



TO WAIVE OR NOT TO WAIVE, THAT IS THE QUESTION

**Handling Waiver, Appearances, and the
Reading of Rights**

Aviva K. Bobb CAC Advanced Training

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 **ADAM L. STRELTZER**
ATTORNEY AT LAW

Lawrence M. Lebowsky

LAW OFFICE OF LAWRENCE M. LEBOWSKY

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

Proposed Conservatees are required to receive notice of the proceedings, appear at the hearing, and be informed of their rights.

- *Does it really matter?*
- *Does my client really need to receive these documents, be at the hearing, and listen to the judge recite this stuff? With my lengthy experience, can't I handle this for him/her?*

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

- 1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, and PETITION on the PROPOSED CONSERVATEE**
- 2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING**
- 3. READING OF RIGHTS**

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

- **PRELIMINARY CONSIDERATIONS – DUE PROCESS:**

- *No person shall be deprived of life, liberty, or property, without due process of law.*

U.S. Const., 5th & 14th Amends.

- Constitutional privileges are ineffectual unless the person holding those privileges is adequately apprised of their rights before adverse action is taken.

See Miranda v. Arizona (1966) 384 U.S. 436

- The opportunity to be heard is the fundamental requisite of constitutional due process, this right can only be given meaning and vitality by the parallel requirement that a person be adequately informed of the imminent governmental action.

Conservatorship of Moore (1986) 185 Cal.App.3d 718



OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

PRELIMINARY CONSIDERATIONS – DUE PROCESS (cont'd):

- ❑ An elementary and fundamental requirement of due process in **any proceeding** which is to be accorded finality is **notice** reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and **afford them an opportunity to present their objections**. The notice must be of such nature as reasonable to convey the required information ... and it must afford a reasonable time for the interested party to make their appearance The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.

Mullane v. Central Hanover Bank Tr. Co. (1950) 339 U.S. 306

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

PRELIMINARY CONSIDERATIONS – DUE PROCESS (cont'd):

Holding a hearing, otherwise mandated by due process, is not necessary when the injured party **does not contest** the facts underlying the deprivatory action.

Codd v. Velger (1977) 429 U.S. 624

See *Pearson v. Dodd* (1977) 429 U.S. 396

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

1. **PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, and PETITION on the PROPOSED CONSERVATEE**
2. **PROPOSED CONSERVATEE'S APPEARANCE AT HEARING**
3. **READING OF RIGHTS**

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

STATUTORY REQUIREMENTS

- **Prob. Code § 1822**
 - Notice of time and place of the hearing on appointment of a conservator, and a copy of the petition, **shall be given** at least 15 days before the scheduled hearing date.
 - To spouse (RDP), relatives, certain governmental agencies, etc.
 - But no requirement as to the proposed conservatee himself/herself.
 - No shortening of time permitted.

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

STATUTORY REQUIREMENTS

- **Prob. Code § 1823**

- Citation setting forth time and place of the hearing **shall** be issued if the petition is filed by someone other than the proposed conservatee.
- Form recites the legal standards by which the need for a conservatorship is adjudged as well as warnings that the adjudication may affect the proposed conservatee's:
 - ...right to contract, manage/control property, give informed consent for medical treatment, fixing of residence, qualification for voting, etc...

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

STATUTORY REQUIREMENTS (cont'd)

■ Prob. Code § 1824

- “Citation and a copy of the petition **shall be served** on the proposed conservatee”
- Service shall be completed at least 15 days before the hearing.
- Service is in the manner of a summons in a civil action, such as personal delivery, acknowledgment or as the Court directs..
- If a notice is required or permitted to be served or delivered to a person who is represented by an attorney of record in the proceeding, the notice must be sent to that attorney (*Prob. Code § 1214; Cal. Rules of Ct., Rule 7.51(b); see Prob. Code § 1215 (methods of delivery)*)

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

STATUTORY REQUIREMENTS (cont'd)

- **Prob. Code § 1824 (cont'd)**
 - *Conservatorship of Wyatt* (1987) 195 Cal.App.3d 391 (petition can be served personally (CCP § 415.10), by mail with return receipt acknowledged (CCP § 415.30), or in another manner authorized by Court, here, first class mail per Local Court Rule).

Question: Can CAC accept service or sign a Notice and Acknowledgment without client consent?



1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

STATUTORY REQUIREMENTS (cont'd)

- **Code of Civil Procedure § 410.50.** Jurisdiction over party; Service of summons, and general appearance; Continuance of jurisdiction over parties and subject matter
 - (a) Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10). A general appearance by a party is equivalent to personal service of summons on such party.
 - (b) Jurisdiction of the court over the parties and the subject matter of an action **continues** throughout subsequent proceedings in the action.

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE GUIDANCE

Failure to satisfy the requirements of Prob. Code § 1200 is a **jurisdictional defect** which may be raised by collateral attack.

Guardianship of Slakmon (1978) 83 Cal.App.3d 224, citing *Estate of Poder* (1969) 274 Cal.App.2d 786; *Estate of Joslyn* (1967) 256 Cal.App.2d 671. *Cf. Estate of Ginocchio* (1974) 43 Cal.App.3d 412.

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

GUIDANCE

Failure to give notice of hearing to the proposed conservatee on an original appointment is a **jurisdictional defect**.

Grinbaum v. Superior Court (1923) 192 Cal. 528

In absence of citation, or by issuance of void citation, court **does not** acquire jurisdiction of parties or power to try issues presented by petition filed pursuant to the Probate Code.

Los Angeles First National Trust & Savings Bank v. Superior Court (1928) 94 Cal.App. 79

1. PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, AND PETITION ON THE PROPOSED CONSERVATEE

GUIDANCE

- Service of a summons **can be waived** by a general appearance in an action, either directly or indirectly through counsel.

Sanchez v. Superior Court (1988)

203 Cal.App.3d 1391

- **This rule is applicable in probate proceedings.**

Farmers & Merchants National Bank v.

Superior Court (1945) 25 Cal.2d 842



Should CAC ever be asking for the requirement to effectuate proper service to be waived?

PRO



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HOW DOES THIS COMPORT WITH DUE PROCESS?

OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

1. **PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, and PETITION on the PROPOSED CONSERVATEE**
2. **PROPOSED CONSERVATEE'S APPEARANCE AT HEARING**
3. **READING OF RIGHTS**

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

ON HEARINGS FOR THE APPOINTMENT OF A CONSERVATOR, THIS SUBJECT CONCERNS THREE (3) RELATED BUT DISTINCT ISSUES:

- A. Can the proposed conservatee be compelled to appear in the courtroom, over objection?*
- B. Can the proposed conservatee be compelled to give testimony in courtroom, on the record, over objection?*
- C. Can the attorney for the proposed conservatee waive the proposed conservatee's appearance at the hearing?*

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

BACKGROUND

- As a general rule, no person may refuse to testify as a witness in a court proceeding.

People v. Whelchel (1967) 255 Cal.App.2d 455; *Evid. Code* §911

- However, the federal Bill of Rights and the California Declaration of Rights both contain a ban on compulsory self-incrimination.

U.S. Const., 5th Amend; Cal. Const., Art. I, § 15

- The historic purpose of this privilege against being called as a witness is to assure that the criminal justice system remains accusatorial, not inquisitorial.

Malloy v. Hogan (1964) 378 U.S. 1; *Cramer v. Tyars* (1979) 23 Cal.3d 131

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

BACKGROUND (cont'd)

- In California trial court proceedings, this ban is effectuated through two separate and distinct testimonial privileges:
 - First, a criminal defendant in a criminal case has an absolute right not to be called as a witness and not to testify.
See Evid. Code § 930
 - Second, any witness in any proceeding has the right to refuse to answer questions which tend to subject the witness to criminal culpability.
See Evid. Code § 940

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

STATUTORY REQUIREMENTS (cont'd)

▪ California Evidence Code:

- Evid. Code § 700 – “Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter”
- Evid. Code § 701 – A person is **disqualified to be a witness if**: (1) incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) incapable of understanding the duty of a witness to tell the truth.
- Evid. Code § 702 – The testimony of a witness concerning a particular matter is inadmissible unless he has **personal knowledge** of the matter.
- Evid. Code § 710 – “Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, **except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth.**”

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

- GUIDANCE (cont'd)
 - However, because a proposed conservatee is not a criminal defendant, but rather a person whose need for the state's assistance may be great, **a proposed conservatee cannot refuse to testify at his own conservatorship trial.**
 - *Conservatorship of Baber* (1984) 153 Cal.App.3d 542
 - *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190 (citing *Conservatorship of Baber*) - LPS conservatee does not have equal protection right of other violent criminal defendants to refuse to testify; **criminal defendants and LPS conservatees are not similarly situated**; does not intimate that proposed conservatee will be compelled to testify in a criminal matter)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- While a person cannot be questioned over objection about matters that would tend to incriminate him or her, a person may be called as a witness and may be required to respond to non-incriminatory questioning which may tend to reveal his or her mental condition.

Cramer v. Tyars (1979) 23 Cal.3d 131 (commitment proceeding)

- The privilege not to disclose any incriminating matter may be asserted by a witness in a civil or criminal proceeding.

In re Gault (1966) 387 U.S. 1

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

The privilege against self-incrimination applies to evidence of 'communications or testimony' of the [individual], **but not to** 'real or physical' evidence derived from him. Reason and common sense suggest that it is appropriate that a fact finder be permitted fully to observe a proposed conservatee, hear him or her speak and respond, so that it may make an informed judgment as to the level of mental and intellectual functioning.

The receipt of such evidence may be analogized to the disclosure of physical as opposed to testimonial evidence and may in fact be the most reliable proof and probative indicator of the person's present mental condition.

People v. Ellis (1966) 65 Cal.2d 529 (requiring defendant to speak for purposes of a voice identification test did not violate his privilege against self-incrimination)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- Caution re Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code §§ 5000-5550) proceedings:
 - **Commitment proceedings** under the LPS Act involve a multi-staged procedure for the involuntary treatment of a person who, by reason of a mental disorder, is dangerous to others, dangerous to himself, or “gravely disabled.” LPS commitment orders involves a loss of liberty by the conservatee and , by its very nature, implicates the same concerns are raised for criminal proceedings that may involve the punishment of incarceration.
 - It is true that the state and federal Constitutions **do not**, of their own force, grant a proposed conservatee a right not to testify under Evid. Code § 930. **But** other safeguards apply, such as the right to a jury trial, requiring proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.
 - Most importantly, a proposed conservatee in an LPS Act proceeding **does** retain the right to refuse to answer questions which tend to subject him or her to criminal culpability pursuant to Evid. Code § 940.

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- **What about proposed conservatees who might be cognitively impaired and/or mentally incapacitated? Should they be permitted to testify in court?**
- Every person is qualified to testify except as provided by statute. A person is disqualified as a witness **only** if he or she is incapable of expressing himself or herself understandably concerning the testimonial matter or is incapable of understanding the duty to tell the truth.
Evid. Code §§ 700-701
- The party **challenging** the witness's competency has the burden of proving the witness's incompetency to testify.

People v. Augustin (2003) 112 Cal. App. 4th 444



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony **do not** disqualify a witness, but merely present questions of credibility for resolution by the fact finder.

People v. Mincey (1992) 2 Cal.4th 408

Adamson v. Department of Social Services (1988) 207 Cal.App.3d 14

- Even persons diagnosed with **dementia** may still be found competent to testify in court under Evid. Code §§700-701.

Marriage of Greenway (2013) 217 Cal.App.4th 628 (divorce proceeding)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- **Regardless, the same rules also apply as for any other witness:**
 - Even if a witness is not entirely disqualified, **a witness may be incompetent to give testimony on a particular matter** if the witness lacks personal knowledge of the subject matter.

Evid. Code § 702(a); Cal. Law Revision Com. com. (1965) (the witness must have a “present recollection of an impression derived from the exercise of the witness' own senses.”)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- **Regardless, the same rules also apply as for any other witness:**

- This implicates the ability of a witness to perceive and recollect facts; the capacity to perceive and recollect is a preliminary legal determination for the judge; whether the witness did perceive and did recollect is for the fact finder to determine.

People v. Dennis (1998) 17 Cal.4th 468 (capacity to perceive and recollect is required)

- Upon a party's objection, a witness's personal knowledge must be shown before the witness may testify regarding the matter.

Evid. Code § 702 (a); see also *Evid. Code* § 403(b).

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

GUIDANCE (cont'd)

- Nevertheless, truly incompetent persons, such as those who are delusional and unable to differentiate between truth and lies, **are not** permitted to testify and rulings based thereon should be set aside on appeal as manifestly unfair.

People v. Lyons (1992) 10 Cal.App.4th 837

- But statements of a witness who is **deemed incompetent** to testify under Evid. Code §§ 700-701 **may** be admissible if otherwise reliable and offered pursuant to an exception to the hearsay rules.

In re Emilye A. (1992) 9 Cal.App.4th 1695

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

WAIVER - STATUTORY REQUIREMENTS

- **Prob. Code § 1825**
 - (a) “The proposed conservatee **shall be produced** at the hearing” except when:
 - (1) *Out of state* when served and is *not* the petitioner;
 - (2) *Unable to attend* the hearing by reason of medical inability, as established by the affidavit of a licensed medical practitioner;OR
 - (3) Where *the court investigator has reported* to the court that **the proposed conservatee has expressly communicated** that the proposed conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the establishment of the conservatorship, and (iii) does not object to the proposed conservator or prefer that another person act as conservator, and the court makes an order that the proposed conservatee need not attend the hearing.



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

WAIVER - STATUTORY REQUIREMENTS



- **Prob. Code § 1825 (cont'd):**
 - (b) If the proposed conservatee is *unable to attend* the hearing because of **medical inability**, such inability shall be established by the **affidavit or certificate of a licensed medical practitioner.**
 - (c) Emotional or psychological instability is not good cause to excuse attendance **unless** attendance is likely to cause serious and immediate physiological damage.

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

Conservatorship of John L. (2010) 48 Cal.4th 131

- LPS case that reviewed important distinctions between LPS and probate conservatorships.

“The Probate Code's mechanism for excusing a proposed conservatee's production and attendance through a court investigator promotes the **dual legislative goals** of minimizing the individual's unwanted court appearances, while guarding against abuse of the conservatorship process by ensuring the individual actually wants to forego attendance and opposition to the proposed conservatorship.” (p. 146)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

Conservatorship of John L. (2010) 48 Cal.4th 131

- Refers to waiver of a right to presence, and in that case, the appointed attorney waived proposed conservatee's (PC's) appearance by making binding representations in court on behalf of her client. **There was no reference to the court waiving the right** (e.g., "conservatee waived his rights to presence," "the court excused John's presence," "right to appear at the hearing," "waiver of the right to attend a hearing to establish an LPS conservatorship," PC "waived his presence and trial rights," "his right to waive presence and a trial," etc.).
- The court noted that Prob. Code § 1825 frames it as a requirement that the PC "be produced," and noted the PC argued that it is a "right" to attend. **The court did not determine which is the case, finding instead that either interpretation made no difference in the outcome.** Court allowed appointed counsel to communicate to court the PC's unwillingness to appear and that he did not wish to contest the conservatorship, relying on CCP § 283(1) "which permits an attorney to make binding representations in court on behalf of her client." (p. 146-147).

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

Conservatorship of John L. (2010) 48 Cal.4th 131

“In view of Welfare and Institutions Code section 5350, Probate Code section 1827, and Code of Civil Procedure section 283, subdivision 1, we hold that a client who **tells** his appointed attorney he is unwilling to attend the hearing and does not wish to contest a proposed LPS conservatorship may reasonably expect his attorney to report such information to the court, with binding effect.” (p. 147.)

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

Conservatorship of Deidre B. (2010) 180 Cal.App.4th 1306

The Court accepted a stipulation by appointed counsel that PC did not wish to attend, etc., in finding that PC's appearance had been waived by counsel. However, there was also a local rule in the case which allowed the court discretion to proceed in the PC's absence if counsel for the PC requests waiver of PC's presence, etc. San Diego Local Rule: 8.2.13: “the court, ‘in its discretion, [may] proceed in the absence of the conservatee **if counsel for the conservatee:**

- (1) requests the court to waive the conservatee's presence,
- (2) represents to the court that there has been contact with the conservatee,

AND

- (1) states that, in the attorney's opinion, it is not in the best interests of the conservatee-client to be present in court or for the court to convene where the conservatee is then housed.’ (Rule 8.2.13.)” (p. 1313).

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

WAIVER - STATUTORY REQUIREMENTS (cont'd)



- **Prob. Code § 1827**
 - “The court shall hear and determine the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the proposed conservatee.”
- **Prob. Code § 1829**
 - Any interested person may appear at the hearing to support or oppose the petition.
- **Code of Civ. Proc. § 283(1)**
 - Counsel in civil proceedings are permitted to make binding representations on behalf of client in the ordinary course of the proceeding.



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

*A. The proposed conservatee **may** be compelled to appear in the courtroom, over objection.*

- A proposed conservatee not otherwise disqualified as a witness may be compelled to appear in court, over objection, because there is no applicable privilege (other than substantiated medical incapacity) to excuse compliance with a properly served Citation in connection with appointment proceedings in a conservatorship case.
- **Assumptions:** (1) *Citation issued, and timely and properly served in the manner of a summons;* (2) *No medical incapacity;* and (3) *No realistic possibility of criminal prosecution for testimony.*



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

*B. The proposed conservatee **may** be compelled to give testimony in court, on the record, over objection.*

- While a proposed conservatee cannot be questioned over objection about matters that would tend to incriminate him or her, a proposed conservatee may be called as a witness and may be required to respond to non-incriminatory questioning which may tend to reveal his or her mental condition. So long as the proposed conservatee has personal knowledge and is not disqualified for being incapable of expressing himself or herself understandably concerning the testimonial matter or incapable of understanding the duty to tell the truth, then the proposed conservatee may be compelled to give testimony in court, on the record, in the conservatorship case.

2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

C. Can the CAC waive the proposed conservatee's right to appear?

- **Probate Code section 1825**
- **Client's decision?**
- **Is the Client capable of instructing and directing attorney?**



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

“Probate Code section 1825(a)(3)’s procedure pertaining to a proposed conservatee’s production and attendance at the hearing must be followed....’ [citing Conservatorship of John L.] Section 1825 is like the light switch to the courtroom and until it is turned on (i.e., satisfied), the trial court cannot truly see the big picture. It is precluded from ruling on the merits of a petition to appoint a conservator until it complies with section 1825.”

Conservatorship of the Person of A.E. (2020) 45

Cal.App.5th 277 (LPS case, grant of petition reversed; proposed conservatee did not appear at the hearing or tell anyone she was waiving her right to be present)



2. PROPOSED CONSERVATEE'S APPEARANCE AT HEARING

*But **should** appearance be waived?*

No guidance in the California Probate Code

No guidance in the California Constitution

No guidance in the Local Rules (Los Angeles County Superior Court)

No guidance in "CALIFORNIA CONSERVATORSHIP DEFENSE; A GUIDE FOR ADVOCATES" by California Advocates For Nursing Home Reform (CANHR)

http://www.canhr.org/publications/PDFs/conservatorship_defense_guide.pdf

*But **should** CAC ask for a client's appearance
to be waived?*

PRO



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OVERVIEW – WHY ARE WE TALKING ABOUT THESE MATTERS?

1. **PERSONAL SERVICE OF CITATION, NOTICE OF HEARING, and PETITION on the PROPOSED CONSERVATEE**
2. **PROPOSED CONSERVATEE'S APPEARANCE AT HEARING**
3. **READING OF RIGHTS**

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- Prob. Code § 1828 provides for two distinct requirements:
 - Certain advisements required **BEFORE** the establishment of a conservatorship of the person or estate, or both (§1828(a));
 - Consultation with proposed required by the Court **AFTER** the giving of the above warnings (§1828(b));
- But compliance with the entire statute is **EXCUSED** when the proposed conservatee is absent from the hearing and excused under §1825 from attendance at the hearing (§1828(c)).

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(a) advisements required **BEFORE** the establishment of a conservatorship of the person and/or estate:**
- **The “court shall inform the proposed conservatee of all of the following...”**
 - ...the case concerns an adjudication of the proposed conservatee’s inability to provide for personal needs, manage financial recourses, or both...
 - ...the proposed conservatee might be disqualified from voting...
 - ...the identity of the proposed conservator...
 - ...the nature and effect on the proposed conservatee’s basic rights...
 - ...the proposed conservatee has the right to oppose the matter...
 - ...the proposed conservatee has the right to a jury trial...
 - ...the proposed conservatee has the right to counsel....

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

Prob. Code § 1828(a) - How advisements are to be given:



- "The court is also **required** to conduct an on-the-record voir dire of the proposed conservatee regarding the nature of the proceeding and the effect of the proceeding on his or her basic rights. "

Conservatorship of Christopher A. (2006) 139 Cal.App.4th 604 (LPS conservatorship, citing Probate Code § 1828 and pre-enactment of section 1828 case *Conservatorship of Chambers*).

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(a)** - How advisements are to be given:

Conservatorship of Christopher A. (2006) 139 Cal.App.4th 604, 613:

“[T]he attorney **may not, without the consent of his or her client**, enter into an agreement that “impair[s] the client's substantial rights or the cause of action itself.”

“[W]e conclude that **before** accepting a stipulated judgment on placement, disabilities, and conservator powers, the court on the record must consult with the conservatee to instruct him or her on the consequences of the stipulation and obtain the conservatee's express consent to the stipulation on those issues.”

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(a)** - How advisements are to be given:

In *Conservatorship of Mary K* (1991) 234 Cal.App.3d 265.

“[T]he advisements required under Probate Code section 1828 were created by the Legislature and, consequently, **are not constitutionally required**,” citing *Conservatorship of Moore*. “Thus, the right to these advisements can also be **validly waived** by the proposed conservatee's counsel.” (p. 272)

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(b) consultation with proposed conservatee required by the Court **AFTER** giving the pre-establishment warnings:**

The “court shall consult the proposed conservatee to determine the proposed conservatee’s opinion concerning all of the following...”

- ...the establishment of the conservatorship...
- ...the appointment of the conservator...

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(b) consultation (cont'd)**
 - i. *Conservatorship of B.C.* (2016) 6 Cal.App.5th 1028. Proposed conservatee was "consulted" where she was fully involved in each step of the proceeding (*i.e.*, she hired counsel to oppose the conservatorship, the court appointed counsel for her, she participated in hearings, the matter was vigorously contested, etc.)

“B.C.’s sentiments were fully represented to the court by her attorney.”

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code § 1828(b) consultation (cont'd)**

ii. Conservatorship of Forsythe (1987) 192 Cal.App.3d 1406 (LPS conservatorship).

- Conservatee was properly consulted and advised under section 1828 where petition identified proposed conservator, and the trial judge “detailedly explained the nature of a conservatorship and the rights and disabilities attending its imposition.”



3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- **Prob. Code 1828(b) consultation (cont'd)**

iii. Conservatorship of Ivey (1986) 186 Cal.App.3d 1559 (LPS conservatorship). Substantial compliance with Probate Code § 1828(a):

“[T]he court advised him, along with several other proposed conservatees, he had the right to be represented by legal counsel both at the hearing and any subsequent proceeding under the LPS Act; the right to object to the appointment of a conservator, to object to any of the disabilities, to object to the placement; and the right to a jury trial with a unanimous verdict and the burden on San Diego County to prove beyond a reasonable doubt that the conservatee is gravely disabled.... The court concluded with the inquiry, ‘If you have any questions, I’ll be happy to try and answer them.’”

3. READING OF RIGHTS

STATUTORY REQUIREMENTS

- Prob. Code 1828(b) **consultation** (cont'd)

iii. Conservatorship of Ivey (cont.):

“Moreover, the statute requires consultation merely to determine the proposed conservatee's opinions. This form of consultation does not rise to the level of a proceeding involving the waiver of constitutional rights....”

“We decline to interpret the statute as requiring an on-the-record express consultation individually with the conservatee regarding his opinion of the conservatorship and conservator.”

3. READING OF RIGHTS

GUIDANCE

- Prob. Code § 1828 requires that after the court advises the proposed conservatee of his or her enumerated rights and prior to the establishment of the conservatorship, the court must consult the proposed conservatee to determine his or her opinion concerning certain pertinent matters.

Conservatorship of Mary K. (1991) 234 Cal.App.3d 265

- The voir dire of proposed conservatees as set forth in Prob. Code § 1828 is not necessary before any conservatorship can be established. It is a legislative rather than constitutional requirement for which compliance can be waived or excused.

Conservatorship of Moore (1986) 185 Cal.App.3d 718

But **should** CAC ever waive the ‘reading of rights’?

PRO



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TO WAIVE OR NOT TO WAIVE, THAT IS THE QUESTION

ADAM L. STRELTZER, Attorney at Law

1801 Century Park East, Suite 2400, Los Angeles, California 90067

adam@streltzer.com

www.streltzer.com

Law Office of Lawrence M. Lebowsky

11150 W. Olympic Blvd., Suite 1120, Los Angeles, California 90064

lebowsky@lebowsky.net