

Legislation by Anecdote—AB 1194

□ As a well-known figure in the entertainment industry put it, for the Legislature it's

■ “Oops, I did it again.”

AB 1194-signed by the Governor, 9/30/2021,
Chapter 417-enhances protections for
conservatees—but was it really necessary?

Legislation by Anecdote

- What triggered this legislation?
 - Britney Spears
 - “I Care a Lot” (If you haven’t seen this yet put it on your to do list.)
 - A rehash of the LA Times articles from 2005 of the failings in the conservatorship system; and reference to the 2012 Santa Clara County matter that led to county reform of fees for professional fiduciaries.

The 2006 Reforms

□ A Package of Bills:

- Creation of the Professional Fiduciary Bureau and regulation of professionals
- Overhaul of Temporary Conservatorships
- Enhancement of Court Investigator Roles
- Scrutiny of Moving Conservatees from their residences
- Ex parte communications to permit complaints to the court

The 2006 Reforms

In response: Courts beefed up investigation offices, more examiners hired, original funding package of over \$17 million was budgeted

--But funding dried up very soon; and in 2011, after the Great Recession, SB 78 effectively cut the legs out from under by stating that enforcement of the reforms would be stayed pending funding

The Premise of AB 1194

- So the starting point of this legislation:
 - Whatever we have isn't working;
 - It's not working largely because it is not funded;
 - There are lots of horror stories going around;
 - And so rather than simply fund it, or do the studies about incidence of conservatorship abuse or numbers of cases reported by the Professional Fiduciaries Bureau, let's revamp the whole thing
- [There are NO reports in any of the eleven legislative analyses performed during the workout of this bill on acts of abuse reported to the Professional Fiduciaries Bureau, enforcement actions taken by the Bureau, or numbers of fiduciaries who have been disciplined]

Summary of the Bill

- ❑ The bill has 26 sections and has to be read in conjunction with the Welfare & Ins Code Sections 15610-15610.70 and the Elder Abuse and Dependent Adult Civil Protection Act [EADACPA]
- ❑ Sections 1 and 2: Amend the Bus & Prof Code re the Professional Fiduciaries Bureau
- ❑ Section 3: Amends the ex parte statute (Prob C. Sec 1051) to mandate reporting to the Professional Fiduciaries Bureau by the Court of certain actions taken by the Court
- ❑ Section 4: Adds Prob C Section 1458 mandating a study by the Judicial Council of the conservatorship process
- ❑ Section 5: Amends the Notice Provisions of Sec. 1460
- ❑ Section 6: Amends Prob C Section 1471 making major changes in representation of conservatees

Summary of the Bill

- Sections 7-11: Amends the Court Investigation provisions of the Code (Section 1826—Initial investigation; 1850-Review; 1850.5-Limited Conservatorships; 1851-Duties at time of Review; 1851.1—Review for transfer cases; See also Sections 19 and 20 regarding CI duties in temporary conservatorships)
- Section 12: WHISTLEBLOWER SECTION ADDED: New 1851.6 permitting any interested person or person entitled to notice who has personal knowledge of a conservatee to petition the court to investigate abuse
- Sections 13-16: Amends provisions relating to termination of a conservatorship, including a limited conservatorship (Section 1860 on termination; 1860.5 on termination of limited conservatorships; 1862 on notice of a hearing on termination; 1863 on trial regarding termination)

Summary of the Bill

- ❑ Section 17: SANCTIONS PROVISION: Adds Prob C Section 2112 to impose financial sanctions for abuse as defined in W&I C 15610.07 by both professional and lay conservators
- ❑ Sections 18-20: Amends temporary conservatorship/guardianship sections (2250-technical nonsubstantive modifications only; 2250.6—duties of court investigators; 2253—change of residence provisions)
- ❑ Section 21: Amends section 2401: Prohibits a fiduciary from referring business to an entity in which fiduciary has a financial interest
- ❑ Section 22: Amends the accounting statute, Section 2620, by relieving professionals from filing all original statements for entire period of accounting

Summary of the Bill

- Sections 23-25: Amend fee provisions: Sec. 2623—standard of “just and reasonable” modified to include “in best interests” of ward/conservatee; modifies ability of fiduciary to get fees in defense of their fees; Sec. 2640—adds “in best interest” language; restricts compensation for defense of fees; Sec. 2641—same provisions for compensation for person only
- Section 26: Amends Sec. 2653 regarding removal of fiduciary; if fiduciary removed for cause, costs awarded to petitioner notwithstanding good faith of fiduciary; and fiduciary liable for own costs of litigation
- AB 1194, in the version showing amendments and additions to existing legislation, and Welfare & Inst Code Sections 15610-15610.70 (Elder Abuse and Dependent Adult Civil Protections Act) are attached as materials for this Webinar)

Changes to Professional Fiduciaries Statutes

- Bus and Prof Code: New section 6563 mandates that licensees list on their websites a fee schedule; and if no website, provide to a prospective client a fee schedule; and that they provide to all persons within the second degree a fee schedule in all conservatorships
- Bus and Prof Code: Sec. 6580 amended; Note that existing statute allows complaints from anyone to be investigated by the Bureau; amendments add:
 - Investigation of abuse allegations
 - Investigation of referrals from court on bad acts of a fiduciary
 - Mandatory revocation of license where professional “knowingly, intentionally, or willfully breached a legal or fiduciary duty ... that constitutes [15610.07] abuse...”
 - Or “Caused serious physical or financial harm or mental suffering to a client through gross negligence or gross neglect.”
 - Detailed procedures for communications between the court and the Bureau
- Prob C 1051 is amended to make mandatory a report by the court to the Bureau when court imposes penalties on professional fiduciaries

Changes to Provisions for Counsel for Conservatees

- Prob C Sec. 1471 undergoes major changes:
 - (a)(5)(B): Mandatory appointment of counsel for ALL conservatees not otherwise represented
 - (d) Conservatee or proposed conservatee gets to choose the attorney so long as the chosen attorney can provide zealous advocacy for the individual
 - (e) “The role of [counsel] . . . is that of a zealous, independent advocate representing the wishes of their client [per B and P Code 6068]”

Increased Court Investigation Mandates

- Sec. 1826: At initiation of case
 - (11) Investigator is to gather and review relevant medical reports from the primary care physician and other relevant mental and physical health care provider
- Sec. 1850: Review
 - Six months after initiation of case [this is current law, but generally not followed]
 - One year after initiation of case, and every year thereafter—the court shall consider terminating the conservatorship at a hearing pursuant to Section 1863
- Sec. 1850.5: Review for limited conservatorships
 - Court shall consider terminating the limited conservatorship per Section 1860.5

Increased Court Investigation Mandates

- Sec. 1851: Scope of inquiry for review:
 - (a)(1)(B): Investigator to determine if conservatee wishes court to remove and replace the conservator
 - (a)(1)(C): Determine whether conservatee still meets criteria under 1801 for conservatorship and whether conservatorship is least restrictive alternative for protection of the conservatee
 - (a)(2): If the investigator determines that conservatorship criteria have been met, determine whether the order should be modified to reduce or expand the conservator's powers and duties to assure that conservatorship is the least restrictive alternative needed for protection of the conservatee

Increased Court Investigation Mandates

- ❑ New Sec. 1851.6: Any interested person or a person entitled to notice under 1822 if they have personal knowledge of a conservatee may petition court to investigate an allegation of abuse under W&I C 15610.07 by a conservator
 - The court shall investigate all such allegations that establish a prima facie case of abuse.
 - [If there has been a similar investigation in the past six months the court may order a limited or no new investigation.]
 - NEW; CROSS REF TO EXISTING 1051 WHERE ANYONE CAN GET COURT TO INVESTIGATE ACTION OF A FIDUCIARY OR SOMETHING INVOLVING CONSERVATORSHIP

Increased Court Investigation Mandates

- ❑ Changes regarding temporary conservatorships:
 - Sec 2250: Minor nonsubstantive changes only
 - Sec. 2250.6: Minor changes; no discussion of mandatory appointment of counsel for unrepresented proposed temporary conservatee
 - Sec. 2253: (Change of Residence under Tcon)
 - (b): Eliminates good cause exception for investigation
 - (b)(8): Gather and review medical reports from primary care physician and other relevant mental and physical health care providers—and use that information to determine (b)(7):
 - Whether the change of residence is required to prevent irreparable harm to conservatee and whether no less restrictive means will prevent that harm

Procedures to Terminate Conservatorships

- Sec. 1860: Amended to refer to procedures under 1863
 - Sec. 1860.5: Termination of limited conservatorship:
 - (d)(2): If the investigation per 1850.5 recommends termination and no petition has been filed, the court shall order the conservator to show cause why the conservatorship should not be terminated
 - (e): New provisions regarding appearance of the conservatee at the hearing
 - (g): Court shall order termination of the limited conservatorship unless court determines by clear and convincing evidence that the 1801 criteria still apply and that the conservatorship is still least restrictive alternative needed for protection of the conservatee

Procedures to Terminate Conservatorships

□ Sec. 1860.5 (continued)

- (h): If the Court determines by clear and convincing evidence that the 1801 criteria are met, court shall determine whether to modify the powers granted to assure that the conservatorship is the least restrictive alternative for protection of the conservatee

- Sec. 1862: If court has set a hearing per Sec. 1850(a)(2) and no petition to terminate has been filed, court shall order conservator to give notice of hearing and appear to show cause why conservatorship should not be terminated

Procedures to Terminate Conservatorships

□ Sec. 1863:

- (b): New provisions regarding appearance of conservatee at hearing
- (c): Unless the court determines by clear and convincing evidence and on the record that the 1801 criteria are still met and that a conservatorship is the least restrictive alternative needed for the conservatee's protection, the court shall terminate the conservatorship
- (d): If the court determines that the 1801 criteria are met the court shall determine whether to modify the existing powers to assure that a conservatorship is the least restrictive alternative needed for the conservatee's protection

Enhanced Sanctions

□ New Sec. 2112:

- (a)(1): If court finds that a professional conservator has abused a conservatee: \$10,000 for each separate act of abuse, payable to the estate of the conservatee
- (a)(2): If court finds that a lay conservator has abused a conservatee: \$1,000 for each separate act of abuse, payable to the estate of the conservatee
- (b): Court to report abuse findings or any other sanction levied against a professional to Professional Fiduciaries Bureau
- (c)(1): "Abused" – an act described in 15610.07 of the Welf & Inst Code

Enhanced Sanctions

❑ Some examples of abuse:

- 15610.07: physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or mental suffering; deprivation by care custodian of goods or services necessary to avoid physical harm or mental suffering
- Financial abuse, as defined in 15610.30:
 - ❑ Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult for a wrongful use, or with intent to defraud, or both---
 - ❑ --Read ALL the definitions in 15610 et seq.

Restrictions on Self Dealing

- Sec. 2401 is amended to prohibit a guardian or conservator from hiring or referring business to an entity in which the guardian or conservator has a financial interest. The amendment eliminates the permissive terms of the existing statute.

And A Surprising Break

- Sec. 2620—the accounting statute—is amended to eliminate the requirement that professional fiduciaries have to file or lodge all account statements for all periods of an accounting (Sec. 2620(c)(3)—deleted!

Tightening Standards on Fees

- All fee sections are amended to add best interest as factor:
 - Sec 2623: Standards for fees:
 - (a)(2)--Compensation as is just, reasonable *and in the best interest of the ward or conservatee*
 - (b)(1)—No compensation for unsuccessfully defending a fee petition, or opposing any initiative by ward or conservatee [does away with good faith exception]
 - (b)(2)—If court finds by clear and convincing evidence that the fiduciary's actions were made in good faith based on best interest of the ward or conservatee, court may reduce compensation rather than denying it completely....

Tightening Standards on Fees

□ Sec. 2640:

- (a)(1), (2), and (3) amended by adding “in the best interest of the ward or conservatee.”
- (d)(1) and (d)(2) modified in language matching the amendments to Sec. 2623 regarding compensation for defending a fee petition or opposing a ward’s or conservatee’s initiative

□ Sec. 2641:

- (a) and (b) modified to incorporate “best interest” standard
- (c)(1) and (2) modified in language matching the amendments to Sec. 2623 regarding compensation for defending a fee petition or opposing a ward’s or conservatee’s initiative

Tightening Standards on Fees

□ Sec. 2653: Fees on Removal Petition

- (c)(1)-If court removes guardian or conservator—Petitioner is awarded costs and other expenses and costs of litigation, including attorney’s fees; good faith exception is deleted
- (c)(2)-Guardian or conservator may not deduct from, or charge to the estate costs of opposing the petition and is personally liable for those costs and expenses
 - [These subdivisions essentially restate existing law and add the good faith deletion.]
- (c)(3)-If court removes a professional fiduciary for cause, court shall report the determination and the basis for removal to the Professional Fiduciaries Bureau

The Funding Exception

- ❑ As introduced, AB 1194 had no exception for funding. Amendments put in funding exceptions so that most sections that impose additional duties on the court, and all modifications of Court Investigation duties, are not requirements that the court must perform “until the Legislature makes an appropriation identified for this purpose.”
 - The stay does NOT impact the changes to the Business and Professions Code; the amendments to Sec. 1471; termination proceedings; the self dealing provision; and fee restrictions [exception for Sec. 2653]
 - The stay DOES affect Sec. 1051 [ex parte communications]; the whistleblower section [new 1851.6]; the sanctions section [2112]; BUT the Courts are able to enforce these provisions if they choose to do so.

Burdens and Advantages

□ On the plus side:

- Although it will cost a fortune, the enhancement of conservatee protections regarding counsel is a positive and aligns the duties of court appointed counsel with Bus and Prof Code Sec 6068;
- The minor change to Sec. 2620 will make compliance with accounting rules more efficient;
- The changes call out bad behavior for punishment and tie EADACPA abuse standards to scrutiny of conservator action; this appears well beyond what is necessary to protect conservatees but will provide additional tools for conservatee advocates.

Burdens and Advantages

□ On the minus side:

- Is this legislation the least restrictive alternative necessary to protect conservatees and wards?
- Or would we be better off with funding the courts to the degree necessary to implement the 2006 reforms and the modifications to those reforms that have already been adopted?
 1. The expanded court investigation duties imposed by the 2006 reforms; enhanced scrutiny of the temporary conservatorship process; implementation of ex parte communications; creation of the Professional Fiduciaries Bureau; and already implemented fee restrictions would go a long way to solve “the conservatorship problem.”

Burdens and Advantages

❑ On the minus side:

2. Is it necessary or helpful to tie EADACPA into the conservatorship legislation? It already applies to elder adults and dependent adults; a professional fiduciary who is found liable for elder abuse in civil court would be subject to discipline already by the Professional Fiduciaries Bureau.
3. What will the negative blowback be on professionals who will opt out of conservatorship work? Many professionals might now wish to focus on trust work and avoid the liabilities incurred by possible causing mental anguish to a conservatee.

What Will It Cost?

- ❑ According to the Senate Floor Legislative Analysis:
 - Low-to-mid tens of millions of dollars annually to comply with the oversight provisions of the 2006 Act. The Budget Act of 2007 appropriated \$17.4 million to comply with the 2006 Act. Current compliance cost likely would be higher.
 - The number of required conservatorship hearings would double; courts with significant conservatorship caseloads project that the requirements of this measure would necessitate the addition of one fully staffed department, with the costs of a judicial officer, an examiner, courtroom staff, and operations. [Budget Act of 2021: \$118.3 million from General Fund for insufficient revenue for trial court operations.]

What Will It Cost?

- The Professional Fiduciaries Bureau estimates ongoing annual workload costs of \$380,000 based on anticipated public complaints and reported court sanctions leading to disciplinary measures.