob. Code §1810.

- (2) In a contested proceeding, the selection of a conservator "necessarily entails making a factual determination of whether or not the appointment of the proposed conservator will best serve the interests of the proposed conservatee." *Conservatorship of Durham* (1988) 205 Cal.App.3d 548, 554.
- (3) The selection of a conservator "is solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be for the best interests of the proposed conservatee." Prob. Code §1812(a).
- (4) Thus, although statutory law gives preference to spouses and other related persons, in a hierarchical statutory order, the law permits the probate court "in its sole discretion to appoint unrelated persons and even public conservators." *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 545.

d. Creditor Standing re Conservatorship:

- i. The petition may be brought by the proposed conservatee's spouse or domestic partner, a relative of the proposed conservatee, any interested state or local entity or agency or employee of California or of a local public entity, or any other interested person or friend of the proposed conservatee. See Prob. Code §1820.
- ii. Creditors are not among those who are permitted to petition for a conservatorship and has no standing to file a petition for conservatorship. However, this is not an affirmative defense but rather a statutory prohibition.
 - (1) Hence, a creditor may not petition for a conservatorship unless the creditor is otherwise an eligible petitioner. Prob. Code §1820(c) (a "creditor of the proposed conservatee may not file a petition for appointment of a conservator unless the creditor is" also the proposed conservatee's spouse, domestic partner or relative, or is an interested public officer or employee of California or of a local public entity).
- iii. Although creditors are generally prohibited from petitioning for the appointment of a conservator, nothing prohibits the following:
 - (1) Someone with standing may petition to appoint a creditor as a conservator; and

(2) A creditor, subject to the requirements of Prob. Code §1812, is not disqualified from serving as conservator simply by virtue of being a conservatee's creditor.

iv. Further, by implication, a creditor may have standing to petition for appointment of a successor conservator should the prior conservator resign or be removed from office. See Prob. Code §2682(c) (if a petition for appointment of a successor conservator "is filed by one other than the conservatee, the petition shall state whether or not the petitioner is a creditor or debtor of the conservatee.").

QUESTION: Would a creditor have standing to oppose a conservatorship petition?

QUESTION: Would a creditor ever be appointed as conservator, and under what circumstances could that be "in the best interests" of the proposed conservatee as required by Prob. Code §1812(a)?

3. IMPACT OF APPOINTMENT OF A CONSERVATOR

a. Legal capacity of a conservatee:

i. Prob. Code §1872 states that, except as otherwise provided by statute, the "appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate."

(1) TORTS – Civ. Code §41 says that a person of unsound mind, of any level of understanding, remains civilly wrong for harm done. However, the person is not liable for exemplary damages unless the person knew the act was wrongful at the time.

(2) CONTRACTS AND OTHER LIABILITY – Persons of unsound mind, without any understanding, have no power to make contracts, incur debts, make conveyances, or waive any rights. Civ. Code §§38-40.

(a) Any such act made by a person of an unsound mind, but not entirely without understanding, may be rescinded. Civ. Code §§39-40.

- (3) LIMITATION RE NECESSARIES OF LIFE – Appointment of a conservator of the estate shall not be construed to deny a conservatee the right to enter into transactions, including incurring a debt, to the extent that it is reasonable to provide the necessities of life to the conservatee and dependents. Prob. Code §1871(d). Further, a person of an unsound mind with no power to make a contract is still liable for the reasonable value of necessities of life. Civ. Code §38.
- (4) Bottom line – Conservatees may still incur liability for the debts and obligations after appointment of a conservator of the estate, only to a limited extent.

b. No more judgment enforcement as usual:

- i. As mentioned above, Code of Civ. Proc. §709.030 provides that a creditor may not enforce a money judgment against the conservator of the assets of a conservatorship estate using the "Enforcement of Money Judgments" division (Code of Civ. Proc. §§695.010-709.030) of California's Enforcement of Judgments Law (Code of Civ. Proc. §§680.010-724.260).
- ii. Instead, the creditor must file a petition directly with the court in which the proceedings are pending, requesting an order compelling the Conservator of the Estate to pay the debt. Code of Civ. Proc. §709.030. See *Neiman Marcus v. Tait* (1995) 33 Cal.App.4th 271.
 - (1) The "petition" method is generally set forth in Prob. Code §§1400 et seq. and specifically detailed in the provisions of Prob. Code §§2400 et seq.

iii. Statutory text:

Code of Civ. Proc. §709.030

Property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment by a procedure provided in this division, *but the judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending under Division 4 (commencing with Section 1400) of the Probate Code for an order requiring payment of the judgment.*

- iv. The statute was enacted to codify the holding of *McCracken v. Lott* (1935) 3 Cal.2d 164 (1935).
- v. The California Supreme Court held in *McCracken v. Lott* that the assets of a judgment debtor, who was judicially declared incompetent, cannot be subjected to execution and supplemental proceedings arising therefrom, based on a valid final judgment, rendered prior to the incompetency, as such property is *in custodia legis*.

- vi. In other words, property in the possession of the legal guardian or representative of an insane person is in the custody of the law, not subject to levy (seizure) under execution, and instead subject to judgment enforcement only to the extent permitted by petition to the court.
- c. Common issues:
 - i. ***What about property of a Conservatee that is not in a conservatorship estate?*** (i.e., something which is not "property in a conservatorship")
 - (1) WHAT IS THE ESTATE?
 - (a) The conservatee's "estate" includes all of the conservatee's "personal property, wherever located, and real property located in California." See Prob. Code §§2400(b) & 2600(b).
 - (b) Digital assets and intangible property are included in the conservatee's personal property, and are therefore "property in a conservatorship estate" and subject to the prohibition against enforcement of judgment pursuant to Code of Civ. Proc. §709.030.
 - (c) Note that the Conservator of the Estate must take the necessary steps to obtain possession of the conservatee's assets and to prevent their transfer or disposal without the Conservator's knowledge and approval. See Rules of Ct. Rule 7.1059(b).
 - (2) TRUST ASSETS (MONEY/PROPERTY HELD IN TRUST):
 - (a) Absent unusual circumstances, or court orders to the contrary, assets held in a revocable trust established by the conservatee are not subject to the conservator's control. Hence, trust assets are not "property in a conservatorship estate" and not subject to the restrictions of Code of Civ. Proc. §709.030 prohibiting execution.
 - (i) Moreover, appointment of a conservator (whether of the person or estate) vacates any office of trustee held by the conservatee. Prob. Code §15643(e).
 - (ii) FYI - often times a conservatee's revocable trust is brought under court supervision, which may provide a forum for investigation and discovery of assets and other information about property which might be used to satisfy a judgment.
 - (b) Nevertheless, as mentioned above, direct levy (seizure) under Writ of Execution of assets in trust is prohibited by

Code of Civ. Proc. 709.010. Instead, the beneficial interest of the judgment debtor in a trust may be subject to enforcement of judgment pursuant only by way of a petition to the court. The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee.

NOTE: Spendthrift provisions in a trust are generally enforced except as provided in Prob. Code §15304 as to "self-settled" trust. See Prob. Code §§15300 set seq. & 15304; Code of Civ. Proc. §709.010(c). California voids and will not give effect to spendthrift provisions in a self-settled trust so as to prevent individuals from placing their property beyond the reach of their creditors while at the same time still reaping the bounties of such property. See Prob. §15304(a). It is against public policy to permit a person to tie up their property in trust in such a way that he can enjoy it but prevent his creditors from reaching it. Where the person makes himself a beneficiary of such a trust, then any restraints in the instrument on the involuntary transfer or alienation of the person's interest in the trust are invalid and ineffective. *Nelson v. California Trust Co.* (1949) 33 Cal.2d 501.

(3) COMMUNITY PROPERTY:

- (a) Note that community property is not automatically part of the conservatorship estate (and therefore not "property of a conservatorship") if one spouse has legal capacity and the other has a conservator. Prob. Code §3051(b)(2). However, the spouse with capacity can elect otherwise and have all community property be administered through the conservatorship - thereby causing all marital assets to be "property of a conservatorship."
- (b) Generally at Prob. Code §3051:
 - (i) The right of a spouse to manage and control community property, including the right to dispose of community property, is not affected by the lack or alleged lack of legal capacity of the other spouse.
 - (ii) If one spouse has legal capacity but the other spouse has a conservator:
 - 1) The spouse who has legal capacity has the exclusive management and control of the community property including the exclusive

power to dispose of the community property.

- 2) The community property is deemed to be excluded from the conservatorship estate.
- 3) However, the spouse having legal capacity may consent, by a writing filed in the proceeding, that all or part of the community property be included in and be managed, controlled, and disposed of as a part of the conservatorship estate.

(iii) If both spouses have conservators, an undivided one-half interest in the community property shall be included in and be managed, controlled, and disposed of as a part of the conservatorship estate of each spouse.

- 1) But the conservators may agree in writing that all or specific parts of the community property shall be included in the conservatorship estate of one or the other of the spouses and be managed, controlled, and disposed of as a part of the conservatorship estate of that spouse.

(c) The rules on managing and disposing of community property are in Fam. Code §§ 1100 (personal property) and 1102 (real property).

- (i) They provide, in general, that personal property may be managed, controlled, and disposed of by either spouse, except that neither may make a gift of community property without the written consent of the other, dispose of community personal property for less than fair and reasonable value, or sell or encumber their household furniture and furnishings, their personal effects, or community personal property used as the family dwelling (e.g., mobile homes) without the written consent of the other. See Fam. Code § 1100.
- (ii) In general, but with some exceptions, one spouse may not lease or convey real property without the other spouse's joining in the execution of the lease or conveyance.

- (d) A separate proceeding may be brought under Prob. Code §§3100 et seq. to authorize the transaction, thereby avoiding the need to appoint a conservator, if the other spouse has legal capacity for the transaction or has a conservator.

ii. ***Can judicial liens be used to protect the creditor?***

- (1) The Conservator of the Estate takes all assets in the same form and subject to the same obligations as the conservatee. If property is subject to a judicial lien (or any other lien, voluntary or otherwise), then the lien remains.
- (2) Part of the enforcement process is the creation of judicial liens, in favor of a judgment creditor, involuntarily affixed to and secured by a judgment debtor's property. See Code of Civ. Proc. §§697.010 et seq.
 - (a) Real property - recording an Abstract of Judgment in the official records of a county within the State of California where real property belonging to a judgment debtor is located.
 - (b) Personal property - filing a Notice of Judgment Lien (Form JL-1) with the California Secretary of State.
 - (c) Liens in pending actions - filing a notice in a pending lawsuit along with an Abstract of Judgment or certified copy of a money judgment.
 - (d) Execution and enforcement liens/ORAP liens/charging order liens/creditor's suit liens - various procedures.

NOTE: There are countless ways that "hidden liens" may arise affecting title to property. See "Hidden Liens Report" by UCC Committee of the State Bar of California.

- (3) However, as mentioned above, Code of Civ. Proc. §709.030 provides that a creditor may not enforce a money judgment against the conservator of the assets of a conservatorship estate using the "Enforcement of Money Judgments" Division of California's Enforcement of Judgments Law (Code of Civ. Proc. §§695.010–709.030). The involuntary creation of a judicial lien on estate assets by the use of any method described therein is therefore barred and prohibited by law – unless the judgment creditor receives approval or authorization of the court supervising the conservatorship.

iii. ***What about pre-judgment and provisional remedies?***

- (1) Is "Attachment" permitted?
 - (a) The usual practice of executing upon a money judgment using levies, judicial liens, ORAPs, creditor's suits, charging orders, assignment orders, turnover orders, etc. are barred. Reminder:
 - (i) "Property in a...conservatorship estate" is not subject to execution. Code of Civ. Proc. §699.720(b)(10).
 - 1) "Execution" is the process by which money judgments are enforced. See Code of Civ. Proc. §§699.010-701.830.
 - (ii) "Property in a...conservatorship estate" is not subject to enforcement of a money judgment by a procedure provided in this division, but the judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending under [Probate Code §§1400 et seq.] for an order requiring payment of the judgment. Code of Civ. Proc. §709.030.
 - 1) This "division" is Title 9, Division 2, Enforcement of Money Judgments, Code of Civ. Proc. §§695.010-709.030.
 - (b) "Attachment" is Title 6.5, Division 2, Code of Civ. Proc. §§481.010-493.060. This is a different "Title" and "Division" than the Enforcement of Judgments Law.
 - (c) However, all "property exempt from enforcement of a money judgment" is exempt from attachment. Code of Civ. Proc. §487.020(a).
 - (i) INTERESTING EXCEPTION – Assets in the possession or name of a conservatee who is the transferee of a fraudulent transfer are subject to attachment. See Code of Civ. Proc. §487.020; Civ. Code 3439.07(a)(2).
 - 1) Presumably such fraudulently transferred assets do not belong to the transferee anyway therefore the conservatorship estate is not being deprived of money or property.

2) However the procedure to do so is uncertain, and proceeding by court order (Prob. Code §850?) is strongly advised.

(2) What about other pre-judgment remedies (a.k.a. "provisional remedies")? All require the filing of complaints and/or compliance with constitutional due process requirements, but are not directly barred by the Enforcement of Judgments Law or conservatorship law. See Title 7, Chapters 1-6, Code of Civ. Proc. §§501-574. The Conservator of the Estate is empowered to appear and defend any such actions.

(a) Writ of Possession/TRO

(b) Injunctions

(c) Receivers

4. PAYMENT OF DEBTS AND EXPENSES

a. Once a conservator is appointed, creditors are barred from directly employing the Enforcement of Judgments Law to collect upon an outstanding judgment. So what happens when a conservator will not pay?

b. The solution provided by the California statutory law, as follows:

i. Code of Civ. Proc. §709.030 prohibits a judgment creditor from executing against property in a conservatorship, but permits the judgment creditor to petition the conservatorship court for an order compelling the Conservator of the Estate to pay a judgment from the estate;

ii. Prob. Code §2403 permits, but does not require, an interested person (including a creditor, with or without a judgment) to file a petition in the conservatorship court requesting an order compelling payment of a debt;

iii. Prob. Code §2404 permits, but does not require, an interested person (including a creditor, with or without a judgment) to file a petition in court requesting payment of suitable support to a conservatee;

iv. Payment of a debt shall then be ordered in the manner provided by and to the extent permitted by the categories set forth in Prob. Code §2430 (and §2431 for certain wage claims), some categories being limited to reasonable amounts, or limited to amounts not to impair provision of suitable support, or with restrict payees, or no limits whatsoever.

v. *Simple and easy, right?*

c. What does this really mean?

i. *In the immortal words of Chandler Bing...can it be any more confusing?*

ii. Statutory analysis:

(1) Prob. Code §2430 provides for multiple categories of debts and claims against a conservatorship estate:

(a) **Before the creation of the conservatorship** [§2430(a)(1)]

(i) These debts "shall" be paid the guardian or conservator shall pay the following from any principal and income of the conservatorship estate, giving priority to 'wage claims' described in Prob. Code §2431 "to the extent required by that section."

(b) **After creation of the conservatorship, for the necessities of life for the conservatee and dependents** [§2430(a)(2)]

(i) These debts "shall" be paid, but only to the extent they are "reasonable," and without reference to the priority of 'wage claims' described in Prob. Code §2431.

(c) **All other debts and claims incurred by the conservatee** [§2430(a)(3)]

(i) These debts "shall" be paid if otherwise lawful and binding upon the estate.

1) See Prob. Code §§1870 et seq. concerning the legal capacity of a conservatee to incur liability after adjudication of incapacity and appointment of a conservator.

(ii) However, these debts are not to be paid "to the extent the payments would impair the ability to provide the necessities of life" to the conservatee and dependents. [§2430(b)]

(d) **Administrative debts and claims** [§2430(a)(4)]

(i) The reasonable expenses incurred in the collection, care, and administration of the estate "shall" be paid, subject to prior court approval for attorneys' and conservators' fees.

1) But, interestingly, there is no requirement for prior court order for other types of professionals, whose fees are generally authorized for payment pursuant to general powers set forth at Prob. Code §2451.5.

- (2) Prob. Code §2403 says that any interested person, including conservator(s) and creditor(s), "may" petition the court to authorize and instruct the conservator as to the estate, specifically including incurring debt or paying costs, fees, or expenses.
 - (a) Permissive - some one "may" petition the court.
 - (i) This does not appear to preclude the use of other proceedings, such as civil actions.
- (3) Prob. Code §2404 says that, if a conservator "fails, neglects, or refuses" to furnish support or "pay a debt, expense, or charge lawfully due and payable by the...conservatee or the estate," then the court "shall" order the conservator to do so either upon petition or on its own motion.
 - (a) Mandatory - the court "shall" order the conservator to pay.

iii. For creditors and judgment creditors:

- (1) If a debt is not being paid, the remedy is to file a petition in the probate court supervising the conservatorship proceedings pursuant to Prob. Code §2403.
 - (a) There is no requirement for a judgment. Judgment creditors may use these procedures, and are prohibited from executing against conservatorship assets. But the prerequisite for a petition is simply a debt lawfully due and payable by the conservatee or the estate.
 - (b) If the debt pre-dates the conservatorship, then there is no problem as the debt must be paid and will be ordered paid.
 - (c) If the debt post-dates the conservatorship, then the debt may be payable, or may not, depending upon its Prob. Code §2430 categorization and resulting court order.

iv. For Conservators of the Estate:

- (1) Certain debts must be paid regardless of the effect upon the conservatee and/or the estate:
 - (a) Debts incurred before the creation of the conservatorship;
 - (b) The reasonable costs of providing for the care of the conservatee and other necessities of life; and
 - (c) The costs and expenses of administration.
- (2) Payment of any other lawful debts incurred by the conservatee during the conservatorship is "discretionary," in that it is not

required to be pay if doing so would impair the ability to provide the necessities of life to the conservatee and dependents.

- v. But categorizing a debt as provided in Prob. Code §2430 is not easy. The conservator may petition the court for instructions when there is doubt whether and how a debt should be categorized and/or paid. See Prob. Code §2403(c).
- vi. Conservatorship of Parker (2014) 228 Cal.App.4th 803:
 - (1) The dispute:
 - (a) Payment of lawful debt incurred by the conservatee **during the conservatorship** are **not required** to be made to the extent the payments would *impair* the ability to provide the necessities of life to the conservatee. Prob. Code §§2430(a)(3) & (b).
 - (b) On the other hand – **conservator "shall pay"** from the principal and income of the estate the "debts incurred by the conservatee **before creation** of the conservatorship." Prob. Code §2430(a)(1).
 - (c) So is a particular debt incurred "before" creation of the conservatorship?
 - (2) In *Conservatorship of Parker*, a conservator was appointed for a defendant in an existing, pending civil action involving various claims, primarily tort claims. Judgment was subsequently rendered upon a jury verdict. To no surprise, judgment enforcement soon took place. Ultimately, after much legal wrangling occurred, the judgment creditor petitioned the probate court to order the conservator to pay a debt due from the conservatee as provided in Prob. Code §§2403 and 2430.
 - (a) Note that the jury found that the defendant-conservatee knew his actions were wrongful when made and therefore liable for punitive damages under Civ. Code §41 notwithstanding his later incapacity.
 - (3) The judgment creditor argued that Prob. Code §§2403(a) and 2430(a)(1) mandated payment as the debt was liability incurred before the creation of the conservatorship, and the judgment simply confirmed and fixed that liability.
 - (4) The conservator argued that the debt was incurred during the conservatorship—and is therefore discretionary—because the judgment creditor obtained the judgment against the conservatee after the conservatorship was established. In the view of the

conservator, the debt was the judgment sought to be enforced and that post-dated the creation of the conservatorship.

vii. The ruling:

- (1) The Second Appellate District found that the debt was a tort claim, incurred by the conservatee *before creation* of the conservatorship by appointment of a Conservator of the Estate, because debt arising from wrongful conduct by the conservatee is "incurred when the tort is committed, not when judgment is entered." *Conservatorship of Parker*, pp. 808 [internal citations omitted].

Excerpt from *Conservatorship of Parker*, pp. 809-810:

It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues. The term 'debt,' used in our statutes, should be given its modern legal significance, as including any sort of obligation to pay money. A debtor is someone who is or may become liable to pay money to another, whether such liability is certain or contingent. A person who causes injury becomes a debtor on the date of the injury-causing incident, even if the amount of the debt is indefinite until an award is made. The inverse is true as well: someone injured by another's tort becomes a creditor when the cause of action accrues, even before legal action is taken. A money judgment is no more than a judicial determination of the validity of an existing claim. [¶] Nothing in the Probate Code suggests a legislative intent to disrupt the settled rule that a debt is incurred when a tort is committed...[and,] under the Probate Code, an unresolved tort claim is a debt. With regard to conservatees, the Supreme Court has acknowledged that debts include tort, quasi-contractual and contractual obligations. [INTERNAL CITATIONS OMITTED]

viii. PROBLEMS AND CONCERNS:

- (1) Exemptions - no longer permitted for pre-conservatorship debts?
 - (a) Exemptions are provided by law, serving to exclude and exempt certain types of a judgment debtor's property, or some or all of the value therein, from the enforcement of judgment.
 - (i) Examples: homestead, insurance, clothing and household items, tools of the trade, etc. See Code of Civ. Proc. §§703.010-704.995.
 - (b) Prob. Code 2430(a)(1) states that "the...conservator **shall** pay...from any principal and income of the estate" the "debts incurred by the ward or conservatee before creation of the...conservatorship." Consequently the order is mandatory and there is no discretion to refuse to do so.

- (c) Property in a conservatorship estate is not subject to enforcement of a money judgment by a procedure provided in Title 9, Division 2, Enforcement of Money Judgments, Code of Civ. Proc. §§695.010-709.030, presumably including "Exemptions."
 - (d) Why should a conservatee be worse-off than if there was no conservator appointed, and therefore no one looking out for the best interests of the conservatee?
- (2) Conflict with Prob. Code §2404?
- (a) Prob. Code §2404 requires that the probate court order a Conservator of the Estate to furnish a conservatee with comfortable and suitable support in the event that the conservator fails, neglects, or refuses to do so.
 - (i) See Prob. Code §2420 (mandating that Conservator of the Estate apply the income from the estate, "so far as necessary, to the comfortable and suitable" support to the conservatee and dependents)
 - (b) Does the *Conservatorship of Parker* ruling set up a conflict where a Conservator of the Estate has to pay a pre-conservatorship debt but doing so would leave the estate insufficient to pay for suitable support of the conservatee?
 - (i) The Second Appellate District ruled that there was "no claim or evidence that the conservators failed, neglected or refused to furnish suitable support to [the conservatee], and we decline to speculate whether this may occur at some unknown time in the future." *Id.*, at 811.
 - (ii) The restriction of Prob. Code §2430(b) does not apply to temper the payment of pre-conservatorship debts, although prior incarnations of the statute appeared to have done so.

COMMENT: The holding of *Conservatorship of Parker* is that a Conservator of the Estate must pay all debts incurred before the creation of the conservatorship, even if those payments would impair the ability to provide necessities of life, absent evidence that the conservators have already failed, neglected, or refused to furnish suitable support to the conservatee.

- (iii) Did they simply leave the conflict to a future date for the probate court to sort out?

- (3) Contra argument – the common-law "Doctrine of Merger"? There may be only one recovery or satisfaction of a claim. So, the general rule is that a claim or cause of action upon which is a later judgment arises is merged in and extinguished by that judgment.
 - (a) In other words, when a court of competent jurisdiction renders a judgment on a claim or cause of action, that claim or cause of action ceases to exist and may no longer be the basis of any action anywhere.
 - (b) The doctrine is applicable to some judgments, and not others, depending upon the principles and policies applicable to the situation.
 - (c) Why? To settle and reduce to the authentic and final form the dispute or relationship of those whom were parties to the proceedings giving rise to the judgment, such that nothing remains uncertain or unresolved, thereby prohibiting duplicative or unlimited liability.
 - (d) No discussion in *Conservatorship of Parker*.

- d. Alternatives to expensive litigation regarding categorization and payment of debt?
 - i. The probate court is empowered to entertain summary proceedings regarding disputes between conservators and third persons regarding payment of a claim. See Prob. Code §2405. Arbitration is also permitted. See Prob. Code §2406.

5. CONCLUSION:

This is a messy and overly-complicated set of principles, rules, and laws. It is easy to misconstrue and misapply the law, potentially leaving conservators, conservatees, and creditors with unfair or unanticipated results as well as suffering with the consequences of unnecessary fees, costs, expense, and delay.


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CODE OF CIVIL PROCEDURE - CCP
PART 2. OF CIVIL ACTIONS [307 - 1062.20] (Part 2 enacted 1872.)

TITLE 9. ENFORCEMENT OF JUDGMENTS [680.010 - 724.260] (Title 9 repealed and added by Stats. 1982, Ch. 1364, Sec. 2.)

DIVISION 2. ENFORCEMENT OF MONEY JUDGMENTS [695.010 - 709.030] (Division 2 added by Stats. 1982, Ch. 1364, Sec. 2.)

CHAPTER 1. General Provisions [695.010 - 695.221] (Chapter 1 added by Stats. 1982, Ch. 1364, Sec. 2.)

ARTICLE 1. Property Subject to Enforcement of Money Judgment [695.010 - 695.070] (Article 1 added by Stats. 1982, Ch. 1364, Sec. 2.)

695.010. (a) Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment.

(b) If property of the judgment debtor was attached in the action but was transferred before entry of the money judgment in favor of the judgment creditor, the property is subject to enforcement of the money judgment so long as the attachment lien remains effective.

(Amended by Stats. 1984, Ch. 538, Sec. 17.)

695.020. (a) Community property is subject to enforcement of a money judgment as provided in the Family Code.

(b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:

(1) Any provision of this division that applies to the property of the judgment debtor or to obligations owed to the judgment debtor also applies to the community property interest of the spouse of the judgment debtor and to obligations owed to the other spouse that are community property.

(2) Any provision of this division that applies to property in the possession or under the control of the judgment debtor also applies to community property in the possession or under the control of the spouse of the judgment debtor.

(Amended by Stats. 1992, Ch. 163, Sec. 33. Effective January 1, 1993. Operative January 1, 1994, by Sec. 161 of Ch. 163.)

695.030. (a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

(b) The following property is subject to enforcement of a money judgment:

(1) An interest in a trust, to the extent provided by law.

(2) A cause of action for money or property that is the subject of a pending action or special proceeding.

(Amended by Stats. 1986, Ch. 820, Sec. 17. Operative July 1, 1987, by Sec. 43 of Ch. 820.)

695.035. (a) A lessee's interest in real property may be applied to the satisfaction of a money judgment in any of the following circumstances:

(1) If the lessee has the right voluntarily to sublet the property or assign the interest in the lease.

(2) If the lessee has the right voluntarily to sublet the property or assign the interest in the lease subject to standards or conditions and the purchaser at the execution sale or other assignee agrees to comply with the standards or conditions that would have had to be complied with had the lessee voluntarily sublet the property or assigned the interest in the lease.

(3) If the lessee has the right voluntarily to sublet the property or assign the interest in the lease with the consent of the lessor, in which case the obligation of the lessor to consent to the assignment is subject to the same standard that would apply had the lessee voluntarily sublet the property or assigned the interest in the lease.

(4) In any other case, if the lessor consents in writing.

(b) A provision in a lease for the termination or modification of the lease upon an involuntary transfer or assignment of the lessee's interest is ineffective to the extent that such provision would prevent the application of the lessee's interest to the satisfaction of the money judgment under subdivision (a).

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

695.040. Property that is not subject to enforcement of a money judgment may not be levied upon or in any other manner applied to the satisfaction of a money judgment. If property that is not subject to enforcement of a money judgment has been levied upon, the property may be released pursuant to the claim of exemption procedure provided in Article 2 (commencing with Section 703.510) of Chapter 4.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

695.050. A money judgment against a public entity is not enforceable under this division if the money judgment is subject to Chapter 1 (commencing with Section 965) of, or Article 1 (commencing with Section 970) of Chapter 2 of, Part 5 of Division 3.6 of Title 1 of the Government Code.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

695.060. Except as provided in Section 708.630, a license issued by a public entity to engage in any business, profession, or activity is not subject to enforcement of a money judgment.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

695.070. (a) Notwithstanding the transfer or encumbrance of property subject to a lien created under this division, if the property remains subject to the lien after the transfer or encumbrance, the money judgment may be enforced against the property in the same manner and to the same extent as if it had not been transferred or encumbered.

(b) If the judgment debtor dies after the transfer of property that remains subject to a lien created under this division, the money judgment may be enforced against the property as provided in subdivision (a).

(Amended by Stats. 1989, Ch. 1416, Sec. 22.)


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PART 2. OF CIVIL ACTIONS [307 - 1062.20] *(Part 2 enacted 1872.)*
TITLE 9. ENFORCEMENT OF JUDGMENTS [680.010 - 724.260] *(Title 9 repealed and added by Stats. 1982, Ch. 1364, Sec. 2.)*
DIVISION 2. ENFORCEMENT OF MONEY JUDGMENTS [695.010 - 709.030] *(Division 2 added by Stats. 1982, Ch. 1364, Sec. 2.)*
CHAPTER 3. Execution [699.010 - 701.830] *(Chapter 3 added by Stats. 1982, Ch. 1364, Sec. 2.)*
ARTICLE 3. Property Subject to Execution [699.710 - 699.720] *(Article 3 added by Stats. 1982, Ch. 1364, Sec. 2.)*

699.710. Except as otherwise provided by law, all property that is subject to enforcement of a money judgment pursuant to Article 1 (commencing with Section 695.010) of Chapter 1 is subject to levy under a writ of execution to satisfy a money judgment.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

699.720. (a) The following types of property are not subject to execution:

- (1) An alcoholic beverage license that is transferable under Article 5 (commencing with Section 24070) of Chapter 6 of Division 9 of the Business and Professions Code.
- (2) The interest of a partner in a partnership or member in a limited liability company if the partnership or the limited liability company is not a judgment debtor.
- (3) A cause of action that is the subject of a pending action or special proceeding.
- (4) A judgment in favor of the judgment debtor prior to the expiration of the time for appeal from the judgment or, if an appeal is filed, prior to the final determination of the appeal.
- (5) A debt (other than earnings) owing and unpaid by a public entity.
- (6) The loan value of an unmaturing life insurance, endowment, or annuity policy.
- (7) A franchise granted by a public entity and all the rights and privileges of the franchise.
- (8) The interest of a trust beneficiary.
- (9) A contingent remainder, executory interest, or other interest in property that is not vested.
- (10) Property in a guardianship or conservatorship estate.

(b) Nothing in subdivision (a) affects or limits the right of the judgment creditor to apply property to the satisfaction of a money judgment pursuant to any applicable procedure other than execution.

(Amended by Stats. 1996, Ch. 57, Sec. 1. Effective June 6, 1996.)


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CHAPTER 6. Miscellaneous Creditors' Remedies [708.010 - 709.030] (Chapter 6 added by Stats. 1982, Ch. 1364, Sec. 2.)

ARTICLE 10. Other Enforcement Procedures [709.010 - 709.030] (Article 10 added by Stats. 1982, Ch. 1364, Sec. 2.)

709.010. (a) As used in this section, "trust" has the meaning provided in Section 82 of the Probate Code.

(b) The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by a judgment creditor to a court having jurisdiction over administration of the trust as prescribed in Part 5 (commencing with Section 17000) of Division 9 of the Probate Code. The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee.

(c) Nothing in this section affects the limitations on the enforcement of a money judgment against the judgment debtor's interest in a trust under Chapter 2 (commencing with Section 15300) of Part 2 of Division 9 of the Probate Code, and the provisions of this section are subject to the limitations of that chapter.

(Amended by Stats. 1986, Ch. 820, Sec. 18. Operative July 1, 1987, by Sec. 43 of Ch. 820.)

709.020. The judgment creditor may apply to the court on noticed motion for an order applying to the satisfaction of a money judgment a contingent remainder, executory interest, or other interest of the judgment debtor in property that is not vested in the judgment debtor. The interest of the judgment debtor may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper to protect the interests of both the judgment debtor and judgment creditor, including but not limited to the imposition of a lien on or the sale of the judgment debtor's interest.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)

709.030. Property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment by a procedure provided in this division, but the judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending under Division 4 (commencing with Section 1400) of the Probate Code for an order requiring payment of the judgment.

(Added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)


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DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (*Division 4 enacted by Stats. 1990, Ch. 79.*)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (*Part 4 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (*Chapter 6 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 1. Definitions and General Provisions [2400 - 2410] (*Article 1 enacted by Stats. 1990, Ch. 79.*)

2400. As used in this chapter:

(a) "Conservator" means the conservator of the estate, or the limited conservator of the estate to the extent that the powers and duties of the limited conservator are specifically and expressly provided by the order appointing the limited conservator.

(b) "Estate" means all of the conservatee's or ward's personal property, wherever located, and real property located in this state.

(c) "Guardian" means the guardian of the estate.

(*Amended by Stats. 2008, Ch. 52, Sec. 2. Effective January 1, 2009.*)

2401. (a) The guardian or conservator, or limited conservator to the extent specifically and expressly provided in the appointing court's order, has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The guardian or conservator:

(1) Shall exercise a power to the extent that ordinary care and diligence requires that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

(c) Notwithstanding any other law, a guardian or conservator who is not a trust company, in exercising his or her powers, may not hire or refer any business to an entity in which he or she has a financial interest except upon authorization of the court. Prior to authorization from the court, the guardian or conservator shall disclose to the court in writing his or her financial interest in the entity. For the purposes of this subdivision, "financial interest" shall mean (1) an ownership interest in a sole proprietorship, a partnership, or a closely held corporation, or (2) an ownership interest of greater than 1 percent of the outstanding shares in a publicly held corporation, or (3) being an officer or a director of a corporation.

(d) Notwithstanding any other law, a guardian or conservator who is a trust company, in exercising its powers may not, except upon authorization of the court, invest in securities of the trust company or an affiliate or subsidiary, or other securities from which the trust company or affiliate or subsidiary receives a financial benefit or in a mutual fund, other than a mutual fund authorized in paragraph (5) of subdivision (a) of Section 2574, registered under the Investment Company Act of 1940 (Subchapter 1 (commencing with Sec. 80a-1) of Chapter 2D of Title 15 of the United States Code), to which the trust company or its affiliate provides services, including, but not limited to, services as an investment adviser, sponsor, distributor, custodian, agent, registrar, administrator, servicer, or manager, and for which the trust company or its affiliate receives compensation.

Prior to authorization from the court, the guardian or conservator shall disclose to the court in writing the trust company's financial interest.

(Amended by Stats. 2006, Ch. 493, Sec. 21. Effective January 1, 2007.)

2401.1. The guardian or conservator shall use ordinary care and diligence to determine whether the ward or conservatee owns real property in a foreign jurisdiction and to preserve and protect that property. What constitutes use of ordinary care and diligence shall be determined by all the facts and circumstances known, or that become known, to the guardian or conservator, the value of the real property located in the foreign jurisdiction, and the needs of the ward or conservatee. The guardian or conservator, except as provided in subdivision (a) of Section 1061 and in Section 1062, is not charged with, and shall have no duty to inventory or account for the real property located in a foreign jurisdiction, but the guardian or conservator shall, when presenting the inventory and appraisal and accounting to the court, include the schedule set forth in subdivision (h) of Section 1063.

(Added by Stats. 2008, Ch. 52, Sec. 3. Effective January 1, 2009.)

2401.3. (a) If the guardian or conservator breaches a fiduciary duty, the guardian or conservator is chargeable with any of the following that is appropriate under the circumstances:

- (1) Any loss or depreciation in value of the estate resulting from the breach of duty, with interest.
- (2) Any profit made by the guardian or conservator through the breach of duty, with interest.
- (3) Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty.

(b) If the guardian or conservator has acted reasonably and in good faith under the circumstances as known to the guardian or conservator, the court, in its discretion, may excuse the guardian or conservator in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(Enacted by Stats. 1990, Ch. 79.)

2401.5. (a) If the guardian or conservator is liable for interest pursuant to Section 2401.3, the guardian or conservator is liable for the greater of the following amounts:

- (1) The amount of interest that accrues at the legal rate on judgments.
- (2) The amount of interest actually received.

(b) If the guardian or conservator has acted reasonably and in good faith under the circumstances as known to the guardian or conservator, the court, in its discretion, may excuse the guardian or conservator in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(Amended by Stats. 1998, Ch. 77, Sec. 2. Effective January 1, 1999.)

2401.6. Any surcharge that a guardian or conservator incurs under the provisions of Sections 2401.3 or 2401.5 may not be paid by or offset against future fees or wages to be provided by the estate to the guardian or conservator.

(Added by Stats. 2000, Ch. 565, Sec. 7. Effective January 1, 2001.)

2401.7. The provisions of Sections 2401.3 and 2401.5 for liability of a guardian or conservator for breach of a fiduciary duty do not prevent resort to any other remedy available against the guardian or conservator under the statutory or common law.

(Enacted by Stats. 1990, Ch. 79.)

2402. When a guardian or conservator is appointed, the court may, with the consent of the guardian or conservator, insert in the order of appointment conditions not otherwise obligatory providing for the care and custody of the property of the ward or conservatee. Any such conditions shall be included in the letters. The performance of such conditions is a part of the duties of the guardian or conservator for the faithful performance of which the guardian or conservator and the sureties on the bond are responsible.

(Enacted by Stats. 1990, Ch. 79.)

2403. (a) Upon petition of the guardian or conservator, the ward or conservatee, a creditor, or other interested person, the court may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) (1) When a guardian or conservator petitions for the approval of a purchase, lease, or rental of real or personal property from the estate of a ward or conservatee, the guardian or conservator shall provide a statement disclosing the family or affiliate relationship between the guardian and conservator and the purchaser, lessee, or renter of the property, and the family or affiliate relationship between the guardian or conservator and any agent hired by the guardian or conservator.

(2) For the purposes of this subdivision, "family" means a person's spouse, domestic partner, or relatives within the second degree of lineal or collateral consanguinity of a person or a person's spouse. For the purposes of this subdivision, "affiliate" means an entity that is under the direct control, indirect control, or common control of the guardian or conservator.

(3) A violation of this section shall result in the rescission of the purchase, lease, or rental of the property. Any losses incurred by the estate of the ward or conservatee because the property was sold or leased at less than fair market value shall be deemed as charges against the guardian or conservator under the provisions of Sections 2401.3 and 2401.5. The court shall assess a civil penalty equal to three times the charges against the guardian, conservator, or other person in violation of this section, and may assess punitive damages as it deems proper. If the estate does not incur losses as a result of the violation, the court shall order the guardian, conservator, or other person in violation of this section to pay a fine of up to five thousand dollars (\$5,000) for each violation. The fines and penalties provided in this section are in addition to any other rights and remedies provided by law.

(Amended by Stats. 2001, Ch. 893, Sec. 33. Effective January 1, 2002.)

2404. (a) If the guardian or conservator fails, neglects, or refuses to furnish comfortable and suitable support, maintenance, or education for the ward or conservatee as required by this division, or to pay a debt, expense, or charge lawfully due and payable by the ward or conservatee or the estate as provided in this division, the court shall, upon petition or upon its own motion, order the guardian or conservator to do so from the estate.

(b) The petition may be filed by the ward or conservatee or by the creditor or any other interested person. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(Enacted by Stats. 1990, Ch. 79.)

2405. If there is a dispute relating to the estate between the guardian or conservator and a third person, the guardian or conservator, or the limited conservator to the extent specifically and expressly provided in the order appointing the limited conservator, may do either of the following:

(a) Enter into an agreement in writing with the third person to refer the dispute to a temporary judge designated in the agreement. The agreement shall be filed with the clerk, who shall thereupon, with the approval of the court, enter an order referring the matter to the designated person. The temporary judge shall proceed promptly to hear and determine the matter in controversy by summary procedure, without any pleadings, discovery, or jury trial. The decision of the temporary judge is subject to Section 632 of the Code of Civil Procedure. Judgment shall be entered on the decision and is as valid and effective as if rendered by a judge of the court in an action against the guardian or conservator or the third person commenced by ordinary process.

(b) Enter into an agreement in writing with the third person that a judge of the court, pursuant to the agreement and with the written consent of the judge, both filed with the clerk within the time for bringing an independent action on the matter in dispute, may hear and determine the dispute pursuant to the procedure provided in subdivision (a).

(Enacted by Stats. 1990, Ch. 79.)

2406. If there is a dispute relating to the estate between the guardian or conservator and a third person, the guardian or conservator may enter into an agreement in writing with the third person to submit the dispute to arbitration under Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. The agreement is not effective unless it has first been approved by the court and a copy of the approved agreement is filed with the court.

(Enacted by Stats. 1990, Ch. 79.)

2407. This chapter applies to property owned by spouses as community property only to the extent authorized by Part 6 (commencing with Section 3000).

(Amended by Stats. 2016, Ch. 50, Sec. 82. Effective January 1, 2017.)

2408. Nothing in this chapter limits or restricts any authority granted to a guardian or conservator pursuant to Article 11 (commencing with Section 2590) to administer the estate under that article.

(Enacted by Stats. 1990, Ch. 79.)

2410. On or before January 1, 2008, the Judicial Council, in consultation with the California Judges Association, the California Association of Superior Court Investigators, the California State Association of Public Administrators, Public Guardians, and Public Conservators, the State Bar of California, the National Guardianship Association, and the Association of Professional Geriatric Care Managers, shall adopt a rule of court that shall require uniform standards of conduct for actions that conservators and guardians may take under this chapter on behalf of conservatees and wards to ensure that the estate of conservatees or wards are maintained and conserved as appropriate and to prevent risk of loss or harm to the conservatees or wards. This rule shall include at a minimum standards for determining the fees that may be charged to conservatees or wards and standards for asset management.

(Added by Stats. 2006, Ch. 493, Sec. 22. Effective January 1, 2007.)


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DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (*Division 4 enacted by Stats. 1990, Ch. 79.*)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (*Part 4 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (*Chapter 6 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 3. Payment of Debts and Expenses [2430 - 2431] (*Article 3 enacted by Stats. 1990, Ch. 79.*)

2430. (a) Subject to subdivisions (b) and (c), the guardian or conservator shall pay the following from any principal and income of the estate:

- (1) The debts incurred by the ward or conservatee before creation of the guardianship or conservatorship, giving priority to the debts described in Section 2431 to the extent required by that section.
 - (2) The debts incurred by the ward or conservatee during the guardianship or conservatorship to provide the necessities of life to the ward or conservatee, and to the spouse and minor children of the ward or conservatee, to the extent the debt is reasonable. Also, the debts reasonably incurred by the conservatee during the conservatorship to provide the basic living expenses, as defined in Section 297 of the Family Code, to the domestic partner of the conservatee. The guardian or conservator may deduct the amount of any payments for these debts from any allowance otherwise payable to the ward or conservatee.
 - (3) In the case of a conservatorship, any other debt incurred by the conservatee during the conservatorship only if the debt satisfies the requirements of any order made under Chapter 4 (commencing with Section 1870) of Part 3.
 - (4) The reasonable expenses incurred in the collection, care, and administration of the estate, but court authorization is required for payment of compensation to any of the following:
 - (A) The guardian or conservator of the person or estate or both.
 - (B) An attorney for the guardian or conservator of the person or estate or both.
 - (C) An attorney for the ward or conservatee.
 - (D) An attorney for the estate.
 - (E) The public guardian for the costs and fee under Section 2902.
 - (b) The payments provided for by paragraph (3) of subdivision (a) are not required to be made to the extent the payments would impair the ability to provide the necessities of life to the conservatee and the spouse and minor children of the conservatee and to provide the basic living expenses, as defined in Section 297 of the Family Code, of the domestic partner of the conservatee.
 - (c) The guardian or conservator may petition the court under Section 2403 for instructions when there is doubt whether a debt should be paid under this section.
- (Amended by Stats. 2001, Ch. 893, Sec. 35. Effective January 1, 2002.)

2431. (a) Subject to subdivision (d), the guardian or conservator may petition the court under Section 2403 for instructions when there is doubt whether a wage claim should be paid under this section.

(b) The guardian or conservator shall promptly pay wage claims for work done or services rendered for the ward or conservatee within 30 days prior to the date the petition for appointment of the guardian or conservator was filed. The payments made pursuant to this subdivision shall not exceed nine hundred dollars (\$900) to each claimant. If

there is insufficient money to pay all the claims described in this subdivision up to nine hundred dollars (\$900), the money available shall be distributed among such claimants in proportion to the amount of their respective claims.

(c) After the payments referred to in subdivision (b) have been made, the guardian or conservator shall pay wage claims for work done or services rendered for the ward or conservatee within 90 days prior to the date the petition for appointment of the guardian or conservator was filed, excluding the claims described in subdivision (b). The payments made pursuant to this subdivision shall not exceed one thousand one hundred dollars (\$1,100) to each claimant. If there is insufficient money to pay all the claims described in this subdivision up to one thousand one hundred dollars (\$1,100), the money available shall be distributed among such claimants in proportion to the amounts of their respective claims.

(d) The guardian or conservator may require sworn claims to be presented. If there is reasonable cause to believe that the claim is not valid, the guardian or conservator may refuse to pay the claim in whole or in part but shall pay any part thereof that is not disputed without prejudice to the claimant's rights as to the balance of the claim. The guardian or conservator shall withhold sufficient money to cover the disputed portion until the claimant has had a reasonable opportunity to establish the validity of the claim by bringing an action, either in the claimant's own name or through an assignee, against the guardian or conservator.

(e) If the guardian or conservator neglects or refuses to pay all or any portion of a claim which is not in dispute, the court shall order the guardian or conservator to do so upon the informal application of any wage claimant or the assignee or legal representative of such claimant.

(Enacted by Stats. 1990, Ch. 79.)