



Evolving Dynamics in California Conservatorships; Use and Abuse of the Preferred Nominee Status Pursuant to *Conservatorship of Ramirez (2001)*

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What's This All About?

- Why should estate planning professionals be concerned about conservatorships?**

Planning for incapacity and its consequences...

- Why are we talking about a 2001 case ruling?**

Conservatorship of Ramirez (2001) 90 Cal.App.4th 390

Conservatorship of Ramirez (2001)

- Recent changes to the Probate Code have encouraged the trial courts to give more weight to the **preferences** of proposed conservatees and their counsel, and, at the same time, **placed heightened scrutiny** over the conduct of independent, professional conservators and the reasons for their appointment.
 - Interested persons are more likely to appear in conservatorship proceedings to challenge the appointment of neutral, independent professionals.
 - The case opinion in Conservatorship of Ramirez (2001) 90 Cal.App.4th 390 is critical.
- **Those who plan and/or administer estates should be aware of, and accommodate in their practice, the increased importance of written nominations and other expressions of preference by their clients, as well as the circumstances when that preference may or may not be effectuated in conservatorship proceedings.**

Conservatorship of Ramirez (2001)

➤ *Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390

- Typical family situation involving an elderly (82 yrs old) woman (Mom) alleged to lack capacity (including memory loss) and for whom a contested petition was brought seeking the appointment of conservator(s) of her person and estate. Independent professionals were appointed as temporary conservators, **then the issue at trial was whether they should be appointed as permanent conservators.**
- The interested persons were Son and Daughter - who **disagreed** on almost everything.
- Mom **expressed** in various ways the desire that the Son, who had been caring for her a long time, be appointed; the Daughter **opposed** the appointment of the son and urged for the appointment of the independent professionals as the permanent conservators. The trial court entered an order appointing **independent professionals** as permanent conservators.
- The Court of Appeal **reversed**, with directions to the trial court to appoint the Son as conservator of Mom's person and estate.

Appointment of a [Probate] Conservator

- **Probate Code §1801(a)** provides, in relevant part, that a “conservator of the **person** may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.”
- **Probate Code §1801(b)** provides, in relevant part, that a “conservator of the **estate** may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence” and that the required substantial inability “may not be proved solely by isolated incidents of negligence or improvidence.”
- **Probate Code §1801(e)** provides that the **standard of proof** for the appointment of a conservator under this section is "clear and convincing evidence."

Nominating a Proposed Conservator

➤ Probate Code § 1810

If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the proposed conservatee may nominate a conservator in the petition or in a writing signed either before or after the petition is filed. The court shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.

(Enacted 1990)

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- Probate Code §1810 teaches the Court to respect the proposed conservatee's written nomination of a conservator, except when doing so is not in the best interests of the proposed conservatee.

Nominating a Proposed Conservator

➤ **Probate Code § 4126(a):**

(Effective January 1, 1995)

- (a) A principal may **nominate**, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced.*
- (b) If the protective proceedings are conservatorship proceedings in this state, the nomination has the effect provided in Section 1810 and **the court shall give effect to the most recent writing** executed in accordance with Section 1810, whether or not the writing is a durable power of attorney.*

➤ **Probate Code §§ 4124-4125:** Authorizing powers of attorney that are not affected by subsequent incapacity of the principal, i.e., “durable.”

➤ **So...California permits a proposed conservatee to nominate a conservator, in writing, including via durable power of attorney. That written nomination has the effect provided in Probate Code §1810.**

Nominating a Proposed Conservator

- What about for historical writings/nominations signed before 1981?
- **Probate Code § 1488**

If before January 1, 1981, an adult has in a signed writing nominated a person to serve as guardian if a guardian is in the future appointed for such adult, such nomination shall be deemed to be a nomination of a conservator. This section applies whether or not the signed writing was executed in the same manner as a witnessed will so long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference.

This statute seeks to ensure that proposed conservatee nominations made under prior versions of the Probate Code remain effective, and that nominations that might have been ineffective and/or noncompliant under prior statutes will be effective now if they comply with Probate Code §1810.

Who Else Can Nominate?

➤ Probate Code § 1811

- (a) *Subject to Sections 1813 and 1813.1, the spouse, domestic partner, or an adult child, parent, brother, or sister of the proposed conservatee may **nominate** a conservator in the petition or at the hearing on the petition.*
- (b) *Subject to Sections 1813 and 1813.1, the spouse, domestic partner, or a parent of the proposed conservatee may **nominate a conservator in a writing signed either before or after** the petition is filed and that nomination remains effective notwithstanding the subsequent legal incapacity or death of the spouse, domestic partner, or parent.*

(Amended 2015)

Discretion to Appoint; Best Interests

➤ Probate Code §1812 (revised 2015)

(a) Subject to §§ 1810, 1813, and 1813.1, **the selection of a conservator of the person or estate, or both, 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.**

(b) Subject to §§ 1810, 1813, and 1813.1, of persons equally qualified in the opinion of the court to appointment as conservator of the person or estate or both, preference is to be given in the following order:

(1) The **spouse or domestic partner** of the proposed conservatee [or their nominee pursuant to §1811].

(2) An **adult child** of the proposed conservatee [or their nominee pursuant to §1811].

(3) A **parent** of the proposed conservatee [or their nominee pursuant to §1811].

(4) A **brother or sister** of the proposed conservatee [or their nominee pursuant to §1811].

(5) Any other person or entity eligible for appointment as a conservator under this code or, if there is no person or entity willing to act as a conservator, under the Welfare and Institutions Code.

(c) The preference for any nominee for appointment under paragraphs (2), (3), and (4) of subdivision (b) is subordinate to the preference for any other parent, child, brother, or sister in that class.

➤ Probate Code §1812 teaches that, although it has discretion, and there is a statutory hierarchy, the trial court must always act in the proposed conservatee's best interests when selecting a conservator.

Summary So Far...



- The court must appoint the nominee of the proposed conservatee as conservator - unless the court finds that such an appointment is not in the best interests of the proposed conservatee.
- This preference is to be given to the most-recent written nomination executed in accordance with Probate Code §1810, whether or not the writing is a durable power of attorney.

Reminders re Standard of Review (Appeal)

- Review of a trial court decision to appoint a conservator for **abuse of discretion**, and review of an underlying factual findings for substantial evidence.
- **So, a trial court's decision to appoint a conservator is reviewed by the Court of Appeal to determine if there is substantial evidence in support of its findings; if not, then it was an abuse of discretion to appoint the conservator(s).**
- *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1011-1012:

When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

Back to Conservatorship of Ramirez

- ✓ Proposed conservatee Ms. Ramirez (Mom) is single (no spouse) and elderly.
- ✓ Contesting persons were Son and Daughter, who did not get along.
- ✓ The neutral, independent professionals were already serving successfully as temporary conservators.
- ✓ Nomination made in written, signed Durable Powers of Attorney (multiple).
 - BUT these were presumed valid since not a contested issue in trial court.
- ✓ Multiple expressions of preference by Mom for Son's appointment:
 - No demonstration that Son had pressured Mom to express preference for his appointment as her conservator.
 - Expressed her preference to the Probate Investigator, multiple expert witnesses, and to the trial court.

Back to Conservatorship of Ramirez

- **Why was Daughter opposed to Son's appointment?**
 - Son and Daughter had long (20+ years) history of conflict, with substantial “difficulty in retaining caregivers due to the tension in the family.”
 - *Is this typical family discord???*
 - Daughter testified that limiting visitation by family members and not permitting family members to provide care while caregivers were engaged had not been effective in removing the tension from Ramirez's home or in ameliorating the conflict between the children. She argued that it would be doubtful that making such rules part of a court order would make them more effective, given the distrust that Son and Daughter have for each other.
 - Daughter asserted that neutral professionals were the only viable solution.

Back to Conservatorship of Ramirez

➤ **Son's Involvement:**

- Son acknowledged the family discord.
- Son acknowledged that, in the past, he had shown poor judgment.
- Son had been long-term manager of her assets and was familiar with her financial affairs and assets.
- Son had been caring for Mom personally for a long period of time before appointment of independent professionals as temporary conservators.
- Son was nominated by Mom in multiple Durable Powers of Attorney.
- Mom had repeatedly expressed preference for Son in connection with the conservatorship proceedings.

Back to Conservatorship of Ramirez

➤ Court of Appeal's Decision to Reverse the Trial Court:

- *Interesting Hyper-Technical Aspect* - The Court of Appeal stated that the trial court's determination that a particular individual should be appointed as conservator **necessarily includes a finding that the appointment is in the conservatee's best interests** (as per Probate Code §1812); no separate finding is required.
- The trial court's decision to appoint the neutral, independent professionals as permanent conservators is **REVERSED** with directions to the trial court to appoint Mom's nominee, the Son, instead.

The Holding of Conservatorship of Ramirez

- **Critical Aspects of the Court of Appeal's Decision to Reverse the Trial Court:**
 - Durable powers of attorney (and a trust) were PRESUMED valid in these proceedings since it was not a contested issue in the trial court.
 - *But there was no reason to suspect otherwise* - expert opinion evidence received that Mom knew what she was doing when she named Son as her agent and nominated him as her conservator in her durable POA's.
 - Some opinion evidence received that Daughter's motives were suspect.
 - *In comparison*, expert opinion evidence received & inferences drawn that the Son was sincerely motivated to serve his Mom's best interests.
 - No demonstration that Son was previously a bad actor or that he had ever mistreated Mom either physically or financially.

The Holding of Conservatorship of Ramirez

Conservatorship of Ramirez at p. 403:

“...it is difficult to understand why the court did not appoint [Son as his Mom’s] conservator. Notwithstanding the conflict between [*Son*] and [*Daughter*], it clearly was in [Mom’s] best emotional and financial interests that the court do so. Through the orders it can fashion and enforce, it is more readily within the court's power to reduce that conflict to manageable proportions than it would be within the power of the [independent professionals]. Not only are the court's findings not supported by substantial evidence, but this case exemplifies the wisdom underlying Probate Code section 1810. **Here a competent, caring family member willing to serve was nominated, and yet the court appointed a professional conservator. This was a clear abuse of discretion.**”

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The Holding of Conservatorship of Ramirez

Conservatorship of Ramirez at p. 403:

“The order is **reversed**. The superior court is **directed** to enter a new and different order appointing appellant conservator of [*Mom's*] person and estate. In conjunction therewith, the court is directed to enter orders **setting a visitation schedule** that allows each child visitation free from the other child's interference, prohibiting [*Daughter*] from harassing [*Son*] by repeatedly calling in various agencies, and any other orders the court deems appropriate for case management.”

The Holding of Conservatorship of Ramirez

- WHAT DID WE LEARN FROM CONSERVATORSHIP OF RAMIREZ:
 - The appellate court held that there was no substantial evidence to support the trial court's finding that it was in Mom's best interest for the appointment of independent professionals for Mom, instead of her nominee, the Son.
 - Notwithstanding the family discord, it was clear to the appellate court that it was in Mom's best emotional and financial interests that the trial court appoint the Son, her nominee.
 - The appellate court believed that the effects of family discord should be handled through trial court visitation and similar orders, which does not necessitate the appointment of independent professionals.

So...What's This All About?

- ❑ Parties to contested conservatorship proceedings are asserting (based on the authority of Conservatorship of Ramirez) that the Probate Court commits an abuse of discretion if it appoints a neutral professional instead of a loving, willing, and qualified family member nominated by the proposed conservatee with sufficient capacity to form an intelligent preference.
- ❑ *So...the question becomes whether this a proper use, or an abuse, of the Conservatorship of Ramirez case holding?*

Proper Use of the Conservatorship of Ramirez Holding

- Existing, valid nomination by a proposed conservatee (or by any other permitted person).
 - In *Conservatorship of Ramirez*, the proposed conservatee was presently able to express a preference to the trial court, the investigator, and to multiple experts who were engaged to determine capacity that her Son should be appointed conservator; AND the evidence was received by the trial court that the proposed conservatee knew what she was doing when she made the same nomination of her Son as conservator in her multiple durable powers of attorney.
- Regarding family discord:
 - When family discord is the ONLY reason for seeking the appointment of an independent professional rather than a nominee, AND that family discord *can* be constrained with appropriate visitation orders.
- When the nominee undisputedly has been AND will be a good fiduciary.
- There is no existing spouse/domestic partner who retains capacity and could nominate.

Abuse of the Conservatorship of Ramirez Holding

- The **proposed conservatee** is distinguishable from Mom:
 - When a proposed conservatee does NOT have sufficient capacity to form an intelligent preference at the critical date of the nomination or expression of preference. *[POSSIBLE CRITICAL ISSUE RE ESTATE PLANNING]*
 - When a proposed conservatee has NOT expressed a preference for the appointment of a conservator.
 - When a proposed conservator has NOT nominated a proposed conservator.
 - When a proposed conservatee has a SPOUSE (or domestic partner) who presently has capacity and can nominate.

Abuse of the Conservatorship of Ramirez Holding

- The **nominee** to be conservator is distinguishable from Son:
 - When there is evidence that the nominee is an **abuser (physical or financial), undue influencer, or other type of bad actor.**
 - Where the circumstances make the motivations of the nominee **suspect.**
 - Where a nominee's "poor judgment" **cannot** be obviated by court orders.

Abuse of the Conservatorship of Ramirez Holding

➤ The circumstances surrounding the proposed conservator's **nomination** is different from the situation described in the Conservatorship of Ramirez case:

- Where the proposed conservatee did NOT have **sufficient capacity** on the relevant date to form an intelligent preference.

[POSSIBLE CRITICAL ISSUE RE ESTATE PLANNING]

- Where reasons EXIST to dispute or contest the **existence or validity** of the nomination made by the proposed conservatee or other permitted person.

[FOR EXAMPLE: *undue influence, mistake, confusion, fraud, forgery...*]

Abuse of the Conservatorship of Ramirez Holding

- The nature of the purported **family discord** is different from the situation described in the *Conservatorship of Ramirez* case:
 - When family discord is **NOT the ONLY** reason for seeking the appointment of an independent professional rather than a nominee, **AND** the discord can be constrained with appropriate visitation orders.
 - When family discord may be the **PRIMARY** or **ONLY** reason for seeking the appointment of an independent professional rather than a nominee, **BUT** the discord **CANNOT be constrained** with judicially-enforceable orders.
 - Where the family discord is accompanied by violence, fraud, or similar actions or omissions of a serious nature.

What's It All Mean?



Recent changes to the Probate Code have encouraged the trial courts to give more weight to the preferences of proposed conservatees and their counsel, and, at the same time, placed heightened scrutiny over the conduct of independent, professional conservators and the reasons for their appointment.

Those who plan and/or administer estates should be aware of, and accommodate in their practice, the increased importance of written nominations and other expressions of preference by their clients, as well as the circumstances when that preference may or may not be effectuated in connection with conservatorship proceedings.

Thank you!



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